Chapter VII
Subsidiary means for the determination of rules of international law

A. Introduction

59. The Commission, at its seventy-third session (2022), decided to include the topic "Subsidiary means for the determination of rules of international law" in its programme of work and appointed Mr. Charles Chernor Jalloh as Special Rapporteur.[212] Also at its seventy-third session,[213] the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant for its future work on the topic, to be submitted for the seventy-fourth session (2023); and a memorandum surveying the case law of international courts and tribunals, and other bodies, which would be particularly relevant for its future work on the topic, to be submitted for the seventy-fifth session (2024).

60. The General Assembly, in paragraph 26 of its resolution 77/103 of 7 December 2022, subsequently took note of the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

61. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/760), as well as the memorandum prepared by the Secretariat, identifying elements in the previous work of the Commission that could be particularly relevant to the topic (A/CN.4/759), which were considered at its 3625th to 3632nd meetings, from 16 to 25 May 2023.

62. In his first report, the Special Rapporteur addressed the scope of the topic and the main issues to be addressed in the course of the work of the Commission. The report also considered: the views of States on the topic; questions of methodology, which is to be grounded in State and international tribunal practice; the previous work of the Commission on the topic; the nature and function of sources of international law and their relationship to the subsidiary means; and the drafting history of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice and its status under customary international law. It also provided an initial assessment of certain aspects of the topic, including judicial decisions, teachings of the most highly qualified publicists of the various nations and possible additional subsidiary means used in the practice of States and international tribunals to determine rules of international law, such as unilateral acts, resolutions and decisions of international organizations and the works of expert bodies. The Special Rapporteur addressed the outcome of the work and, consistent with the related prior work of the Commission, proposed draft conclusions as the final form of output, with the main object of clarifying the law based on current practice. He proposed five draft conclusions and also made suggestions for the future programme of work on the topic.

63. At its 3633rd meeting, on 26 May 2023, the Commission decided to refer draft conclusions 1 to 5, as contained in the Special Rapporteur's first report, to the Drafting Committee, taking into account the views expressed in the plenary debate.[214]

[212] At its 3583rd meeting, on 17 May 2022. The topic had been included in the long-term programme of work of the Commission during its seventy-second session (2021), on the basis of the proposal contained in an annex to the report of the Commission to that session (*Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), annex).

[213] At its 3612th meeting, on 5 August 2022.

[214] The draft conclusions proposed by the Special Rapporteur in his first report read as follows:

64. At its 3635th meeting, on 3 July 2023, the Commission considered the report of the Drafting Committee (A/CN.4/L.985) on the topic and provisionally adopted draft conclusions 1 to 3 (see sect. C.1 below). At its 3651st to 3657th meetings, from 31 July to 4 August 2023, the Commission adopted the commentaries to draft conclusions 1 to 3, as provisionally adopted at the current session (see sect. C.2 below).

65. At its 3642nd meeting, on 21 July 2023, the Commission considered an additional report of the Drafting Committee containing draft conclusions 4 and 5 provisionally adopted by the Drafting Committee (A/CN.4/L.985/Add.1), as orally revised, and took note of the

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"**Draft conclusion 1**

Scope

The present draft conclusions concern the way in which subsidiary means are used to determine the existence and content of rules of international law.

Draft conclusion 2

Categories of subsidiary means for the determination of rules of law

Subsidiary means for the determination of rules of international law include:

(a) Decisions of national and international courts and tribunals;

(b) Teachings of the most highly qualified publicists of the various nations;

(c) Any other means derived from the practices of States or international organizations.

Draft conclusion 3
Criteria for the assessment of subsidiary means for the determination of rules of law

Subsidiary means used to determine a rule of international law are assessed on the basis of the quality of the evidence presented, the expertise of those involved, conformity with an official mandate, the level of agreement among those involved and the reception by States and others.

Draft conclusion 4
Decisions of courts and tribunals

(a) Decisions of international courts and tribunals on questions of international law are particularly authoritative means for the identification or determination of the existence and content of rules of international law;

(b) For the purposes of paragraph (a), particular regard shall be had to the decisions of the International Court of Justice;

(c) Decisions of national courts may be used, in certain circumstances, as subsidiary means for the identification or determination of the existence and content of rules of international law.

Draft conclusion 5
Teachings

Teachings of the most highly qualified publicists of the various nations, especially those reflecting the coinciding views of scholars, may serve as subsidiary means for the identification or determination of the existence and content of rules of international law."

report.[215] The commentaries to these two draft conclusions are expected to be adopted during the next session.[216]

1. Introduction by the Special Rapporteur of the first report

66. The Special Rapporteur introduced his report by making some general observations and discussing the structure and organization of the 10 chapters contained in the report. He noted, as a starting point, that subsidiary means were an important component of the international legal system, for which reason the Commission considered that they could be usefully clarified long after their inclusion in Article 38 of the Statute of the International Court of Justice. He explained that, as indicated in chapter I of the report, the main purpose thereof was to provide a solid foundation for the Commission's work on the topic and to obtain the views of members of the Commission and States. He indicated that, in principle, Article 38 of the Statute of the International Court of Justice, which was the basis for the topic, was an applicable law provision directed at the judges of the Court, and was widely recognized by States, practitioners and scholars as the most authoritative statement of the sources of international law. He recalled that the consideration of the topic served as a final addition to the work of the Commission on the sources enumerated in Article 38 of the Statute of the International Court of Justice. The fact that this provision was considered a settled part of customary international law and was used widely in national and international practice indicated that, by adopting a cautious and rigorous approach, rooted in the actual manner in which subsidiary means were employed to determine the rules of international law, the Commission could provide useful guidance to States, international organizations, courts and tribunals, and all those called upon to use subsidiary means to assist in the determination of rules of international law.

67. In relation to chapter II, the Special Rapporteur noted that the reactions by Member States in the Sixth Committee to the inclusion of the topic in the programme of work of the Commission had been generally positive. He pointed out the views of 24 delegations in the Sixth Committee that had supported the consideration of the topic to complement and complete the prior work of the Commission on the sources of international law and that had suggested that its consideration could help to avoid certain negative consequences of the fragmentation of international law. He observed that, even the few delegations that initially seemed hesitant during the General Assembly debate in 2021, appeared to embrace the Commission's decision by 2022. The only exception was the delegation that had suggested in 2021 that the Commission may find it challenging to garner interest and input on the topic from States. The Special Rapporteur also noted the Commission's interest in receiving information from States on how they, including their national courts, used subsidiary means to determine rules of international law. He expressed appreciation to the two States that had submitted written comments and the hope that additional States from all geographic regions

[215] The report and the corresponding statement of the Chair of the Drafting Committee are available in the Analytical Guide to the Work of the International Law Commission: https://legal.un.org/ilc/guide/1_16.shtml. The draft conclusions 4 and 5, provisionally adopted by the Drafting Committee, read as follows:

> "**Draft conclusion 4**
> **Decisions of courts and tribunals**
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> 1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of rules of international law.
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> 2. Decisions of national courts may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law.
>
> **Draft conclusion 5**
> **Teachings**
>
> Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law. In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity."

[216] See infra paras. 84–108 for the summary of the plenary debate on these two draft conclusions.

would share their practice with the Commission, as that could help to strengthen the practical relevance and utility of its work on the topic.

68. The Special Rapporteur then referred to chapter III, which proposed three topics for the consideration of the Commission. First, the origins, nature and scope of subsidiary means: that part of the report discussed the nature and functions of sources in the international legal system, focusing on mostly theoretical issues and on how different ways of thinking about the sources of international law and their interaction with the subsidiary means could affect the practical work of the Commission on the topic. A key question linked to that discussion concerned how narrow or broad the universe of subsidiary means was; in other words, whether, in addition to judicial decisions (and clarifying their scope) and teachings (and clarifying their scope), the work should reflect the decades of practice whereby international lawyers – including courts and tribunals – used a range of additional subsidiary means and materials to determine rules of international law. The report analysed in detail the drafting history of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. He noted that the report then carried out a systematic textual analysis of the various elements of Article 38, paragraph 1 (*d*), and explored the possibility of addressing additional subsidiary means for the determination of rules of international law.

69. A second component of the topic concerned the function and relationship between subsidiary means and the sources of international law, namely, treaties, customary international law and general principles of law. The Special Rapporteur stressed that some of the questions that needed to be addressed included the weight and value given to the decisions of international courts and tribunals, and the relationship between Articles 38 and 59 of the Statute of the International Court of Justice, *inter alia*, whether there existed a system of *de facto* precedent. He explained that the notion that the findings of judicial bodies could serve as a basis to identify obligations when interpreting and applying treaties, customary international law and general principles would also need to be examined.

70. A third component of the topic concerned the opportunity to clarify additional subsidiary means. The Special Rapporteur suggested that the Commission could explore the evolution of subsidiary means to establish the existence of obligations of States, with examples such as unilateral acts and declarations of States, and resolutions of international organizations, as well as the works of expert bodies, in particular those created and mandated by States and international organizations to carry out certain functions. He considered that the Commission should proceed with caution and rigour in its choice of specific subsidiary means to study, without hampering the development of international law as manifested in the practices of States and international organizations.

71. The Special Rapporteur indicated that the question of coherence and unity of international law, sometimes referred to as the problem of fragmentation, could affect the scope and utility of the topic. He noted that, at the time of the preparation of the syllabus for the topic, in 2021, he had considered that the issue of conflicting judicial decisions on the same legal question could fall outside the scope of the project. However, given its relevance to the consideration of judicial decisions and the fact that the Commission had not addressed the substance of the question to date, he asked other members to comment on whether the issue of fragmentation should be kept outside the scope of the present topic or not. He also indicated that, while it would be for the Commission, in the exercise of its independent mandate conferred on it by States, to decide on the matter based on a scientific evaluation, it would be useful for the Commission to do so after taking into account the views of States in the Sixth Committee.

72. The Special Rapporteur further referred to the form of the possible outcome of the work. He considered that it would be best in the form of draft conclusions accompanied by commentaries, consistent with the practice of the Commission in relation to the other topics dealing with the sources of international law, which had been supported by States at the Sixth Committee.

73. In chapter IV of the report, the Special Rapporteur considered the question of methodology, and observed that the study of the topic would require a comprehensive examination of a wide variety of primary and secondary materials and legal scholarship on the subject. He referred to the emphasis in decisions of national and international courts on

questions of international law and the extent to which courts and States applied a similar methodology to that of the International Court of Justice. He underlined that the analysis should rely on materials from all States, regions and legal systems of the world that were as representative as possible. The Special Rapporteur proposed that, as part of the work on the topic, the Commission could include a multilingual bibliography, as had been the practice with topics concluded recently. He stressed the need for such a bibliography to be representative of the various regions and legal systems of the world and invited members of the Commission and States to propose items for inclusion, especially in all the official languages of the United Nations.

74. The Special Rapporteur had then analysed the use of subsidiary means by the Commission on its prior work in chapter V of the report and referred to the memorandum prepared by the Secretariat surveying the previous work of the Commission related to subsidiary means. He noted that: (*a*) judicial decisions and teachings were prevalent in the work of the Commission, but that the nature and extent of their use, as with other materials, varied and depended on the topic under consideration; (*b*) the use of judicial decisions was prevalent in the Commission and suggested that such decisions could be perceived as being akin to primary sources of international law; (*c*) the Commission relied on judicial decisions more than teachings; and (*d*) the Commission in some cases had relied on teachings to identify the practice of States, and that it had attached different weight to the work of individual scholars than to that of expert groups.

75. Chapter VI of the report addressed the nature and function of sources in the international legal system. The Special Rapporteur indicated that he had intended to situate subsidiary means in the broader context of the sources of international law and sought to address some theoretical debates, including the reference to formal and material sources of international law. He emphasized the relevance of Article 38 of the Statute of the International Court of Justice and observed that certain questions of hierarchy arose from that provision. Those included whether the sources were listed in a particular sequence and thereby suggested a hierarchy, what was the role and status of subsidiary means, and whether there existed a distinction between primary and secondary sources.

76. Chapter VII focused on the drafting history of Article 38 of the Statute of the International Court of Justice, in particular the debate and common ground among the drafters of the provision concerning the appropriate role of subsidiary means in the determination of rules of international law. He recalled that Article 38 had been included in both the Statute of the Permanent Court of International Justice and the Statute of the International Court of Justice.

77. The Special Rapporteur presented four observations with respect to the drafting of the Statute of the Permanent Court of International Justice. First, he observed that the drafting history confirmed that there had been diverse views at the time of the drafting of Article 38 concerning the role of judicial decisions and teachings. For some, judges could only apply the law, while others considered that international judges also had a function to develop the law owing to the existence of gaps in international law and the slow formation process of customary international law. Second, he observed that the members of the Advisory Committee of Jurists established pursuant to the mandate in Article 14 of the Covenant of the League of Nations[217] (Advisory Committee) had considered that the role of teachings was to assist with objectively determining the existence of rules agreed to by States that could be applied in a specific case. Third, the debate in the Advisory Committee had revealed that the majority of members considered that, in principle, both judicial decisions and teachings were important in the process of the identification of rules of international law. He observed that both served to help resolve practical legal problems. Fourth, the Advisory Committee had debated whether the sources in Article 38 should be used in successive order as a guide to the judicial task: some members of the Advisory Committee had considered that to be the case, while others had been of the view that the list only implied that the sources should be addressed systematically.

[217] Covenant of the League of Nations (Versailles, 28 April 1919), League of Nations, *Official Journal*, No. 1, February 1920, p. 3.

78. Chapter VIII of the report analysed the elements of Article 38, considering its ordinary meaning and then its elements. The Special Rapporteur had presented two tentative observations: first, that subsidiary means were not sources in the formal sense as the first three listed in Article 38, but documentary or auxiliary sources indicating where a court could find evidence of the existence of rules, even if courts, including the International Court of Justice, did rely, for reasons of legal security and legal stability, on their prior judicial decisions – a practice that also is found among States – more than on scholarly writings; and second, that, in principle, teachings and judicial decisions were placed on the same footing, performing complementary roles without any hierarchy between them.

79. In chapter IX, the Special Rapporteur had analysed other materials that could be considered as subsidiary means for the determination of rules of international law. The chapter considered the non-exhaustive nature of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, the potential subsidiary means found in practice, and how to distinguish between subsidiary means and the evidence of the existence of rules of international law, and tentatively addressed issues of the weight to be accorded to the materials.

80. The Special Rapporteur indicated that Article 38 of the Statute of the International Court of Justice was merely a directive to the Court and not necessarily intended as an exhaustive enumeration of the sources of international law. That said, it was widely considered an authoritative, if sometimes incomplete, statement of the sources of international law. He added that, against that backdrop, the Commission could add value by clarifying the role of subsidiary means and attempting to identify materials as candidates for subsidiary means. He further cited some of the main examples found in legal scholarship, including unilateral acts or declarations of States, resolutions or decisions of international organizations, agreements between States and multinational enterprises, religious law, equity and soft law.

81. The Special Rapporteur observed that unilateral acts could be considered as being binding or non-binding depending on the context, and that resolutions of international organizations or intergovernmental conferences could also be binding or non-binding. He added that subsidiary means would have varying levels of weight and authority, which would depend on, *inter alia*, the legal context, the way in which they were drafted and the expertise of the individuals involved in the drafting. Additional factors to consider when assessing the weight of a particular source included the mandate of the institution that produced the material, as well as the level of agreement within and beyond the relevant body.

82. The Special Rapporteur recalled that he had tentatively favoured the inclusion of resolutions and decisions of international organizations and the work of expert bodies as relevant subsidiary means. He had, however, considered that unilateral acts and religious law should not be addressed for a variety of reasons, including the lack of certainty whether some were not formal sources of international law as opposed to subsidiary means for determining rules of international law.

83. Finally, in chapter X, the Special Rapporteur had presented five draft conclusions and a tentative programme of work. The Special Rapporteur had further proposed that the second report would address the function of subsidiary means and study judicial decisions, while the third report would be dedicated to teachings and, as appropriate, other subsidiary means, including the study of the role of individuals and private expert bodies, as well as those established by States. He had suggested that, if the proposed timetable was maintained, the Commission could adopt on first reading the entire set of draft conclusions in 2025.

2. Summary of the plenary debate

(a) General comments

84. Members welcomed the first report of the Special Rapporteur. Members also agreed on the practical importance and relevance of the work on the topic, for its own intrinsic merit, but also taking into account the need for the completion of the Commission's work on that last remaining aspect of Article 38 of the Statute of the International Court of Justice, which concerned the subsidiary means for the determination of rules of international law. They

agreed with the Special Rapporteur that subsidiary means were not sources of international law, as opposed to those mentioned in Article 38, paragraph 1 (*a*) to (*c*), of the Statute of the International Court of Justice.

85. Members also emphasized that the function of subsidiary means was to assist in the determination of rules of international law. As such, it was important for the Commission to elaborate the functions of subsidiary means and to define what "determination" of rules meant.

86. With respect to the terminology, some members expressed the view that it would be important to recall that the term used in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice in French and Spanish expressly referred to the auxiliary function of such materials, which confirmed that they were not sources of international law. This was not, however, to suggest that subsidiary means were not important in practice; only that they played an auxiliary role in the process of determining the rules of international law.

87. There was consensus among the members on the need, where possible, for consistency with the prior work of the Commission on other topics relating to the sources of international law, including that recently concluded on the identification of customary international law, the identification and legal consequences of peremptory norms of general international law (*jus cogens*) and the ongoing work on general principles of law. That was to be without prejudice to the particular needs of the present topic.

88. Members generally agreed that the category of subsidiary means for the determination of rules of international law was not necessarily exhaustive. Several proposals were made for additional means that could be examined in the present topic. In that connection, some members favoured further analysis of the work of expert bodies and resolutions of international organizations. Other members also gave the opinion that the Commission should study certain types of unilateral acts capable of producing legal obligations as part of additional subsidiary means that could be used to determine rules of international law. Yet other members cautioned against an undue expansion of the category of subsidiary means, suggesting instead the expansion of existing categories of subsidiary means to encompass new subsidiary means, which could be dealt with separately.

89. Some members referred to the principle of *iura novit curia* and the possible relation it would have to subsidiary means. Accordingly, in their view, the role of the judge was to know the law. The suggestion was made that the Commission consider how that could affect, if at all, its approach to the present topic. Others referred to the function of counsel representing the parties to disputes, who typically sought to espouse a particular interpretation or understanding of the content of the law, thereby indicating that the ascertainment of norms was not a task exclusive to judges. That reinforced the practical relevance of the study of the present topic.

90. Members generally expressed support for the study of the weight to be given to subsidiary means. Some members expressed the view that Article 38 paragraph 1 (*d*), of the Statute of the International Court of Justice did not distinguish between judicial decisions and teachings. Other members were of the view that, in practice, judicial decisions carried greater weight. Several members suggested that additional criteria should be provided for resorting to the decisions of national courts as subsidiary means, and that the resolutions and decisions of international organizations and bodies should be addressed.

(i) Scope and outcome of the topic

91. Members generally agreed with the issues set forth for consideration by the Commission in the Special Rapporteur's first report, namely: (*a*) the origins, nature and scope of subsidiary means; (*b*) the function of subsidiary means and their relationship to the sources of international law; and (*c*) additional subsidiary means for the determination of rules of international law. Members broadly agreed that the subsidiary means mentioned in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice were not exhaustive and that the Commission should elaborate on possible additional subsidiary means for the determination of rules of international law other than those included in such category. Some members agreed with the Special Rapporteur that unilateral acts of States capable of creating legal obligations should not be considered as subsidiary means. Several members agreed that

there were other subsidiary means that warranted further consideration by the Commission, including unilateral acts. Frequently mentioned were certain resolutions and decisions of international organizations and bodies, as well as the works of private expert bodies and treaty bodies, all of which could assist in the determination of rules of international law. Some members, however, expressed doubts about the use of resolutions of international organizations as subsidiary means because they pertain rather to the process of interpretation or formation of international law.

92. Members agreed that the main function of subsidiary means was to assist in the determination of rules. A proposal was made to include a draft conclusion concerning the functions, which could also refer to the use of subsidiary means to interpret other sources or to determine the effects and legal consequences of certain rules. Another suggestion was to include a draft conclusion addressing the relationship between subsidiary means and sources of international law.

93. It was suggested that the Commission consider the distinction between the formation, interpretation and identification of rules of international law. It was also proposed that the Commission's consideration could elaborate on the distinction between the supplementary means of interpretation provided in the Vienna Convention on the Law of Treaties[218] and the subsidiary means for the determination of rules of international law.

94. Support was also expressed for focusing on the practical aspects of the use of subsidiary means. The view was expressed that the Commission should avoid excessively theoretical discussions and rather concentrate on existing law and practice. Some members considered that the analysis of conflicting decisions of international courts and tribunals fell naturally within the scope of the topic. They considered that clarification of the matter by the Commission could be useful as guidance for practitioners. Other members suggested that the fragmentation of international law had proved to be a more theoretical than practical problem and, consequently, that the question of fragmentation should thus not be considered. Other members indicated that it was important to refer to the proliferation of international tribunals and the phenomenon of cross-fertilization and harmonization of international law.

95. Support was expressed for referring to the degree of representativeness in the context of the draft conclusions and when assessing subsidiary means. Such representativeness should cover several aspects, including considerations of regional distribution, legal traditions and gender.

96. As to the outcome of the topic, members generally agreed that there was no need to depart from the previous decision of the Commission to have draft conclusions as an appropriate form of output for the topic, since that was consistent with the approach in prior related topics. A view was expressed that draft guidelines could also be an appropriate outcome. Several members expressed support and appreciation for the Special Rapporteur's proposal to prepare a multilingual bibliography as part of the work of the Commission on the topic.

(ii) Methodology

97. Members generally agreed with the methodology proposed by the Special Rapporteur, which included a careful examination of practice and literature. Some indicated that, while the practice of States and the jurisprudence of international courts and tribunals were a good starting point, the jurisprudence of national courts, the output of international organizations and academic literature would also be relevant. Members further referred to a need for more diverse sources and references in more languages and from the various regions of the world and legal traditions to be used in the consideration of the topic, which would help to strengthen the utility and legitimacy of the Commission's work on the topic.

98. Some members expressed the view that there could be some methodological difficulty in the consideration of the practice of tribunals, since some subsidiary means, especially teachings, were often consulted but not always cited formally in court decisions. A number

[218] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 443.

of members also stressed the importance of keeping in mind the applicable law clauses of each tribunal when analysing their use of subsidiary means.

(b) Draft conclusions 1 to 3

99. Draft conclusions 1 to 3 were provisionally adopted by the Commission with commentaries at the present session (see sect. C below). Accordingly, following the practice of the Commission, the summary of the plenary debate on these draft conclusions is not included in the present report.

(c) Draft conclusion 4

100. With respect to draft conclusion 4 (decisions of courts and tribunals),[219] several members noted that the draft conclusion overlapped with and further developed draft conclusion 2 on the decisions of courts and tribunals. Some members referred to the need to consider what was meant by the decisions of international courts and tribunals being particularly authoritative for the determination of rules of international law.

101. While it was agreed that, in general, no system of judicial precedent existed in international law, there was nonetheless value in consistency and predictability. A consistent approach to the draft conclusions was called for and it was noted that, while draft conclusions 1 to 3 proposed by the Special Rapporteur in his first report referred to the determination of rules of international law, the proposed draft conclusions 4 and 5 referred to the identification or determination of the existence and content of rules of international law.

102. Some members were of the view that the authority of the decisions of the International Court of Justice should be taken in context and that, in certain cases, the decisions of other international courts and tribunals could be more relevant due to their expertise in a particular subject. Other members agreed with a general reference to the importance of the decisions of the International Court of Justice. Some of them highlighted that such special regard had already been accorded to such decisions in previous conclusions on completed topics of Commission.

103. Members generally stressed the need for additional criteria specifically applicable to the decisions of national courts. Other members supported the Special Rapporteur's formulations, including the need to proceed with caution with some national court decisions. In the view of other members, only the decisions of national courts applying international law could be considered as constituting subsidiary means for purposes of the determination of rules of international law.

(d) Draft conclusion 5

104. With respect to draft conclusion 5 (teachings),[220] members supported the reference to highly qualified publicists of the various nations and underlined that writings should be representative of the principal legal systems and regions of the world. Members also stressed that teachings may influence international law beyond Article 38 of the Statute of the International Court of Justice.

105. Members were also of the view that the cogency and quality of the reasoning should be a more important criterion than the eminence of the writer. It was questioned why the "coinciding" of views should be a criterion and wondered how such factor could be related to those included in draft conclusion 3. It was suggested that the commentary should address the issue of the coinciding views of scholars. Some members considered that the coinciding views of scholars should not be included, as it could imply a requirement of consensus. Other criteria suggested for the consideration of teachings included the quality of the material, the reputation of the writers and an analysis of whether their positions had been accepted or challenged by peers.

[219] See above footnote 214 for the initial proposal of the Special Rapporteur and footnote 215 for the text provisionally adopted by the Drafting Committee after the plenary debate.

[220] See above footnote 214 for the initial proposal of the Special Rapporteur and footnote 215 for the text provisionally adopted by the Drafting Committee after the plenary debate.

106. It was noted that the lack of diversity in teachings used should be addressed. It was further suggested that the criterion of representativeness, including considerations of regional distribution, legal traditions, gender and racial diversity, should be included in draft conclusion 5 or in a separate draft conclusion.

107. It was also suggested that the Commission could elaborate in the commentary on the status of the work of certain bodies, such as the International Committee of the Red Cross, or the possible value of other materials that would not fall within the category of teachings, such as individual and joint separate opinions of judges.

(e) Future programme of work

108. Members generally supported the proposal by the Special Rapporteur to address the origins, nature and function of subsidiary means and to focus on judicial decisions and their relationship to the sources of international law. They considered that analysis of that issue in his next report could be complemented by the memorandum requested from the Secretariat surveying the case law of international courts and tribunals, and other bodies. While most members agreed with the proposed timeline in the tentative programme of work suggested by the Special Rapporteur, some members advised caution. It was recalled that more time had been needed to complete the consideration of certain other topics relating to the sources.

3. Concluding remarks of the Special Rapporteur

109. In his summary of the debate, the Special Rapporteur welcomed the interest that the topic had received from the members of the Commission. He noted that the extensive participation of members during the plenary debate had demonstrated the importance and practical relevance of the topic to States and practitioners of international law. He underlined that, while individual members might place their emphasis differently or hold differently nuanced views, there was consensus on the substantive issues raised for discussion in what had proved to be a rich and intellectually stimulating debate. Importantly, he recalled that there had been strong support for his approach, including for the proposed scope and outcome of the topic discussed in his first report. The three prongs of the topic had found consensus. In that regard, there had been unanimous support for the consideration of the two specific categories of subsidiary means expressly mentioned in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, namely judicial decisions and teachings.

110. He also recalled that members had also reached consensus that Article 38 was not exhaustive and, therefore, would only be a starting point and not the end point for the Commission's consideration of the topic if the topic was to prove practically useful to international lawyers. In his view, there had been general consensus that there were additional subsidiary means used for the determination of rules of international law, which were prevalent in the practice of States and international organizations, and therefore properly fell within the scope of the present topic. Without prejudice to his addressing other issues in future reports, based on what the research actually demonstrated and taking into account State input, the Commission should, in his view, at a minimum, address during the present topic the works of expert bodies and resolutions and decisions of international organizations in order to clarify their role as subsidiary means for the determination of rules of international law.

111. The Special Rapporteur noted the general support for the final outcome of the Commission's work, which should take the form of draft conclusions accompanied by commentaries, since the purpose of the topic was to clarify various aspects of subsidiary means for the determination of rules of international law and that such outcome was consistent with previous work of the Commission. He also noted that the use of that form of output in the present topic – reflecting primarily codification – would not preclude the Commission, consistent with its settled practice dating back to 1949, from engaging in progressive development if needed.

112. As to the methodology regarding the use of subsidiary means, he recalled that support had been expressed for following the practice of the Commission and that of States and, as appropriate, of international organizations and others. The Special Rapporteur also noted that members had broadly agreed with the proposed scope of the topic and the centrality of a

careful analysis of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice as a starting point, but not necessarily a limit on the work of the Commission. In particular, he underlined the customary international law nature of the provision and the existence of nearly a century of practice confirming the extensive use of additional subsidiary means.

113. The Special Rapporteur stated that the concerns raised by some members related to the linguistic versions of the text of Article 38 of the Statute of the International Court of Justice which refer to "*moyens auxiliaires*", "*medios auxiliaries*", in French and Spanish, respectively. He emphasized the importance of multilingualism and recalled that the practice of drafting in English, French and Spanish would assist in ensuring that the same meaning is conveyed across the official languages.

114. The Special Rapporteur recalled that the syllabus for the topic had noted three issues relating to judicial decisions and teachings, and the scope of such categories. He observed that several members had addressed some of those issues, and that members largely upheld that the category of judicial decisions should be understood in a broad sense and include advisory opinions, in line with the previous work of the Commission.

115. The Special Rapporteur further noted the support of members for referring to the decisions of the International Court of Justice, which was also consistent with the recent work of the Commission. He mentioned that, while those decisions had particular relevance, especially on questions of general international law, reference thereto should not be understood as suggesting a hierarchy among courts or decisions. He also recalled that the first report had referred to the importance of the work of specialized tribunals, which may issue decisions and rulings that were quite authoritative in their respective areas of competence. In any event, in a decentralized system such as international law, each court had its own statute and the quality of the decisions and their compliance with norms in their respective areas would be quite important.

116. The Special Rapporteur observed that some members had raised questions on whether to include in the work on the topic decisions of certain bodies, for example, arbitral panels, conciliation commissions, the dispute settlement system of the World Trade Organization, commissions of inquiry and other mechanisms without judicial character. He also noted that, when referring to arbitral tribunals, certain peculiarities should be taken into account and that investor-State tribunals could fall within the scope of the topic. The Special Rapporteur also noted the broad support for including the decisions of international human rights treaty bodies. He recalled that members had discussed whether the appropriate way to include them was as judicial decisions or under a separate category. He explained that many of the suggestions made were already intended for examination in his future reports.

117. The Special Rapporteur observed that there had been general consensus that references to the decisions of national courts on questions of international law could be particularly relevant, while other members had emphasized the need for caution when examining such materials. He added that it was possible that a decision of a national court could serve as subsidiary means when carrying out a comparative survey of a well-accepted rule of international law. He also stressed that, as stated by the Commission in its recent work, national court decisions played a dual role as evidence of State practice and as a form of subsidiary means for the identification of the existence and content of a rule of international law. Furthermore, the Special Rapporteur also noted that members had referred to the importance of ensuring diversity in the consideration of jurisdictions, legal traditions and regions of the world.

118. In relation to the second category of subsidiary means (teachings), the Special Rapporteur observed that the majority of members had referred to the individual and collective work of scholars. Other members had called for a distinction between teachings, whether individual or collective, and works produced by expert bodies that could be considered as additional subsidiary means. The Special Rapporteur observed that it was his intention, in line with the analysis contained in his first report, to propose a set of stand-alone draft conclusions addressing the contemporary role of private and public or State-empowered bodies, and the differences between them. The Special Rapporteur noted that he would take

into account the suggestions of some members to address further functions of subsidiary means in future reports.

119. The Special Rapporteur observed that many members had referred to the question of diversity of the publicists and the over-reliance by some courts and tribunals on materials from the Anglo-American tradition and limiting to a few languages and legal traditions, and that proposals had been presented advocating for gender diversity as well. He recalled that he had raised various questions of diversity that might affect the perception of the universality of international law in his first report, including in relation to aspects that had not even been debated by members, such as the imbalance in the nationality of counsel appearing before the International Court of Justice. In any case, he welcomed that members of the Commission had expressed an openness and even support for ensuring representativeness in the work, especially in the present topic.

120. In the context of judicial decisions, he noted that members had supported his intention to carry out a more detailed study of the relationship between Articles 38 and 59 of the Statute of the International Court of Justice and the notion of precedent (*stare decisis*), or lack thereof, under international law, as well as its link to the rights of third parties. The Special Rapporteur noted that members had broadly agreed that there existed no formal system of precedent (*stare decisis*) in general international law, while recognizing that following the methodology of legal reasoning adopted in previous cases was not the same as being bound by past decisions. He added that, while not mandatory, there existed extensive practice by parties to international disputes and judges in international courts and tribunals of relying on their own prior decisions for reasons of legal security and predictability. He added that reference had been made to certain cases where tribunals had departed from their consistent practice, and that the commentary to the relevant draft conclusion could clarify that the authority of judicial decisions as subsidiary means was also dependent on contextual elements.

121. In relation to a third category of other subsidiary means, the Special Rapporteur recalled that several members had agreed with his proposed exclusion of unilateral acts of States capable of creating legal obligations. He added that many members had supported the inclusion of the resolutions of international organizations as additional subsidiary means. He noted that other members were of the view that the resolutions of international organizations could only serve as evidence of the elements of certain sources like customary international law, but were not subsidiary means themselves. However, he indicated that, in practice, much as was the case with decisions of national courts, there was no reason why resolutions could not play a dual function as elements that could be considered either in the determination of rules of law derived from the established sources or as subsidiary means for the determination of such rules. The Special Rapporteur recalled that additional subsidiary means proposed had included non-binding resolutions, equity, arbitral awards, religious law and certain types of decisions from regulatory organizations. He did not consider some of the candidates mentioned in literature as potential subsidiary means as meriting further examination by the Commission. Some of them, such as unilateral acts of States and religious law, did not, in his view, even fall within the category of subsidiary means for the determination of rules of international law. In any event, some of those same candidates, such as unilateral acts, had previously been examined by the Commission. He saw no need to revisit them or to examine politically sensitive topics such as religious law.

122. As regards the question of whether the unity and coherence of international law should be examined, at least in terms of the possible conflict between judicial decisions issued by different courts and tribunals, the Special Rapporteur noted that some members had argued that the fragmentation of international law had already been studied by the Commission and expressed the view that it did not create difficulties in practice and as such was best left out of the consideration of the topic. Others considered that the issue of fragmentation, especially with the risk of conflicting judicial decisions arising from the proliferation of international courts and tribunals, was quite important and that the present topic was the opportunity to clarify it. Other members suggested that the matter could be referred to in the commentary or dealt with by way of a without prejudice clause. The Special Rapporteur, for his part, agreed that the issue of conflicting decisions was important, if sometimes complex, and could well be an area for the Commission to seek to add practical value. He explained that the

Commission, in its 2006 report of the Study Group on the fragmentation of international law,[221] had only indicated that the topic of conflicting jurisprudence concerned the institutional competencies and hierarchical relations between tribunals *inter se*, which was better left to them to address. Thus, the Commission had not substantively addressed the issue. In any case, he was of the firm view that, given its potential implications for the scope of the topic and, although it should be for the independent Commission to ultimately decide based on a scientific assessment, it would be especially important to invite and to take into careful account the views of States and others expressed in the Sixth Committee. He therefore underlined the need to invite State input on that and other issues raised in his first report since, after all, it was hoped that States would be the primary beneficiaries of the Commission's work. He expressed intention to return to the matter in the future.

123. In relation to the proposal to include a multilingual bibliography, the Special Rapporteur noted that several members had provided scholarly works and State practice from various jurisdictions. He observed that the intention to request contributions from members and States was aimed at addressing the problem of unequal representation in the consideration of subsidiary means and to ensure more diversity and bring more legitimacy to the work of the Commission.

124. The Special Rapporteur noted the general support for the proposed programme of work. He also indicated that his proposed timeline for future work, as indicated in his first report, was tentative and could be adjusted in order to properly address the substance. He was committed to scientific rigour and did not believe in speed in the consideration of the topic coming at the expense of the substance and rigour of the work.

125. In terms of substance for the future work, the Special Rapporteur indicated his intention, in his next report, to address the decisions of courts and tribunals and how they used the subsidiary means to determine rules of international law.[222] He was confident that the memorandum from the Secretariat surveying the decisions of international courts and tribunals, and other bodies – showing how they employ subsidiary means – would contribute to the Commission's debate next year.

C. Text of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission at its seventy-fourth session

1. Text of the draft conclusions

126. The text of the draft conclusions provisionally adopted by the Commission at its seventy-fourth session is reproduced below.

Conclusion 1
Scope

The present draft conclusions concern the use of subsidiary means for the determination of rules of international law.

Conclusion 2
Categories of subsidiary means for the determination of rules of international law

Subsidiary means for the determination of rules of international law include:

(*a*) decisions of courts and tribunals;

(*b*) teachings;

(*c*) any other means generally used to assist in determining rules of international law.

[221] *Yearbook … 2006*, vol. II (Part Two) (Addendum 2), document A/CN.4/L.682 and Add.1.
[222] See chap. X below.

Conclusion 3
General criteria for the assessment of subsidiary means for the determination of rules of international law

When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*:

(*a*) their degree of representativeness;

(*b*) the quality of the reasoning;

(*c*) the expertise of those involved;

(*d*) the level of agreement among those involved;

(*e*) the reception by States and other entities;

(*f*) where applicable, the mandate conferred on the body.

2. Text of the draft conclusions and commentaries thereto

127. The text of the draft conclusions, together with commentaries provisionally adopted by the Commission at its seventy-fourth session, is reproduced below.

Subsidiary means for the determination of rules of international law

General commentary

(1) As always with the Commission's output, the draft conclusions are to be read together with the commentaries.

(2) The present draft conclusions seek to contribute greater clarity on the use of subsidiary means and their relationship with the sources of international law in two principal ways. First, they aim to identify and elucidate the roles of subsidiary means for the determination of rules of international law, consistent with the letter and spirit of Article 38, paragraph 1, of the Statute of the International Court of Justice.[223]

(3) Second, the present draft conclusions offer a consistent methodological approach when using subsidiary means for determining the existence and content[224] of rules of international law. Such determination relates to two main aspects. Firstly, in some cases, there may be a question whether, using subsidiary means, a rule of international law can be identified or determined to exist based on one of the established sources of international law, such as a treaty, customary international law or a general principle of law. Secondly, in other cases, it may be determined that a certain rule exists, but debate could remain about its content and scope. In either scenario, the subsidiary means, for instance a judicial decision, could be used as an auxiliary means to make that determination. The interaction between subsidiary means and the sources of international law, as well as the potentially far-reaching implications of the possible expansion of the category of subsidiary means, indicates that it is vital that the use of any subsidiary means to elucidate the sources of rules of international law be carried out using a coherent and systematic methodology.[225] Such a methodology

[223] Statute of the International Court of Justice, Article 38, available at http://www.icj-cij.org/en/statute.

[224] The Commission also addressed the question of the existence and content of rules in its topic on identification of customary international law (see conclusions on identification of customary international law and commentaries thereto, *Yearbook … 2018*, vol. II (Part Two), paras. 65–66). The same logic applies here, even though the discussion in the present context is about subsidiary means instead of a source of international law. See the first report of the Special Rapporteur on the present topic (A/CN.4/760).

[225] The Commission, in various projects, has already determined that a methodology is needed to clarify the sources of international law. It should build, as appropriate, on its previous conclusions on subsidiary means that may be used for the determination of the existence and content of rules of international law, which have already found general support among States, whether those rules are of a customary international law nature (conclusion 13, para. 1: "[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules";

should contribute to enhancing the consistency, predictability and stability of international law.

(4) Article 38 of the Statute of the International Court of Justice, which is regarded as the authoritative statement of the sources of international law, is the point of departure for the current draft conclusions. Paragraph 1 of Article 38 directs that the Court, whose primary function is to decide in accordance with international law the disputes submitted to it by States, shall apply: (*a*) treaties, whether general or particular, establishing rules expressly recognized by the contesting States; (*b*) international custom, as evidence of a general practice accepted as law; (*c*) the general principles of law recognized by the "community of nations";[226] and (*d*) as subsidiary means for the determination of rules of law, "judicial decisions" and "the teachings of the most highly qualified publicists of the various nations".

(5) Article 38 is the applicable law provision of the Statute of the International Court of Justice. However, its significance stems not only from its inclusion in the Statute of the principal judicial organ of the United Nations[227] and the only universal court with general jurisdiction, but also from the broader acceptance and reliance on Article 38 by States and tribunals, as well as legal scholars, as an authoritative statement of the sources of international law under customary international law. There is no suggestion from the practice of States and international organizations or established literature that Article 38 is an exhaustive enumeration of the sources of international law or the subsidiary means for the determination of rules of international law. Thus, in addition to judicial decisions and teachings, which may be thought of as the traditional subsidiary means, the present draft conclusions will also address additional subsidiary means prevalent in the practice of States and international organizations, which will be elaborated in later draft conclusions. The view was expressed, however, that the list of subsidiary means found in Article 38, paragraph 1 (*d*), can be read broadly to address contemporary developments.

(6) The Commission has selected "draft conclusions" as the final form of output for its work on this topic. This is consistent with, and complements, the Commission's recent output on four topics addressing the sources and related issues of international law, namely, identification of customary international law,[228] general principles of law,[229] identification and

conclusion 14: "[t]eachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law", *Yearbook … 2018*, vol. II (Part Two), para. 65), general principles of law (draft conclusion 8, para. 1: "[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of general principles of law are a subsidiary means for the determination of such principles"; draft conclusion 9: "[t]eachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of general principles of law", contained in chap. IV of the present report) or even peremptory norms of general international law (*jus cogens*) (draft conclusion 9, para. 1: [d]ecisions of international courts and tribunals, in particular of the international court of justice, are a subsidiary means for determining the peremptory character of norms of general international law"; draft conclusion 9, para. 2: "[t]he works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law", *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 43).

[226] Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice refers to "civilized nations". The Commission has, in the context of its topic "General principles of law", rightly dispensed with that outdated term in favour of the more inclusive term "community of nations". The latter term will therefore also be used in this topic. See draft conclusion 2 on general principles of law, contained in chap. IV of the present report.

[227] Charter of the United Nations, Article 92: "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

[228] *Yearbook … 2018*, vol. II (Part Two), chap. V, pp. 89–113, paras. 53–66.

[229] Contained in chap. IV of the present report.

legal consequences of peremptory norms of general international law (*jus cogens*)[230] and subsequent agreements and subsequent practice in relation to the interpretation of treaties.[231]

(7) Regarding the normative value of "draft conclusions", the Commission has, to date, not adopted a one-size fits all definition of draft conclusions, since it must examine the specific needs of each topic on its own terms. That said, because States and other users of the Commission's work may be more familiar with "draft articles" as a final form of output, draft conclusions as used here should be understood as the outcome of a process of reasoned deliberation and, more specifically, a statement of the rules derived from the practice found on subsidiary means in the determination of rules of international law. Their essential characteristic is to clarify the law based on the current practice. Thus, the content of the present draft conclusions, in line with the statute of the Commission and the general practice on the related topics mentioned above, reflects primarily codification and possibly elements of progressive development of international law.

(8) Taking the above considerations into account, and given its mandate to assist States with the codification and progressive development of international law consistent with article 1 of its statute, the Commission expects that the present draft conclusions may facilitate the work of all those who may be called upon to address subsidiary means for the determination of rules of international law. Nonetheless, as the present draft conclusions do not address all possible subsidiary means, it is the process of applying the established subsidiary means to determine rules of international law and of determining the scope of new subsidiary means that may emerge in the future which would benefit from the application of the criteria contained in the present draft conclusions. Ultimately, when the text and the accompanying commentaries are read together, the draft conclusions should provide useful guidance to States, international organizations, international and national courts and tribunals and all those, including legal scholars and practitioners of international law, who may have reason to address subsidiary means for the determination of the rules of international law.

Conclusion 1
Scope

The present draft conclusions concern the use of subsidiary means for the determination of rules of international law.

Commentary

(1) Draft conclusion 1 is introductory in nature. It provides, in a general way, that the present draft conclusions concern the use of subsidiary means for the determination of rules of international law. The use of the term "present draft conclusions" makes clear that the objective is to set out the scope of the entire set of draft conclusions. The term "concern", instead of "apply" (which is typically used in outcomes that would be recommended to States as bases for future conventions), relates to the object of the work. It also reflects the practice of the Commission in the work on similar topics that result in "draft conclusions" or "draft guidelines" rather than "draft articles".

(2) The term "the use of" was selected after a consideration of two main options. First, like the scope provision on the topic of identification of customary international law,[232] the formula "the way in which subsidiary means are used" was proposed in order to underline the methodological nature of this topic. Second, during the Commission's discussions, consideration was given to an alternative formulation that would have provided that subsidiary means "are to be used". The Statute of the International Court of Justice directs the Court to apply judicial decisions and teachings, as subsidiary means, but at the same time indicates that the judges may use them as a means for the determination of the rules of

[230] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), chap. IV, paras. 43–44.

[231] *Yearbook … 2018*, vol. II (Part Two), chap. IV, pp. 23–88, paras. 39–52.

[232] The scope provision, in conclusion 1, stated: "[t]he present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined." See conclusion 1 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 65.

international law. That said, in practice, while the judges could and do refer to the subsidiary means when they deem it necessary, Article 38, paragraph 1 (*d*), of the Statute does not actually obligate the Court to apply the subsidiary means. The Commission settled on the formulation that the draft conclusions concern "the use of" subsidiary means, which was seen as less imperative than the phrase "are to be used". In addition, the formulation employed was preferred because it was more neutral.

(3) For the purposes of the present commentaries, and with the view to enhancing clarity, terminological explanations are important. First, while the reference to "subsidiary means for the determination of rules of international law" is derived from Article 38, paragraph 1 (*d*), of the Statute of the Court, it is not identical to the wording in that provision which speaks of the determination of "rules of law". The term "subsidiary means for the determination of rules of international law" will be frequently used in this topic and the commentaries but the broader term "rules of law" contained in the Statute will sometimes be substituted with the term "rules of international law." The latter formula ensures consistency with the title of the present topic, the choice of which was intended to emphasize that the principal thrust of the project is the determination of the rules of international law, as opposed to the rules of law more generally. Importantly, the fact that the term "rules of law" is broader than the term "rules of international law" does not operate as a limitation on the substantive scope of the present draft conclusions. Nor does it change the analytical approach that is required. At the same time, the reference to rules of international law should be understood as not being an *a priori* exclusion of other rules of law that could provide assistance in the determination of rules of international law.

(4) Second, an analysis of the ordinary meaning of the term "subsidiary" under Article 38, paragraph 1 (*d*), of the Statute, in the various authentic language versions,[233] indicates that they are auxiliary in character.

(5) The term as expressed in English was derived from the Latin "*subsidiarius*" and refers to something that provides assistance, that is "subordinate", "supplementary" or "secondary"; "something which provides additional support or assistance; an auxiliary, an aid".[234] The second term "means" is a reference to an "intermediary agent or instrument"; "something interposed or intervening".[235]

(6) Third, and more substantively, the Commission's study of the French (*moyens auxiliaires*), Spanish (*medios auxiliares*) and other equally authentic language versions of Article 38, paragraph 1 (*d*), found that they more precisely underline the ancillary or auxiliary nature of the subsidiary means.[236] The other authentic language versions also set forth a relatively narrower understanding of the term subsidiary than a broader ordinary understanding which also became associated with the English term. They further confirm that both judicial decisions and teachings differ in their nature from the sources of law, expressly enumerated in Article 38, paragraph 1 (*a*) to (*c*), of the Statute: treaties, international custom and general principles of law. In other words, judicial decisions and teachings are subsidiary simply because they are not sources of law that may apply in and of themselves. Rather, they are used to assist or to aid in determining whether or not rules of international law exist and, if so, the content of such rules. This is not to suggest that the

[233] See, in this regard, Vienna Convention on the Law of Treaties, art. 33. Furthermore, pursuant to Article 111 of the Charter of the United Nations, the Chinese, French, Russian, English, and Spanish texts are equally authentic. In accordance with Article 92 of the Charter, the annexed Statute of the Court forms an integral part of the Charter. The Charter has therefore been authenticated in the above five languages. Pursuant to resolution 3190 (XXVIII) of the General Assembly of 18 December 1973, Arabic was included among the official and the working languages of the General Assembly and its Main Committees.

[234] "Subsidiary", *Oxford English Dictionary* (Clarendon, 3d ed., 2013). Available at www.oed.com.

[235] "Means", *ibid*.

[236] The same understanding is reflected in the Chinese and Russian versions. The Arabic version of the Charter and of the annexed Statute is not covered by Article 111 of the Charter, and different translations exist. The Arabic-speaking members of the Commission therefore engaged in a useful linguistic exchange in a meeting with the United Nations translators and interpreters, leading to an assessment that the better translation of "subsidiary means" would be: وسائل احتياطية.

subsidiary means are not important. On the contrary, they remain so, albeit only as auxiliary means for the identification and determination of rules of international law.

(7) On the preceding point, the Commission has already determined in its 2022 draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) that some subsidiary means, specifically decisions of international courts and tribunals, are even "a subsidiary means for determining the peremptory character of norms of general international law".[237] Before reaching that conclusion, the Commission had also concluded – in its work on two other topics that are particularly relevant because they concern the sources in Article 38 of the Statute – that subsidiary means may be used for the identification or determination of rules of customary international law (Article 38, para. 1 (*b*)) and for general principles of law (Article 38, para. 1 (*c*)).

(8) That the sources of law are distinct from the subsidiary means, but at the same time interact with some of the latter, such as prior judicial decisions, is confirmed by the approach of the International Court of Justice to the application of Article 38 in several cases. For instance, in *Military Activities in and against Nicaragua (Nicaragua v. United States of America)*, in resolving the question of the law applicable to that case, the Court cited its prior judgment in the *North Sea Continental Shelf* cases for the rule that it was required to apply the various "sources of law enumerated in Article 38 of the Statute",[238] which would include both multilateral treaties, customary law and general international law, even where they overlap. In the *Continental Shelf (Tunisia/Libya)* case, the Court recalled that "[w]hile the Court is, of course, bound to have regard to all the legal sources specified in Article 38, paragraph 1, of the Statute of the Court in determining the relevant principles and rules applicable to the delimitation, it is also bound, in accordance with paragraph 1 (*a*), of that Article, to apply the provisions of the Special Agreement" and that, referring to the *North Sea Continental Shelf* judgment, international law required delimitation be effected "in accordance with equitable principles, and taking account of all the relevant circumstances".[239]

(9) Similarly, in the *Gulf of Maine* case, a Chamber of the Court determined that

> the Court, in its reasoning on the matter, must obviously begin by referring to Article 38, paragraph 1, of the Statute of the Court. For the purpose of the Chamber at the present stage of its reasoning, which is to ascertain the principles and rules of international law which in general govern the subject of maritime delimitation, reference will be made to conventions (Art. 38, para. 1 (*a*)) and international custom (para. 1 (*b*)), *to the definition of which the judicial decisions (para. 1 (d)) either of the Court or of arbitration tribunals have already made a substantial contribution*.[240] [Emphasis added].

In *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, the Court examined "the sources listed in Article 38 of the Statute of the Court", which it found that it "must consider" in relation to "the law applicable to the fishery zone"

[237] See, in this regard, draft conclusion 9, para. 1, entitled "Subsidiary means for the determination of the peremptory character of norms of general international law" and paras. (1) to (4) of the commentary thereto, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 44, at pp. 43–45. See also para. (2) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 109 ("The term 'subsidiary means' denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law (as are treaties, customary international law and general principles of law). The use of the term 'subsidiary means' does not, and is not intended to, suggest that such decisions are not important for the identification of customary international law").

[238] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 82–85.

[239] *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18. at p. 37, para. 23.

[240] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 290–291, para. 83.

including its "material" prior decisions in the *Gulf of Maine* case.[241] Finally, in *Frontier Dispute (Burkina Faso/Niger)*, the Court interpreted Article 38, paragraph 1, in the context of the object of the Special Agreement between the parties and found that it "clearly indicates that the rules and principles mentioned in that provision of the Statute must be applied to any question that it might be necessary for the Court to resolve in order to rule on the dispute".[242] Among those rules the Court found applicable to that case was the principle of the intangibility of boundaries inherited from decolonization (*uti possidetis juris*), for which the Court referred to prior judgments in *Frontier Dispute (Burkina Faso/Republic of Mali)* and *Frontier Dispute (Benin/Niger)*.[243]

(10) As regards the phrase "for the determination of rules of international law", the term "determination" comes from Article 38, paragraph 1 (*d*), of the Statute. In the view of the Commission, the term could be understood in at least two ways. First, "determination" has one meaning when considered in its noun form "determination" and another as a verb "determine". As a noun it can mean "ascertainment" (a means of ascertaining what the rule is, a piece of evidence), whereas the word "determine" as a verb can also mean to "decide" (as will be explained in paragraph (13)). Under the first meaning, "determination" is "limited to a determination in the sense of finding out what is the existing law".[244] Such determination would encompass several operations, which may include, depending on the factual context, the identification of a rule or the determination of whether a certain rule exists; and, if it does exist, the content of the rule and its possible application to a specific case.

(11) For example, the determination process could involve analysis of a particular type of subsidiary means, *e.g.* a decision of an international court, establishing that an international legal rule exists on a given point in issue. The rule may be assessed to exist (or not) as any of the sources of international law contained in Article 38, paragraph 1 (*a*) to (*c*), namely international conventions or treaties, international custom and general principles of law. To take the example of treaties, the existence of a given rule may be relatively easy to establish, but the scope of the rule may be contested. This is where both the source of the rule and the subsidiary means may interact to help solve a practical problem. For example, a prior judicial decision, being used as a subsidiary means, might be cited by the parties and the court, since the decision might have already referred to and provided an interpretation of a rule stated in a treaty, such as the principle of the sovereign equality of all States in Article 2, paragraph 1, of the Charter of the United Nations. Both the treaty rule, in the example from the Charter, and the prior decision explaining it could then be relevant to resolving the dispute between the parties.

(12) In other instances, when it comes to the sources of law other than treaties, i.e. customary international law or general principles of law, more analysis will be required of the interaction between the subsidiary means and the source. This is because both proof of customary international law and proof of general principles of law each require certain additional legal tests to be fulfilled before the existence and content of the legal rule can be identified. Irrespective of the source consulted, reference to the prior judicial decision as a subsidiary means does not mean that the latter is the source of the law; rather, the decision itself may provide evidence of the existence and content of a rule of international law that could then apply. The binding effect of the rule, if and when it is applied, would stem from the treaty, custom or general principle and not the prior judicial decision, since there is no doctrine of judicial precedent (*stare decisis*) in general international law (as confirmed by Article 59 of the Statute of the International Court of Justice).

(13) But, in addition to the meaning given in paragraph (10) above, the word "determine" as a verb can also mean to state the law. In some cases, and although as a formal matter Article 59 will continue to apply, the Court simply refers to the rule whose content it determined in previous decisions. In most cases, it may do so without engaging in further

[241] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 61, para. 52.

[242] *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, pp. 44, at p. 73, para. 62.

[243] *Ibid.*, paras. 63 and 66.

[244] M. Shahabuddeen, *Precedent in the World Court* (Cambridge, Cambridge University Press, 1996), p. 76.

analysis to establish whether the rule exists or not, since that could at a later stage be taken as a given, following the prior decision to that effect. For, after all, in practice, judges – as well as States and their legal representatives for that matter – do not start with a clean slate when they have to resolve a new dispute raising factual and legal issues similar to those already considered. Indeed, prior decisions are "frequently used to identify or elucidate a rule of the law, not to make such a rule, i.e. not so much in the quality of binding precedents as having persuasive influence".[245] For reasons of legal security,[246] not only does the Court itself refer to its own prior decisions, it often seeks to explain a prior position that is based on previous decisions or to justify a departure from a prior decision.[247]

Conclusion 2
Categories of subsidiary means for the determination of rules of international law

Subsidiary means for the determination of rules of international law include:

(*a*) decisions of courts and tribunals;

(*b*) teachings;

(*c*) any other means generally used to assist in determining rules of international law.

Commentary

(1) Draft conclusion 2 sets out three main categories of subsidiary means for the determination of rules of international law. These are: the decisions of courts and tribunals; the teachings, in the sense of by those of scholars from the various nations, regions and legal systems of the world; and any other means generally used to assist in determining rules of international law. The first two categories are rooted in and largely track the language of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, with the adjustments discussed below. The third category addresses the fact that there are other means used generally in practice to assist in the determination of the rules of international law. Below, the present commentary explains each of these categories in turn, but starts with the *chapeau*.

Chapeau *of draft conclusion 2*

(2) The *chapeau* of draft conclusion 2 simply states that "subsidiary means for the determination of rules of international law include". In formulating the current *chapeau*, consideration was given to using the alternative term "including but not limited to," or to

[245] Rosenne, *The Law and Practice of the International Court, 1920–2005*, p. 1553.

[246] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 90–92 and 101, paras. 116, 120 and 139 ("116. Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court's function, according to Article 38 of its Statute, is to 'decide', that is, to bring to an end, 'such disputes as are submitted to it'. Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articulates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.").

[247] See, for instance, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 122, where the Court determined that it must "determine, in accordance with Article 38 (1) (*b)* of its Statute, the existence of 'international custom, as evidence of a general practice accepted as law' conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, *it must apply the criteria which it has repeatedly laid down* for identifying a rule of customary international law. In particular, *as the Court made clear* in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris* (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77)" (emphasis added).

replacing “include” with “can take the form of”, all of which were aimed at confirming the non-exhaustive nature of the categories of subsidiary means mentioned in the draft conclusion. In the end, the Commission decided to use simply the term “include”, at the end of the sentence, as it was sufficiently clear and general. Substantively, as already indicated earlier, the point of departure for the *chapeau* is that the list of subsidiary means contained in Article 38, paragraph 1 (*d*), of the Statute is not exhaustive and those means have broader relevance because they are part and parcel of customary international law.

(3) The first two categories, set out in draft conclusion 2, subparagraphs (*a*) and (*b*), are rooted in Article 38, paragraph 1 (*d*), of the Statute of the Court, which refers to “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. Those formulations were shortened to refer to “decisions of courts and tribunals” and then “teachings”. Then there is the third category of “any other means”. The latter encompasses other subsidiary means that are not expressly mentioned in Article 38, but that have emerged in practice to also perform an auxiliary or assistive role in the determination of the rules of international law. That there is a third category of means described as subsidiary is captured in two senses: first, by the use of the term “include” at the end of the *chapeau* and, second and more substantively, by the inclusion of a paragraph (*c*) which anticipates the existence of a more open-ended category of any other subsidiary means.

*Subparagraph (*a*) – decisions of courts and tribunals*

(4) Subparagraph (*a*) recognizes the first category of subsidiary means as being comprised of “decisions of courts and tribunals”. Consistent with its prior work addressing the subsidiary means,[248] the Commission decided to delete the qualifying word “judicial” in favour of the much broader formulation “decisions of courts and tribunals”. This was intended to ensure that a wider set of decisions from a variety of bodies could be covered by the present draft conclusions. The view was expressed, however, that the much narrower formulation “judicial decisions”, which mirrors the exact term in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, was preferable to the broader formulation “decisions of courts and tribunals” that was adopted.

(5) Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice expressly mentions “judicial decisions” as being among the subsidiary means for the determination of rules of international law. It is not immediately apparent from an examination of the Charter of the United Nations (Chapter XIV), the Statute, the secondary documents of the Court (for example, the Rules of Court or the Practice Directions) or the jurisprudence of the Court that they contain any explicit definitions of the term “judicial decisions”. Questions have arisen in practice and in the present topic concerning the meaning and scope of the term “judicial decisions”. That is why the Commission ultimately settled on the broader term “decisions of courts and tribunals” here, as it has done in other prior topics.

(6) The term “decisions” refers to a judgment, decision or determination by a court of law or a body of persons or institution, as part of a process of adjudication with a view to bringing to an end a controversy or settling a matter. While normally such a decision, especially a judicial one, would be issued by a court of law, such as the International Court of Justice or other international or national courts, it may also be issued by another type of appropriate adjudicative body. Relatedly, as regards the decisions of the International Court of Justice or other international courts, it should be clarified that decisions would include not just final judgments rendered by a court, but also advisory opinions and any orders issued as part of incidental or interlocutory proceedings.[249] The latter would include orders on provisional

[248] For example, as was the case in the title of conclusion 13 in the topic identification of customary international law: “Decisions of courts and tribunals”. *Yearbook … 2018*, vol. II (Part Two), para. 65.

[249] The above reading is consistent with the Commission’s view in identification of customary international law, where, in the commentary to conclusion 13 addressing subsidiary means, it explained that “the term ‘decisions’ includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters”: para. (5) of the commentary to conclusion 13, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 109.

measures issued by international courts and tribunals.[250] The term "decisions", understood in a broad sense, includes those taken under individual complaints procedures of State-created treaty bodies, such as the Human Rights Committee. Thus, instead of the term "judicial decisions", which is found in Article 38, paragraph 1 (*d*), of the Statute, the Commission, consistent with its prior work, selected the broader term "decisions", the merit of which is to encompass decisions issued by a wider range of bodies.

(7) The term "courts and tribunals" should generally be understood broadly. It encompasses both international courts and tribunals and national courts or, as they are sometimes referred to, municipal courts. The broad meaning captures, for example, the International Court of Justice, the International Tribunal for the Law of the Sea, the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Lebanon and the dispute settlement bodies of the World Trade Organization as well as investment tribunals. Reference to courts and tribunals would also encompass regional judicial bodies, such as the African Court on Human and Peoples' Rights, the Court of Justice of the European Union, the Economic Community of West African States (ECOWAS) Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights.

(8) For reasons of clarity, although this point will be elaborated in later draft conclusions, national courts means the courts or tribunals that may operate within a domestic legal system. They usually operate on the basis of national law: this includes some, but not all, of the so-called "hybrid" courts with mixed subject-matter jurisdiction and composition.[251] Here, it can be noted that national court decisions perform a dual function in the sense that, in addition to serving as subsidiary means, they can be also indications of State practice and a basis for finding *opinio juris* or to determine the existence of a principle common to the various legal systems. In the conclusions on identification of customary international law, for example, the Commission observed that State practice consisted of the conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.[252] Importantly, they could also, as already indicated above, be a form of subsidiary means. Their findings, especially on questions relating to international law, may prove to be valuable.

(9) The extensive practice of using decisions of international and national courts and tribunals as subsidiary means for the determination of rules of international law will be further elaborated upon in future draft conclusions, starting with draft conclusion 4.

*Subparagraph (*b*) – teachings*

(10) Article 38, paragraph 1 (*d*), of the Statute directs the Court to apply "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". Like the category of "decisions of courts and tribunals", which forms subparagraph (*a*) of draft conclusion 2, neither the Charter of the United Nations (Chapter XIV), the Statute nor the secondary documents of the Court (in particular the Rules of Court or the Practice Directions), contain any definition of the term "teachings". Neither the Court nor the Permanent Court of International Justice have defined the term "teachings" as a category in their practice. It would therefore seem useful to briefly examine the ordinary meaning of the term.

(11) In the present draft conclusions, and as will be further explained in draft conclusion 5, the Commission decided to use the term "teachings" to describe the second well-established category of subsidiary means. The Commission debated the possibility of using

[250] Para. (5) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook…2018*, vol. II (Part Two), para. 66, at pp. 109–110.

[251] The Commission, in the context of the topic of identification of customary international law, has offered working definitions of the terms "international courts and tribunals" and "hybrid" courts which is a convenient albeit starting point for our purposes: para. (6) of the commentary to draft conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), pp. 109–110.

[252] *Ibid*., para. 65, conclusion 5 of the conclusions on identification of customary international law. Further discussion of "hybrid courts", and their output, will follow in later draft conclusions on the present topic.

the "most highly qualified publicists" reference contained in Article 38, paragraph 1 (*d*). The formulation was found to be a historically and geographically charged notion that could be considered elitist. It was also felt that it focused too heavily on the status of the individual as an author as opposed to the scientific quality of the individual's work, which ought to be the primary consideration. The view was, however, expressed that the formulation "the teachings of the most highly qualified publicists of the various nations", which mirrors the exact phrase used in Article 38, paragraph 1 (*d*), of the Statute of the Court, was preferable to the succinct formulation "teachings".

(12) In draft conclusion 2, the reference to teachings is not just to any teachings, but those that may be considered as originating from either individual or groups of scholars that are eminent in the sense of being among the most highly qualified publicists of the various nations. Special attention should be given to the works of those considered prominent in their fields. That said, as indicated above, while the reputation of the author of the work may provide a useful indication of quality, it should also be stressed that it is ultimately the quality of the particular writing that is more important.

(13) The term "teachings," both in its ordinary meaning and in the form of its synonyms, is evidently a broad category. Its meaning encompasses written works as well as lectures. This meaning may be the immediate one that comes to mind, when one hears a reference to teachings, but the term need not be understood so narrowly. In fact, it is best understood more broadly given the possibilities that technological advancements may offer. Indeed, in its prior work, the Commission has determined that both "teachings" or "writings" are "to be understood in a broad sense".[253] The Commission also considered that the category would include "teachings in non-written form, such as lectures and audiovisual materials".[254] Thus, it can be concluded that teachings are comprised of writings or doctrine, as well as recorded lectures and audiovisual materials and, for that matter, materials in any other format for dissemination, including those which might be developed in the future.

(14) As in the case of subparagraph (*a*), which addresses decisions of courts and tribunals and is further elaborated upon in draft conclusion 4, the nature of and the need for representativeness of teachings in terms of the various legal systems and regions of the world will be elaborated upon in future draft conclusions, starting with draft conclusion 5.[255] That draft conclusion makes clear that teachings would include the works of individual scholars, especially – as the drafting history of Article 38, paragraph 1 (*d*), confirms – the coinciding views of such scholars or doctrine. The coinciding views of scholars is not a requirement that there be scholarly consensus, assuming that were even possible. However, where there appears to be a general trend evident from a review of a diverse and representative body of scholarly works, such trend would likely be a reliable indication, on balance, that those views are more likely to be accurate. This is particularly the case where the general views follow objective individual assessments by the authors concerned. They would also include the works of private expert bodies such as the Institute of International Law and the International Law Association. Texts produced by State-empowered bodies, such as the Commission, may be considered separate from the "teachings of publicists". Their texts are produced under the auspices of official institutions and may reflect the involvement of States and or their representatives in the work. This makes them different from the "teachings of publicists". The Commission will elaborate on this matter in future draft conclusions.

[253] Para. (1) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 110; and the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available (A/CN.4/710/Rev.1).

[254] *Ibid*. See also third report on identification of customary international law, by Sir Michael Wood, Special Rapporteur (A/CN.4/682), chap. V, and statement of the Chair of the Drafting Committee on identification of customary international law, p. 15, available from https://legal.un.org/ilc/guide/1_13.shtml#dcommrep.

[255] The commentary to draft conclusion 5 will be considered by the Commission at its next session.

*Subparagraph (*c*) – any other means generally used to assist in determining rules of international law*

(15) Subparagraph (*c*) of draft conclusion 2 provides for the third category of subsidiary means when it states that subsidiary means for the determination of rules of international law include "any other means generally used to assist in determining rules of international law". While various candidates that could be included in the "any other means" category emerge from practice and the literature, the key ones may include the works of expert bodies and resolutions/decisions of international organizations, as explained elsewhere.[256] The view was expressed that this subparagraph is best understood in the light of future work on the question of additional subsidiary means.

(16) Alternatives for subparagraph (*c*) were considered, ranging from formulating an illustrative list of subsidiary means to simply leaving a placeholder as an indication that text would be included in the future. Regarding the illustrative list of additional subsidiary means, express mention was made to the works of expert bodies and the resolutions or decisions of international organizations. After a thorough deliberation, taking into account the various positions, the Commission settled on referring in general terms to "any other means generally used to assist in determining rules of international law". That formulation was thought sufficiently broad to allow for further elaboration of its contents in future draft conclusions and the commentaries thereto. Express mention was made of the need to have separate and additional draft conclusions addressing the works of expert bodies especially those created by States, which found broad support for inclusion. The categories mentioned would also accord with the prior work of the Commission in several topics completed since 2018.

(17) The role of the works of expert bodies and other entities has been examined by the Commission in its recent work on other topics: "Identification of customary international law" (specifically conclusions 13 on decisions of courts and tribunals and 14 on teachings), "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (conclusion 13 on pronouncements of expert treaty bodies), "General principles of law" (draft conclusions 8 on decisions of courts and tribunals and 9 on teachings)[257] and "Peremptory norms of general international law (*jus cogens*)" (draft conclusion 9 on subsidiary means for the determination of the peremptory character of norms of general international law – addressing both judicial decisions, teachings and the works of expert bodies).[258] However, there is a need to further assess to what extent they can specifically contribute as subsidiary means for the determination of rules of international law in the context of the present draft conclusions.

(18) The Commission has left the third category open in order not to foreclose the possibility of other subsidiary means, which may not be in widespread use now or that are in use but left out of the work on the present topic, from being covered by the present draft conclusions as the work develops. Still, it did consider it prudent to add the qualifier "generally", to indicate that a degree of qualification or usage in practice was needed. The goal is to make clear that not just any subsidiary means would qualify. It is those that are generally used, including by courts and tribunals. Specifically, the use of the term "generally" conveys that a particular material used on a single occasion as a subsidiary means by one specific court or tribunal would not automatically become a subsidiary means more generally.

(19) Finally, subparagraph (*c*) alluded to the role of subsidiary means, namely "to assist" in determining the rules of international law. This may raise the question of the function of the traditional and additional subsidiary means, which will be the subject of a future draft conclusion, much as was the case in the topic "General principles of law".[259] At this stage, the formulation "to assist" was introduced to foreshadow some of the elements that could be

[256] See, in this regard, the detailed discussion of additional subsidiary means in A/CN.4/760, chap. IX.

[257] Contained in chap. IV of the present report.

[258] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 43.

[259] Draft conclusion 9, contained in chap. IV of the present report.

helpful in both identifying possible candidates for other subsidiary means and emphasizing their auxiliary function.

Conclusion 3
General criteria for the assessment of subsidiary means for the determination of rules of international law

When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*:

(*a*) their degree of representativeness;

(*b*) the quality of the reasoning;

(*c*) the expertise of those involved;

(*d*) the level of agreement among those involved;

(*e*) the reception by States and other entities;

(*f*) where applicable, the mandate conferred on the body.

Commentary

(1) Draft conclusion 3, which concerns the general criteria for assessing subsidiary means for the determination of rules of international law, seeks to provide guidance to assess the weight to be given to those means.

Chapeau *of draft conclusion 3*

(2) The *chapeau* of draft conclusion 3 provides that reference should be made to various factors when assessing the weight of subsidiary means as part of the determination of rules of international law. Different subsidiary means will have varying levels of "weight". These may also vary between fields of international law, in the sense that one subsidiary means may have different weight in different contexts. For example, decisions by one international court or tribunal usually have great significance to that court or tribunal itself, but they may be considered less important by another, which may instead give priority to its own decisions.

(3) The six criteria are to be used as general factors for determining the relative weight to be given to materials that are already considered subsidiary means under one of the categories identified in draft conclusion 2. They are not intended for determining whether a particular material is to be considered a subsidiary means within the meaning of the draft conclusions as a whole. This point is made explicit in the *chapeau*. The factors listed in the draft conclusion, which have been explained in previous works of the Commission, are therefore possible elements contributing to assessing the weight to be given to subsidiary means, and the use of those elements would be dependent on the circumstances under which they are being used. The provision sets out the criteria in subparagraphs to enhance readability and help clarify that not all factors would be applicable to all the categories of subsidiary means. Instead, which factors would be relevant, and to what extent, would depend on the specific subsidiary means in question and the prevailing circumstances. The view was nonetheless expressed that there may be insufficient practice supporting these criteria at this stage of the topic or that listing the factors risks being seen as a theoretical exercise.

(4) The applicability of the rule is confirmed by the phrase stating that "regard should be had to, *inter alia*" in the *chapeau* of draft conclusion 3. Two elements are worth stressing. First, the use of the term "should" indicates that reference to the criteria is not mandatory, although in many cases, it would plainly be desirable. The idea is to signal that what follows is not meant to be a prescriptive statement or to establish an obligation to use a particular subsidiary means. Second, the use of the term "*inter alia*", was also intended to convey that the list of criteria encompassed those that would likely be the most frequently encountered and could serve as a useful guide, but were illustrative instead of exhaustive.

*Subparagraph (*a*) – their degree of representativeness*

(5) Subparagraph (*a*) refers to the degree of representativeness of the materials being used as subsidiary means. This criterion entails, *inter alia*, that in assessing subsidiary means, recourse should be had to the decisions of courts and tribunals, teachings and any other subsidiary means from various regions or legal systems. This criterion should be applied flexibly if the rules of international law under consideration are bilateral or regional in nature. In such cases, the focus would instead be on the content and degree of specialization of the subsidiary means used to aid in the determination of the rules in question. This is an example of a flexible application of the criteria identified in draft conclusion 3.

*Subparagraph (*b*) – the quality of the reasoning*

(6) Subparagraph (*b*) refers to the quality of the reasoning. The Commission considered that such criterion should prevail over the renown of the author in the case of teachings. At the same time, the criterion is subjective and not necessarily applicable to all subsidiary means. For example, on the one hand, the quality of the reasoning of a judicial decision or the pronouncement of an expert body may usefully be assessed. On the other hand, it might be less relevant when examining certain other materials.

*Subparagraph (*c*) – the expertise of those involved*

(7) Subparagraph (*c*) refers to the level of expertise of those involved. The Commission was of the view that, similarly to subparagraph (*b*), this criterion referred to the background and the qualifications of those involved in relation to the topic, which should demonstrate expertise on the subject matter in a number of ways, rather than focusing exclusively on the renown or academic titles of the particular author or actors. The expertise of the individuals involved in drafting a text is also mentioned by the Commission in the conclusions on identification of customary international law as a factor influencing the "value" of "the output of international bodies engaged in the codification and development of international law".[260] This too is suggested by the Commission in its previous work and is considered by individual judges of the International Court of Justice when applying the teachings of publicists.

*Subparagraph (*d*) – the level of agreement among those involved*

(8) Subparagraph (*d*) lists the level of agreement of those involved. This criterion is meant to refer to the internal consensus when a decision was made or among the authors of a text. Once again, such criterion would need to be applied flexibly. Accordingly, evaluating the level of agreement could be most appropriate when considering teachings, where the level of convergence among scholars in relation to a specific point of law would be of significance.

(9) The level of agreement may reflect in the coinciding views of individual scholars, which is not a requirement that there be scholarly consensus, assuming that were even possible. However, where there appears to be a general trend evident from a review of a diverse and representative body of scholarly works, such trend would likely be a reliable indication, on balance, that those views are more likely to be correct. This is particularly the case where the general views follow objective individual assessments by the authors concerned.

(10) The Commission has previously noted "support ... within the body" as a factor influencing the "value" of "[t]he output of international bodies engaged in the codification and development of international law" in its conclusions on identification of customary international law.[261] A high level of agreement may be particularly significant if the concurring persons represent different geographical regions or legal systems.

[260] Para. (5) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 110.

[261] *Ibid*.

*Subparagraph (*e*) – the reception by States and other entities*

(11) An external component is addressed in subparagraph (*e*): the reception by States and other entities. It should be noted that, even when there is a measure of consensus among those who participated in producing a particular work or decision, the outcome can be subject to external criticism. The reactions and views of others in the field are also indications of how well received, or not, a particular subsidiary means might be. In other words, the external component is the reaction after the decision was made: "[t]he reception of the output by States and others", i.e. the level of agreement *outside* the relevant body (this was also mentioned by the Commission in the conclusions on identification of customary international law).[262] The Commission has suggested that its own output "merits special consideration" in part due to its "close relationship with the General Assembly and States", but that its value depends "above all upon States' reception of its output".[263]

*Subparagraph (*f*) – where applicable, mandate conferred on the body*

(12) Finally, subparagraph (*f*) refers to the significance of the mandate conferred on the body that took the decision being assessed. The opening qualifier "where applicable" was included to make it clear that what is being referred to are those situations where the subsidiary means being assessed were produced by a body operating under an official or intergovernmental mandate, such as human rights treaty bodies, or certain expert bodies, like the International Law Commission. In its previous work on the identification and legal consequences of peremptory norms of general international law (*jus cogens*), the Commission described such entities as being "established by States or international organizations" and further clarified that they would encompass both the organs created by such entities and their subsidiary organs.[264]

(13) This criterion is useful in assessing whether particular regard should be had to decisions of a particular court and, if so, whether to give it greater weight: for example, because it is a specialist tribunal with particular competence, such as the International Tribunal for the Law of the Sea in relation to the law of the sea; the International Criminal Court in relation to matters of international criminal law; or the Dispute Settlement Body of the World Trade Organization in relation to matters of international trade law. In any event, the criterion in question is not necessarily meant to apply to the works of purely private expert bodies, such as the Institute of International Law or the International Law Association. This is not, however, to imply that the "works of expert bodies without an intergovernmental mandate are irrelevant".[265] It is only to indicate that those works are necessarily going to be treated differently from those created by States or international organizations.

(14) "Mandate" is mentioned by the Commission in its previous work as a factor influencing the "value" of "[t]he output of international bodies engaged in the codification and development of international law".[266] The works of universal and regional codification bodies would here be relevant to the extent that such bodies were created by and interact with States. In the same previous work, the Commission suggested that its own output "merits special consideration" in part owing to its "unique mandate".[267] Subsidiary means are often produced by organizations that have been given a mandate by States. Particular regard may be given to subsidiary means that fall squarely within such a mandate than those that fall outside it. Some institutions have a general mandate, such as the Commission, which is empowered to develop and codify "international law" whether public or private.[268] The

[262] Para. (5) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 110.

[263] Para. (2) of the commentary to Part Five, *ibid*., at pp. 104–105.

[264] See draft conclusion 9, para. 2, and para. (8) of the commentary thereto of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 44, at p. 46.

[265] Para. (8), *ibid*.

[266] Para. (5) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 110.

[267] Para. (2) of the commentary to Part Five, *ibid*., pp. 104–105.

[268] Statute of the International Law Commission, 1947, art. 1, para. 1.

United Nations Commission on International Trade Law (UNCITRAL) also has a special mandate in relation to matters of private international law. Other institutions may have a more specialized mandate. That the International Court of Justice in *Diallo* believed "that it should ascribe great weight to the interpretation adopted by" the Human Rights Committee,[269] which was within the Committee's mandate, supports this view. In the *Committee on the Elimination of Racial Discrimination* case, the Court, in its reasoning, "carefully considered the position taken by the … Committee" but did not follow it.[270] Such bodies will need to be considered separately. Their work, and other subsidiary means found in practice, will be subject to further analysis and specific draft conclusions in the future work in the present topic.

[269] The Court explained that "[a]lthough the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled." In the same case, the Court referred to the interpretations of certain regional human rights provisions in various treaties by the African Commission on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights. In relation to issues of compensation for human rights violations, it also took into careful account the practice of various international courts, tribunals and commissions. See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324, at pp. 331, 334, 339 and 342, paras. 13, 24, 40 and 49.

[270] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71, at p. 104, para. 101; see also para. 100.