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International Law Commission

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Provisional summary record of the 3667th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 15 May 2024, at 10 a.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
	Ms. Orosan
	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 10.05 a.m.

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

Mr. Grossman Guiloff said that the Special Rapporteur was to be congratulated on his second report on the topic "Subsidiary means for the determination of rules of international law" (A/CN.4/769), which was well argued and raised pertinent issues that built on the Commission's work on the topic thus far.

He had concerns about some of the terminology used in the report. The Special Rapporteur indicated that subsidiary means assisted in the identification, determination and application of rules derived from the sources of international law. However, those terms were not used uniformly throughout the report. If the Special Rapporteur understood certain terms to have different meanings in different circumstances, he should make that clear in the commentaries. Moreover, it should be emphasized that subsidiary means helped to determine both the existence and the content of rules of international law and provided guidance on their application. Other terms had also been used in ways that could lead to confusion. For example, paragraph 77 indicated that the function of subsidiary means was "to provide help or support or to assist the sources", a phrase that could be interpreted as referring to similar but different functions. If a specific function was implied, it would be useful to learn whether there was any practice to support it.

Paragraph 68 of the report stated that "despite the formal position indicating that there was no hierarchy of the sources contained in Article 38, there was in practice a hierarchy". However, hierarchy was not the only reason why treaties and customary law were resorted to more frequently than general principles of law. On the contrary, the key consideration was often the application of the principle of *lex specialis*, since treaty and customary rules often provided more specific prescriptions to be followed in situations that were also covered by general principles. It should be borne in mind that general principles could also form the basis of peremptory norms, as expressly recognized in draft conclusion 5 (2) of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*). Consequently, a rule of *jus cogens* derived from a general principle of law would prevail over a contrary treaty provision.

As in the first report on the topic (A/CN.4/760), the Special Rapporteur maintained that judicial decisions and academic teachings were not sources of international law. However, paragraph 88 of the report indicated that "the judge or court … could help to shape the contours of a rule", which appeared to recognize certain additional functions, such as a "gap-filling" role, that went beyond the auxiliary function of subsidiary means. In that regard, the reference in paragraph 105 to the judgment of the Supreme Court of Appeal of South Africa in the case of *Minister of Justice and Constitutional Development and others v. Southern African Litigation Centre and others*, in which the South African Court indicated that judicial decisions could offer "guidance" in the absence of a binding treaty or other international instrument, seemed to afford a "residual" role to subsidiary means, implying that the decisions of international tribunals could contain or convey a rule not otherwise found in a study of a source of international law. If that was the Special Rapporteur's view, he should substantiate it with references to practice and show that such practice had led to the creation of a customary rule.

Some of the examples given to illustrate the gap-filling function of subsidiary means, such as the reference in paragraph 101 to the 2015 decision of Pre-Trial Chamber II of the International Criminal Court in *Situation in the Republic of Kenya*, appeared to be inaccurate. The International Criminal Court, in that case, had referred to a hierarchy among the sources of law in the Rome Statute, stating that: "Recourse to the subsidiary sources of law referred to in article 21 (1) (b) and (c) of the Statute is only possible when … there is a lacuna in the Statute or the Rules." The gap-filling observed in the practice of that body reflected the distinct sources of law that it applied under article 21 of the Rome Statute. Moreover, the term "subsidiary sources" was not synonymous with the term "subsidiary means" in Article 38 (1) (*d*) of the Statute of the International Court of Justice and in fact referred to treaties and general principles of law.

As the Commission moved ahead with its work, it should avoid discussions that were not strictly relevant to the topic at hand, such as those relating to formalism and judicial activism. There were three interrelated aspects of any judicial determination: first, the way in which judges arrived at a decision, which could only be deduced from the opinions they expressed or from the text of the decision; second, the decision itself; and third, the way in which the decision was viewed or enforced by parties other than the parties to the litigation.

Like other members of the Commission, he was concerned about language in the report suggesting that subsidiary means were "sources" of international law. In paragraph 98, for example, the reference to the 1998 judgment of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Zejnil Delalić et al.*, which mentioned "other subsidiary sources", could give rise to confusion in the absence of further clarification.

The report provided a comprehensive analysis of the practice of international judicial bodies, in particular the International Court of Justice. However, it was important to mention the practice of regional bodies because the specific legal contexts in which they operated could result in practices that differed from those of universal bodies. Regional legal cultures could contain doctrinal norms and practices that determined the way in which precedent was applied and the weight attributed to the decisions of regional bodies. For example, the Inter-American system followed the doctrine of "conventionality control", or review of national laws' compliance with international conventions, which opened up the possibility of considering advisory opinions as "binding" for the various organs of the States parties to the American Convention on Human Rights. In many cases across Latin America, reviews of compliance with international conventions had led to real changes, including the determination that amnesties were incompatible with the American Convention. It was also interesting to note that it was mainly countries that followed the civil law tradition, not the common law tradition, that had ratified the American Convention and had accepted the jurisdiction of the Inter-American Court of Human Rights. It would be interesting to analyse that development and determine to what extent it had had a wider impact.

With regard to contentious cases, the Institute of International Law had referred to the flexibility and value of the doctrine of *jurisprudence constante*, or settled case law, which went beyond the principle of *stare decisis* in that it did not only affect the parties to a given dispute. In making decisions, courts could look to case law when faced with factual circumstances that were similar to those of previous cases. The Inter-American Court, for example, had developed case law on Indigenous Peoples' right to collective property and the concept of full reparation in its 2012 judgment in *Kichwa Indigenous People of Sarayaku v. Ecuador*, on the basis *inter alia* of its 2001 judgment in *Mayagna* (*Sumo*) *Awas Tingni Community v. Nicaragua.* Case law had also led to developments in procedural matters. For example, the Inter-American Court had established in its 1988 judgment in *Velásquez-Rodríguez v. Honduras* that it could link individual cases to widespread and systematic violations on the basis of reasonable inferences and presumptions, and since that time had done so without repeating its reasoning. Such practices would be overlooked if the Commission were to focus solely on the practice of international courts and tribunals. Approaching the topic with a focus on the role of precedent would also place emphasis on the underlying rule of law requirement that similar cases must be decided similarly and would provide richer content for the Commission's work than an approach based on *stare decisis.*

Care must be taken not to imply the existence of hierarchies between international and regional judicial bodies, although the special characteristics of the latter could have an impact on the weight of their pronouncements in other contexts. States were free to resolve their disputes through regional judicial settlement mechanisms, whose pronouncements could have an equally binding value. Furthermore, the Commission's review of the decisions of expert bodies or resolutions of international organizations of a universal character should be without prejudice to the standard-setting activities of regional and treaty bodies, such as the United Nations treaty bodies, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, the European Committee of Social Rights, the Arab Human Rights Committee and the Association of Southeast Asian Nations. When considering the work of those expert bodies, it would be necessary to take into account their relationship with the institutional and treaty framework that defined their mandate.

In studying the decisions of expert bodies and resolutions of international organizations, it would be essential to carefully classify the sources of particular pronouncements into distinct categories, such as “court”, “tribunal” and “expert body”. There was a minor inaccuracy in paragraph 83 of the report, where the United Nations Human Rights Committee was referred to as a “tribunal”. The Committee was not a tribunal but rather a monitoring body established under the International Covenant on Civil and Political Rights. There were different opinions on its judicial nature, with some saying that it was a “quasi-judicial” body whose views constituted authoritative recommendations. Quasi-judicial expert bodies played a variety of roles: they were competent to receive individual communications and issue views, and they also issued general comments or recommendations on specific rights or issues, thematic and State-specific reports and recommendations or observations to States following the periodic review process. Such bodies could have a significant impact and should be studied further. For example, in 1986, Peter Kooijmans, the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, had proposed that rape in prisons should be recognized as torture, a suggestion that had found its way into general comment No. 2 (2007) of the Committee against Torture, which explicitly referred to State responsibility for torture if the Government failed to exercise due diligence to prevent and investigate acts of ill-treatment, including rape, committed by non-State officials or private agents and to prosecute and punish the perpetrators. The Committee against Torture was thus able to state that rape in prison was a form of torture without being required to carry out an exhaustive analysis of article 1 of the Convention against Torture; rather, it simply cited the relevant general comment. In addition, that position had been accepted by States, as shown by their practice.

Regarding the proposed draft conclusion 6, he agreed that subsidiary means had an auxiliary function with respect to the sources of international law. The Special Rapporteur noted more specific functions, such as the possibility that subsidiary means “may serve as an independent basis for the rights and obligations of the subjects of international law” or “may … be influential in helping clarify or even providing a basis for the subsequent development of the law”. However, the assertion concerning their alleged role as an independent basis for obligations did not seem compatible with draft conclusion 6. Subsidiary means should not be considered “quasi-sources” on the same level as customary international law, treaties and general principles of law. In addition, the words “found in” were out of place in draft conclusion 6. The sources of international law were not “found in” treaties, customary international law and general principles of law, which were sources in and of themselves.

Paragraph 80 of the report indicated that “the task of applying Article 38, paragraph 1, would necessarily require the Court to apply a given rule found in one of the sources listed in subparagraphs (*a*) to (*c*) of paragraph 1”, and that idea was reflected in the wording of draft conclusion 6 (a). However, the International Court of Justice could also apply other rules of international law that fell within the scope of the dispute or legal question submitted to it, such as unilateral acts or binding resolutions of international organizations. Subsidiary means could assist the Court in determining the existence and content of the rules contained in all sources of international law, and draft conclusion 6 should be amended to reflect the existence of other sources. In addition, paragraph 81 of the report stated that the application of general principles of law required a prior assessment to determine “whether a general principle of law that is common to the various legal systems exists and, if so, whether it is transposable to the international legal system”. It should be clarified that such an assertion referred only to principles emanating from domestic legal systems that required transposition and that subsidiary means could also be useful in determining the existence and content of principles emanating from the international legal system.

Regarding draft conclusions 7 and 8, the phrase “disputes between States or international organizations” was overly narrow and unduly excluded the practice of courts and tribunals that were accessible to other subjects of international law, including human rights tribunals, international criminal tribunals, investment arbitration tribunals and other quasi-judicial bodies. As other members had noted, a more general formulation of draft conclusion 7, covering decisions of other judicial or quasi-judicial bodies, would be more appropriate. Lastly, the use of the word “normally” in the phrase “do not normally follow their own prior decisions or those of other courts and tribunals” in draft conclusion 7 was not representative of the practice highlighted in the report, since it implied that international

courts or tribunals could choose whether to follow precedent or not. Some international courts and tribunals might be bound to apply precedent by virtue of their constituent instrument or another international agreement. In some cases, such as those involving the application of Article 59 of the Statute of the International Court of Justice, prior decisions could not be followed as binding precedent; in others, such as cases in the inter-American system, prior decisions must be followed on the basis of the principle of compliance with international conventions. Draft conclusion 7 should be amended accordingly, perhaps through the addition of a "without prejudice" clause, and that point should be clarified in the commentaries.

He supported the referral of the draft conclusions to the Drafting Committee.

Ms. Okowa said that the Special Rapporteur's excellent second report built well on the first report and the draft conclusions adopted by the Commission at its seventy-fourth session. At that session, there had been broad consensus that judicial decisions and teachings were subsidiary means for the determination of rules of international law and were not to be placed in the same category as the three sources of international law that the International Court of Justice was bound to apply under Article 38.

The topic was the last of the methodological topics to be undertaken by the Commission and was understandably expected to provide the necessary link with sources already covered extensively in the Commission's previous work. There remained an understandable concern among international lawyers about the dangers of fragmentation when the determination and development of the law was undertaken by different courts. In that context, she particularly welcomed the Special Rapporteur's proposal to consider, in his future work, the broader question of unity and coherence in international law in relation to conflicting decisions of different courts and tribunals.

The Special Rapporteur was correct in concluding that a decision of the Court had no binding force except between the parties and in respect of that particular case. Beyond that, a judgment was thus no more binding than an advisory opinion; that fact was often forgotten by those who stressed the non-binding nature of advisory opinions. There was a considerable body of jurisprudence supporting that position. Moreover, the drafting history of Article 59 of the Court's Statute indicated that the provision had been intended to restate the principle of *res judicata* and rule out a system of binding precedent, although, as Von Stauffenberg had explained in his commentary to the Statute of the Permanent Court of International Justice, it had also been accepted by the Council of the League of Nations that decisions of the Court were meant to gradually modify international law over time.

The focus of the Special Rapporteur's second report was on the functions of judicial decisions as subsidiary means and on the meaning and effect of Article 59. An individual judicial decision was clearly a source of obligation and not an independent source of law. In her view, consideration of Article 59 was important because it provided an important contextual element for evaluating the subsidiary function of decisions. Moreover, Article 38 (1) (*d*) was subordinate to Article 59, since a decision created a binding obligation as between the parties with which they must comply; that point was further buttressed by Article 60 of the Statute. Accordingly, the cumulative effect of Articles 59, 60 and 61 of the Statute was that a judgment created an obligation that was final in that it definitively settled the dispute between the parties.

A distinction could helpfully be drawn between two important effects of judicial decisions. The first was explicitly provided for by the Statute of the International Court of Justice, while the second was not. The second type of effect was more indirect, though no less important, and was discussed in paragraphs 190 to 200 of the report. However, those ideas could be further developed and were not currently reflected in draft conclusion 7 or 8. The core principle in that regard, as the Special Rapporteur recognized, was that the binding nature of judicial decisions could extend beyond the parties *inter se* and create objective regimes that were *de facto* binding even on non-parties to the dispute. In her view, that second effect of judicial decisions also merited extended treatment so as to distinguish properly between contexts in which judicial decisions were subsidiary means for the determination of rules of international law and contexts in which judicial decisions not only clarified the law but established legal situations that were binding on third parties.

To take a practical example, a judgment of the Court demarcating a territorial or maritime boundary between two States not only was a source of obligations between the two disputing States, but also established a legal reality that was binding on those not parties to the boundary dispute. In the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, the Court had reiterated the permanent nature of boundaries established by treaty, even where the treaty itself was only transitory. The opposability of boundaries, whether the boundaries in question had been established by treaty or judicial decision, had also been recognized in the 1998 award in the *Eritrea/Yemen* arbitration.

The Special Rapporteur referred to the Court's consideration of the 1928 General Act for the Pacific Settlement of International Disputes in the *Aegean Sea Continental Shelf (Greece v. Turkey)* case. The Court had observed that, notwithstanding the provisions of Article 59 of the Statute, it was evident "that any pronouncement of the Court as to the status of the 1928 Act, whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey". The Court's position as an authoritative interpreter of the Charter of the United Nations also generated objective legal effects beyond the specific circumstances of the case. Furthermore, the Court had specified in a long line of cases that a party intervening under Article 63 of the Statute would be bound by any construction given by the Court in its judgment, even though it remained technically a non-party to the dispute.

The Special Rapporteur was clearly aware that judgments could have *erga omnes* effects. However, in the second report he did not elaborate on what that additional extra-party effect of the Court's judgments meant for demarcating those decisions that were clearly subsidiary. Yet that element was central to the distinction between binding obligations to which *res judicata* applied – obligations that established objective regimes – and those decisions which were auxiliary in nature and therefore not binding.

In paragraph 8 of the report, the Special Rapporteur noted that other more specific functions of judicial decisions, such as their function as supplementary means of interpreting treaties, would be considered in a future report. The reasons for deferring the consideration of such functions were not immediately apparent, not least because addressing that issue in the current report would have provided the necessary balance in a chapter otherwise exclusively focused on adjudication. As other members of the Commission had pointed out, questions involving the determination of rules of international law regularly arose in contexts other than litigation.

There was a considerable body of opinion in the literature that judicial decisions could be supplementary means of interpreting treaties. The conclusion of the International Court of Justice in the *LaGrand* case that provisional measures were binding had, in effect, been treated as dispositive when interpreting the constitutive treaties of other international tribunals. That dispositive effect had been displayed in the *Pey Casado* case before an international arbitral tribunal under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Under article 47 of the Convention, it was not mandatory for arbitral tribunals to order preliminary measures. Instead, article 47 provided that "the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party". In the *Pey Casado* case, the tribunal, relying on the *LaGrand* judgment, had decided that it was settled under international law that provisional measures were binding, including those recommended under article 47 of the Convention.

However, the temporal element must also be taken into account, since the determination in the *LaGrand* case that provisional measures had binding effect had also been given retrospective effect. The provisional measures in the *Armed Activities on the Territory of the Congo* case, which had been indicated in July 2000, before the determination in the *LaGrand* case, had been held in 2005 to have been binding. The basis for that decision had been expounded upon in the 2007 judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, namely that the Court in *LaGrand* had done "no more than give the provisions of the Statute the meaning and scope that they had possessed from the outset". The question of the retrospectivity of judicial decisions was a rich vein for further work by the Special Rapporteur.

With regard to how judicial decisions could operate as *de facto* precedents for international courts and tribunals, the Special Rapporteur's conclusions were broadly in line with the attitude of the International Court of Justice towards its previous decisions and the position in much of the academic commentary, where it was accepted that there was no doctrine of binding precedent in international law. While there might be strong policy and doctrinal reasons for retaining that as the formal position, it sat rather uneasily with the significant normative role of precedent in the argumentation of States, international organizations and non-governmental actors before international courts and in other forums.

As was evident from international practice, settled jurisprudence on a particular point of law would, for all practical purposes, operate as binding precedent. The jurisprudence of the International Court of Justice, in particular, reflected a fairly strong theory of precedent. For example, it would need very strong reasons to depart from rules that had been established in its previous case law. The pleadings of States before international courts invariably also attached considerable importance to the Court's previous case law. The Special Rapporteur might wish to ponder whether the draft conclusions in their current form captured that reality. The cautious, minimalist approach in draft conclusions 7 and 8 did not accord appropriate weight to the actual role of precedent in the determination of rules.

While the Commission had a different agenda and political responsibility from the Institute of International Law, it might wish to reflect on the Institute's approach to precedent as formulated in its 2023 resolution on precedents and case law (*jurisprudence*) in inter-State litigation and advisory proceedings. Although that resolution did not go far enough, it reflected the complexity that underpinned the use of precedent in international law.

Decisions of individual judges and separate opinions had correctly been identified in the Special Rapporteur's first report as teachings under Article 38 (1) (*d*). However, it could be argued that they also performed another important function with respect to the judicial decision itself. The reasoning in a case might foreclose competing interpretations of the law, but the decision must be understood in the broader context of the judgment. For instance, the operative part of the 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* only made sense when considered together with the dissenting opinions and separate declarations made by the judges. A reasoned separate opinion might play an important role in explaining the rationale of a decision and the limits of the judgment's application and therefore formed part of the context of the judicial decision itself and could be considered together with it, in addition to being categorized as "teachings" under Article 38 (1) (*d*). A revised draft conclusion could arguably reflect the role of separate opinions and declarations in the determination of rules of law.

In her view, judicial decisions, at least as far as the International Court of Justice was concerned, were not merely means for the determination of rules of international law, but also played a part in their progressive development. In some instances, under the guise of determination of a rule, the Court would in fact expand and develop the rule that it found, although the Court had been hesitant to acknowledge that it performed that quasi-legislative task. Other courts and tribunals applying judicial decisions might also have a responsibility for their evolution and development as part of the process of determination of the rules. The Special Rapporteur mentioned that function of the Court's judicial decisions in paragraph 124 of the report, but there was no reference in draft conclusion 6 to the role of judicial decisions in the evolution or progressive development of the law. That putative role of judicial decisions merited further consideration.

The Special Rapporteur had correctly taken as his point of departure the idea that the primary role of subsidiary means was to determine relevant rules of international law, guided only by Article 38 (1) (*a*) to (*c*) of the Court's Statute. The Court's role, as traditionally understood in that framework, was to apply existing law, not to develop or expand it by filling in the gaps it encountered in bodies of rules. Yet the Court's process of determining or identifying rules of international law was not value-neutral, but rather involved elements of expansion and evolution of legal rules to fit the particular circumstances under consideration. That process, repeated over several cases, created an almost geological accretion of judicial decisions and their normative content. The successive layers of judicial decisions could then mould and modify the substantive content of international law. The Court thus did not perform a mechanical task in determining the existence of a rule and applying it. In rendering

its decisions, it must inevitably engage with the scope of a rule's application, which opened the door to progressive development of the law. The result was that, while staying within the general existing legal framework, its rules progressively evolved in order to better reflect changing values in international society.

The Court's 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, in which it had observed that reservations were valid as long as they were compatible with the treaty's object and purpose, had marked a departure from the unanimity rule that had largely prevailed until that point and had constituted, in geological terms, something of a tectonic shift. The majority of the Court had clearly been of the view that, in their identification of the applicable rule, a more flexible approach to the reservation question was the most appropriate in a world increasingly involving a multiplicity of sovereign States and where the adherence of as many of them as possible to general multilateral treaties was desirable. Compatibility with a treaty's object and purpose had finally been restated in the 1969 Vienna Convention as positive law.

That was not to say that the progressive development of international law must always proceed in a positive direction. In some cases, judicial decisions, or even a series of judicial decisions, could be regressive. The Court, in its judgment in the *Immunities and Criminal Proceedings* case, had affirmed the immunity of Heads of State even though there was no support for that position in the national decisions on which it had relied in arriving at its conclusions. In part, the Court had been guided by its earlier judgments on the question, in particular in the case concerning the *Arrest Warrant of 11 April 2000.*

As to the draft conclusions themselves, draft conclusion 6 accurately reflected the substance of the Commission's discussions at its seventy-fourth session. In draft conclusions 7 and 8, the language employed by the Special Rapporteur was remarkably cautious and did not fully reflect the varied legal contexts in which questions of precedent arose and were dealt with. He might consider drawing inspiration from the relevant 2023 resolution of the Institute of International Law, as well as the comments made by Commission members at the current session.

In conclusion, she fully supported the referral of the three draft conclusions to the Drafting Committee.

Mr. Akande said that the report of the Special Rapporteur and the memorandum by the secretariat had provided the Commission with the materials for engaging in what had been a very rich debate on a challenging topic.

His comments would focus on the draft conclusions and on the approach that he believed should be taken with respect to those texts. Regarding draft conclusion 6, he strongly supported the idea of having a draft conclusion on the nature and function of subsidiary means. In his view, clarifying the nature and function of subsidiary means ought to be one of the main contributions of the Commission's work on the topic. It should clarify that subsidiary means were not sources of international law but could assist those who were seeking to determine what a rule of international law provided.

He appreciated the Special Rapporteur's proposal to state expressly that subsidiary means were "auxiliary". The use of that word in English would help to explain what the English term "subsidiary" actually meant and would bring the text into line with other language versions of Article 38 (1) (*d*) of the Statute of the International Court of Justice. However, it might also cause problems in the other language versions of the draft conclusion, which would in effect say that auxiliary means were auxiliary. More importantly, the word "auxiliary" in the English language, while accurate, was not self-explanatory, and users might therefore still wonder what it meant in that context.

He would suggest a single paragraph for draft conclusion 6, which could read: "Subsidiary means assist with the identification of the existence and content of the rules of international law." He would not object to the addition of a second sentence stating that subsidiary means were not sources of international law, but careful thought would have to be given to its formulation. The wording he had just proposed used the word "identification" rather than "determination" as in the draft conclusions that had been provisionally adopted at the previous session following a debate on which of the two words to use. In his view, there

were two reasons for preferring the word “identification” in draft conclusion 6. First, it should be borne in mind that “subsidiary means” was the short form of “subsidiary means for the determination of rules of international law”. If the expression were to be spelled out in full, it would be repetitive to say “subsidiary means for the determination of rules of international law assist with the determination of the existence and content of the rules”. Second, while some, including States in the Sixth Committee, insisted that the words of the Statute should be used, the Commission’s task was not merely to repeat what was stated in the Statute, but rather to explain it. Such an explanation was particularly important in a draft conclusion dealing with the nature and function of subsidiary means. As had been pointed out at the previous session, the word “determination” could have several meanings, one of which might suggest that the entity that was engaged in the determination of a rule was the entity that created the rule. As that was not what was meant by “determination” in the current context, the word “identification” would be clearer in that particular draft conclusion.

If the Commission opted for the wording he had proposed, it could leave out the words “interpreting and applying” currently contained in paragraph (b) of draft conclusion 6, as they were merely intended to clarify what was meant by “determination”. He would be in favour of placing the draft conclusion immediately after draft conclusion 2.

He supported the general thrust of draft conclusions 7 and 8, in which the Commission tackled the difficult task of capturing and explaining practice in a way that was faithful to theoretical approaches that were important for how the international legal system was supposed to work. In short, the aim was to make clear that judges were not granted a lawmaking function, while reflecting the reality that reference was routinely made to their decisions in efforts to set out what the law was. As other members had pointed out, the approach taken in the two draft conclusions was somewhat limited. First, they referred only to the decisions of international courts and tribunals, whereas it had been accepted in draft conclusion 4 (2) that decisions of national courts could, in certain circumstances, be used as subsidiary means for the determination of rules of law. Second, the draft conclusions referred only to the decisions of international courts and tribunals when they settled disputes between States or international organizations or when they delivered advisory opinions. That formulation would seem to leave out a number of other decisions that might be used as subsidiary means, such as decisions of international criminal tribunals, human rights courts, investment treaty arbitrations and international administrative law tribunals. Third, draft conclusions 7 and 8 seemed to be addressed to courts and tribunals themselves, whereas the Commission should be providing guidance to any actor that was seeking to use decisions of courts and tribunals as a means of identifying rules of law. Fourth, he agreed with other members who had argued that the draft conclusions should not focus on precedent as such. The question of precedential value was one for a court that was asked to apply a prior decision.

He agreed with the suggestion to replace draft conclusions 7 and 8 with a single draft conclusion spelling out the particular criteria for assessing the weight of decisions of courts and tribunals as subsidiary means, to complement the general criteria set out in draft conclusion 3 on the assessment of subsidiary means. The single draft conclusion should include the elements of weight that were currently set out in draft conclusion 8, namely whether the decision addressed analogous factual and legal issues and whether the reasoning in the decision was persuasive. Other criteria for assessing the weight of decisions of courts and tribunals when used as subsidiary means could be added. The Commission could draw some of those additional criteria from the 2023 resolution of the Institute of International Law, but should exercise caution, given that the resolution focused on the use of precedents in inter-State litigation, whereas the Commission’s focus was broader. The additional criteria that were relevant in assessing the weight of decisions of courts or tribunals would in his view include the extent to which the decision was part of an established case law or body of concurring decisions, whether the court or tribunal had a specific mandate with regard to the application of the rule in question and whether the reasoning remained relevant.

A first paragraph setting out those criteria, which would be addressed to all those who used the decisions of courts and tribunals as subsidiary means, could be followed by a second paragraph specifically addressed to courts and tribunals. That second paragraph would deal with the question of precedent and whether courts and tribunals were bound to follow their own previous decisions. In addition to establishing a general proposition regarding the non-

binding nature of decisions of courts and tribunals, the Commission would need to take account of those specific areas where courts and tribunals were bound by previous decisions, particularly where courts were part of a hierarchy.

Finally, it was important to make clear that, under the current topic, the Commission was dealing only with the use of decisions of courts and tribunals as subsidiary means for the determination of rules of international law. That could be done in two ways. First, the proposed draft conclusion could be drafted in a manner that tracked draft conclusion 3, with wording such as "When assessing the weight of decisions of courts and tribunals as subsidiary means for the determination of rules of international law, regard should be had to …" and then listing the criteria. Second, it would be helpful to include a paragraph stating that the use of decisions of courts and tribunals as subsidiary means for the determination of rules of international law was without prejudice to their use for other purposes. Ideally, that paragraph should be paragraph 3 of draft conclusion 4, which concerned decisions of courts and tribunals.

The Chair, speaking as a member of the Commission, said that the Commission had already determined that subsidiary means for the determination of rules of international law, namely decisions of courts and tribunals and teachings, were not sources of international law *per se*, unlike treaties, customary international law and general principles of law. That fundamental distinction between sources of international law and subsidiary means had been clearly established in the Commission's conclusions on identification of customary international law, its draft conclusions on general principles of law and its work on the current topic at the previous session, and should inform its future work on the topic.

Regarding paragraphs 62 and 63 of the report, it was not clear to him exactly how the Special Rapporteur planned to address the question of conflicting decisions of international courts and tribunals. In any case, he would advise caution, as conflicting decisions could occur in various circumstances, and it might not be possible for the Commission to reach general conclusions on the issue without entering into sensitive aspects of judicial policy. Similarly, it did not seem appropriate for the Commission to revisit the topic of fragmentation of international law, especially from the limited perspective of judicial decisions as a subsidiary means of determining rules of international law. In addressing the topic of fragmentation, the Commission had conceived of international law as a system based on rules and principles that gave it coherence and unity. If the second report was implying that, in order to avoid conflicting decisions, courts and tribunals should follow previous decisions rendered by other tribunals, that would be tantamount to suggesting that there might be "binding precedents" in international law, which would not reflect reality except where *lex specialis* applied.

In relation to the Special Rapporteur's statement in paragraph 68 of the report, it should be pointed out that there was no hierarchy between general principles of law, treaties and customary international law. The Special Rapporteur seemed to have misinterpreted the draft conclusions on general principles of law adopted on first reading, in particular draft conclusions 10 and 11. Indeed, paragraph (2) of the commentary to draft conclusion 11 indicated that general principles of law were not in a hierarchical relationship with treaties and customary international law. That statement was deduced from the text of Article 38 (1) of the Statute of the International Court of Justice and had been confirmed by the findings of the Study Group on the fragmentation of international law. Paragraph (4) of the commentary noted that the absence of a hierarchy between the three sources was a statement of general international law, but that nothing prevented States from establishing, for example, a treaty regime envisaging a different arrangement, such as the Rome Statute of the International Criminal Court, article 21 of which seemingly created a hierarchy between the different sources to be applied by the Court. In addition, as Mr. Paparinskis had noted at the Commission's 3665th meeting, there was no hierarchy between sources of international law and subsidiary means, since they were not of the same nature and were not comparable.

In paragraph 73 of the report, it was not clear what was meant by the assertion that judicial decisions and teachings performed "distinct yet ultimately complementary functions". Both were subsidiary means and their functions were defined by Article 38 (1) (*d*) of the Statute.

In paragraph 77, he did not understand what exactly the Special Rapporteur had in mind in the last two sentences. The Commission should be careful not to suggest that subsidiary means had a function other than that of assisting in the determination of rules of law. In any case, as several members of the Commission had pointed out, the scope of the topic referred to subsidiary means for the determination of rules of international law and not to every conceivable analytical approach to judicial decisions, teachings and other means.

In paragraph 79, the Special Rapporteur characterized the sources of international law as "principal means" as opposed to "subsidiary means". However, in his own view, the sources should not be characterized as means, even if the qualifier "principal" was used. The sources of international law were just that: sources and not means.

In the context of paragraph 87, it was important to highlight the discussions that had led to the adoption of the Statute of the Permanent Court of International Justice, which did not give it legislative power. That should guide any discussion of the role of judicial decisions as subsidiary means. Regardless of how that role or function was described, there should be no suggestion that courts could "create" international law.

Regarding paragraph 88, he, like other members, was not convinced that subsidiary means could be characterized as serving a "gap-filling" function.

In paragraph 124, the Special Rapporteur seemed to be equating subsidiary means with general principles of law when stating that, like general principles of law, subsidiary means could have functions such as serving as a means of interpreting or complementing the rules of international law, including addressing lacunae in the law or advancing the coherence or the systemic nature of international law as a legal system. He did not consider it appropriate to suggest that general principles of law had the same functions as subsidiary means. General principles of law were a source of international law, whereas decisions of courts and tribunals and teachings were subsidiary means for the determination of rules of international law.

To his mind, the Special Rapporteur went too far in paragraph 125 by suggesting that subsidiary means, in particular judicial decisions but also others, such as the decisions of expert bodies, could serve as an independent basis for the rights and obligations of the subjects of international law. That was something on which the Commission had agreed with respect to general principles of law, as a source of international law, in the draft conclusions adopted on first reading at the seventy-fourth session. That statement in relation to subsidiary means would imply that subsidiary means were sources of international law, although it had already been made clear that that was not the case.

Regarding paragraph 126, he agreed with many members that the word "mainly" should be deleted from paragraph (b) of draft conclusion 6, at least until the Special Rapporteur had provided a convincing demonstration that subsidiary means could indeed perform the additional functions suggested in that paragraph.

With regard to paragraph 140, he agreed with the Special Rapporteur that there was no doctrine of *stare decisis* at the international level.

With regard to paragraph 159, the relationship between Articles 59 and 38 of the Statute was much simpler than the second report seemed to suggest. Article 59, together with Article 60, reflected the principle of *res judicata*, which referred to the final and binding nature of a judicial decision for the parties to the case only. The concept of "precedent" was broader and related to the authority that a judicial decision might have to influence a subsequent judicial decision in various ways, even if the first judicial decision was not binding as a matter of *res judicata* between the parties to the subsequent case. Of course, *res judicata*, as a general principle of law, should not be conflated with the broader concept of precedent. In his view, *res judicata* did not fall within the scope of the topic and did not need to be discussed further in that context.

In conclusion, he generally agreed with the basic idea of draft conclusions 7 and 8, although they would require work in the Drafting Committee, including the possibility of merging them, as several members had suggested. He supported the referral of draft conclusions 6, 7 and 8 to the Drafting Committee.

Mr. Jalloh (Special Rapporteur), summing up the debate on his second report on subsidiary means for the determination of rules of international law, said that he was grateful to the members for their careful study of the report and their valuable contributions on the topic. While there had been some valid criticisms, including some with which he agreed, there had also been some baseless criticisms with which he could not disagree more, including some that were based on misapprehensions or even misstatements of the content of his report. He would focus mainly on the substantive points that had been raised and would offer only preliminary observations on some of the main textual suggestions put forward in respect of the draft conclusions, which would, as was the usual practice, be debated thoroughly in the Drafting Committee.

He had been extremely pleased to see so many members participate in the plenary debate on the second report, which showed the importance and relevance of the Commission's work on the topic. Most members had focused in their statements on the two most important issues covered by the report and had generally welcomed his detailed examination of practice on the nature and functions of subsidiary means in chapter III and on the general nature of precedent in domestic and international adjudication in chapter IV. Nearly all members had agreed that the focus on those two substantive issues was appropriate and that the findings reached were supported by the practice of the International Court of Justice and the International Tribunal for the Law of the Sea. Many members had expressed their support for the referral of the three proposed draft conclusions to the Drafting Committee.

Although they had not disagreed with the core findings of the report, several members would have preferred a broader analysis that encompassed additional courts. Some members would have welcomed references to more national court decisions from regions other than those cited in the report, as well as an analysis of decisions of investor-State arbitral tribunals, the Dispute Settlement Body of the World Trade Organization (WTO) and regional human rights courts and tribunals.

As some members seemed to acknowledge, the analysis contained in his report focused on judicial decisions and not decisions more broadly. While it was true that the decisions of human rights courts were judicial decisions that could have been included, he had not done so in an attempt to keep the report shorter in the light of the concerns expressed by some members about the length of his first report. However, it was not clear to him that WTO decisions and investor-State tribunal decisions qualified as "judicial decisions" as understood in the text adopted by the Commission at its seventy-fourth session. A number of members had expressly suggested at that session that they did not. He therefore believed that the second report's focus on Article 38 (1) (*d*) of the Statute of the International Court of Justice and the practice of the Court and its predecessor was appropriate and fully justified. That was true not only because the Court was the principal judicial organ of the United Nations that set the bar for other courts and tribunals, but because its interpretation of its own Statute, including Article 38 and related provisions such as Article 59, was obviously authoritative for the purposes of the Commission's work in elucidating the subsidiary means for the determination of rules of international law. That was particularly true given that Article 38 (1) of the Statute was also said to constitute customary international law.

While it would have been an interesting intellectual exercise, he was not convinced that the outcome of the analysis would have been substantively different had he expanded the range of cases and courts and tribunals studied. Mr. Reinisch seemed to have conceded that point, at least in relation to national court decisions discussing the function of subsidiary means. In any event, the analysis in the second report had always been intended to be supplemented by the helpful compilation of practice contained in the memorandum by the secretariat. That voluminous document catalogued an extensive body of practice from the International Court of Justice, the Permanent Court of International Justice and the International Tribunal for the Law of the Sea and also contained numerous references to arbitral awards in inter-State cases. The memorandum also covered the practice of six international criminal tribunals, as well as boundary, claims and compensation commissions and nine United Nations treaty bodies.

As indicated in paragraph 205 of the report, he had exercised restraint in developing certain aspects of the analysis partly to accommodate members' preference for a shorter

report. Recognizing that there could be some value in examining the works of additional bodies, he had also expressly indicated that he could always return to the most relevant practice of arbitral bodies and WTO in subsequent reports. In future, he would simply write a report that was the length he considered appropriate for the topic at hand.

He appreciated the related suggestion to further diversify the jurisdictions, languages and authors cited in the report. He had found and included Spanish and French sources in the report, but his efforts to find sources in Arabic, Chinese and Russian had not been as successful, given the limited resources and time available to him, especially with the unusually early deadline for the report. He sincerely apologized to all members and hoped that the Commission would begin to address the issue of how to provide multilingual research support to all special rapporteurs.

In his first report, he had invited Commission members and States in the Sixth Committee to recommend relevant sources for the topic from their regions and in their languages. Regrettably, only two or three members had provided suggestions, which he had tried to take into account in the second report. During the plenary debate at the current session, he had also received some helpful suggestions of cases and literature from a number of members. For example, Mr. Galindo had usefully highlighted the jurisprudence of some national courts in the Americas in relation to "conventionality control". He would study all of those sources closely to analyse their relevance for the commentaries and future reports. He hoped that other members would assist in finding case law in other languages and journals that were often difficult to access in practice, especially as special rapporteurs were given no institutional support for the writing of reports. The representativeness of the outcome of the Commission's work on the topic would depend on the level of collective effort. Producing an outcome that was as representative as possible of all the world's regions, legal systems and languages was at the heart of the legitimacy of the Commission's work and of international law itself.

Over the course of the debate, several members had commented negatively on specific wording he had used to explain certain issues in the report. While he recognized that words did matter, and he had tried to be careful in selecting words that best conveyed his ideas, he was doubtful that the personal preferences of members as to how special rapporteurs expressed themselves in their own reports were of constructive value for the Commission's work.

Under the 2021 syllabus for the topic and the tentative programme of work approved at the seventy-fourth session, part of the Commission's mandate was to clarify the nature and functions of subsidiary means for the determination of rules of international law. The syllabus also indicated that the relationship between Article 38 (1) and Article 59 of the Statute would be examined. The exchange of views on the question of functions during the plenary discussion had highlighted not only the broad interest in that aspect of the topic but also its potential centrality for the consideration of subsidiary means more broadly.

Members were aligned in recognizing the importance of drawing a distinction between the sources of law listed in subparagraphs (*a*) to (*c*) of Article 38 (1) of the Statute, on the one hand, and the subsidiary means listed in subparagraph (*d*), on the other. That distinction, which also confirmed the Commission's previous positions on the issue, as explained in paragraph 123 of the report, formed the foundation for a more in-depth examination of the nature and function of subsidiary means, including their relationship with the sources listed in Article 38 (1).

While there had been broad agreement regarding the distinct nature of subsidiary means, as compared to the sources of international law, some members had expressed doubts as to whether that distinction had been sufficiently brought to the fore in the current text. Ms. Mangklatanakul, supported by other members, had appeared to suggest reformulating the phrase "auxiliary in nature" in draft conclusion 6 (a) to make the status of subsidiary means as something distinct from sources of international law even more apparent. Ms. Galvão Teles had challenged his approach to clarifying the auxiliary nature of subsidiary means and considered that reliance on conclusions reached by the Commission at the previous session to substantiate the finding that subsidiary means were distinct from the sources of international law and had an auxiliary function rendered the reasoning circular. On the

contrary, such cross references had been made in order to build on the consensus reached by the Commission at the seventy-fourth session and thus ensure consistency and efficiency in its future work.

More members had taken issue with the use of the word "auxiliary" to describe the nature of subsidiary means. Mr. Reinisch and Mr. Nguyen had suggested that the word "auxiliary" should be replaced with "secondary" or, in the case of Mr. Reinisch, "subordinate". Part of the trouble, of course, was that the word "auxiliary" was difficult to translate into other official languages, as pointed out by Mr. Akande. In substance, "auxiliary" had its roots in the Latin word *auxiliārius*, denoting an assistant or ally, as well as the noun *auxilium*, meaning help or aid, and the Latin verb *augere*, signifying "to increase". Currently, its definition encompassed the idea of giving supplementary or additional help and support. He therefore contended that the word underscored the supporting role of subsidiary means in clarifying the law rather than constituting a source of international law in and of themselves, which was something that had already been agreed upon at the previous session. Discussion on the matter would continue in the Drafting Committee.

Ms. Galvão Teles had argued that "auxiliary" was of little explanatory value. Ms. Ridings, supported by Ms. Oral, had wondered whether he had used the words "auxiliary" and "assistive" in reference to the function of subsidiary means to mean the same thing. In fact, he had used the two words synonymously in the second report, as they reflected essentially the same idea. As Mr. Huang had helpfully pointed out, the phrase "auxiliary in nature" was basically in line with the concept conveyed by the term "assistive materials" in the Chinese text of Article 38 (1) of the Statute.

While he concurred on the need to emphasize that subsidiary means were distinct from the sources of international law, the term "auxiliary" sufficiently reflected that distinction. The choice of wording also reflected the views expressed by both members of the Commission and States in the Sixth Committee in 2023. Indeed, the Commission had used such language to explain the role of subsidiary means in its commentaries on the topics of identification of customary international law, general principles of law and identification and legal consequences of peremptory norms of general international law (*jus cogens*). There should not be any remaining doubts over the term "auxiliary", because the Commission had already explained at length the auxiliary nature of subsidiary means in the commentaries to draft conclusions 1 and 2 adopted at its seventy-fourth session; for example, in paragraph (3) of the general commentary, paragraphs (4) and (6) of the commentary to draft conclusion 1 and paragraph (3) of the commentary to draft conclusion 2. However, the issue warranted further discussion by members with a knowledge of the official languages of the United Nations to avoid any circularity that might result from the translations of "auxiliary".

Regarding the additional functions that subsidiary means could have, his statement in paragraph 124 of the report that, while "the auxiliary function is the main role of subsidiary means, there are, in practice, probably other more specific functions of subsidiary means" had apparently given rise to confusion. He would like to clarify that, first, it was his understanding that subsidiary means comprised at least three categories, namely decisions, teachings and any other means generally used to determine rules of international law. Those were the categories set out in draft conclusion 2, adopted by the Commission in 2023.

Second, some of those subsidiary means, such as teachings, might have specific functions that could overlap with other subsidiary means, such as decisions. At the same time, some of their more specific functions could be distinct from the other subsidiary means, which had led him to recommend that the Commission should distinguish between the general functions of subsidiary means and the more specific functions of those means to ensure that those nuances were considered as the work on the topic progressed.

Third, his reference to general principles of law in paragraph 124 was not intended to equate subsidiary means with that source of law, but rather to allude to the Commission's determination that general principles of law had both general and more specific functions and to argue that subsidiary means could similarly have both general and more specific functions, especially given the wider nature of the category of such means under consideration. The competing views that members held on that issue illustrated the challenge of attempting to

strike a balance between staying faithful to the exact wording used in Article 38 (1) (*d*) of the Statute and going beyond the exact text to bring greater clarity to it.

With regard to the use of the term "determination", Mr. Oyarzábal, for example, had suggested that it should be stated more clearly that the principal function of subsidiary means was to assist with the determination of the existence and content of rules of international law. Additionally, some members had expressed doubts concerning the introduction of additional terms in draft conclusion 6, namely "identifying", "interpreting" and "applying". Several members had commented that the relationship between those terms required further discussion and clarification. Further clarification had been sought as to whether there was a distinction between the "determination" and the "identification" of rules of international law. Mr. Nesi had specifically taken issue with the inclusion of the word "identifying", given that it had different possible meanings.

If the claim was that the Commission could not use any word in the draft other than "determination", as found in Article 38 (1) (*d*), it should be pointed out that the words "shall apply", found in the *chapeau* of paragraph 1, referred not only to the sources listed in subparagraphs (*a*) to (*c*) but also to judicial decisions and teachings, "as subsidiary means for the determination of rules of law". Against that backdrop, clarifying the meaning of international law by elaborating on, rather than strictly repeating, the wording used in prominent provisions such as Article 38 not only was within the Commission's mandate, but was in fact the purpose and aim of the Commission's work. Bringing greater clarity to the meaning of "determination" by including additional terms would serve that purpose.

Equally importantly, as Ms. Ridings had rightly noted in her statement, the Commission had itself hardly been consistent in its use of the apparently favoured term "determination"; rather, it had referred to "determination" and "identification" interchangeably in its work on identification of customary international law and identification and legal consequences of peremptory norms of general international law (*jus cogens*). In the discussions on those topics, the Commission had accepted the proposed approach of the Special Rapporteurs. He hoped that the same courtesy would be extended to him as Special Rapporteur, especially since he firmly believed it was crucial to further clarify the term "determination" to add more clarity to that important issue. Moreover, the use of those terms added further granularity to the Commission's understanding of the determination of the existence and content of rules of international law. His aim had been to break down the determination process into a series of practical steps as would occur in practice: first identifying whether a rule of international law existed on a given point, then determining the scope of that rule and finally applying it to resolve the issue at hand.

Chapter IV of the report concerned the general nature of precedent in domestic and international adjudication. Given the different views expressed by members, which sometimes pulled in opposite directions, he suggested that some of the substantive points should be taken up during the discussions in the Drafting Committee.

Several members had expressed the concern that certain wording in draft conclusions 7 and 8, such as "precedent" and "persuasive value", as well as the report's reference to the doctrine of *stare decisis*, ran the risk of importing domestic common law concepts into international law. However, as the report should make clear, he had no such intention: he held no brief for either common law or civil law. On the contrary, even though he had given a brief comparative analysis of the common law and civil law approaches to precedent, his view was that there was no such thing as legally binding precedent in international law, with the exception of specific regimes such as that of international criminal law, administrative tribunals and bodies such as the WTO Appellate Body.

The point of referring to domestic concepts of precedent in chapter IV of the report was to capture how prior decisions were used similarly to subsidiary means in the domestic context and to distinguish those domestic rules and practices from the use of subsidiary means in international law. He had used domestic legal systems as a point of contrast to highlight the finding that international law differed from various domestic systems in that it lacked a rule of legally binding precedent.

As explained in the report, in the absence of such a rule the International Court of Justice had developed its own system whereby it followed the reasoning and correct

statements of the law in prior cases and distinguished between the operative part of the judgment and the reasoning. The operative part, in accordance with Article 59 of the Statute, was binding only on the parties to the particular case. The reasoning, on the other hand, was simply a statement of the law, by which third States were naturally bound. That system, as highlighted in paragraph 202 of the report, had worked generally well, and there was no need in international law to have recourse to any domestic concepts of legally binding precedent or equivalent notions, which he had expressly warned against in his report.

That understanding was reflected in the proposed draft conclusions themselves. Draft conclusion 7, "Absence of a rule of precedent in international law", stated that "[i]nternational courts or tribunals ... do not normally follow their own prior decisions or those of other courts and tribunals as legally binding precedents". As he had explained in his introductory statement, draft conclusions 7 and 8 addressed two sides of the same issue and should thus be read together. That approach should make clear to the reader that the reference in draft conclusion 8 to the "persuasive value" of prior decisions meant that, if the law had been correctly interpreted in a prior case that was factually similar and raised the same legal questions, international courts or tribunals would follow the reasoning. They would do so for reasons of convenience and of legal security and stability. He did not intend to suggest in any way that prior decisions were followed because of some amorphous rule of legally binding precedent.

A number of members had requested further guidance or the development of specific criteria for assessing the persuasiveness of prior decisions. In paragraph 155 of the report, it was stated that legal security was the reason for the Court not to start afresh each time it had a new case before it. Even States litigating cases before the Court took as points of departure the prior findings of the Court in related cases. The report also stated that the same approach was reflected in article 21 of the Rome Statute of the International Criminal Court. He therefore agreed with Mr. Reinisch that essential rule of law considerations such as legal certainty and predictability were at the core of why the International Court of Justice followed its own previous decisions. As the *Handbook of the International Court of Justice* itself stated, "in support of its reasoning, the Court often cites its previous rulings, or those of its predecessor, thus maintaining a certain consistency in its decisions in the interests of legal security".

Regarding the substantive matter of whether or not to include further criteria in draft conclusion 8, he noted Mr. Oyarzábal's intriguing proposal to include a reference to draft conclusion 3 in draft conclusion 8. Another suggestion had been to incorporate some of the criteria defined in draft conclusion 3 into draft conclusion 8. However, draft conclusion 3 was of a more general character. Not all of the criteria contained in that draft conclusion were relevant for assessing the degree of persuasiveness of prior decisions. That was expressly contemplated in the commentary to draft conclusion 3, which stated that "not all factors would be applicable to all the categories of subsidiary means". There were some factors of direct relevance, such as "the quality of the reasoning" and "the level of agreement among those involved". However, to consider "the reception by States and other entities" as a criterion for the persuasiveness of a decision might well pose serious rule of law concerns, and "the expertise of those involved" seemed more suitable for assessing teachings. That issue could be discussed in the Drafting Committee to establish whether those criteria ought to be included in the draft conclusion or whether such considerations were best addressed in the commentary.

Almost all members had questioned the use of the word "normally" in draft conclusion 7. However, draft conclusions 7 and 8 were descriptive of the practice whereby prior decisions in international law were normally followed or referred to not because they were legally binding precedents, but because they had persuasive value as accurate statements of the law. He agreed with other members that there were indeed specific treaty regimes that stipulated a rule of legally binding precedent in the resolution of disputes, which was why the word "normally" was an accurate statement of contemporary practice. If, however, there was a collective preference to delete that term, he would work with other members to devise a more suitable formulation. In addition, possible exceptions to the general absence of binding precedent could be mentioned in the commentaries to draft conclusion 8.

Numerous comments had also been made on the scope of draft conclusions 7 and 8, which covered situations in which international courts or tribunals settled disputes between States or international organizations or issued advisory opinions. The types of decisions that were addressed in the draft conclusions directly concerned the point he had raised about the word "normally", as special treaty regimes such as those under international criminal law did indeed include a rule of legally binding precedent. He noted the proposal of potentially suitable solutions, such as the idea put forward by Mr. Oyarzábal to extend the scope of draft conclusions 7 and 8 by removing the phrase "when settling disputes between States or international organizations or issuing advisory opinions".

He had put forward three draft conclusions in his second report in the hope that they might clarify various critical issues on which there had been much confusion in the literature regarding subsidiary means. The draft conclusions addressed the nature and function of subsidiary means (draft conclusion 6), the absence of a rule of precedent in international law (draft conclusion 7) and the persuasive value of decisions of courts and tribunals (draft conclusion 8).

Draft conclusion 6 addressed two separate but interrelated issues: the nature and the function of subsidiary means. Mr. Fathalla had suggested that the draft conclusion could be split into two, with each of the current paragraphs becoming its own individual draft conclusion. Other members had made similar points, stressing that the nature and functions of subsidiary means should not be conflated.

The substance of draft conclusion 6 (a) had been supported by many members in principle. However, quite a few members had said they would prefer to adjust the sentence by excluding the express reference to "treaties, customary international law and general principles of law". He had included that enumeration of sources to track the language of Article 38 (1) of the Statute and to preserve a link with it. That was why he had used the expression "*vis-à-vis*", which indicated the relation between the sources of international law and the subsidiary means. Nevertheless, he supported the suggestion to end the sentence after the word "sources".

Concerning draft conclusion 6 (b), certain members had raised issues regarding the phrase "mainly resorted to". That wording was in line with that of draft conclusion 10 (1) of the draft conclusions on general principles of law, which stated: "General principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part." The language was thus consistent with prior work of the Commission and could be retained. Furthermore, some members had seemed hesitant about including the three verbs "identifying", "interpreting" and "applying" and had asked whether they were intended to explain the term "determination" and how they related to each other. As Mr. Asada and Ms. Ridings had pointed out, the terms added further granularity to the Commission's understanding of the determination of the existence and content of rules of international law. Such development was a natural part of the evolution of the work of the Commission. He did not see what further clarity would be added if the Commission merely stated that "subsidiary means for the determination of rules of international law are resorted to when determining the rules of international law". That would be to state the obvious.

With regard to draft conclusion 7, the suggestion that had recurred most often had been to remove the word "normally". Although he had already explained why he had included that word in the draft conclusion, he had noted the many interesting suggestions on how the Commission could remove it while still preserving the main point, namely the absence of a rule of legally binding precedent in international law. In his view, the exact wording was a matter that could best be dealt with in the Drafting Committee.

Lastly, with regard to draft conclusion 8, he had already indicated that he was open to proposals to include further criteria for assessing the persuasiveness of prior decisions. While some of the criteria contained in draft conclusion 3 were relevant, in particular "the quality of the reasoning", not all of them should be referred to in draft conclusion 8. The main criteria for persuasiveness could be included in draft conclusion 8 or in the commentaries thereto.

Although a few members had proposed that draft conclusions 7 and 8 should be merged into a single draft conclusion, his view was that it would be beneficial for clarity and comprehensiveness to retain the current structure with two separate draft conclusions. That

would facilitate the work of the Drafting Committee by allowing the Commission to focus on one idea at a time and, if the Commission decided to include a second paragraph in draft conclusion 8 specifying the criteria for the persuasiveness of judicial decisions, a merged draft conclusion could become so comprehensive that the main point would be lost. Furthermore, the Commission could extend the scope of both draft conclusions by simply deleting the phrase "when settling disputes between States or international organizations or issuing advisory opinions".

Some members had made proposals that involved rearranging the order of the proposed draft conclusions, including some that had already been provisionally adopted in 2023. His position, as explained in paragraph 60 of the report, was that the Commission should follow its usual working methods with respect to the current topic, meaning that issues such as the sequencing of provisions should be addressed at the first-reading stage, when the entire set of draft conclusions would be available to the Commission. At that stage, the Commission would have a set of draft conclusions organized into coherent parts, together with the commentaries thereto, before it sent them to States for their review and input.

Virtually all the members who had expressed a view on the future programme of work had supported his proposal to proceed with the programme set out in paragraphs 227 and 228 of the report. Based on the plenary debate and the members' suggestions regarding additional issues that the Commission could cover in relation to the aspects of the topic that were addressed in the current report, he would continue to reflect on the best way forward.

Given the overall positive reception of the draft conclusions, it was his hope that they could be referred to the Drafting Committee. In closing, he wished once again to thank members of the Commission for their excellent and intellectually stimulating contributions on the topic and looked forward to continuing the discussion in the Drafting Committee.

The Chair said he took it that the Commission wished to refer draft conclusions 6, 7 and 8 to the Drafting Committee.

It was so decided.

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

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

The meeting rose at 12.55 p.m.