Provisional

For participants only

18 June 2024

Original: English

International Law Commission

Seventy-fifth session (first part)

Provisional summary record of the 3665th meeting
Held at the Palais des Nations, Geneva, on Monday, 13 May 2024, at 3 p.m.

Contents

Present:

Chair:	Mr. Vázquez-Bermúdez
Members:	Mr. Akande
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Subsidiary means for the determination of rules of international law (agenda item 8) (*continued*) (A/CN.4/769)

Ms. Ridings said that the Special Rapporteur's second report (A/CN.4/769) was of high quality, well structured and faithfully followed the Commission's discussions on the topic at its seventy-fourth session. The excellent memorandum by the secretariat (A/CN.4/765) would be of continuing use in future discussions on the topic. She welcomed the Special Rapporteur's proposal to address the issues raised in the Sixth Committee and to make suggestions for revisions to the provisionally adopted draft conclusions and commentaries at the first-reading stage.

With regard to chapter III of the report, it would be useful to clarify a number of terminological issues. First, concerning the Special Rapporteur's references to the "auxiliary" and "assistive" function of judicial decisions, she completely agreed that subsidiary means were "auxiliary" in character. In her statement at the seventy-fourth session, she had also referred to subsidiary means as being auxiliary and assisting in the determination of rules of international law. She would be interested to know whether the Special Rapporteur considered that there was a difference between the two concepts – "auxiliary" and "assistive" – or whether "auxiliary" also encompassed the function of assisting in determining the existence and content of rules of international law.

The second terminological issue had to do with the use of the expressions "determination" and "identification" of rules of international law, another point that had been discussed at the seventy-fourth session. It was not clear whether the Special Rapporteur considered there to be a distinction between the two terms and, if so, what the nature of that distinction might be. Paragraph 82 of the report stated that the subsidiary level of legal determination involved using judicial decisions or teachings "as a means to first identify whether a rule of international law on a given point exists and, once it has been determined that this is the case, to apply that rule". That seemed to imply that the Special Rapporteur considered that determination was a two-step process, and thus suggested that determination and identification were not synonymous, even though they were sometimes used interchangeably in the report.

Admittedly, the Commission itself had not been consistent in the past on that score and seemed to have referred to the two terms interchangeably in its work on identification of customary international law and identification and legal consequences of peremptory norms of general international law (*jus cogens*). It would be instructive to learn what approach the Special Rapporteur intended to follow and whether he intended to draw a distinction between "determination" and "identification".

The Special Rapporteur suggested several times in the report that subsidiary means had a gap-filling role similar to that played by general principles of law. To some extent, the "gap filling" was based on the practice of the International Criminal Court, even though the Rome Statute had a distinct applicable law provision in article 21. The potential gap-filling role seemed to be based on the auxiliary function of subsidiary means, which was the basis for draft conclusion 6 (a). Yet the Special Rapporteur also suggested, in paragraph 70 of the report, that subsidiary means could not directly fill gaps in the existing international legal framework and that judges did not create law.

The language used by the Special Rapporteur was confusing and might convey a message that was inadvertent or contrary to the one intended. There might be a truncating of the process of using subsidiary means. As the Special Rapporteur rightly noted, subsidiary means were used after there was first recourse to the sources of law to determine a rule. For example, it was often suggested that recourse to general principles of law might serve to fill a lacuna in the law. Where there was a judicial decision to that effect that was referred to by a judge as a subsidiary means to determine what the rule was, the judge was not filling a gap in the law by resorting to the subsidiary means, but rather was interpreting and applying the sources of law. She therefore did not consider the reference to "gap filling" to be very illuminating.

She wondered whether there was a sufficient connection between draft conclusion 6 (b), which provided that "subsidiary means are mainly resorted to when identifying, interpreting and applying the rules of international law derived from the sources of international law", and draft conclusion 4 (1), provisionally adopted by the Commission, which referred to decisions of international courts and tribunals as a "subsidiary means for the determination of the existence and content of rules of international law". The use of subsidiary means to determine the existence and content of rules of international law was confirmed by several of the observations presented in the secretariat's memorandum. In terms of determining the existence of rules of international law, observations 9, 10, 27, 28 and 29 confirmed that the Permanent Court of International Justice and the International Court of Justice had relied on their previous decisions to identify applicable rules. With regard to identifying their content, observation 16 concluded that the International Court of Justice had referred to its own decisions and those of the Permanent Court of International Justice as a means to interpret its Statute. Observation 58 pointed out that judges referred to the outputs of the Commission in their analysis of the existence and content of rules of customary international law.

Draft conclusion 6 (b) seemed to address a subset of the primary functions of judicial decisions in determining the existence and content of rules of international law, namely the ancillary functions of identifying, interpreting and applying the content of rules of international law found to exist. Those additional terms could add further granularity to an understanding of the determination of the existence and content of rules of international law, which might be of some assistance in explaining the functions of subsidiary means in a holistic manner, which in turn would help to guide the draft conclusions.

In examining the subset of the functions of subsidiary means, it was illustrative to look more closely at the language used by the judges of the International Court of Justice, who had employed different language to describe how they used subsidiary means to determine the existence, on the one hand, and the content, on the other, of rules of international law. For example, to identify the existence of such rules, they had employed subsidiary means to "declare" the existence of a rule or provide material to "support" the existence of such a rule. To identify the content of such rules, they had used subsidiary means to "interpret", "define" or "clarify" the content of the rule in question. In that context, subsidiary means had also been used by judges to support a favoured "interpretation", "definition" or "clarification" of the content of the rule. Her written statement included references to the various cases in which that matter was discussed further. Those findings showed that subsidiary means had been used by judges as a functional tool to assist in determining rules of international law.

Concerning the more specific functions of judicial decisions, the Special Rapporteur had remarked that the role of subsidiary means in improving the coherence and unity of international law would be addressed in a future report. Apart from the tendency of international courts and tribunals to rely on their previous decisions for unity and coherence, judicial decisions also played a central role in clarifying the interrelationship between different sources and regimes of international law. In the context of clarifying the interaction between different sources of international law, in the *North Sea Continental Shelf* cases and the case concerning *Ahmadou Sadio Diallo*, the International Court of Justice had discussed the effects of treaty-making on the formation of customary international law. In the Court's 1986 judgment in *Military and Paramilitary Activities in and against Nicaragua*, the majority of the Court had elaborated upon the existence of identical rules under conventional and customary international law and their interrelationship. In terms of the interplay between different regimes of international law, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Armed Activities on the Territory of the Congo* and *Legality of the Threat or Use of Nuclear Weapons*, the Court had elaborated upon the relationship between international humanitarian law and human rights law in situations of armed conflict. In the judgment in *Gabčíkovo-Nagymaros Project* and the advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, the majority of the Court had analysed the relationship between international environmental law, general international law and the law of armed conflict. Those cases illustrated a series of genuine attempts to reduce the substantive fragmentation of international law and amplify the unity of international law as a legal system. She hoped that the Special Rapporteur would return to that point.

The Special Rapporteur had indicated in paragraph 64 of his second report that the more specific functions of various subsidiary means would need to be considered in future reports. She assumed that such consideration would include the question of specific functions of judicial decisions, even though the subsequent reports would focus on the role of teachings and other subsidiary means. Aside from finding that judicial decisions performed a role that was auxiliary or assistive to that of the sources, that they could be used by other courts and tribunals as an authoritative (re)statement of existing law and that they could serve as an independent basis for rights and obligations of the subjects of international law, the Special Rapporteur did not, in the second report, directly unravel the question of any other "specific" functions of judicial decisions in the context of determining rules of international law. There might be value in identifying the more specific functions of judicial decisions in order to provide a more comprehensive picture of their function. In that context, the distinction between specific functions of judicial decisions on the one hand and the subsets of the auxiliary function on the other would need to be explained.

The extensive discussion of judicial precedent contained in chapter IV of the report relied on national court decisions in a select group of countries, as well as decisions of the International Court of Justice and the International Tribunal for the Law of the Sea. She agreed with other members that, when discussing precedent, it was important not to draw conclusions from an examination of only a select group of national systems. Many members had spoken of the value of examining other courts and tribunals and had highlighted especially illustrative decisions. A broader examination of jurisprudence would enable the Special Rapporteur to draw conclusions on the absence of strict precedent and the value of judicial decisions. As she had said at the previous session, what judges followed was not so much past decisions themselves as the legal reasoning and conclusions they contained.

In her view, the question of precedent in the World Trade Organization (WTO) dispute settlement system was of particular interest, especially given the impasse over the functioning of the Appellate Body. The Special Rapporteur was doubtless aware, in particular, of the negotiations on the reform of the WTO dispute settlement process and the draft ministerial decision on dispute settlement that sought to clarify that previous dispute settlement reports interpreting a provision did not have binding force in respect of subsequent disputes. In an interesting contrast to draft conclusion 8, the draft text also stated, possibly as a result of negotiations between WTO member States, that "[n]either Members nor adjudicators may presume that an interpretation of the covered agreements contained in a WTO dispute settlement report is persuasive".

As for the draft conclusions themselves, she agreed with many of the comprehensive comments made by Commission members on the specific language of draft conclusions 6, 7 and 8. Rather than repeating the points already made, particularly concerning the need to remove ambiguities, she would leave the discussion to the Drafting Committee. In order to facilitate the Commission's work, the Special Rapporteur could perhaps provide a revised text of the draft conclusions, taking into account the very consistent comments that had already been made in the plenary meetings. She supported the referral of the draft conclusions to the Drafting Committee.

Mr. Paparinskis, welcoming the memorandum by the secretariat on the case law of international courts and tribunals, and other bodies, which would be particularly relevant for the Commission's work on the topic, said that it would be very useful for members of the secretariat to introduce their memorandums at plenary meetings in the same way that the special rapporteurs introduced their reports.

He agreed with the Special Rapporteur that it would not be fruitful to reopen the debate on aspects already agreed upon by the Commission. The draft conclusions, and particularly the commentaries thereto, that had been adopted by consensus had already settled several important substantive and terminological issues of direct relevance for the Commission's work at the current session. It was unfortunate that the Commission did not have before it the commentaries to draft conclusions 4 and 5, which were closely connected to the substance of the second report, even though draft conclusions were supposed to be read together with the commentaries. Nonetheless, the debate might prove helpful to the Special Rapporteur in finalizing the commentaries.

In the second report, the Special Rapporteur noted that one of the important developments since the previous session had been the adoption by the Institute of International Law of its 2023 resolution on precedents and case law (*jurisprudence*) in inter-State litigation and advisory proceedings, paragraph 2 of which addressed subsidiary means. It should be recalled that paragraph (14) of the commentary to draft conclusion 2 confirmed that outputs of the Institute were subsidiary means that were particularly likely to be accurate, which meant that the Commission should engage seriously with them, both in terms of their substance and for drafting inspiration. At the same time, due account should be taken of differences in focus and scope, in particular the resolution's treatment of non-inter-State proceedings and non-permanent courts or tribunals only in a "without prejudice" clause.

With regard to the nature and function of subsidiary means, the Commission must consider where those issues fitted within the topic. Whether nature and function were addressed as the first point; among the final points, as had been done in the draft conclusions on general principles of law adopted on first reading; or between teachings and precedent, as was currently the case, would affect the drafting of the argument and the associated draft conclusion. In his view, chapter III built upon issues that were mostly addressed in draft conclusions 1 and 2 or the commentaries thereto. Therefore, it might make sense to draft a conclusion that could be inserted between those two provisions with a view to setting out the key aspects and assumptions of the project as early, accessibly and concisely as possible.

As reflected in paragraph (6) of the commentary to draft conclusion 1, the Commission had already agreed that subsidiary means "differ in their nature from the sources of law" and "are subsidiary simply because they are not sources of law that may apply in and of themselves". It was also noted in paragraph (6) that "[t]his is not to suggest that the subsidiary means are not important". It must follow that the importance of subsidiary means did not and could not affect the first proposition about their difference from sources, nor did the "subsidiary" characteristic on its own say anything about the role that such means played or should play in the order or style of reasoning. In short, the empirical importance of subsidiary means and rhetorical styles regarding them were inquiries distinct from their juridical nature. Finally, there was no hierarchy between sources and subsidiary means. An inquiry into hierarchy required the objects to be of the same nature so that they would be capable of comparison in principle, which the ones in question were not.

Terminology that was in tension with those propositions should be avoided, such as the descriptions in the report of the relationship between sources and subsidiary means as a "hierarchy" or of sources as "primary" as against subsidiary means as "gap-filling", "secondary" or "supplementary". The Commission had deliberately refrained from using any of those terms in the commentaries, with the pointed exception of "secondary" and "supplementary" in paragraph (5) of the commentary to draft conclusion 1, and even then only to illustrate "a broader ordinary understanding which also became associated with the English term", not confirmed by any of the other authentic language versions, as noted in paragraph (6).

The materials on the nature of subsidiary means set out in chapter III, particularly regarding the International Court of Justice, were mostly in line with what had been agreed at the previous session. If some decisions rendered within the field of international criminal law suggested otherwise, the Commission could confirm that they did not reflect the general rule but rather a treaty-based departure from it.

The report did not address the interaction between subsidiary means for the determination of rules of law and "supplementary means of interpretation". While he commended the Special Rapporteur's efforts to limit the length of the report, it would have been the appropriate place to address that question. The distinction was simple: the principles of treaty interpretation reflected in articles 31–33 of the Vienna Convention on the Law of Treaties related to the law of sources and were thus different in nature from subsidiary means. Addressing the issue would have both dispelled any confusion and driven home the key difference between sources and subsidiary means: for supplementary means of interpretation, the difference from materials falling under the primary rule was in the order of application and the weight to be given to materials of the same nature, while for subsidiary means, the difference from sources was in the nature of the materials.

In addition to the auxiliary function of subsidiary means, the Special Rapporteur called for more specific functions to be recognized, such as "complementing the rules of international law" or "advancing the coherence or the systemic nature of international law as a legal system". While interesting, the claim was not easy to reconcile with the distinction between sources and subsidiary means, which, according to paragraph (12) of the commentary to draft conclusion 1, meant that "[t]he 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".

If, however, broader functions were addressed, he would encourage the Commission to also acknowledge that some of the most influential contemporary teachings pursued the important function of exposing parochialism, contradictions, hypocrisies and biases in and of international law. Examples of such teachings included the works of Mohammed Bedjaoui, Mohamed Benouna, Georges Abi-Saab, Kéba Mbaye, Taslim Elias, R.P. Anand, Martti Koskenniemi, Hilary Charlesworth, Christine Chinkin, B.S. Chimni, Antony Anghie, Anne Orford, Ntina Tzouvala, Surabhi Ranganathan and some current members of the Commission.

Concerning the text of the draft conclusions, he supported the substance of draft conclusion 6 (a) but would prefer to split the single sentence into two sentences, on nature and function, respectively. Drafting inspiration for the sentence on nature could be drawn from the language in paragraphs (6), (8) and (12) of the commentary to draft conclusion 1 on the difference between sources and subsidiary means, as well as paragraph 2 of the Institute of International Law resolution. The second sentence, on function, could build on the language of draft conclusion 2 (c), which in paragraph (19) of the commentary had already been explicitly linked with the then future draft conclusion on function. For example, it could read: "Subsidiary means for the determination of rules of international law assist in determining rules of international law", or, borrowing from draft conclusions 4 and 5, "… assist in determining the existence and content of rules of international law".

Like Mr. Forteau and other members who had expressed a similar view, he would hesitate to expand the functions of subsidiary means beyond what was set out in Article 38 (1) (*d*) of the Statute. Lastly, a "without prejudice" clause should be inserted in the draft conclusion regarding, first, the role of materials that could be categorized as both subsidiary means and sources of international law, such as judicial decisions of domestic courts regarding customary international law and general principles of law, and possibly also the work of expert bodies regarding principles of treaty interpretation; and second, special rules of international dispute settlement, particularly regarding applicable law, that departed from the general rules on the nature and function of subsidiary means. The clause on special rules could address, in addition to international criminal law-related practice, institutions that characterized their judgments as setting legally binding precedents for parties, such as the Caribbean Court of Justice, or as binding for domestic courts or other authorities, such as the Inter-American Court of Human Rights and the Court of Justice of the European Union, or, conversely, rules requiring the acceptance of judgments of another court on certain issues as binding, such as those of the Court of Justice of the European Free Trade Association, or reflecting judicial hierarchy. The third sentence of paragraph 6 of the relevant Institute of International Law resolution of 2023 could provide drafting inspiration in that regard.

Regarding the nature of precedent, he supported the substance of the Special Rapporteur's proposals, although he disagreed somewhat with their framing, which should be brought into line with the Commission's approach to the topic so far. First of all, it was unclear that the common-law-based perspective and language of "precedent" helped to advance the Commission's work. Chapter IV of the report indicated that the doctrine of precedent, despite its role in some domestic legal orders, was not followed at the international level by either the International Court of Justice or the International Tribunal for the Law of the Sea; that was unsurprising, as it was stated at the outset of the analysis, in paragraph 140, that there was broad agreement among jurists on that point. Indeed, the Commission stated as much in paragraph (12) of the commentary to draft conclusion 1. If the role of precedent in the analysis was to be built up only to be knocked down, perhaps another concept should be used; after all, the term was not found in the Statute of the International Court of Justice, nor did the Court commonly use it. The only occasion in the previous three decades in which the full Court had referred to "precedent" had been in the very particular instance where its

own previous decisions on a particular question regarding the status of a certain State had been at issue, in the 2008 preliminary objections judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. Conversely, terms such as "judicial decisions", "binding" and "binding force" did feature in the Statute and were widely used in practice.

He had doubts about the placement of draft conclusions 7 and 8, as currently drafted, within the Commission's work on the topic thus far, owing to their exclusive focus on the perspective of international courts and tribunals, to the exclusion of other actors. The strength of the Commission's work on the generalist topics of sources and responsibility lay in its explicitly agnostic attitude towards the institutional setting in which the outcome of its work might be applied. The Special Rapporteur departed from that approach and from the Commission's work on subsidiary means thus far by shifting from a generalist perspective to a specialist perspective centred on international dispute settlement. The framing should be brought into line with the generalist perspective previously adopted in respect of the Commission's work on sources. Considered in the context of draft conclusions 1 to 5, the substance of the proposals in the second report would best fit as an extension of draft conclusion 3, on general criteria for the assessment of subsidiary means, in that it provided particular, special criteria for assessing decisions of courts and tribunals. Paragraph (13) of the commentary to draft conclusion 3 already introduced that concept.

Furthermore, shifting the focus away from international dispute settlement would allow the Commission to sidestep issues of considerable complexity and delicacy that related to the procedure of the International Court of Justice and were relevant to pending cases, which were addressed in chapter IV (C) to (E) of the report. It was not obvious that the Commission should attempt to resolve in passing questions relating to the precise import of the rules of one particular court, such as those set out in Articles 60 to 63 of the Statute of the Court. A change of framing would also expand the impact of the Special Rapporteur's work. One consequence of the current framing was that the wording of draft conclusion 8, which was likely to be of great importance for practitioners, would not be applicable to engagement with international law by such important actors as the domestic executive, legislature or courts, or international bodies other than courts or tribunals.

In paragraphs 196 to 198 of the report, the Special Rapporteur rhetorically asked how States could ignore the findings of the International Court of Justice when determining the scope of their own obligations. One answer was that, under draft conclusion 3, the Court's findings could be assessed like those of any other court. For example, States could show through reactions, whether expressed primarily through the legal process or through United Nations processes, that the Court had erred. The underlying rule could itself be contested or in flux, as was recognized in paragraph 5 of the relevant Institute of International Law resolution of 2023. Of course, no international lawyer was likely to advocate ignoring the Court, and the criteria set out in draft conclusion 3 would suggest that great weight should be given to its pronouncements in most settings, but that was the consequence of the application of criteria on weight, not an *a priori* assumption.

He agreed with those members who had called for engagement with the practice of international courts and tribunals beyond the International Court of Justice and the International Tribunal for the Law of the Sea. The secretariat's memorandum helpfully addressed arbitral tribunals, international criminal tribunals and claims commissions, albeit without characterizing such commissions as international tribunals. Paragraph (7) of the commentary to draft conclusion 2 also referred to the dispute settlement bodies of WTO, investment tribunals and regional judicial bodies as international courts or tribunals. However, the Commission should be prudent in its approach to such materials. Paragraph 9 of the memorandum suggested that references by a court or tribunal to decisions of other courts or tribunals might be examples of the use of an applicable law provision contained in its constituent instrument rather than examples of reliance on those decisions as subsidiary means. Moreover, most courts and tribunals addressed in the memorandum did not explicitly characterize their references as subsidiary means.

There was also a risk of flattening the diverse international judicial landscape in search of uniformity. The Commission should focus on the identification of the various factors that would help to make sense of the plurality in the fabric of international courts and tribunals.

Approaches differed between bodies, within bodies and over time, and assumptions about proper judicial functions shifted, sometimes but not always in the direction of giving greater weight to judicial decisions. For example, in his book *International Legal Argument in the Permanent Court of International Justice*, jurist Ole Spiermann had shown how the Permanent Court had in the 1930s turned to a narrower conception of its function. As Ms. Ridings had just noted, the recent draft ministerial decision submitted as part of the reform of the WTO dispute settlement process stated that "[a]djudicative reports shall have no precedential effect". In short, perspectives changed, and the Commission's thinking and drafting should be nuanced enough to accommodate moves in all directions.

He proposed that draft conclusions 7 and 8 should be merged into a single draft conclusion entitled "Particular criteria for the assessment of decisions of courts and tribunals", drawing upon draft conclusions 2 (a), 3 and 4, and also addressing the decisions of domestic courts, in line with draft conclusion 4 (2). The new draft conclusion would consist of three paragraphs addressing, respectively, the lack of binding force of judicial decisions except between the parties and in respect of that particular dispute, which would replicate the current draft conclusion 7; the particular criteria for assessing the weight of judicial decisions, replicating the current draft conclusion 8; and a "without prejudice" clause for special rules.

If the framing was not changed, however, draft conclusion 7 should be redrafted without reference to "precedent". The word "normally" should be replaced with wording such as "do not have to", thereby replacing the descriptive focus of the draft conclusion with a normative one. Drafting inspiration in that regard could be found in Article 59 of the Statute of the Court and paragraph (12) of the commentary to draft conclusion 1. A second paragraph should be inserted, containing a "without prejudice" rule applicable to specialist fields and bodies, in line with proposals made by the Special Rapporteur and Ms. Okowa at the Commission's preceding session (A/CN.4/SR.3651 and A/CN.4/SR.3654). Either the text or the commentary thereto could elaborate on the various scenarios in which decisions would be binding, including for parties before the court or to the instrument, or for the particular court, or reflecting judicial hierarchy. He could support draft conclusion 8 broadly as drafted but would prefer more detail regarding criteria, which could perhaps be expressed along the lines of the list in draft conclusion 3. The language of paragraphs 3 and 6 of the Institute of International Law resolution could provide drafting inspiration in that regard.

In conclusion, he fully supported the Special Rapporteur's proposed future programme of work and appreciated his openness to making adjustments. The draft conclusions should be referred to the Drafting Committee.

Mr. Mingashang said that the Special Rapporteur was to be commended on the constructive approach taken in the second report on subsidiary means, which reflected a number of technical and theoretical observations made by members during the discussion of the first report on the topic. Paragraph 77 of the second report indicated that the specific functions of subsidiary means would be addressed in a future report. For that reason, at the current session, he would address only the Special Rapporteur's chosen methodology, which appeared to correspond to a formalist approach to international law. The issues to which that approach might give rise could affect the practical value of the Commission's work on the topic in a number of ways and for a variety of reasons.

First, it remained to be seen whether, in adopting a formalist approach, the Commission was effectively fulfilling its mandate, under article 15 of its statute, to promote the progressive development of international law in the sense of "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". While the Commission produced outputs in forms other than draft articles for future conventions, it was pertinent to ask for whom such work was intended. It would be unwise to overlook the harm that the formalist conception of international law had caused to large swathes of humanity. It should be considered whether jurists who subscribed, for example, to Third World approaches to international law could easily accommodate, in their conception and interpretation of such law, draft conclusions that had been elaborated on a formalist basis. Yet it was they who advised the representatives of their respective States in debates involving international law in world affairs. In any case, the formalist approach was not only limited

but sectarian. It served as a vehicle for structural violence in international relations, camouflaged by ideological biases that were now an open secret.

The Special Rapporteur had certainly made some important points on the functions of subsidiary means in chapter III of the report, and the views and perceptions expressed in that respect were generally shared by a large number of international law specialists. The problem was that they made up a specific group of specialists who adhered to the dominant discourse in the current configuration of the international system, whose inequalities, injustices and double standards were axiological benchmarks that were difficult to call into question. The taboos affecting the formalist discourse in international law had been increasingly laid bare by specialists in that area, including by the jurist Shabtai Rosenne, whose practical view, as the Special Rapporteur pointed out in paragraph 88 of the report, focused on what the Permanent Court of International Justice and the International Court of Justice had actually done rather than what the Statute actually said they should do. Paragraph 88 of the report offered food for thought on the methodology to be followed in drawing up draft conclusions under the topic.

The report's in-depth analysis of the practice of the International Court of Justice and other international courts reflected the limits of formalism when it came to rigorous legal reasoning. The Special Rapporteur pointed out, in paragraph 89 of the report, that while the International Court of Justice frequently referred to its own decisions, those of the Permanent Court of International Justice and those of other international courts and tribunals, it did so "as a matter of routine", and did not always explain itself or the basis for its actions, especially when those could be said to be routine. As Mr. Forteau had underlined, care should be taken in using the jurisprudence of national courts for the purposes of the topic

He wondered whether the Commission, too, would follow the International Court of Justice "as a matter of routine" when it pronounced itself on the nature and functions of subsidiary means. Whatever the answer to that question, any reasoning inspired by a formalist methodology was likely to pose real problems from the standpoint of coherence and scientific rigour, as it usually involved leaps of logic and continually distorted reality by clinging to abstract ideals. While he did not object to the choice of formalism as a methodological lens *per se*, he was concerned about the fact that it was presented as the only possible methodology, or at least the most representative one, in an increasingly divided world.

The question of precedent in international law was one of the most technical and controversial problems in the field, giving rise to conflicting theories and deep divisions between adherents to different representations of the law. Yet the Special Rapporteur seemed to downplay its importance, stating in paragraph 134 of the report that "the differences in the variety of approaches to precedent between the common law and civil law should not be overemphasized". He applauded the Special Rapporteur's insightful treatment of that aspect of the topic and was in broad agreement with the analyses he presented.

Once again, however, the fact that all those analyses were based on a formalistic theoretical and methodological approach, as was explicitly stated in paragraph 158 of the report, was problematic. The International Court of Justice could not but consider itself to be bound by its previous positions on matters such as the interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide. He had detected signs of controversy of the kind described in that paragraph in the statement made by Mr. Forteau, who, at the preceding meeting, had said that draft conclusion 7 seemed to exclude the possibility of precedents while draft conclusion 8 asserted their persuasive value.

In his view, great caution should be exercised in drawing conclusions on the matter insofar as, according to the report, there was no single universally endorsed definition of "precedent" and the starting point of the Commission's analysis "must be the general rule of interpretation" in article 31 (1) of the Vienna Convention on the Law of Treaties. The question was whether or not judges contributed to the creation of law. On the one hand, there was the question of the status of precedent as such, which entailed the consideration of how precedent emerged and crystallized, and, on the other hand, the question of the scope and effect of a specific judicial decision in relation to the parties to the case and in relation to third parties. Chapter IV (D) seemed to reflect the state of the law and to be based on the understanding that subjects of international law had of judicial decisions. Article 59 of the Statute of the

International Court of Justice was explicit on that point and there was no need to quibble over it. Great caution should also be exercised in formulating points of view on the nature and status of precedent because the body of knowledge on the question was given over to confrontations based on opposing intellectual positions.

Turning to the text of the draft conclusions, he said that the title of draft conclusion 6 implied that it was stating the obvious, whereas the nature of subsidiary means was not, ontologically speaking, of secondary importance from the point of view of reasoning in international law. He wondered whether the title should perhaps be replaced with "Purposes and functions of subsidiary means", since there was nothing obvious about the statement that subsidiary means were auxiliary in nature; indeed, the whole concept arose from a particular ideological and historical context.

The title of draft conclusion 7, "Absence of a rule of precedent in international law", also needed to be qualified. To say that there was no rule of precedent in international law was an *a priori* assumption and not a deduction drawn from the actual practice of law, as shown by the pertinent references to Shabtai Rosenne in the report. The second clause of draft conclusion 7, which read "do not normally follow their own prior decisions or those of other courts and tribunals as legally binding precedents", reflected a great many presumptions. The wording should specify whether or not courts and tribunals followed their own prior decisions rather than saying they "normally" did so. Moreover, the rejection of the idea of "legally binding precedents" immediately raised questions about the meaning and scope of the phrases "settled case law (*jurisprudence constante*)" and "prior decisions", and, in the same vein, about the practical significance of the theory of reversal of precedent. The title of draft conclusion 8, "Persuasive value of decisions of courts and tribunals", clearly illustrated the incongruousness of the terms that made up the substance of draft conclusion 7. If there were no "legally binding precedents", where did the "persuasive value of decisions of courts and tribunals" come from?

His observations were intended to enhance the Special Rapporteur's very learned, clear, well-researched and incisive report on a very controversial subject. He recommended that the draft conclusions should be referred to the Drafting Committee for further refinement and stood ready to provide the Special Rapporteur with any support that might be needed to achieve a successful outcome.

Mr. Nesi said that he wished to commend the Special Rapporteur for the comprehensive analysis of such a delicate issue, based on a wealth of relevant practice and doctrinal views on the nature and function of subsidiary means. He appreciated the fact that the Special Rapporteur had fully taken into account the Commission's 2023 debates on the topic and the comments made by representatives of States in the Sixth Committee.

As the Special Rapporteur had pointed out, the starting point for a full understanding of the subject under discussion was the only legal reference in that area, namely Article 38 of the Statute of the International Court of Justice and the interpretations given to its content during its drafting and by successive jurisprudential decisions. However, the practice and doctrinal views collected by the Special Rapporteur should be more geographically comprehensive and reflect a wider variety of legal cultures. In addition, it was important to stress that subsidiary means, which did not belong to the category of sources of international law, played an auxiliary role, as correctly identified by the Special Rapporteur in paragraph 124 of the report.

Furthermore, in order to have a correct understanding of the nature and function of those instruments, the relation between judicial decisions and teachings on the one hand and sources of international law on the other should be clarified so as to adequately guide the work of the Drafting Committee on the proposed draft conclusions.

With regard to draft conclusion 6, he agreed that the subsidiary nature of such means should be clarified in order to avoid any risk that subsidiary means might be regarded as a quasi-source of international law. That, together with the wording and interpretation of Article 38 and the relevant jurisprudence, was the fundamental starting point for any analysis of subsidiary means. However, he had some doubts about the content of draft conclusion 6 (b).

In order to better understand the nature and function of subsidiary means, it was crucial to analyse how they related to the sources of international law. Subsidiary means were ontologically different from such sources and drew on a combination of different sources, following legal reasoning to interpret them or to resolve factual and legal disagreements. That idea should lead to a reflection on the wording used in draft conclusion 6 (b) as proposed.

While he agreed that subsidiary means could be resorted to when "interpreting and applying the rules of international law", he would be cautious about including in the draft conclusion the function of "identifying" the rules of international law. The reason was that the term "identification", which the Commission had already decided to delete from the draft conclusions proposed in 2023, as Mr. Asada had recalled at the preceding meeting, could have two similar but nonetheless distinct meanings. In ordinary English, "identification" could be defined as either the act of recognizing something or the act of stating and proving what that thing was. While those meanings seemed similar, there was a fine line between the two. Determining the existence of a source was not the same as determining its content. That double meaning was also reflected in the Commission's earlier work on identification of customary international law, where the commentary made it clear that the task of the Commission, meaning the identification of customary law, was to provide guidance on the existence and content of customary international law, embracing both meanings. However, in his opinion, the Commission should emphasize that the aim of subsidiary means was to recognize the existence of a source and not to determine its content.

On the contrary, the Commission could affirm that sources of law identified the content of subsidiary means by way of a process of combining legal reasoning from different sources, and the opposite could not be true at the same time. Therefore, subsidiary means could only provide evidence of the existence of international rules, which was also confirmed by authoritative doctrine. For example, commentators such as Mohamed Shahabuddeen defined subsidiary means as tools to "elucidate the existing law, and not bring new law into being", thereby determining its content. The Commission must therefore reflect on the use of the term "identify" in order to avoid misinterpretations. In view of the double meaning that the term could assume, the draft conclusions should clarify that it should be interpreted only as the act of recognizing, finding evidence of or confirming pre-existing international norms, in line with the meaning given to the term "determination" in Article 38 of the Statute.

Chapter IV of the report, which focused on the role of precedent in international law and the persuasive value of judicial decisions, referred to a specific function of judicial decisions as subsidiary means, namely interpretation. He fully agreed with other members that, in order to have a clear view of the interpretative value of prior decisions for the work of international and national tribunals, a more thorough analysis of other international and regional judicial bodies was essential. In particular, he would like to support Mr. Galindo's suggestion that judicial decisions from different contexts should be analysed, especially as the prior decisions of some human rights courts, such as the Inter-American Court of Human Rights, were binding for national courts.

While such domestic judicial trends should be taken into account in discussing the influence that previous international judicial decisions might have on national courts, he agreed with the conclusion, in paragraph 202 of the report, that there was no doctrine of *stare decisis* in international law, and therefore precedents were not binding on an international court dealing with other legal and factual disputes. However, that conclusion was not fully reflected in the proposed draft conclusion 7. In particular, as other members had rightly pointed out, the use of the term "normally" could be seen as a way of reintroducing the doctrine of *stare decisis* through the back door, should international tribunals deem it appropriate. Moreover, he was doubtful about limiting the application of draft conclusion 7 to cases where international courts or tribunals settled disputes between States or international organizations, since regional human rights courts, as well as other international adjudicatory bodies such as the WTO Dispute Settlement Body and other arbitral tribunals, often applied previous international decisions when dealing with claims brought before them.

That consideration was even more relevant with regard to draft conclusion 8. In regional human rights tribunals, previous decisions, even if they were not binding on national courts, played an essential role. Regional courts such as the European Court of Human Rights referred to precedents in order to strengthen their jurisprudence and to persuade States to

comply with their findings. More simply, given that regional courts and other international tribunals received many more applications than the International Court of Justice and the International Tribunal for the Law of the Sea, which were the main focus of the report, they often used reference to precedent as a shortcut to expedite routine cases. Those were just some of the reasons, other than persuasiveness, why international courts and tribunals referred to previous decisions, and all those reasons deserved more attention in the context of the topic at hand. Therefore, the caveat "when settling disputes between States or international organizations or issuing advisory opinions" should be removed from both draft conclusions 7 and 8 and the Special Rapporteur should engage in a more detailed analysis of how and why courts and tribunals other than the International Court of Justice and the International Tribunal for the Law of the Sea referred to precedents.

Accordingly, the title and content of draft conclusion 8 should be reconsidered. In the absence of a rule conferring binding force on precedents in international law, the draft conclusion should focus more generally on the use of precedents by international tribunals and not confine itself to examining their use by international tribunals when they found such precedents persuasive. Even the International Court of Justice, the International Tribunal for the Law of the Sea and the international criminal tribunals cited previous decisions for reasons other than persuasiveness. In its 2008 judgment on preliminary objections in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the Court had held that, "[t]o the extent that the decisions contain findings of law", previous decisions, while not binding, would not be departed from "unless [the Court] finds very particular reasons to do so". That showed that the legal content of particular decisions could be a factor that courts took into account when using previous verdicts, in particular to guarantee consistency in their jurisprudence. Another concrete example was the *Prosecutor v. Tadić* case before the International Tribunal for the Former Yugoslavia. That case had become one of the main reference points for identifying the threshold for the existence of an international or a non-international armed conflict. The importance of that decision lay not only in its persuasiveness but also in its establishment of an interpretative specification of international norms. As there was no such clear definition of non-international armed conflict in the Geneva Conventions of 12 August 1949 or Protocol II Additional thereto, the *Tadić* definition had been used in the Rome Statute of the International Criminal Court. The same idea applied to all the judgments of the International Tribunal for the Former Yugoslavia that clarified the factors for assessing the intensity of hostilities and the degree of organization of non-State armed groups, thus assisting courts and tribunals in determining whether hostilities rose to the level of a non-international armed conflict. Those precedents were relevant not only to decisions on analogous legal or factual issues, but also to any case in which courts were called upon to classify armed conflicts under international law and interpret the content of the relevant international humanitarian norms, thus assuming a role that went beyond mere persuasiveness.

He would also be wary of retaining the term "persuasive" in draft conclusion 8. By focusing on persuasiveness, the Commission ascribed relevance to precedents on the basis of an element that did not rely solely on the correctness of the legal merits of the decision, but could also be linked to the rhetorical value of a decision. Something was persuasive if it was convincing to an audience; however, what was convincing did not necessarily correspond to the reality of the facts and was not always fully correct in legal terms. Therefore, both the aim and the content of draft conclusion 8 should be reconsidered. The text should focus on the role that precedents could play for all international courts and tribunals, not limiting it to their persuasive power, but trying to understand in a comprehensive way why and when States referred to previous international decisions. Moreover, despite the permissive wording, it could be risky to refer only to persuasiveness when dealing with the value of international judicial decisions. The Commission should try to identify other characteristics of previous decisions, such as consistency, legal certainty, coherence and others, that might lead international courts and tribunals to refer to them.

He wished once again to commend the Special Rapporteur for his second report and recommended that the draft conclusions should be referred to the Drafting Committee.

Mr. Fathalla said that he would like to thank the Special Rapporteur for his second report and the secretariat for its memorandum. Both documents provided great insights for

the Commission's work on the three new draft conclusions proposed by the Special Rapporteur.

According to the findings set out in chapter II of the memorandum, most courts and tribunals had never explicitly referred to subsidiary means. However, according to observations 11 and 12, the Permanent Court of International Justice had in some cases applied the same approaches as in prior cases and had even referred occasionally to the importance of consistency with its prior decisions in the absence of sufficient reason to depart from them. That could be interpreted as an indirect indication that such decisions could constitute subsidiary means, as reflected in draft conclusion 4.

The International Court of Justice had gone even further by expressly referring to subsidiary means on three occasions. Moreover, according to several observations in the memorandum, including observation 33, the Court had relied frequently on not only its own prior decisions but also those of other courts and tribunals. The same was true of other tribunals: the International Tribunal for the Law of the Sea had relied on the Court's decisions, as had international criminal tribunals such as the International Tribunal for the Former Yugoslavia. Therefore, practice confirmed that the Court's decisions were a subsidiary means of utmost importance in the sense of Article 38 (1) (*d*) of its Statute.

Decisions of other international and national courts and tribunals were also considered subsidiary means under Article 38 (1) (*d*). For example, the Court indirectly qualified decisions of such bodies and of quasi-judicial bodies such as human rights treaty bodies as subsidiary means, as described in observations 48 to 54. The memorandum confirmed his view that decisions of national courts should carry less weight as subsidiary means than decisions of international tribunals.

Turning to the draft conclusions proposed in the Special Rapporteur's second report, he noted that draft conclusion 6 stressed the auxiliary character of subsidiary means, which was fully in line with the practice of the courts and with the Special Rapporteur's findings, as stated, for example, in paragraph 123. There should be a clear distinction between the nature and the function of subsidiary means, which should be reflected in two different draft conclusions. The draft conclusion on the nature of subsidiary means could be placed at the beginning of the set of draft conclusions, as it laid the foundation for all of them, not just for the latter ones.

Draft conclusion 6 (a) was descriptive. That was acceptable, as its purpose was to describe the nature of subsidiary means, which could not be done in a prescriptive manner. Draft conclusion 6 (b) should be reformulated to clarify that it focused on the function of subsidiary means. He therefore proposed that it should read: "Subsidiary means are mainly resorted to for the function of identifying, interpreting and applying the rules of international law." The words "derived from the sources of international law" at the end of the sentence should be deleted, for the reasons stated by a number of other members. He was pleased to note that the sentence did not include the word "secondary", which had been criticized in the Commission's debate in 2023 and by some members in the current debate.

Draft conclusions 7 and 8 were interrelated. As he had just explained, most courts, including the International Court of Justice, relied frequently not only on their own decisions but also on those of other courts and tribunals. Article 59 of the Court's Statute provided that third parties were not bound by decisions that did not directly concern them, but was silent on whether the Court itself was bound by its prior decisions. In paragraph 153 of the report, the Special Rapporteur argued that Article 59 should not be understood as excluding the binding force of precedents for further rulings of the Court. That concept was crucial for the legal stability, predictability and consistency of international law. Therefore, it was important for the Court and other courts and tribunals to follow their own rulings when the legal and factual circumstances were similar and the same legal rule applied. The Commission had discussed the value of legal stability in 2023 in the context of sea-level rise.

In the light of courts' and tribunals' extensive practice of referring to their prior decisions, he suggested that international courts and tribunals should be encouraged to rely more on their precedents. That could be done by combining draft conclusions 7 and 8 into a single draft conclusion. In addition, he agreed with many other members that the terms "normally" and "persuasive" did not fit within the context of the draft conclusions. The new

draft conclusion would read: “International courts or tribunals, when settling disputes between States or international organizations or issuing advisory opinions, are not required to follow their own prior decisions or those of other courts and tribunals as legally binding precedents except if these decisions address analogous factual and legal issues based on the same international legal rules.” If that formulation was accepted, the title should be “Legal value of precedence in international law”.

He agreed with the Special Rapporteur’s proposal related to the future work on the draft conclusions. He also agreed with other members that draft conclusions 6, 7 and 8 should be referred to the Drafting Committee.

Ms. Galvão Teles said that the Special Rapporteur’s second report on subsidiary means contained useful elements for the Commission’s reflections. The memorandum by the secretariat, which should be read in conjunction with the report, would also be valuable for the continuation of the Commission’s work on the topic.

The second report offered a comprehensive analysis of the nature and function of judicial decisions as subsidiary means for the determination of rules of law, as well as an exploration of a potential rule of “binding precedent” in international law. Before turning to the three draft conclusions proposed by the Special Rapporteur, she wished to make some general remarks on the methodology used and the conclusions drawn in chapter III of the report, which focused on clarifying the main function of subsidiary means and their relationship to the sources of international law. That relationship was a key aspect of the current topic, since subsidiary means were not an autonomous source of international law, but only played a role in the identification and interpretation of international law. A prudent approach was thus warranted in order not to conflate or expand unduly the role of subsidiary means.

She fully concurred with the conclusion that subsidiary means were different from the sources of international law and had an auxiliary function. However, she found the evidence provided in chapter III (C)–(G) of the report largely unconvincing, for several reasons. For one, the reasoning seemed to be somewhat circular. The preliminary conclusion drawn by the Special Rapporteur in 2023 had been based on a textual interpretation of the various language versions of Article 38 (1) of the Statute of the International Court of Justice, as well as its drafting history, scholarly literature and practice. The second report also noted, in paragraph 78, that the Commission “has already determined, and some States appear to have already concurred, that subsidiary means play an auxiliary role to the sources”. The Special Rapporteur attempted to justify that conclusion on the basis of a textual reading of Article 38 (1), based on scholarly literature (in sections C and G), the drafting history of Article 38 (1) (in section D), the practice of international courts (in section E) and a few national court decisions (in section F). The point was not merely that chapter III was repetitive, but that the Commission had already come to a conclusion on the basis of certain elements, which were invoked once again in the second report to confirm the correctness of that conclusion.

Although the Special Rapporteur had provided a helpful overview of different national and international court decisions that illustrated the use of subsidiary means, the question of what made such use auxiliary in nature was not made explicit in the report. In other words, while it was clear from the examples cited that the courts made use of, or referred to, judicial decisions or teachings, or both, it was not apparent that they did so in an auxiliary fashion, nor was it clear what that auxiliary function entailed in practice. For example, in chapter III (F), four examples were discussed to prove the point that “courts at the national level … treat subsidiary means as auxiliary”. The Federal Court of Justice of Germany had indeed stated that judicial decisions, like academic opinions on international law, were only to be referred to as aids in clarifying customary international law. However, the Court had further stated that, in the light of recent legal developments at the international level, particular attention should be paid to the actions of organs of international organizations and especially international courts, in addition to those of national courts, in particular where they applied international law directly, and to the work of the International Law Commission. The Court had then proceeded to discuss a number of national court decisions, the work of the Commission on immunity of State officials from foreign criminal jurisdiction, States’ responses to that work and academic literature. On the basis of that analysis, which had been

limited to subsidiary means, the Court had rejected the claim that the person in question enjoyed functional immunity.

In a similar vein, the report noted that the reliance of the Supreme Court of Sierra Leone on "the decisions of the International Court of Justice and the House of Lords" showed that subsidiary means were used in an auxiliary role. However, the report failed to explain what made such reliance "auxiliary". The examples given and discussed in the report did not sufficiently illustrate or explicitly explain how the use of judicial decisions and teachings differed from the use of "formal sources of law" in judicial decisions.

In addition, the examples were drawn from Germany, the United States of America, South Africa and Sierra Leone, leaving the Asia-Pacific, Eastern European, and Latin American and Caribbean States unrepresented. Apart from the problem of geographical representation, the cases cited all explicitly referred to the use of judicial decisions or teachings as "subsidiary means". There might be many more decisions in which national courts had relied on subsidiary means in identifying, determining or applying rules of international law, without explicitly pronouncing on their status or use. Such decisions could usefully be analysed as well. Lastly, both the German and South African decisions cited seemed to indicate that the decisions of international courts and academic literature were regarded as materials that contributed to the development of customary international law rather than subsidiary means with an auxiliary function.

As she had pointed out during the plenary debate in 2023, it was necessary to draw a distinction between the use of judicial decisions as subsidiary means for determining the existence or content of a rule and their use as evidence of the formation of a rule of customary international law or the recognition of a general principle. That distinction seemed to be lost at some points in the report, especially in the analysis of the practice of national and international courts. Moreover, the methodological choice to examine only judicial decisions in order to understand their use as subsidiary means was questionable. If "judicial decisions" were considered to be subsidiary means, then it appeared that the second report analysed subsidiary means rather than "formal sources of law" to determine the function of such means.

In addition, it might also be useful to analyse States' written and oral submissions to international courts and tribunals, and to national courts where the State was a party to the dispute. According to conclusions 5 and 6 of the Commission's conclusions on identification of customary international law, "State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions", and included "verbal acts". An analysis of States' written and oral submissions could shed light on the ways in which States, rather than courts, used subsidiary means in practice. The current analysis offered by the Special Rapporteur focused only on how judicial decisions were used in judicial decisions. It would be consistent with the Commission's methodology to examine State practice to analyse the ways in which States themselves relied on and made use of subsidiary means. In fact, the second report stated in paragraph 89 that teachings were "frequently relied upon by parties" to proceedings before the International Court of Justice, even though they were rarely cited by the Court in its majority decisions.

The Special Rapporteur was certainly correct in affirming that decisions of the International Court of Justice were binding only between the parties to the case, including those intervening under Article 63 (2) of the Statute. However, that statement required some qualifications, as Court decisions could be binding on third States or at least have some legal consequences for them.

First, the Court's decisions might create objective effects for third States. That was the case where the interpretation and application of treaties establishing objective regimes was involved, such as the delimitation of a boundary between two States that was effective against States not involved in a dispute; examples of such cases included *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* and *Aegean Sea Continental Shelf (Greece v. Turkey)*. Arguably, the Court's advisory opinions might also have a wide range of legal consequences, especially where they involved the determination of obligations *erga omnes*, as did the Court's advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.

Second, it was important to emphasize that the Court's decisions to indicate provisional measures created an autonomous legal regime that could have legal effects on third parties. For instance, third States might be under an obligation not to render assistance to a State that, by its actions, could aggravate or extend the dispute before the Court in violation of its provisional measures.

Third, there might be instances where a Court decision would have legal consequences for States that were not parties to the dispute but were still parties to the treaty at issue, especially where a case was brought before the Court on the basis of *erga omnes partes* standing. A more granular analysis of those issues would thus be warranted, especially in view of the increasing resort to third-party interventions, advisory opinions and cases brought on the basis of *erga omnes partes* standing.

Turning to the proposed draft conclusions, she said that draft conclusion 6, which set out the nature and function of subsidiary means, lacked explanatory value, as might be expected from an examination that left the "auxiliary function" largely implicit. Draft conclusion 6 (a) did not add much in terms of clarification, as "auxiliary in nature" was just as ambiguous as "subsidiary means" was acknowledged to be in paragraph 75 of the report. The Commission could improve the drafting by removing the wording "sources … found in", which, as other members had mentioned, was incorrect.

Draft conclusion 6 (b) similarly raised a number of questions. As mentioned by other members, the word "mainly" was vague, since the other circumstances in which subsidiary means were resorted to were as yet unknown. Moreover, the draft conclusion did not explain the function of subsidiary means but only the processes during which subsidiary means were resorted to. The risk of not clarifying the auxiliary function was that, in practice, subsidiary means might be considered to stand on a footing similar to that of the sources of international law. In addition, since the report presented only a limited analysis of subsidiary means by focusing on judicial decisions, its use as a basis for a draft conclusion about the nature and function of all subsidiary means was somewhat misleading.

In sum, draft conclusion 6 was not very successful in explaining or elucidating the nature and function of subsidiary means, and the extent to which it added value was questionable. The draft conclusion should preferably be formulated in such a way as to make it clear that subsidiary means could not, in and of themselves, form the basis of a rule of international law. As she had proposed in 2023, the draft conclusion on the nature and function of subsidiary means should become a new draft conclusion 2, placed before the current draft conclusion 2 on the categories of subsidiary means for the determination of rules of international law, in order to inform the whole project, whose structure was also in need of more clarity and definition with regard to the use of the different subsidiary means and the general provisions that were applicable to all of them.

Draft conclusion 7 dealt with the absence of a rule of precedent in international law. However, since the relevant words of the draft conclusion – "as legally binding precedents" – were placed at the end of the sentence, the draft conclusion appeared at first to state that international courts or tribunals did "not normally follow their own prior decisions". That was incorrect, since, in paragraphs 202 and 223 of the report, the International Court of Justice and the International Tribunal for the Law of the Sea were said to have created their own practice with regard to prior decisions and to "routinely rely on the decisions" of other courts. If the aim of the draft conclusion was to clarify that there was no rule of precedent in international law, that point could be made more clearly and succinctly. Examining the procedures of additional courts and tribunals to strengthen the basis on which that conclusion was drawn could also be beneficial. Alternatively, it might be possible to avoid referring explicitly to the absence of a rule of legally binding precedent, in line with the relevant resolution adopted in 2023 by the Institute of International Law.

Including draft conclusion 8 in the draft conclusions would similarly make the point that international courts and tribunals were not bound by an obligation to follow their own prior decisions or those of other courts and tribunals, as a result of the modal verb "may" in the phrase "may follow their own prior decisions". Draft conclusions 7 and 8 could indeed be merged into a single draft conclusion, as proposed by other members. She also agreed with other members that the Commission should discuss whether the phrase "when settling

disputes between States or international organizations or issuing advisory opinions" was too limiting, as it left out bodies such as human rights courts, criminal courts and investment tribunals.

A final point that would militate in favour of addressing both precedent and the persuasive value of judicial decisions in a single draft conclusion was that those issues had more to do with ensuring coherence and certainty in the work of each court and tribunal and in their relationship than with the role of case law as a subsidiary means for the determination of rules of international law. Such a draft conclusion should be placed after the current draft conclusion 4 on decisions of courts and tribunals.

Lastly, she supported the referral of the draft conclusions to the Drafting Committee, taking into account the important comments that had been made in the plenary debate.

Programme, procedures and working methods of the Commission and its documentation (agenda item 11) (*continued*)

Mr. Paparinskis (Chair of the Planning Group) said that the Planning Group was composed of Mr. Asada, Mr. Cissé, Mr. Forteau, Mr. Galindo, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Huang, Mr. Jalloh, Mr. Lee, Ms. Mangklatanakul, Mr. Mavroyiannis, Mr. Nesi, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Oyarzábal, Mr. Patel, Mr. Ruda Santolaria, Mr. Sall, Mr. Vázquez-Bermúdez and Mr. Zagaynov, together with Ms. Ridings (Rapporteur), *ex officio*.

The Chair, speaking as Chair of the Working Group on the long-term programme of work, said that the Working Group was composed of Mr. Argüello Gómez, Mr. Asada, Mr. Fathalla, Mr. Fife, Mr. Forteau, Mr. Galindo, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Huang, Mr. Jalloh, Mr. Lee, Ms. Mangklatanakul, Mr. Mavroyiannis, Mr. Mingashang, Mr. Nesi, Mr. Nguyen, Ms. Okowa, Ms. Oral, Ms. Orosan, Mr. Ouazzani Chahdi, Mr. Oyarzábal, Mr. Paparinskis, Mr. Patel, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Sall, Mr. Savadogo and Mr. Zagaynov, together with Ms. Ridings (Rapporteur), *ex officio*.

The meeting rose at 5.30 p.m.