

Provisional

For participants only

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Provisional summary record of the 3712th meeting

Held at the Palais des Nations, Geneva, on Monday, 12 May 2025, at 10 a.m.

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Present:

Chair: Mr. Paparinskis

Members: Mr. Akande
Mr. Argüello Gómez
Mr. Asada
Mr. Fathalla
Mr. Fife
Mr. Forteau
Mr. Galindo
Ms. Galvão Teles
Mr. Grossman Guiloff
Mr. Jalloh
Mr. Laraba
Mr. Lee
Mr. Ma
Ms. Mangklatanakul
Mr. Mavroyiannis
Mr. Mingashang
Mr. Nesi
Mr. Nguyen
Ms. Okowa
Ms. Oral
Ms. Orosan
Mr. Ouazzani Chahdi
Mr. Oyarzábal
Mr. Patel
Mr. Reinisch
Ms. Ridings
Mr. Ruda Santolaria
Mr. Sall
Mr. Savadogo
Mr. Tsend
Mr. Vázquez-Bermúdez
Mr. Zagaynov

Secretariat:

Mr. Pronto Secretary to the Commission

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

General principles of law (agenda item 4) (*continued*) (A/CN.4/779 and A/CN.4/785)

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he wished to thank the members of the Commission for their useful and constructive comments and suggestions during the debate on his fourth report on general principles of law (A/CN.4/785). In his summary of the debate, he would refer only to the issues that he considered to be the most fundamental, without necessarily addressing all the specific drafting suggestions, which could be considered in the Drafting Committee.

Mr. Jalloh, and others, had emphasized that the Commission's practice during the second-reading stage was to preserve the structure and content of the first reading, making amendments only when there was a compelling reason to do so. Mr. Jalloh had added that the Commission must evaluate States' comments by critically analysing them to determine whether such compelling reasons existed, and that the Commission's assessment should take into account the views of States that most directly reflected law and practice.

Several members had noted with concern that only a very small number of States had submitted written comments; they had highlighted not only the importance of the topic, "General principles of law", but also its complexity and the importance of addressing the various challenges it raised.

Some members had expressed their appreciation for the interest shown by academic institutions in the Commission's work on the topic. Mr. Patel had recalled the interest shown in the topic by the Asian-African Legal Consultative Organization, which had organized a very interesting webinar in 2023 on general principles of law.

Commission members had generally given the work completed thus far a positive reception. All members supported referring the draft conclusions to the Drafting Committee, taking into account the discussion in plenary meetings. There was general support for the final outcome of the Commission's work on the topic to be a set of draft conclusions accompanied by commentaries and a bibliography.

Some members, such as Ms. Orosan and Mr. Oyarzábal, had pointed out that the approach taken in the draft conclusions appeared to be rather progressive, and they had stressed that the Commission needed to adopt a rigorous and careful approach to the topic. He agreed with those observations, as the Commission's work could have systemic consequences. Respect for the system of sources of international law, as developed by States over the years, must be ensured.

Other members, such as Mr. Forteau and Mr. Zagaynov, had stated that further clarification of certain terminology would be useful. For example, a distinction could be made between general principles of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice and other principles that did not necessarily constitute general principles of law. He agreed that such clarification could be provided in the commentary to the draft conclusions, depending on how the Commission as a whole characterized specific principles. The question of terminology was one that he had stressed since the start of his work as Special Rapporteur and indeed constituted one of the major challenges with regard to the topic.

Some members, such as Mr. Fife, had said that a non-exhaustive list of examples of general principles could be useful, if not in a separate draft conclusion then at least in the commentary. Most members, however, including Mr. Galindo, Ms. Galvão Teles, Mr. Jalloh, Mr. Reinisch, Mr. Sall and Mr. Zagaynov, shared the Special Rapporteur's view that such a list should not be included, for reasons that he had given in his various reports on the topic. The majority of members supported the mention of examples of general principles throughout the commentary.

There was general consensus on the content of draft conclusion 1, and therefore no drafting changes were required. Further clarification of the scope of the general principles of law that were the subject of the conclusions could be included in the commentary.

With regard to draft conclusion 2, there was general agreement among members that “recognition” was the essential element for the existence of general principles of law. Differing views had nevertheless been put forth on how to express that in the draft conclusion. While some members found the three new paragraphs proposed in the fourth report to be useful, many members had indicated that they did not consider their inclusion to be necessary. He would not insist on the inclusion of the new paragraphs; the Drafting Committee could continue to work on the basis of the draft conclusion adopted at first reading, and further clarification could be provided in the commentary.

One of the main questions that had arisen during the discussions was what term the Commission should use to replace the term “civilized nations” as used in Article 38 (1) (c) of the Statute of the International Court of Justice. A number of members, including Ms. Oral, Ms. Galvão Teles, Mr. Jalloh, Mr. Nguyen, Mr. Sall, Mr. Akande and Mr. Fathalla, had suggested the term “community of nations”, in line with the wording used in the International Covenant on Civil and Political Rights. Other members, including Ms. Mangklatanakul, Mr. Fife, Mr. Oyarzábal and Mr. Patel, had suggested the term “community of States”, while yet others, such as Mr. Grossman Guiloff, Mr. Nesi and Mr. Reinisch, had expressed their preference for the term “international community”. The decision on which term to use was not only a question of form but also of substance. The fundamental issue was to determine who could contribute, through their recognition, to the formation of general principles of law. There was consensus that States were the main contributors. While most members believed that international organizations could also contribute to the formation of general principles of law, some considered that only the recognition of States was relevant. He considered that there was no need to amend draft conclusion 2 as adopted on first reading. Further clarification could be made in the commentary, emphasizing that, while recognition by States was the most relevant consideration, international organizations could also sometimes participate in the formation of general principles of law through their recognition, depending, among other things, on their mandate and the particular context.

With regard to the question of the persistent objector, Mr. Patel and Mr. Zagaynov, among others, had considered that the concept could be applicable in the context of general principles of law and that it should be mentioned, at least in the commentary. Mr. Akande had stated that the concept of the persistent objector would be relevant only for general principles formed within the international legal system. In contrast, Ms. Ridings, Mr. Galindo, Mr. Grossman Guiloff and others had indicated that it would not be appropriate to refer to the concept at all in the context of general principles of law, given the absence of relevant practice and jurisprudence. He would add that there was also no authoritative doctrine on the matter. He saw very little practical utility in referring to the notion of the persistent objector in the context of general principles of law. The formation process for such principles was different from that of other sources of international law, and it was difficult to imagine a situation in which a State would maintain an objection under the required conditions. While conceptually it might be possible to refer to the persistent objector, as opposition to general principles was conceivable, there was no supporting practice or jurisprudence, and in his view the matter remained highly theoretical.

With regard to draft conclusion 3, there was consensus among members concerning general principles of law derived from national legal systems. As for general principles of law formed within the international legal system, the majority of Commission members considered that such principles did indeed exist. Mr. Akande had emphasized the need for a clearer distinction between the two categories of principles, suggesting that the second category required a more explicit form of recognition. Mr. Forteau and Mr. Paparinskis had expressed agnosticism regarding the existence of general principles formed within the international legal system. Others, including Mr. Galindo, Mr. Oyarzábal and Mr. Reinisch, had expressed doubts and stressed the need to identify more relevant examples to support the existence of that category of general principles. Some members had questioned some of the examples of such principles cited in the fourth report. In that regard, Mr. Akande, Mr. Asada, Mr. Fathalla, Mr. Oyarzábal and Mr. Zagaynov had pointed out the need to more clearly distinguish between general principles of law formed within the international legal system and norms of customary international law. Mr. Fife had suggested that the Commission should clarify in its commentary that, with respect to the second category of general principles, it was dealing with the progressive development of international law.

Mr. Oyarzábal had considered that it would be useful to mention in the commentary the number of States opposing recognition of a second category. Ms. Orosan had been the only member to propose deleting draft conclusion 3 (b), as well as draft conclusion 7, altogether.

Several members had clearly stated that the second category set out in draft conclusion 3 was not *lex ferenda* but was firmly rooted in the intellectual and legal history of international law, going back to the Advisory Committee of Jurists of the Permanent Court of International Justice established in 1920, and was reflected in the literature. In line with suggestions from the Nordic countries and the Netherlands, some members had proposed harmonizing the language of paragraph 3 (b) with that of paragraph 3 (a) by replacing the phrase “may be”. That proposal should be considered by the Drafting Committee. He reiterated his own conviction that principles of the second category did exist and that there was sufficient practice, as well as a conceptual and doctrinal basis, to include them in the draft conclusions.

As in previous years, the methodology proposed by the Commission for identifying general principles of law derived from national legal systems had received broad support from its members. Draft conclusion 6, which concerned the concept of transposition, had prompted various comments and suggestions. Some members, such as Mr. Fathalla, had expressed agreement with the current wording of the draft conclusion and the clarifications provided in the commentary. Others, including Mr. Zagaynov, had disagreed with the notion of implicit recognition but had found the examples of confirmed transposition cited in the fourth report to be useful. Ms. Orosan, Mr. Reinisch and Mr. Sall had indicated that greater clarity should be provided by explaining how the transposition of general principles was carried out in practice, and that it would be helpful to include more concrete examples in the commentary. Ms. Galvão Teles, Mr. Asada, Mr. Fife and Mr. Zagaynov had made specific proposals for reformulating draft conclusion 6, which could be considered by the Drafting Committee. Some members had also expressed a preference for the term “transposability” rather than “transposition”. Mr. Nesi had offered an explanation of what he understood the term “transposition” to mean, suggesting that it could be included in the commentary. That proposal could be examined when the Commission considered the commentary to the draft conclusion.

With regard to draft conclusion 7, some members, including Mr. Akande and Mr. Fathalla, had expressed agreement with the methodology outlined in draft conclusion 7 (1). Others, however, had indicated that it was unclear and that further guidance should be provided in the commentary. They had also emphasized the need to more clearly distinguish between general principles of law and customary international law. Mr. Forteau had suggested that the Commission could essentially retain the draft conclusion as adopted on first reading and supplement it with additional explanations in the commentary, as proposed in paragraph 133 of the report. Mr. Patel had been of the view that the combination of inductive and deductive reasoning could be further elaborated on to avoid ambiguity. Mr. Akande had remarked that the challenge lay in defining the methodology for identifying the general principles and deciding whether it could go beyond what was already set out in draft conclusion 7 (1) and its accompanying commentary. He was not convinced that the Commission could further elaborate on the inductive and deductive processes already described in the commentary adopted on first reading.

Regarding the “without prejudice” clause contained in draft conclusion 7 (2), several members had suggested that the paragraph should be excluded from the draft conclusion, as it created uncertainty. Others had suggested that the issue should be addressed not in the draft conclusion itself but rather in the commentary. He agreed with both suggestions. As for draft conclusion 7 (1), he was of the view that it should be retained and supplemented with additional elements in the commentary, providing a more detailed account of the methodology that the Commission considered to be applicable, including both inductive and deductive analysis.

Regarding draft conclusions 8 and 9, two members had suggested deleting them in the light of the Commission’s ongoing work on the topic “Subsidiary means for the determination of rules of international law”. The main issue that had arisen was how to ensure consistency between the Commission’s work on that topic and the present topic. Mr. Grossman Guiloff had suggested that the original language of Article 38 (1) (d) of the

Statute of the International Court of Justice, referring to “the teachings of the most highly qualified publicists of the various nations”, could be retained in draft conclusion 9. According to Mr. Reinisch and Mr. Zagaynov, no changes were necessary to draft conclusions 8 and 9, as the Commission’s work on subsidiary means was still ongoing, and it would be preferable not to prejudge the outcome of that work. In contrast, Ms. Mangklatanakul, Ms. Galvão Teles, Mr. Jalloh and Mr. Oyarzábal had expressed the view that it would be better to strive for consistency between the two topics from the outset. No modifications had been proposed with respect to draft conclusion 8. As for draft conclusion 9, in the absence of consensus on aligning it with the Commission’s work on subsidiary means, the version adopted on first reading could be retained. The commentary could then be further developed to include a reference to, among other elements, the importance of linguistic diversity.

With regard to draft conclusion 10, some members, including Ms. Oral, Ms. Galvão Teles, Mr. Fathalla, Mr. Oyarzábal and Mr. Reinisch, had supported the suggestion made in the fourth report to reverse the order of paragraphs 1 and 2, so as to avoid giving the impression that general principles of law applied only when treaties and customary international law failed to resolve a particular issue in whole or in part. Other members, such as Mr. Asada, Mr. Forteau, Mr. Nesi and Mr. Zagaynov, had opposed the proposed change, arguing that the primary function of general principles of law was to fill legal gaps. Mr. Galindo had disagreed with the idea that general principles served to contribute to the coherence of the international legal system, noting that such a function could be performed by any source of law, depending on the subject matter. He had also argued against drawing a distinction between primary and secondary rules. Some members, including Mr. Lee and Mr. Patel, had expressed doubts about the role of general principles as a source of rights and obligations. Other members, such as Mr. Forteau and Mr. Oyarzábal, had noted that some States had expressed concern about a perceived contradiction between draft conclusion 10 (2) and draft conclusion 11 (1). Mr. Oyarzábal had suggested inserting the phrase “in practice” in draft conclusion 11 (2) to address that issue, while Mr. Forteau had proposed alternative wording to avoid a perception of contradiction. Mr. Asada, however, had not seen any contradiction in that regard. Mr. Lee had emphasized the need to distinguish between the two categories of general principles when discussing their functions, on the grounds that principles of the first category were primarily aimed at filling legal gaps, whereas those of the second category were intended to maintain coherence within the international legal system. His own view was that those practical and theoretical issues were very important and should be taken into account when preparing the commentary to draft conclusion 10.

With regard to draft conclusion 11, some members had suggested that the distinction between general principles of law and customary international law could be further elaborated upon, possibly in the commentary. Mr. Akande and Mr. Lee had emphasized the need to distinguish between the two categories of general principles. In their view, principles derived from national legal systems could be subject to a potential hierarchical relationship with treaties and customary international law, whereas principles formed within the international legal system would not be in such a hierarchical relationship with other sources. Mr. Nesi had proposed reconsidering the contents of draft conclusion 11 (3), arguing that the risk of conflict between a general principle of law and a treaty or customary norm was minimal. As Special Rapporteur, he did not fully agree with that assessment, noting that there could be cases where, for example, two States concluded a bilateral treaty that excluded the application of a generally applicable principle in a specific area of their relations. In such cases, the principle of *lex specialis* would clearly apply to determine which rule governed the relationship between the two States, giving precedence to the treaty in question.

The newly introduced draft conclusion 12 had received broad support from members of the Commission. Some members had also referred to the existence of other possible general principles with limited scope of application, for example in such regions as Central Asia, Africa and Latin America. Mr. Forteau, Mr. Akande and Mr. Nesi had made constructive suggestions to improve the wording of draft conclusion 12, which could be taken into account by the Drafting Committee.

He concluded by reiterating his appreciation to the members of the Commission who had participated in the debate. He requested that the full set of draft conclusions 1 to 12, as contained in the fourth report, be referred to the Drafting Committee.

The Chair said he took it that the Commission wished to refer draft conclusions 1 to 12, as contained in the Special Rapporteur's fourth report, to the Drafting Committee, taking into account the views expressed during the plenary debate.

It was so decided.

Subsidiary means for the determination of rules of international law (agenda item 8) (A/CN.4/781 and A/CN.4/781/Add.1)

Mr. Jalloh (Special Rapporteur), introducing his third report on the topic "Subsidiary means for the determination of rules of international law" (A/CN.4/781), said that the Commission had received positive feedback from States in the Sixth Committee on the work that it had done to date on the topic. Eighty-one States had commented on that work during the Sixth Committee's consideration of the Commission's report on its seventy-fifth session, with many of the delegations highlighting the importance and relevance of the topic and expressing overall support for the draft conclusions provisionally adopted by the Commission thus far. The criticisms expressed had generally been narrowly framed but shared by a number of delegations. Given the positive comments from a wide and representative list of Governments, the scope and direction of the Commission's work on the topic was now well settled.

To accommodate the suggestion made by several States that the Commission should address the weight of teachings in draft conclusion 5, the Commission could add a new paragraph to that draft conclusion that would read: "When assessing the weight of a teaching under paragraph 1, regard should be had to, as appropriate, the criteria set out in draft conclusion 3." Alternatively, it could address the weight of teachings in a separate draft conclusion, as it had done in draft conclusion 8 with respect to the weight of decisions of courts and tribunals. To respond to the uncertainty expressed by some States about the relationship between the specific criteria set out in draft conclusion 8 for assessing the weight of decisions of courts and tribunals and the general criteria set out in draft conclusion 3 for assessing the weight of subsidiary means, he would suggest that the Commission should follow a *lex specialis* approach and delete the portion of the *chapeau* of draft conclusion 8 that indicated that the criteria set out in that draft conclusion were in addition to the criteria set out in draft conclusion 3. While he had initially hoped that changes to the draft conclusions and commentaries already provisionally adopted by the Commission could be considered at the current session, he would now, given the severe time constraints resulting from the shortening of the session, recommend that those changes be considered at a later time.

In chapter III of his third report, he noted the agreement among States and Commission members on the need for greater clarity regarding the use of teachings. Article 38 (1) (d) of the Statute of the International Court of Justice directed the Court to apply, alongside decisions, "the teachings of the most highly qualified publicists of the various nations" as subsidiary means for the determination of rules of law. His previous reports had demonstrated that courts typically used teachings – a broad category – to assist in identifying, interpreting or determining whether a rule of international law existed and, where one did, to clarify its scope and content. That practice underpinned the Commission's express recognition of the category of teachings in draft conclusions 2 and 5. Draft conclusion 5 emphasized the value of teachings that were supported by a convergence of academic opinion, which was consistent with the reference to "publicists" and "teachings" in Article 38 (1) (d).

In the same chapter, he identified three categories of teachings: teachings by individual scholars, practitioners or publicists, whose writings, monographs and commentary offered direct insight into legal reasoning; teachings produced by collectives of private persons forming scientific or learned societies or *ad hoc* expert groups with specialized expertise; and pronouncements by expert bodies that were created or empowered by States or international organizations. He then suggested that the weight of those teachings should be assessed on the basis of authorship and content. As the Commission had already considered the writings of individuals in previous years, in his third report, he addressed the teachings of expert groups, comprising both permanent and *ad hoc* bodies organized under

domestic law or formed informally, as a second distinct category of teachings that warranted further examination. Such an approach was consistent with the syllabus for the topic.

Private groups, including scientific societies, academic research institutes and professional associations of international lawyers such as the Institute of International Law and the International Law Association, had long contributed to the development, clarification and codification of international law. Their work generally aimed to influence State behaviour and could inform the interpretation and application of international legal norms. The outputs of their work took many forms, including reports, manuals, guidelines, resolutions and commentaries, and some of those outputs had helped to shape core rules of general international law and influenced international and national jurisprudence in specialized fields of international law. He provided examples of such outputs in his report and, in paragraphs 109 to 118, illustrated how they had been used by various international courts and arbitral tribunals. Many more examples of the influence of the outputs of private expert groups could be found in the second memorandum prepared by the secretariat on the topic (A/CN.4/765).

In his report, he put forward a proposal for a new draft conclusion 9 that would formally acknowledge the important role of such bodies. However, he wished to correct draft conclusion 9 (1), into which some errors had inadvertently been introduced in the report. It should read: "Outputs authored by private expert groups, organized independently of States or international organizations, may serve as a subsidiary means for the determination of the existence and content of rules of international law." He would recommend that the weight of the outputs of private expert groups should be assessed through the application of the general criteria set forth in draft conclusion 3, which had been endorsed by the Commission for all subsidiary means and provided a consistent framework for assessing the authority and relevance of such outputs; he had proposed such a provision as draft conclusion 9 (2). Alternatively, the Commission could address the weight of such outputs in a separate draft conclusion. In his proposed formulations for both paragraphs of draft conclusion 9, he had drawn on language used in the draft conclusions already provisionally adopted by the Commission in order to help it reach consensus on the wording of the new draft conclusion and to ensure conceptual clarity and coherence across the conclusions.

Chapter IV of his report addressed public expert bodies. He provided a definition of "expert body" in paragraph 128; since the expert bodies in question were created or empowered by States, they were considered "public". Those bodies varied considerably in character and purpose and included universal codification bodies such as the Commission itself and the United Nations Commission on International Trade Law (UNCITRAL), regional codification committees such as the Inter-American Juridical Committee and the African Union Commission on International Law, and human rights treaty bodies such as the Human Rights Committee and the Committee on the Rights of the Child.

In his view, the outputs of public expert bodies with close links to States should not be categorized as teachings under Article 38 (1) (d) of the Statute of the International Court of Justice. In his report, he maintained that such bodies, particularly those with official mandates such as the progressive development and codification of international law, warranted separate treatment in the work on the topic. In the report, he distinguished the International Law Commission, which was composed of independent experts, from UNCITRAL, which comprised State delegates. He also argued that the outputs of the Commission's work should not be classified as teachings of publicists under Article 38 (1) (d) because, unlike independent scholars, the Commission operated within a formal institutional framework under the General Assembly, and there was significant State involvement in its work.

While some texts produced by the Commission, such as the reports of Special Rapporteurs, did resemble scholarly writings, the final outputs of its work – in the form of, for example, draft articles, conclusions or principles – reflected its dual mandate to assist States in the codification and progressive development of international law. Consequently, the Commission's work could contribute to the development of new treaty law, the crystallization of customary international law or the clarification of general principles of law and thus spanned multiple categories under Article 38 (1), including those under subparagraphs (a), (b) and (c). The outputs of its work occupied a *sui generis* position as

subsidiary means for determining international law, as they interacted in a dialectical manner with the sources of international law.

States, international tribunals and national courts regularly cited the Commission's outputs not just as persuasive, but as authoritative statements of international law. The International Court of Justice, the International Tribunal for the Law of the Sea and other international courts and bodies had relied on the Commission's work in cases too numerous to mention. He highlighted a handful of examples in his report to underscore the relevance of the Commission's outputs as subsidiary means. The weight of the Commission's work, like that of other subsidiary means, should be evaluated using the general criteria in draft conclusion 3, including the quality of its reasoning, the expertise of those involved, its mandate, the degree of representativeness in its work, State involvement in its work and, above all, the reception of its outputs, primarily by States but also by other legal actors such as international organizations.

The human rights treaty bodies, also addressed in chapter IV of his report, comprised independent experts and had been created under the ten core universal human rights treaties to monitor States' compliance with their obligations under those treaties. The treaty bodies' outputs had not been contemplated in Article 38 of the Statute of the International Court of Justice, which predated the creation of those bodies by several decades, and there were important questions about whether and, if the answer was yes, how those outputs could be used as subsidiary means for determining rules of international law. The Commission had previously addressed human rights treaty bodies in its Guide to Practice on Reservations to Treaties and its conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties and had recognized the connection between their outputs and both article 32 of the Vienna Convention on the Law of Treaties and Article 38 (1) (d) of the Statute of the International Court of Justice. In its conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission had adopted the neutral term "pronouncements" to refer to the broad spectrum of the treaty bodies' outputs, a term that he was in favour of retaining for the Commission's work on the topic at hand.

Chapter IV also addressed the influential outputs of the International Committee of the Red Cross, a private Swiss association empowered by States to perform important functions under international humanitarian law. Those outputs were frequently cited by international courts and tribunals, scholars and States. His analysis in chapter IV culminated in his proposal for draft conclusion 10, entitled "Pronouncements of public expert bodies" and consisting of three paragraphs, the first of which stated that the pronouncements of expert bodies "may serve as a subsidiary means for the determination of the existence and content of rules of international law", the second of which addressed the assessment of their weight, and the third of which was a "without prejudice" clause with respect to the use of such pronouncements for other purposes.

In chapter V of the report, he addressed the question of whether resolutions of international organizations and intergovernmental conferences could serve as subsidiary means for the determination of rules of international law. During the Commission's debates on the topic, a number of members had been in favour of recognizing resolutions as subsidiary means, while others had viewed them as evidence of, for example, State practice or *opinio juris*. A broader use of resolutions in the determination of rules of law under Article 38 (1) of the Statute of the International Court of Justice had previously been confirmed in, for example, the Commission's conclusions on identification of customary international law, which recognized that resolutions could provide evidence for determining the existence and content of rules of international law, even if they could not in and of themselves create such rules.

Resolutions functioned like judicial decisions and teachings, offering persuasive legal analyses or, at least, a basis for such analyses. In advisory proceedings such as *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* and in cases such as *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, the International Court of Justice had used resolutions not only as records of State practice, but also as materials for the interpretation of legal norms. Those

two functions of resolutions, as both evidence and analytical tools, underscored their potential role as subsidiary means for the determination of rules of international law. In the first paragraph of his proposed text for draft conclusion 11, the use of the words “may serve”, in the statement that resolutions adopted by international organizations or at intergovernmental conferences “may serve as a subsidiary means for the determination of the existence and content of rules of international law”, signalled a flexible and context-dependent approach. The second paragraph addressed the weight of resolutions and sought to distinguish legally substantive resolutions from aspirational or political ones. The third paragraph was a “without prejudice” clause with respect to the use of resolutions for other purposes.

Chapter VI of the report addressed the issue of fragmentation. After he had first introduced the issue in his first report, Commission members and States had generally expressed support for the inclusion of the issue in the Commission’s work on the topic. He had, however, decided to defer a detailed analysis of it until his third report. In chapter VI, he defined fragmentation, assessed the Commission’s previous work on the issue and examined conflicting decisions that illustrated fragmentation, or lack of coherence, in international law. There was a conflict when two rules led to different solutions to the same issue. In its work on the topic “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, carried out between 2002 and 2006, the Commission had distinguished between institutional fragmentation, which stemmed from the proliferation of courts and tribunals, and substantive fragmentation, where divergent legal rules developed across specialized regimes of international law. The Commission’s earlier work had primarily focused on the substantive aspect of fragmentation and only briefly addressed the institutional dimension.

He wished to stress that his report focused on the institutional issues raised by fragmentation, including those related to the issuance of conflicting decisions, not the substantive fragmentation that had already been addressed by the Commission. In 2000, Judge Guillaume, then President of the International Court of Justice, had warned that inconsistent rulings had the potential to erode legal certainty and diminish the legitimacy of international tribunals and international adjudication.

The divergence between the International Court of Justice and the International Tribunal for the Former Yugoslavia on the standard for attributing the conduct of non-State actors to States and the conflicting decisions that they had issued on essentially the same legal question, which he analysed at length in his report, easily constituted the best example of the risk of institutional fragmentation. While the Court had established an “effective control” test with respect to that standard in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Tribunal had adopted an “overall control” test in *Prosecutor v. Duško Tadić*. The Court had then reaffirmed its “effective control” test in its judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, where it expressed reservations about the Tribunal’s broader standard. Essentially, the Court had rejected the Tribunal’s “overall control” test, noting that the Tribunal lacked a mandate to address State responsibility and that its findings in a criminal context could not be directly applied to general international law, and had warned that the adoption of the Tribunal’s standard would broaden the scope of State responsibility well beyond the fundamental principles governing international responsibility.

Chapter VI then moved on to an analysis of the Court’s efforts to promote unity and coherence in international law. While the Court was not hierarchically superior to other tribunals, as the principal judicial organ of the United Nations and the only international court with general subject-matter jurisdiction, it played a vital role in fostering the coherence of international law. Its decisions were often cited by other courts, reflecting a broader pattern of interjudicial dialogue that promoted the consistency of international law. The influence of judicial decisions – one of several subsidiary means under Article 38 (1) (d) used to determine rules of international law – often depended on the quality of the legal reasoning that they contained and the interpretative methodology employed. Consistency and predictability were essential for the credibility of international law. His proposal for draft conclusion 12, on coherence in decisions of courts and tribunals, sought to reinforce the broader unity and

coherence of international law, to emphasize that international law functioned as a single, integrated legal system and that the use of subsidiary means, including judicial decisions, should reflect that systemic coherence. It also sought to highlight the fact that courts and tribunals often considered the reasoning of decisions from other judicial bodies when interpreting international law, not out of obligation, but because such consideration promoted clarity, stability, legal consistency and, ultimately, the rule of law in international affairs.

Chapter VII of the third report explored the relationship between “subsidiary means” under Article 38 (1) (d) of the Statute of the International Court of Justice and “supplementary means of interpretation” under article 32 of the Vienna Convention on the Law of Treaties, and was the basis for draft conclusion 13, which was intended to clarify the relationship between the two concepts and address the confusion arising from legal discussions of their relationship. The chapter reaffirmed the distinct functions of subsidiary means for determining the existence and content of international legal rules *vis-à-vis* supplementary means for interpreting treaties when the general rule of interpretation under article 31 of the Vienna Convention proved insufficient. Despite their formal differences, the provisions sometimes interacted in judicial practice, as courts and tribunals might use the same materials under both headings, thus raising questions about conceptual overlap, hierarchical relationship and practical implications. That convergence was especially relevant in the light of the growing number of specialized tribunals with divergent interpretative approaches.

The Commission’s work on the topic thus far had treated interpretation as a distinct yet interrelated function of subsidiary means. Critiques of the formulation of draft conclusion 6, on the nature and function of subsidiary means, had highlighted the potential tension between interpretation as a function and determination as a more fundamental role. The related debate had reflected divergent views, with some members favouring a single determinative function while others advocated a broader, multifunctional understanding. Those differences underscored the need to clearly delineate the scope and role of subsidiary means in a variety of interpretative contexts.

States in the Sixth Committee had expressed varying views. While there was broad consensus on the auxiliary nature of subsidiary means, opinions differed on their influence in interpreting international law, and their relationship with supplementary means of interpretation under the Vienna Convention on the Law of Treaties. The European Union, for example, had explicitly linked subsidiary means to the interpretation process, suggesting, rightly in his view, that they played a dynamic role, not only in identifying existing rules, but also in shaping their meaning and application in evolving contexts. Denmark, for its part, had emphasized that subsidiary means could influence, or shape the outcome of, interpretation.

Much of the confusion stemmed from the terminology used, as “subsidiary” and “supplementary” suggested some sort of functional overlap. The difference was easier to distinguish in theory than in practice. Under Article 38 (1) (d) of the Statute of the International Court of Justice, “subsidiary means” guided the Court in determining legal rules, whereas, under the Vienna Convention on the Law of Treaties, “supplementary means” formed part of a framework relating specifically to treaty observance, application and interpretation. Subsidiary means could also inform treaty interpretation under article 31 of the Vienna Convention by, *inter alia*, assisting in determining the ordinary meaning of terms or identifying relevant rules of international law under article 31 (3) (c) of that instrument. The chapter likewise addressed specialized regimes such as the Rome Statute of the International Criminal Court, which explicitly regulated the use of prior decisions in interpreting applicable law. That *lex specialis* approach was distinct from general international law. Similarly, a comparative review of judicial practice illustrated varying degrees of reliance on supplementary means. The International Court of Justice typically made use of *travaux préparatoires* for confirmation while the dispute settlement organs of the World Trade Organization and investment tribunals showed greater flexibility, often referencing past decisions to ensure legal coherence and predictability without being necessarily bound to do so.

Draft conclusion 13, which was intended to clarify that the same materials could function both as subsidiary means for determining international legal rules and supplementary means of interpreting treaties, highlighted the practice of using subsidiary

means, such as judicial decisions, to interpret treaties under articles 31 and 32 of the Vienna Convention.

In chapter VIII, he had sought to organize the structure of the draft conclusions as logically as possible and in a manner that reflected the discussions that had taken place within the Commission and recent comments and suggestions from States. The proposed four-part structure set out in the report was by no means the only way in which the provisions could be organized. He would welcome any suggestions from members on that subject during the debate.

According to the future programme of work outlined in chapter IX of the third report, it had been his intention to complete the draft conclusions on the topic on first reading at the Commission's seventy-sixth session in 2025. However, due to the severely curtailed session and the financial crisis facing the United Nations, a first reading would not be possible. He hoped that the first reading could take place in 2026.

The preliminary selected bibliography on the topic, which had been issued on 24 March 2025, contained a comprehensive set of materials in various languages touching on one or more of the subsidiary means under discussion. He invited all Commission members to suggest materials, bearing in mind the established criteria for inclusion, to ensure that the final version of the bibliography was fully representative of the languages, principal legal systems and regions of the world.

The 13 draft conclusions proposed across all three reports provided what he hoped was a useful framework for understanding the role and value of subsidiary means and clarifying how courts and tribunals might make principled, context-sensitive use of such means to determine the content of legal rules. The provisions were also aimed at providing States, practitioners, legal scholars and others with a clearer vocabulary for assessing the probative weight of various materials in different legal settings.

Mr. Galindo said that the almost unanimous support of the States that had taken a position on the topic confirmed that the Commission had made the right choice in deciding that its output should take the form of draft conclusions. Nonetheless, despite the progress made, finishing the first reading of the draft conclusions in 2025 seemed impossible, mainly due to the repercussions of the liquidity crisis facing the United Nations. The Commission must take the time that it needed to produce substantively solid conclusions.

The commentary to draft conclusion 9 should further elaborate on the issue of legal opinions, which was dealt with only briefly in the report. The Commission had addressed the same issue in its conclusions on identification of customary international law, which stated that legal opinions could be considered *opinio juris* when adopted by governmental authorities. Such legal opinions, especially when issued by legal advisers to foreign affairs ministries, served as more than *opinio juris* or teachings. Some legal opinions, even when they did not constitute *opinio juris*, formed a kind of jurisprudence in a given State which, at least in some respects, resembled the notion of precedent. The scenario was even more complex when domestic legal systems allowed for binding legal opinions; in that case, they must be followed. Legal opinions adopted by governmental authorities, even when treated as teachings, tended to be more consistent than the writings of scholars, for example, since some such opinions were repeatedly referred to and substantially informed the work of foreign affairs ministries.

Although the Commission was not the appropriate forum for a discussion on the sociology of international law, the fact that there were authors from outside Europe who had contributed to the development of international law but who were not regularly cited for "complicated reasons" was a crucial point that should be elaborated on in the commentary. Any study by the Commission on teachings must necessarily address the foundations for understanding how norms were a direct by-product of knowledge, and how such knowledge was unequally distributed around the world.

He was sceptical about whether it was possible to objectively determine that individuals or collectives had been "organized independently of State or international organization involvement", in the language of draft conclusion 9. Issues related to State financing for research were complex, and the line between independent research and research

in which States had some involvement was blurred. He would prefer to delete that language from the draft conclusion and address the issue in the commentary.

Concerning draft conclusion 10, on pronouncements of public expert bodies, he had doubts as to whether the Commission played the role of a “crystallizer” of customary international law. If that was a reference to the moment in which an emerging customary rule was established, that was an issue that fell exclusively within the purview of States. He tended to agree with the Special Rapporteur that to characterize the work of the Commission itself as a “teaching” did not properly reflect its nature. However, it was necessary to specify which part of the Commission’s work was being characterized thus. The reports of Special Rapporteurs, for example, could not be equated with the final commentaries of the Commission on a given topic. While the former resembled more closely the idea of “teachings” in that it revealed individual positions, the latter, as the understanding of a group of experts, surpassed “teachings” in its traditional sense. The picture became even more complex when assessing the Commission’s products in terms of their impact on the Sixth Committee. States engaged more positively with certain topics than others, thus making it challenging to accord equal weight to all the Commission’s outputs, even though they represented the understanding of the collective body.

He generally agreed that the weight to be accorded to the decisions of the human rights treaty bodies depended on whether their respective founding treaties regarded those outputs as binding. Such decisions should, in his view, be referred to as “pronouncements”, as the usage of that term was well established.

While he agreed with the current wording of draft conclusion 10, the related commentary needed to explore many nuances. Regarding draft conclusion 11, the explanation provided by the Special Rapporteur did not clearly delineate the different functions of resolutions of international organizations and intergovernmental conferences, which could serve as subsidiary means or elements of customary international rules or treaty interpretation. The commentary to that provision should do more to distinguish the various roles that such decisions might play.

As for draft conclusion 12, on coherence in decisions of courts and tribunals, he had already raised many concerns about addressing, in connection with the topic at hand, the issue of fragmentation of international law and, consequently, the question of its unity and coherence. It was not, to his mind, a good idea to deal with those issues, for a number of reasons. For one thing, it seemed that few States in the Sixth Committee were enthusiastic about addressing them. A summary of the related debates might usefully have been included in the third report. Moreover, it could be detrimental to the Commission’s image to delve into an issue that had already been dealt with under the topic “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”. If the Commission had not dealt with the issue from the perspective of the so-called proliferation of international courts and tribunals on that occasion, it was because it had not seen any added value in doing so.

Much of the discussion on the fragmentation of international law took place from a value-oriented perspective and not from the perspective of a sociological phenomenon, which could be problematic. Like any social system, international law had been affected by the idea of differentiation. Being against or approaching fragmentation as something evil misrepresented a social phenomenon that was a feature of different historical developments and affected how society and social relations were conceived in the international realm.

The quest for the unity and coherence of international law derived from a complicated analogy under which tackling the alleged “primitive” character of international law required interpreting and applying it in a coherent and unified manner similar to that usually employed to conceptualize domestic legal systems. Although that analogy was needed to understand the features of contemporary international law, its premises must be scrutinized as the operation of domestic legal systems themselves was far from coherent and unified.

The debate on fragmentation turned on the assumption that international law had lost its capacity for coherence and unity because of social differentiation and that they should be regained as soon as possible. It was, however, highly contestable to say that international law had always been coherent and unified. The diversity of subjects treated by international law

had been limited for centuries and the doctrine of *domaine réservé* contained many prospective conflicts. The expansion of international law beyond the realm of Mably's *Le Droit public de l'Europe* had likewise engendered many tensions and contradictions.

He had the strong impression that by focusing on aspects related to the unity and coherence of international law, the most essential aspects that could make international law change the world for the better, such as social justice, equality among States and individuals, and freedom, were being overlooked. The fundamental question was: what were the priorities of international law? In his view, unity and coherence were not among them.

He highly doubted whether subsidiary means could address the consequences of the fragmentation of international law. That would amount to attributing to them a function that they did not possess, even when understood as supplementary means. The practice of States and international organizations seemed to corroborate that position. In most cases, there were no international judicial cases to support a given decision. For example, in the practice of the legal advisers of foreign affairs ministries, solutions were often produced by deducing rules established in treaties or referencing previous analogous cases. When international judicial decisions did exist, they were not usually resorted to as a response to differentiation. On the contrary, they were frequently employed to prove that specialized norms must be considered without leaving much room for their interaction with other general norms or regimes.

Empirically speaking, there were only a few cases of serious interpretative conflicts between international courts and tribunals. That was demonstrated by the fact that the same couple of cases were referred to time and again, such as the confrontation between the International Court of Justice and the International Tribunal for the Former Yugoslavia on the "effective control" and "overall control" tests, respectively. He was therefore against including draft conclusion 12.

As for draft conclusion 13, despite its merits, the Special Rapporteur's discussion of subsidiary and supplementary means of interpretation could lead the Commission to offer to States assessments that contradicted what it had stated in relation to other topics, including in its conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. Moreover, the Commission would do well to avoid a domain that was proper to legal interpretation, since it was not the appropriate forum to discuss matters of jurisprudence. His preference would be for draft conclusion 13 to be made into a "without prejudice" clause that simply stated that subsidiary means could play complementary roles. The related commentary could provide examples of other uses. He was in favour of referring the draft conclusions to the Drafting Committee.

Mr. Savadogo, after thanking the Special Rapporteur for his excellent third report, said that the preliminary selected bibliography on subsidiary means for the determination of rules of international law ([A/CN.4/781/Add.1](#)) contained references to highly instructive sources of doctrine and case law. To increase the user-friendliness of the bibliography, the Special Rapporteur might consider adding the relevant pages and paragraphs of each document cited. Three additional references might usefully be added to the list: first, "Christiaan Timmermans, 'Dialogue between legal doctrine and the European Court of Justice', *The Rabel Journal of Comparative and International Private Law*, April 2013, pp. 368–378"; second, "Tobias Lock, *The European Court of Justice and International Courts*, Oxford University Press, 2015, pp. 7–24"; and, third, a reference to the analysis of the Commission's work on subsidiary means by Lucie Delabie, published in the *Annuaire français de droit international*.

The generic term "judicial decisions" referred to decisions handed down by both national and international courts. National court decisions played only an indirect role in determining rules of international law and were used to help prove State practice. In other words, they were a means of determining an unwritten rule of international law, custom or general principles of law. The relative effect of *res judicata*, enshrined in Article 59 of the Statute of the International Court of Justice but also valid as a general principle of law with regard to arbitration awards, did not diminish the influence exerted in practice by international judicial decisions on the interpretation and evolution of international law. International courts played a considerable role in determining the existence, meaning and scope of general rules of international law whose status was difficult to define. International

case law made a real contribution in the field of maritime delimitation where, as noted in the arbitral award issued by the Permanent Court of Arbitration in *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)* on 7 July 2014, the *acquis judiciaire* was such that it constituted a source of international law.

The role of judicial decisions as a subsidiary means for determining rules of international law could be altered by what legal writers had referred to as the “proliferation of international courts and tribunals” and the subsequent risk of conflicting case law. That phenomenon opened the door to “forum shopping” and to competition for jurisdiction in the settlement of disputes that related to the same facts but were likely to fall within the jurisdiction of different courts. The proliferation of international courts and tribunals had become a striking feature of a changing international order.

The promotion by the International Court of Justice of unity and coherence of international law had not been dealt with by the Commission previously. Nor was the promotion of unity and coherence of case law the prerogative of the International Court of Justice; rather, it was an interactive process. By way of example, while the International Tribunal for the Law of the Sea referred extensively to the Court’s judgments, advisory opinions and orders, the Court also cited the Tribunal’s decisions. Commission members could refer to the list of cases included in the written version of his statement. On the other hand, with the exception of a few rare cases, the International Court of Justice was reluctant to refer to arbitral awards, most often simply using the general phrase “decisions of arbitral tribunals”.

The International Tribunal for the Law of the Sea seemed to take a less cautious approach to citing arbitral awards, for example in its judgments in *M/V “Norstar” (Panama v. Italy)*, *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana v. Côte d’Ivoire)* and the *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, as well as in the advisory opinion issued by the Seabed Disputes Chamber in *Responsibilities and obligations of States with respect to activities in the Area*.

Although endowed with less authority, arbitral case law was not without influence on the decisions of other jurisdictions, and even States. Such case law had established certain important principles that had set indisputable precedents to which international practice continued to refer. They included the principle of neutrality in times of war, as set out in the 1872 arbitral award handed down in *Alabama claims of the United States of America against Great Britain*; the general characteristics of territorial sovereignty, as established in the arbitral award handed down in the *Island of Palmas* case; and the principle of the proportionality of reprisals for an offence, as set out in the 1928 arbitral award in the *Naulilaa Arbitration (Portugal v. Germany)*. But the fact remained that arbitral awards handed down in different forums and by different arbitrators were not always consistent and uniform in their analysis of international law and therefore in their treatment of similar situations. A striking illustration was provided by the dispute settlement mechanism of the International Centre for Settlement of Investment Disputes and the contrasting assessment of “state of necessity” in several arbitration awards involving Argentina.

In any event, neither judges nor arbitrators were formally bound by judicial or arbitral precedents. Even if judges had a role to play in terms of creating general rules, it was important to adhere to the rule that case law was not, in principle, a source of international law. Under the terms of Article 38 (1) (d), it was a “subsidiary means”, namely, a supplementary means of identifying and interpreting legal norms. Case law played a greater role in certain areas of international law such as international trade law, where the case law of the Appellate Body of the World Trade Organization played a key role due to States’ inability to successfully conclude new negotiations on standards.

The Special Rapporteur, in paragraphs 233 *et seq.* of his report, had provided examples of decisions that raised the problem of conflicting case law. However, the experience of recent years had shown that concerns about the fragmentation of international law due to conflicting case law, while not unfounded, had not been decisively substantiated. Perhaps the warning issued by Judge Guillaume, former President of the International Court of Justice, in his speech to the Sixth Committee on 27 October 2000 on the subject of the

proliferation of international judicial bodies, had had a positive effect in both universal and regional jurisdictions. Flexible, non-formalized procedures for regular meetings between judges or presidents of different jurisdictions helped to ensure harmonization in the interpretation of texts.

The situation of teachings differed from that of judicial decisions in that it had no status in relation to States, who were the main holders of normative power. Unlike judges and arbitrators, who were entrusted by States with the task of settling specific cases, teachings stood alone. Admittedly, authors conducted their work independently, which lent them intellectual credibility; nevertheless, their work might be greeted with circumspection by some States for reasons of legal policy or perceived national interest.

Notwithstanding that fact, he shared the Special Rapporteur's opinion on the role of teachings and his approach to including resolutions of international organizations among the means of determining rules of law. Chapter V of the report dealt convincingly with that issue. Teachings helped to distinguish, detect and specify the scope of unwritten rules of international law, customs and general principles of law. They were, therefore, evidence; they did not create the rules but helped in the recognition of their existence.

Teachings could also contribute to the formulation of rules in new or rapidly developing areas of international law such as space law, the legal regime of which was based purely on teachings; the law of the sea, where teachings had played a significant role in the development of concepts such as the concepts of a "continental shelf", "contiguous zone" and "exclusive economic zone"; and environmental law. The role of Dionisio Anzilotti in drafting the rules of international responsibility should also be borne in mind. The main role of teachings lay both upstream and downstream of the creation of law: upstream, doctrinal writings gave rise to a form of awakening; downstream, they played a critical or interpretative role with regard to existing rules and contributed to their evolution. Many academics sat on the benches of courts and tribunals and on codification bodies; it was reasonable to assume that their writings and experience influenced their contribution to the activities of the institutions concerned.

In paragraphs 108 *et seq.* of his report, the Special Rapporteur made an apt reference to teachings in court rulings. It might be pertinent to include a reference to paragraph 99 of the judgment in *LaGrand (Germany v. United States of America)*, in which the International Court of Justice had observed that the interpretation of Article 41 of its Statute had been "the subject of extensive controversy in the literature". In paragraph 116 of the judgment, the Court had added that "the question of the binding character of orders indicating provisional measures had been extensively discussed in the literature, but had not been settled by its jurisprudence". The Court thereby indirectly attached importance to teachings. While it was unusual for a specific author to be mentioned in the body of judgments, advisory opinions or orders issued by the International Court of Justice or the International Tribunal for the Law of the Sea, or in the text of arbitral awards, parties to disputes quoted teachings profusely in their written pleadings and oral arguments, with the aim of convincing the court or tribunal of a particular line of reasoning. Similarly, judges and arbitrators cited teachings in their individual or dissenting opinions, as illustrated in paragraph 295 of the Special Rapporteur's report. While, like other jurisdictions, the Court of Justice of the European Union refrained from explicitly referring to teachings, the Advocates General did not, demonstrating once again the key role played by the invisible but powerful medium of teachings.

Turning to the draft conclusions themselves, he said that the title of draft conclusion 9 should be changed to "*Travaux des auteurs individuels et des groupes d'experts privés*" [Outputs of individual authors and private expert groups] to better reflect the content. With regard to the weight attributed to such outputs, he supported the Special Rapporteur's proposal to include, in the second paragraph of draft conclusion 9, a reference to draft conclusion 3.

In the first paragraph of draft conclusion 10, the phrase "a pronouncement of an expert body" should be rendered in the plural to ensure consistency with the title. In the title of draft conclusion 11, the word "and" should be replaced with the word "or", because the types of resolutions referred to were not cumulative. In the first paragraph of draft conclusion 12, the phrase "should promote" should be replaced with a less prescriptive formulation such as

“should seek to promote”. Lastly, the first paragraph of draft conclusion 13 required substantial revision.

He supported sending draft conclusions 9 to 13 to the Drafting Committee.

Mr. Forteau said that the Special Rapporteur, in his third report, had tackled the very complex topic of “Subsidiary means for the determination of rules of international law” with dedication and commitment. His examination of practice and case law revealed a number of grey areas and uncertainties that made codification of the topic particularly difficult. The Commission thus had a strategic choice to make: it could strive to rationalize the existing state of affairs by setting clear criteria that made it easier to distinguish between the different categories, which risked oversimplifying things; or it could attempt to transcribe the existing state of affairs in all its nuances and ambiguities, which would bring with it the risk of failing to provide the users of the draft conclusions with simple, unambiguous guidance. At the current stage, he preferred the first option. With that in mind, he would attempt to identify the elements of clarification that could bring some order to current practice.

For lack of time, he would not be able to go into detail on each of the many topics covered in the report, which, in his view, was not sufficiently concise. His silence on any particular point should not be interpreted as acquiescence.

Turning first to chapters III and IV of the report, which addressed the question of how to define the category of “teachings” and identify which types of material and bodies fell into it, with particular reference to the work of expert bodies, he said that practice and case law were rather confused on that point, as illustrated by the fluctuating role that the International Court of Justice attributed to the Commission’s work. A further complicating factor was that one body could have different functions: for example, the human rights treaty bodies had both a quasi-judicial role and a role in identifying, interpreting and progressively developing international rules through their general comments. Similarly, the International Committee of the Red Cross had an operational role as well as a more legal function of identifying or commenting on the law.

To bring some order to current practice, the Special Rapporteur proposed the use of an institutional criterion: the distinction he made in draft conclusions 9 and 10 was between the “private” or “public” nature of the persons and expert bodies. In his opinion, that distinction did not work, as it had the unfortunate, although likely unintended, effect of excluding, for instance, French professors from the category of teachings. In France, professors were not “private experts”: universities were public institutions and law professors were public servants. “Teachings” were therefore primarily produced by individuals and research centres affiliated with and funded by the State. However, a reference to “individuals” appeared only in draft conclusion 9, which was focused on “private” experts, and since no other draft conclusion defined teachings precisely, it seemed to exclude professors working in public universities from subsidiary means for the determination of rules of international law, which would be problematic.

In addition, and more importantly, the key criterion for defining “teachings” was not institutional but functional: what was decisive in determining whether the work of a person or body fell into the category of “teachings” was not their status, but the nature of their work, and more precisely their function, namely, to act independently and according to a scientific, objective and impartial method. Teachings were bound by the ethics of research. For him, the key criterion was the nature of the work done and the method followed to do it.

Taking that criterion into account, “teachings”, in the broadest sense of the term, could encompass the various documents drawn up by experts or groups of experts using a scientific, objective and independent method. That approach was the key to a better understanding of current practice. His own position on that point had evolved since 2023 thanks to the work of the Special Rapporteur. Some of the work of the International Committee of the Red Cross, for example, as well as certain documents adopted by treaty bodies and even certain documents of international organizations, could be classified as teachings when – but only when – they had been produced independently for the purposes of legal research.

He wished to propose, therefore, that draft conclusions 9 and 10 should be combined into a single draft conclusion divided into two paragraphs, the first stating that teachings

were, in the strictest sense, aimed at persons whose principal occupation was teaching and research; and the second specifying that, by extension and in a broader sense, the work of certain other persons or bodies could be classified as teachings when, and only when, it was carried out by independent experts. Whether those people or bodies were private or public was irrelevant: what mattered was the way in which they worked and their status as independent experts. For example, an article written by a ministry's legal adviser or an ambassador and published in a law journal would count as teachings in the broad sense if it reflected only the independent views of its author.

Some of the Commission's work could fall into that second category, of teachings in the broader sense. Commission members were expected to act as independent experts under the United Nations rules applicable to them. At the same time, the Commission had been given a specific mandate: it not only codified but also developed the law. It had to take into account the observations of States, and its work had an operational purpose, in that it could be transformed into international conventions and thus become the *travaux préparatoires* of such conventions. In view of that ambiguity, the Commission's body of work could not, in its entirety, be assigned to the category of teachings. On the other hand, it was possible to subsume the Commission's work under that category when it was used for the independent expertise it provided on the state of international law on a given issue. That functional criterion helped to explain the case law of the International Court of Justice which, depending on the circumstances, assigned different roles to the Commission's work.

Turning to chapter V of the Special Rapporteur's report, he said that the role of the resolutions of international organizations seemed to fall clearly within the realm of lawmaking rather than into the category of subsidiary means. Such resolutions were in fact legal acts, adopted by States acting in that capacity. They had either binding or recommendatory effect and could serve as evidence of customary international law. That role had nothing to do with the question of subsidiary means.

Contrary to the argument set out by the Special Rapporteur in paragraph 192 of his report, the role of a resolution – even one that merely codified existing law – was related to the formation of international law and was not a subsidiary means. A resolution to codify the law was a legal act expressing a political will. General Assembly resolution 2625 (XXV) on the principles of international law was a good example: States had met within the General Assembly, not to restate as experts what the law said, like professors in a symposium, but to express in a legal instrument their official position on what they considered to be the state of international law on the principles in question. The negotiators of that resolution had surely received negotiating instructions from their national authorities. It could not therefore constitute subsidiary means, as it was the expression of a political will that was part of the lawmaking process.

The case law cited in paragraphs 195 to 197 of the report and in observations 68 to 70 of the memorandum prepared by the secretariat (A/CN.4/765) clearly showed that international courts used resolutions as evidence of international law and not as subsidiary means. The International Court of Justice had made that clear in its advisory opinions on the *Legality of the Threat or Use of Nuclear Weapons*, in 1996, and on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, in 2019: in both cases, the Court had expressly referred to the normative value and character of resolutions, the word “normative” reflecting their contribution to the lawmaking process. For those reasons, he was unable to endorse draft conclusion 11, which was not supported by any convincing evidence of practice or case law.

The only type of document adopted by an international organization that could be classified as subsidiary means was one that constituted an expert work by the organization, for example when the secretariat of an organization produced a memorandum on a given issue. However, such a document would fall into the category of the aforementioned work of expert bodies.

With regard to chapter VI of the Special Rapporteur's report, which dealt with the unity and coherence of international law, he was not convinced that that question was relevant to the topic at hand. Draft conclusion 12 seemed to fall outside the scope of the Commission's work on subsidiary means, since it was not about how those should be used, but about how

courts and tribunals should conduct themselves, which was a different matter. Moreover, it was unclear why it concerned only courts and tribunals; logically, it should also cover teachings and any subject of law who interpreted and applied international law.

Furthermore, he did not share the devotion to the “stability” of international law mentioned in draft conclusion 12. If international law was to progress, the need for “stability” must not be exaggerated. *Jus cogens* and *erga omnes* obligations would never have seen the light of day if the Commission, in 1966, and the International Court of Justice, in 1970, had been bound by draft conclusion 12.

Chapter VII of the Special Rapporteur’s report dealt with the difference between “subsidiary means” for determining rules of law and “supplementary means” of interpretation, which was clearly a very difficult subject. The Special Rapporteur had concluded that subsidiary means could play a significant role in interpretation and that their interpretative function was distinct from their role in determining the existence and content of the rules of international law, as indicated in the first paragraph of draft conclusion 13, and that subsidiary means could serve as supplementary means of interpretation, as indicated in the second paragraph.

He had two problems with that line of reasoning, which permeated the entire chapter. First, it did not always take account of the important clarification set out in the second paragraph of draft conclusion 6, according to which the same material could be used for different purposes, for example as a subsidiary means in one context and as a means of interpretation in another. That did not mean that subsidiary means were themselves a means of interpretation.

Furthermore, the reasoning behind the Special Rapporteur’s proposed draft conclusion 13 introduced confusion as to the level at which subsidiary means came into play. Subsidiary means were used to determine interpretation. He had no problem with that. It was fair to say that subsidiary means played a role in interpretation. However, it did not transform the function of subsidiary means, nor did it transform them into means of interpretation. Subsidiary means were always used in an ancillary capacity, as an aid to the means of interpretation, and not as the means of interpretation themselves. To put it another way, they played a role in determining the interpretation, but not in the interpretation itself. Subsidiary means did not have two functions; their sole function was to help determine the existence and content of the law, which obviously included helping to determine the interpretation of the law.

When, for example, a provision of a treaty gave rise to debate as to its interpretation, it was necessary to have recourse to the means of interpretation laid down in articles 31 to 33 of the Vienna Convention on the Law of Treaties, which were binding on States. Their application could, of course, be aided by subsidiary means. For example, to determine whether there was a subsequent agreement or what the *travaux préparatoires* said, teachings and case law could be consulted to shed light on the understanding of those means of interpretation. In that respect, subsidiary means intervened from the outside, to clarify the means of interpretation, as was rightly stated at the end of draft conclusion 13 (2), but that did not transform subsidiary means into means of interpretation themselves, as was erroneously indicated at the beginning of draft conclusion 13 (2).

It would be more correct to say that when a problem of interpretation arose, States must apply the rules of interpretation and means of interpretation set out, in particular, in articles 31 and 32 of the Vienna Convention. In the process of applying those rules and means, States might have recourse to subsidiary means to assist them.

For instance, recourse could be made to case law or to the work of expert bodies to identify the object and purpose of a treaty, or the existence of a subsequent practice under article 31 of the Vienna Convention. The International Court of Justice had taken that approach in its 2004 advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and its 2010 judgment in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. In its 2021 judgment in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, the Court had been even clearer, indicating that when interpreting a treaty, it applied first article 31 of the Vienna Convention and then

article 32 thereof; only after doing that had it examined, in that case, the practice of the Committee on the Elimination of Racial Discrimination. The Court had ultimately concluded that its own interpretation of the treaty, conducted “by applying ... the relevant customary rules on treaty interpretation”, had led it to a different interpretation from the one adopted by the Committee, which it therefore did not follow. The Court’s conclusion confirmed that the practice of expert bodies, as a subsidiary means, operated on a different level to the rules and means of interpretation set out in articles 31 and 32 of the Vienna Convention.

Similarly, in its 2004 judgment in *Avena and Other Mexican Nationals (Mexico v. United States of America)*, the Court had had to interpret the expression “without delay”, which appeared in the Vienna Convention on Consular Relations, using the rules and means of interpretation set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties to do so. Subsequently, in the case concerning *Jadhav (India v. Pakistan)*, the Court merely referred to its case law from the *Avena* judgment because it had already taken a position on the interpretative question in that case. Its previous case law had easily enabled it, as a subsidiary means, to determine the interpretation to be adopted, since it had already interpreted the rule in question in an earlier judgment, in application of articles 31 and 32 of the Vienna Convention.

The Commission must, in his view, maintain as clearly as possible the distinction between means of interpretation and subsidiary means, even if it was not always easy, as the Special Rapporteur pointed out in paragraph 347 of his report. Nothing could be more dangerous than to call that fundamental difference into question, as that would destabilize the method that must be followed in interpreting the rules of international law. Draft conclusion 13 therefore required substantial revision.

While he was eminently grateful to the Special Rapporteur for his report, which dealt with highly complex issues, he had a number of reservations with regard to the reasoning used in the report and some of the draft conclusions proposed. He had no doubt, however, that the Special Rapporteur and the Drafting Committee would be able to address those concerns.

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

Mr. Oyarzábal (Chair of the Drafting Committee) said that, for the topic “Subsidiary means for the determination of rules of international law”, the Drafting Committee was composed of Mr. Akande, Mr. Argüello Gómez, Mr. Asada, Mr. Fife, Mr. Galindo, Mr. Grossman Guiloff, Mr. Lee, Mr. Ma, Ms. Mangklatanakul, Mr. Mavroyiannis, Mr. Nesi, Mr. Paparinskis, Mr. Patel, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Savadogo and Mr. Zagaynov, together with Mr. Jalloh (Special Rapporteur) and Mr. Fathalla (Rapporteur), *ex officio*.

The meeting rose at 1 p.m.