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Chair: Mr. Chindawongse . . . . . (Thailand)

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23-20893 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 79: Report of the International Law Commission on the work of its seventy-third and seventy-fourth sessions (*continued*) (A/78/10)

1. **The Chair** invited the Committee to continue its consideration of chapters VII and IX of the report of the International Law Commission on the work of its seventy-fourth session (A/78/10).

2. **Mr. Tan** (Singapore), speaking on the topic "Subsidiary means for the determination of rules of international law", said that the International Law Commission's work on the topic would complement its efforts related to Article 38, paragraph 1 (*a*), (*b*) and (*c*), of the Statute of the International Court of Justice. Referring to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, he said, with regard to draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), that his delegation noted with interest the Commission's decision to use the wording "decisions of courts and tribunals" in subparagraph (a), rather than the term "judicial decisions", used in Article 38, paragraph 1 (*d*), of the Statute.

3. The broader formulation made clear that decisions on matters of international law issued by adjudicative bodies might also fall under the scope of the draft conclusion. In that regard, the term "courts and tribunals" might encompass other adjudicative entities carrying out functions akin to those of courts or tribunals. In its commentary to the draft conclusion, the Commission helpfully cited as possible examples the dispute settlement bodies of the World Trade Organization and the Council of the International Civil Aviation Organization. Although the International Court of Justice had said that the Council was not a judicial institution in the proper sense of that term, it had recognized the Council's function of settling disagreements between two or more contracting parties relating to the interpretation or application of the Convention on International Civil Aviation and its annexes.

4. His delegation had only preliminary comments at the current juncture with regard to the category of "any other means generally used to assist in determining rules of international law" set out in subparagraph (c), until the Commission elaborated further on the contents of the category. If the Commission identified additional subsidiary means that could fall within the category, it should explain how it arrived at that conclusion, especially how such means were generally used to assist in determining rules of international law. The Commission should also be careful to avoid an undue expansion of the categories of subsidiary means beyond those that were currently widely accepted.

5. With regard to draft conclusion 3 (General criteria for the assessment of subsidiary means for the determination of rules of international law), the Commission clarified, in paragraph (4) of its commentary, that in the phrase "regard should be had to, inter alia", used in the chapeau, the term "should" indicated that the reference to the criteria was not mandatory, although in many cases it would plainly be desirable. With regard to the provision in the chapeau that reference should be made to various factors when assessing the weight of subsidiary means for the determination of rules of international law, the Commission also noted in paragraph (3) of the commentary, that "not all factors would be applicable to all the categories of subsidiary means". Having considered those clarifications, his delegation suggested replacing the term "should" with "may", which would make it clearer that the factors to which regard should be had when assessing the weight of subsidiary means would ultimately depend on the circumstances in each case.

6. **Ms. Lee** Young Ju (Republic of Korea), referring to the topic "Subsidiary means for the determination of rules of international law", said that her delegation agreed with the view of the Special Rapporteur, as contained in the International Law Commission's report (A/78/10) that although there was no formal system of judicial precedent (*stare decisis*) in international law, judicial decisions played an important role in the determination of rules of international law. While her Government respected the decisions of international courts and tribunals, which were crucial to upholding the rule of law in international relations, it held the view that judicial decisions were not binding on States that were not parties to the relevant cases.

7. With respect to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, her delegation believed that the general criteria for the assessment of subsidiary means for the determination of rules of international law set out in draft conclusion 3 should be taken into account when assessing the weight of judicial decisions. As different courts and tribunals occasionally applied diverging reasonings to identical legal questions, there was a need for caution and balance when relying on judicial decisions as subsidiary means. Indeed, there were also cases where dissenting or separate opinions were more convincing than the majority view and were subsequently more widely

accepted by the international community. An apt example was the powerful dissenting opinion of Judge Tomka in the 23 July 2023 judgment of the International Court of Justice in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, in which he had characterized the majority judgment as "disquieting".

8. While the syllabus for the topic prepared in 2021 (see A/76/10) had contained only two categories of subsidiary means, namely judicial decisions and the teachings of the most highly qualified publicists of the various nations, which was consistent with Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law) set out the additional category of "any other means generally used to assist in determining rules of international law". The Commission should consider whether that additional category might substantially expand the scope of the topic beyond what was provided in Article 38, paragraph 1 (*d*), of the Statute and should further clarify the criteria that defined that category.

9. Turning to the topic "Succession of States in respect of State responsibility", she said that her delegation had previously pointed out the relative paucity and inconsistency of State practice with respect to the topic. There was also substantial divergence of views among commentators on the topic. Furthermore, the Commission's past work relating to the topic, namely, the 1978 Vienna Convention on Succession of States in respect of Treaties, the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, and the articles on nationality of natural persons in relation to the succession of States, was less than impressive. Those considerations raised the question of whether the topic was fit for codification or progressive development by the Commission, in particular for the development of draft articles that would serve as a basis for a binding legal instrument. That concern had been partially addressed by the Commission when it had decided to change the form of the final outcome of its work from draft articles to draft guidelines.

10. Given those circumstances, her delegation approved of the Commission's decisions to continue its discussion on the topic but not to proceed with the appointment of a new Special Rapporteur for the topic, and to re-establish the Working Group on the topic at its next session with a view to undertaking further reflection on the way forward. It requested the Commission to also reflect on ways to improve its working methods for selecting topics.

11. **Mr. Bernardes** (Brazil), referring to the topic "Subsidiary means for the determination of rules of international law", said that his delegation welcomed the International Law Commission's decision to have draft conclusions as the form of output for the topic, which was consistent with its approach to other products relating to sources of international law, including its work on identification of customary international law and on general principles of law. Although subsidiary means for the determination of rules of law were mentioned in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, they did not constitute a source of international law and therefore did not create legal rules, rights or obligations for any subject of international law. Subsidiary means should be considered to be auxiliary means for determining rules arising from the formal sources of law listed in Article 38, namely, treaties, customary international law and general principles of law. Noting that draft conclusions were primarily aimed at codifying existing rules, his delegation encouraged the Commission to focus its work on codification, based on established State practice. His delegation commended the Special Rapporteur for his proposal for the Commission to include a multilingual bibliography as part of the work on the topic, and encouraged him to include substantive material from Portuguese-speaking countries in the bibliography.

12. Referring to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, he said, with regard to subparagraph (a) of draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), that the phrase "decisions of courts and tribunals" was broader than the term "judicial decisions" used in the Statute. His delegation urged caution in terms of broadening the meaning and scope of the Statute to include the decisions of ad hoc arbitral bodies, which were not exactly judicial in nature, and those of treaty monitoring bodies, which were not even adjudicatory in nature. Although their reports, comments and recommendations might be invested with technical quality, there should be no equivalence between those subsidiary means and the decisions of permanent judicial bodies. The Commission might therefore reflect on whether it would be more appropriate to put those subsidiary means in a different category and on ways to differentiate them in its commentary.

13. The Commission could help avoid fragmentation in international law with regard to judicial decisions. It should take into particular consideration the decisions of the International Court of Justice as subsidiary

means, especially those concerning topics related to general international law. In that context, his delegation welcomed draft conclusion 4 (Decisions of courts and tribunals), as provisionally adopted by the Drafting Committee. At the same time, consideration of the decisions of other international tribunals should be limited essentially to specific topics that fell within their purview. His delegation reiterated that there was no system of precedent (*stare decisis*) in international law.

14. Regarding subparagraph (b), his delegation believed that consideration of teachings as a subsidiary means should be restricted essentially to the contributions of collective bodies, such as the Institute of International Law, the Inter-American Juridical Committee and the Commission. Caution was required when drawing upon the teachings of individual publicists, as they often reflected the national or other individual viewpoints of their authors and varied greatly in quality. Furthermore, such teachings did not always distinguish between determining rules of law and advocating for their development. In that context, his delegation commended the Special Rapporteur for his efforts to identify the writings of individual scholars that reflected coinciding views of persons with competence in international law that could serve as subsidiary means. However, it was worth noting that such so-called coinciding views were usually restricted to particular legal systems, geographical regions and languages. Further clarification was also needed regarding the scope, meaning and application of subparagraph (c), which referred to "any other means generally used to assist in determining rules of international law".

15. His delegation welcomed draft conclusion 3 (General criteria for the assessment of subsidiary means for the determination of rules of international law) and emphasized that, when assessing the degree of representativeness of subsidiary means, due regard should be had to geographic and linguistic diversity. It also stressed the importance of the reception of the subsidiary means by States and, where applicable, the mandate conferred on the relevant tribunal or other body.

16. Turning to the topic "Succession of States in respect of State responsibility", he said that his delegation took note of the recommendation of the Working Group on the topic for the Commission to continue its consideration of the topic. Noting that the Commission had been working on the topic over the past six years, his delegation encouraged it to conclude its study within a specific time frame.

17. **Ms. Thornton** (United States of America), speaking on the topic "Subsidiary means for the determination of rules of international law", said that her delegation had provided the International Law Commission with information on the topic earlier in the year. It would be important to assess the function of subsidiary means early in the Commission's study; in that regard, her delegation commended the Special Rapporteur for his first report (A/CN.4/760) and looked forward to his second report. Her delegation appreciated the Commission's caution regarding the possibility of clarifying or including additional subsidiary means beyond those identified in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice and would closely follow developments in that area. Her delegation noted that many of the other proposed sources of subsidiary means described in the Commission's report (A/78/10) were expert bodies which were themselves typically comprised of publicists. Her delegation also urged caution concerning the use of resolutions or decisions of international organizations as subsidiary means, given the high number of such resolutions, most of which were non-binding, and which were often adopted with minimal debate and through consensus procedures. In that context, the proposed criteria for assessing the weight of those and other potential additional subsidiary means might require further development.

18. Her delegation supported the view of the Commission members who had identified the cogency and quality of the reasoning of a subsidiary means as an important factor in assessing its weight. For example, when assigning weight to the decisions of courts and tribunals – a matter that was addressed in conclusion 4 of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Drafting Committee – it was important to consider whether the decision was well reasoned. A decision that provided evidence of any conclusions concerning the existence and content of a rule of international law, including references to the extensive State practice and *opinio juris* upon which it was based, should be accorded more weight than one that was simply declaratory. In addition, while the Commission in its commentaries did not suggest any hierarchy among the criteria for assessing the weight of subsidiary means, the reception by States and the quality of the reasoning should be of prime importance.

19. Turning to the topic "Succession of States in respect of State responsibility", she said that her delegation welcomed the Commission's incremental approach. In particular, it agreed with the Commission's decision to continue considering the issue but not to proceed with the appointment of a new Special

Rapporteur, while the Working Group on the topic took more time to reflect on the best way forward.

20. **Mr. Gorke** (Austria), speaking on the topic "Subsidiary means for the determination of rules of international law" and the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the International Law Commission, said that while his delegation appreciated the work of the Special Rapporteur, it would have preferred more succinct commentaries. With regard to draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), his delegation remained sceptical about the existence of additional types of subsidiary means other than decisions of courts and tribunals, and teachings, as set out explicitly in subparagraph (c), which referred to "any other means generally used to assist in determining rules of international law", and as suggested in paragraph (5) of the general commentary. His delegation continued to support the view expressed in the same paragraph that the existing list of subsidiary means found in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice could be read broadly.

21. The Special Rapporteur and the Commission would have to make a very cogent case for the existence of additional subsidiary means. His delegation wondered whether the works of expert bodies and resolutions and decisions of international organizations would be useful candidates for the proposed third category of subsidiary means. Given that the works of expert bodies were usually non-binding, they could be subsumed under the category of teachings. His delegation suggested refining the definition of other subsidiary means provided in subparagraph (c), as the wording was circular.

22. With regard to subparagraph (a), while his delegation appreciated the idea of considering the entire jurisprudence of courts and tribunals as subsidiary means, it was unclear whether that goal was achieved by the phrase "decisions of courts and tribunals", used in place of the term "judicial decisions" found in the Statute. A decisive criterion should be whether any third-party dispute settlement institution was empowered to decide disputes or render advisory opinions. As such bodies might be empowered to do so, they should be included in the formulation. His delegation therefore suggested using the wording "jurisprudence of courts and tribunals and other bodies" in place of "decisions of courts and tribunals". In that context, it was worth noting that the Human Rights Committee, which was mentioned in paragraph (6) of the commentary to the draft conclusion, was not a court or tribunal empowered to decide cases and could only issue legally non-binding views. His delegation agreed with the substance of the view expressed in paragraph (14) of the commentary that the representativeness of teachings was an important consideration, but it wondered why draft conclusion 5, as provisionally adopted by the Drafting Committee, was mentioned in the paragraph, when it appeared that the question of representativeness was addressed much more prominently in draft conclusion 3.

23. While his delegation generally agreed with the criteria for the assessment of subsidiary means for the determination of rules of international law listed in draft conclusion 3, it considered that "the quality of the reasoning", given in subparagraph (b), should be regarded as the paramount criterion and should be mentioned first. While his delegation appreciated the reference in subparagraph (e) to the reception by States and other entities, it doubted whether that was a crucial aspect of assessing the weight of subsidiary means and suggested adding the introductory phrase "where applicable" to the subparagraph, as had been done in subparagraph (f).

24. Turning to the topic "Succession of States in respect of State responsibility", he said that his delegation welcomed the Commission's proposal to produce a report on the topic. A report that outlined the scarce but important practice in the field and analysed the legal problems involved would offer the most valuable contribution. His delegation also supported the Commission's decision to establish a Working Group to consider the way forward and would appreciate a speedy conclusion of work on the topic in 2024.

25. **Mr. Ferrara** (Italy), speaking on the topic "Subsidiary means for the determination of rules of international law", said that his delegation appreciated the International Law Commission's decision to continue its work on the topic, which would complete its analysis of the sources of international law under Article 38 of the Statute of the International Court of Justice. It was worth recalling that the subsidiary means listed in Article 38 were not in themselves sources of international law but were essential tools for the determination of the existence and content of rules of international law.

26. Regarding the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, his delegation was of the view that, in draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), it should be specified in the chapeau that the determination of rules of international

law included the determination of their existence and content, as was acknowledged in the general commentary. His delegation was considering the view that the list of subsidiary means contained in Article 38, paragraph 1 (*d*), of the Statute was not exhaustive, and took note of the debate over the inclusion of subparagraph (c), which anticipated the existence of a category of any other subsidiary means.

27. His delegation valued the inclusion of representativeness among the criteria for the assessment of subsidiary means for the determination of rules of international law listed in draft conclusion 3. Considering a variety of subsidiary means determined in different regions and by different judicial systems was essential to ascertaining the existence and content of a rule of international law in a way that guaranteed the coherence of the international legal system as a whole. His delegation proposed including a reference to representativeness also in draft conclusion 4 (Decisions of courts and tribunals), to ensure consistency with draft conclusion 5 (Teachings), both provisionally adopted by the Drafting Committee, and to promote judicial contributions from different regions.

28. His delegation was grateful to the Special Rapporteur for inviting States to express their views on the possibility of including the issue of fragmentation of international law in the scope of the topic. Defining a shared methodology for the use of subsidiary means would contribute to the interpretation of international law, thus helping to resolve some of the issues related to the fragmentation of international law. However, his delegation did not find it appropriate to include the study of fragmentation within the already vast scope of the topic, as that might impede the eventual adoption of the draft conclusions. His delegation would consider submitting written comments and relevant information on the topic at a later stage.

29. Turning to the topic "Succession of States in respect of State responsibility", he said that while his delegation recognized the reasons why the Commission had not produced the usual annual report on the topic, including the fact that the term of the Special Rapporteur had come to an end, it believed that the international community would benefit from a broader overview of the topic. It remained open to considering options to stimulate constructive debate on several issues arising from the draft guidelines on succession of States in respect of State responsibility provisionally adopted by the Commission.

30. Given the practical challenges arising from the scarcity and inconsistency of State practice, his delegation valued the results achieved thus far and supported the Commission's decision to re-establish the open-ended Working Group on the topic at its seventy-fifth session as the first step in reflecting on the way forward. His delegation particularly encouraged the Commission to explore appropriate solutions that would preserve the extensive work completed to date. It welcomed the proposal to engage in a Working Group-led process with the aim of highlighting the most significant issues and developing a final report, to be adopted by the Commission and submitted to the General Assembly.

31. **Ms. Thiéry** (France), speaking on the topic "Succession of States in respect of State responsibility", said that her delegation had taken note of the International Law Commission's decision to change its approach and opt for a Working Group-led process at its seventy-fifth session aimed at preparing a final report to be adopted by the Commission. The Commission should ensure that its work on a topic did not depend exclusively on the efforts of the Special Rapporteur for the topic. There should be continuity in the Commission's work, regardless of whether the terms of members were renewed. Her delegation would follow with interest the results of the work of the Working Group on the topic and called on the Commission to streamline its work on the topic.

32. Turning to the topic "Subsidiary means for the determination of rules of international law", she said that the starting point for the Commission's work must remain Article 38 of the Statute of the International Court of Justice, which was the authoritative statement on the topic. With regard to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, her delegation wished to draw attention to the linguistic differences between the phrase "subsidiary means" used in English and the phrase "*moyens auxiliaires*" used in French. While the means referred to in the English phrase could be understood as referring to a secondary source of international law, the means referred to in the French word *moyens* could not be understood as constituting true "sources" of international law. In that regard, the Commission's analysis of the different language versions of Article 38 of the Statute contained in paragraph (6) of its commentary to conclusion 1 (Scope) was relevant and useful.

33. Although the list of subsidiary means contained in Article 38, paragraph 1 (*d*), of the Statute was not exhaustive, it should not be read too broadly, at the risk of generating too many categories, which would result in more confusion than clarity. In that context, the possibility of considering the growing category of

unilateral acts as "subsidiary means" required thorough reflection. Draft conclusion 3 (General criteria for the assessment of subsidiary means for the determination of rules of international law) included elements that might be difficult to assess in practice, some which were subjective in nature and whose assessment would thus be a delicate matter. In its commentary to the draft conclusion, the Commission indicated that the criterion of "representativeness" included "teachings in terms of the various legal systems and regions of the world". Her delegation shared that view of representativeness, which was based on the diversity of legal systems, and should be supported.

34. **Mr. Janeczko** (United Kingdom), speaking on the topic "Subsidiary means for the determination of rules of international law", said that questions concerning sources of international law were particularly suitable for consideration by the International Law Commission. Given the importance of such questions to the international legal system, it was imperative that the Commission approached them with caution and allowed States time to contribute fully.

35. With regard to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, his delegation welcomed the explanation of the proposed normative value of the output provided in the general commentary. The Commission's said that its intention was to produce draft conclusions that reflected "primarily codification and possibly elements of progressive development of international law". His delegation was sceptical that the Commission's output to date reflected that intention. It encouraged the Commission to maintain an open mind as to the form of its final output.

36. His delegation urged the Commission to make clear in its commentary the status of specific provisions it developed. For example, the general criteria for the assessment of subsidiary means for the determination of rules of international law set out in draft conclusion 3 would be better characterized as guidelines than as codification of existing law. His delegation welcomed the fact that, in its commentary to draft conclusion 3, the Commission indicated that there might be insufficient practice supporting those criteria at the current stage. The Commission should also mention that point in its commentary with respect to the second sentence of draft conclusion 5 (Teachings) provisionally adopted by the Drafting Committee, which his delegation considered to be a guideline.

37. His delegation agreed with the Commission that it was important to elaborate on the functions of subsidiary means and to define what was meant by "determination of rules". It would be worth exploring that issue early in the Commission's consideration of the topic to inform the direction of its work moving forward. The non-exhaustive list of categories of subsidiary means for the determination of rules of international law proposed in draft conclusion 2 included a broad category comprising "any other means generally used to assist in determining rules of international law". While Commission members had generally agreed that the category of subsidiary means was not necessarily exhaustive, some members had cautioned against an undue expansion of the category. His delegation strongly agreed with that note of caution and, in that regard, considered the need to distinguish between subsidiary means and evidence of the existence of rules of international law, which had been raised by the Special Rapporteur in his report (A/CN.4/760), to be of fundamental importance. It would be helpful if the Commission would consider that issue in more detail before exploring potential additional subsidiary means.

38. It was also important that the Commission should ensure consistency with its previous products, such as the conclusions on identification of customary international law, where it had addressed the issue of subsidiary means. Regarding the proposed timeline for the topic, his delegation noted that some Commission members had called for caution and had recalled that more time had been needed to complete the consideration of certain other topics relating to the sources of international law. Given the substance and importance of the topic, his delegation supported a measured approach that would build in sufficient time for States to participate fully.

39. **Mr. Hasenau** (Germany), speaking on the topic "Subsidiary means for the determination of rules of international law", said that his delegation welcomed the International Law Commission's focus on Article 38 of the Statute of the International Court of Justice, in continuation of its work on the sources of international law. In a world of ever-growing interconnectedness and an increasing number of norms of international law, it was important to achieve consensus regarding those norms, such as Article 38. However, a cautious approach was advisable when discussing issues related to fundamental aspects of the international legal system, such as the rules on determining the sources of international law.

40. Regarding the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, the meaning of the words "court and tribunals referred to in draft conclusion 2 (Categories of subsidiary means for the

determination of rules of international law) was still unclear. His delegation also wondered what the differences were between the term "judicial decisions" used in Article 38 of the Statute and the phrase "decisions of courts and tribunals" used in draft conclusion 2. The Commission should seek to retain the exact wording of the Statute wherever possible in order to avoid misunderstandings in what the applicable law might be and require. If indeed a deviation from the text of the Statute was required, the reasons for such deviation should be fully explained in the commentary to the draft conclusion.

41. His delegation was generally open to the idea that the Statute did not contain an exhaustive list of subsidiary means for the determination of rules of international law and that there were other subsidiary means in addition to decisions of courts and tribunals, and teachings. However, the Commission's work on that question must be firmly based on the practice of States. His delegation looked forward to future reports of the Special Rapporteur and would be attentive to that issue.

42. The inclusion of draft conclusion 3 (General criteria for the assessment of subsidiary means for the determination of rules of international law) was apt; given the myriad subsidiary means available, it would be important to offer criteria for comparing them. The Commission could expand its commentary to draft conclusion 3 to provide better examples of the different criteria and explain how they related to the various means for the determination of rules of international law. Certain criteria might be more useful when weighing court decisions, while others might be more fitting for teachings. The quality of the legal reasoning offered by a court or a scholar should be given particular weight. It would be more logical to first define the means for the determination of rules of international law and then to elaborate on the criteria for weighing them. His delegation therefore suggested placing draft conclusion 3 after the definitions of the various forms of subsidiary means.

43. **Ms. Padlo-Pekala** (Poland), speaking on the topic "Subsidiary means for the determination of rules of international law", said that her delegation took note of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the International Law Commission. It agreed with the Commission's commentary to draft conclusion 1 (Scope) that it was important to "define what 'determination' of rules meant". One possible approach would be to define it as lying somewhere between the interpretation and the formation of international law. In that respect, the Commission could elaborate on the distinction between interpretation and determination in the commentary.

44. With respect to draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), although, prima facie, decisions of courts and tribunals, and teachings were placed on an equal footing and were rooted in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, in practice different roles and values were ascribed to them, including in the Commission's own work. For example, the Commission's commentaries to the conclusions on identification of customary international law had been based almost entirely on decisions of the International Court of Justice. The Court itself predominantly cited its own jurisprudence and permanent courts in general seemed more prone to refer to decisions of other international courts and tribunals than to teachings. The practice should therefore be explained in the commentary to draft conclusion 2, to prevent the reader from assigning unrealistic values to the different categories of subsidiary means. Conclusion 13 of the conclusions on identification of customary international law offered a good starting point for making a distinction between the role of international courts and that of national courts in the context of subsidiary means.

45. Regarding draft conclusion 3 (General criteria for the assessment of subsidiary means for the determination of rules of international law), her delegation suggested listing the criterion "the reception by States and other entities", currently set out in subparagraph (e), first.

46. Referring to the topic "Succession of States in respect of State responsibility", she said that her delegation had carefully examined the possible options for moving forward, considering that the Special Rapporteur was no longer with the Commission. Poland was in favour of a Working Group-driven process aimed at preparing a final report to be adopted by the Commission. That approach had already proven successful with its work on the obligation to extradite or prosecute (*aut dedere aut judicare*) and could be successfully repeated with the current topic.

47. **Mr. Evseenko** (Belarus), referring to the topic "Subsidiary means for the determination of rules of international law", said that his delegation supported the widely held view that the International Law Commission's work on the topic was necessary, in order to complement and complete its prior work on the sources of international law. One of the Commission's main objectives should be to describe all existing subsidiary means for the determination of rules of international law and the methodologies used to apply them.

48. His delegation agreed with certain observations made by the Special Rapporteur in his report (A/CN.4/760) on the Commission's use of subsidiary means, including that judicial decisions and the teachings of the most highly qualified publicists were prevalent in the work of the Commission; that the nature and extent of their use varied; and that the Commission made more use of judicial decisions than teachings. However, more attention should be accorded to other subsidiary means not explicitly mentioned in Article 38 of the Statute of the International Court of Justice, such as the resolutions or decisions of international organizations, unilateral acts of States and different types of international texts containing so-called soft law norms. Such subsidiary means played an important role in the formation of international law norms, as international organizations and States relied to a great extent on them to regulate their international relations. His delegation therefore supported the members of the Commission who favoured further analysis of the works of expert bodies and resolutions of international organizations, as reflected in the Commission's report (A/78/10).

49. With regard to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, he said that the six criteria for the assessment of subsidiary means for the determination of rules of international law identified in draft conclusion 3 would have special practical value. Nonetheless, none of them taken individually was universally applicable and sufficient in all contexts.

50. His delegation supported the inclusion in the Commission's work of the question of fragmentation of international law, which was exacerbated by the current proliferation of international tribunals and arbitral bodies. His delegation did not believe that the decisions of the International Court of Justice should be considered the most authoritative in all matters. Indeed, the decisions of specialized international courts and tribunals and arbitral bodies should carry greater weight in the determination of norms in a particular field of international law due to their expertise in that field. The members of such legal institutions often included the most highly qualified jurists with deep expert knowledge of international law norms and other specialized areas in which disputes arose.

51. Teachings played an important role as a source of international law. They included not just research studies and publications by authoritative scholars and researchers, but also the expert opinions and doctrinal views of various research and non-governmental organizations dealing with questions of international law, whose members were international jurists. The guiding principle in the selection of writings for the determination of rules of international law should be the reputation and authority of the authors, the quality and the thoroughness of their works, and the geographic and linguistic diversity of the selected teachings.

52. When preparing the relevant draft conclusions, the Commission should emphasize in particular that teachings were not a means for creating international legal norms, but rather performed a subsidiary role in the identification of such norms, in line with Article 38 of the Statute of the International Court of Justice. His delegation supported the approach for the study of the topic proposed by the Special Rapporteur in his report and believed that special attention needed to be paid to examining additional subsidiary means, judicial and arbitral decisions, and teachings.

53. Turning to the topic "Succession of States in respect of State responsibility", he said that his delegation's comments at the seventy-sixth and seventy-seventh sessions of the General Assembly (see A/C.6/76/SR.23 and A/C.6/77/SR.29) were still relevant. His delegation welcomed the Commission's decision to establish a Working Group on the topic and the incremental approach taken by the Working Group to determining the way forward for the topic. It was currently premature to begin work on a final report on the topic. Instead, the Working Group should undertake further reflection on the draft guidelines currently before the Commission, taking into account the diversity of State practice across regions, and resume its discussion on the way forward for the topic at the Commission's seventy-fifth session, at the earliest.

54. **Mr. Zukal** (Czechia), referring to the topic "Succession of States in respect of State responsibility", said that his delegation noted that, in its report (A/78/10), the International Law Commission did not disclose its reasons for deciding to establish a Working Group rather than following the usual practice of appointing a new Special Rapporteur for the topic after the Special Rapporteur had left the Commission. It indicated in the report that the Working Group had focused its discussion on considering the way forward, namely, whether it should continue developing a text in the Drafting Committee and proceed to conclude the first reading of the draft guidelines currently before the Commission, or whether it should pursue a different course, as suggested in the plenary in 2022. The various views of the members of the Working Group on that matter were also described in the report. Noticeably, however, there was no allusion whatsoever to the views that Member States had expressed when the topic had been considered by the Committee during the seventy-

seventh session of the General Assembly, despite the fact that the Commission had had before it the topical summary of the Committee's discussion of that session (A/CN.4/755).

55. As noted in that topical summary, delegations had generally expressed appreciation for the work of the Commission on the topic, had welcomed the consolidation of the work in the form of draft guidelines, and had highlighted the potential usefulness of such guidance to States. Delegations had also taken note of the Commission's decision to change the final form of its work on the topic to draft guidelines and had highlighted the potential relevance of guidelines to the progressive development of international law. Contrary to the preference of Member States, the Working Group had recommended, as reported in the Commission's report (A/78/10), that the Commission should continue considering the topic through the format of an open-ended Working Group, without appointing a new Special Rapporteur, and that further reflection should be undertaken on the basis of a working paper to be prepared by the Chair of the Working Group, identifying "the various complexities surrounding the provisions adopted by the Commission thus far and outlining the options open to the Commission".

56. The Commission had not solicited the views of Member States before making such a departure from its usual practice in either chapter IX or chapter III of its report, where it had included its questions for Member States. Indeed, in paragraph 4 of its resolution 77/103, the General Assembly recommended that the Commission should continue its work on the topics in its current programme of work, taking into account the comments and observations of Governments, whether submitted in writing or expressed orally in debates in the Sixth Committee, and in paragraph 40 of the resolution, it underlined the importance of the records and topical summary of the debate in the Sixth Committee for the deliberations of the Commission.

57. The use of a Working Group to complete work on a topic that had been previously guided by a Special Rapporteur was not a novelty. For example, in 1999, 26 draft articles on nationality of natural persons in relation to succession of States had been finalized on second reading by a Working Group in the light of written comments of Member States, which had been summarized in a memorandum by the Secretariat. The Commission had also used Working Groups to bring to a close its work on the topics "Unilateral acts of States" and "The obligation to extradite or prosecute (*aut dedere aut judicare*)", as it had been unable to adopt draft articles on those topics, despite considering them over a number of years. In the case of the first topic, the efforts of the Working Group had resulted in the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, which had been adopted by the Commission in 2006. In the case of the second topic, on the basis of the work of the Working Group, in 2014, the Commission had adopted a final report summarizing particular aspects of its study, thus concluding its consideration of the topic.

58. The situation was far different with respect to the current topic. Since beginning its work, the Commission had provisionally adopted on first reading 17 draft guidelines with commentaries, covering the essential part of the topic. Member States had thoroughly commented on those provisions throughout the various stages of their elaboration. The majority of them had also supported the proposal that the Commission had made in 2022 to continue its work on the topic in the form of draft guidelines. As the draft guidelines constituted an almost complete set of provisions on the topic, the Working Group should finalize the first reading of the draft guidelines, which should then be submitted to Member States for their comments and observations, including regarding the most appropriate way for the Commission to complete its work on the topic.

59. The topic "Subsidiary means for the determination of rules of international law" complemented the prior work of the Commission on sources of international law. The Commission had already agreed that subsidiary means were not formal sources of international law, and that their function was to assist in the identification and determination of rules of international law. His delegation believed that the Commission therefore did not need to produce extensive theoretical studies on the subject, and encouraged it to focus on the practical aspects of the use of subsidiary means with a view to providing guidance to practitioners and clarifying the relevance and potentially increasing the impact of subsidiary means. A representative overview of the use of subsidiary means would be the appropriate means of offering such clarification.

60. His delegation would thus welcome the memorandum, to be submitted by the Secretariat, surveying the decisions of international courts and tribunals and other bodies and describing how they employed subsidiary means. His delegation welcomed and agreed with the consensus view in the Commission on the need to maintain continuity and consistency with the prior work of the Commission on other topics relating to the sources of international law. The Commission should avoid reopening issues that had already been settled under those topics.

61. Concerning the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, his delegation welcomed the inclusion of the broad term "decisions" in subparagraph (a) of draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), as it believed that the decisions of any international body that exercised judicial powers and was entitled to consider the rules of international law should be taken into consideration when determining the rules of international law. The decisions of national courts might also be relevant as subsidiary means; however, the Commission should make clear that such decisions should be resorted to with caution and on the basis of the quality of the reasoning. His delegation therefore found that the wording of paragraph 2 of draft conclusion 4 (Decisions of courts and tribunals), provisionally adopted by the Drafting Committee, was too broad and that additional criteria for the use of such decisions should be established.

62. With respect to the category of additional subsidiary means proposed in subparagraph (c) of draft conclusion 2, his delegation suggested that the Commission should clarify its approach to Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice in the light of its previous work on other topics. Article 38, paragraph 1 (*d*) expressly mentioned two categories of subsidiary means: judicial decisions and the teachings of the most highly qualified publicists of the various nations. In line with that provision, the Commission, in its conclusions on identification of customary international law, had characterized only those two categories as subsidiary means for the determination of rules of international law. In conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), the Commission had included the decisions of courts and tribunals, teachings and the works of expert bodies among the subsidiary means for the determination of the peremptory character of norms of general international law, noting in its commentary to the draft conclusion, as set out in the report on the work of its seventy-third session (A/77/10), that the subsidiary means identified were not exhaustive.

63. His delegation requested the Commission to elaborate on the character of resolutions and decisions of international organizations or works of other expert bodies and treaty bodies in light of Article 38 of the Statute and the Commission's previous work on related topics. With regard to the relevant debate in the Commission, his delegation was convinced that unilateral acts of States could not be characterized as subsidiary means. As the Commission itself had indicated in its Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted in 2006, unilateral acts *stricto sensu* were "formal declarations formulated by a State with the intent to produce obligations under international laws", and thus were a source of law.

64. **Ms. Vittay** (Hungary), speaking on the topic "Subsidiary means for the determination of rules of international law", said that the Special Rapporteur's report (A/CN.4/760) provided an excellent basis for further discussion. Her delegation welcomed the proposal in the report that, as part of its work on the topic, the International Law Commission could include a multilingual bibliography, which would be representative of the various regions and legal systems in the world.

65. With regard to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, subparagraph (a) of draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law) listed "decisions of courts and tribunals" as subsidiary means, omitting the qualifying word "judicial" used in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. Her delegation found the Commission's reasons for that omission, provided in its commentary to the draft conclusion, to be convincing and thus supported its approach. It also agreed with the Special Rapporteur's explanation in his report that the broader term "decisions" could encompass decisions issued by arbitral tribunals, although such tribunals had not been mentioned in the commentary. As the International Court of Justice had referred to the decisions of arbitral tribunals in its judgments, including in *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, her delegation believed that the Commission should include them in its commentary, with any qualifications it deemed necessary.

66. Her delegation believed that the term "decision" also encompassed decisions taken in relation to individual complaints procedures of State-created treaty bodies, although it took note of the divergent views within the Commission on that front, and was also mindful that the Court itself had referred to the outcome of human rights treaty bodies. In its 2010 judgment in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the Court stated that: "Although the Court is in no way obliged … to model its own interpretation of the [International] Covenant [on Civil and Political Rights] on that of the [Human Rights] Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to

supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security".

67. Nevertheless, her delegation believed that a cautious approach was needed, as such treaty bodies had a limited mandate and were allowed to issue only non-binding interpretations. Moreover, different treaty bodies might give different interpretations of a certain right at different times. More detailed guidance on the relationship between those different sources of subsidiary means as well as the different categories of subsidiary means would be useful for resolving such contradictions. Such guidance would be most appropriate in the commentaries, most probably in the commentary to draft conclusion 4 (Decisions of courts and tribunals), as provisionally adopted by the Drafting Committee. Her delegation stood ready to provide information on national practices if that should prove useful to the Commission.

68. **Ms. Egmond** (Kingdom of the Netherlands), referring to the topic "Subsidiary means for the determination of rules of international law", said that while her delegation had initially expressed doubt regarding the inclusion of the topic in the International Law Commission's programme of work, it had since been convinced of its potential. The Commission's study could, for example, help to identify how soft law, including non-binding instruments agreed by States, might contribute to the identification and application of international law, which was of particular practical relevance. Such work might also be pertinent to the topic of non-legally binding international agreements, which had been added to the Commission's programme of work. The Kingdom of the Netherlands had recently submitted examples of State practice in response to the Commission's requests contained in its reports on the work of its seventy-third and seventy-fourth sessions, in order to support the future work of the Special Rapporteur and the Commission.

69. Her delegation agreed with the position expressed by the Special Rapporteur in his first report (A/CN.4/760) that subsidiary means for the determination of rules of international law were not sources of international law, at least not in the formal sense. However, while it agreed with him that subsidiary means were documentary and auxiliary sources, it believed that they might also be considered to confirm or determine the meaning of a particular rule. Her delegation concurred with the Special Rapporteur that subsidiary means had varying levels of authority.

70. With respect to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, draft conclusion 2 set out the categories of subsidiary means for the determination of rules of international law, including decisions of courts and tribunals. Her delegation was not convinced that decisions, as defined in the draft conclusion, could only refer to judicial decisions of courts or tribunals established by law, as at the current stage the quality of a decision should be the primary consideration when assessing whether it was a subsidiary means. The category could also include decisions of quasi-judicial bodies, such as human rights treaty bodies or compliance committees established under multilateral environmental agreements. In addition, there should be no hierarchy between the decisions of different courts or bodies. In that regard, the decisions of national courts should not be excluded from the scope of the Commission's work.

71. Regarding the category of any other subsidiary means, proposed in subparagraph (c) of draft conclusion 2, her delegation questioned whether at the current stage unilateral acts of States and legally binding resolutions of international organizations should be included in that category. Her delegation was of the view that single unilateral acts were only binding on their authors, and therefore did not consider that they readily constituted subsidiary means for the determination of rules of international law. Parallel or uniform unilateral acts of multiple States, on the other hand, might be relevant to the formation of customary international law but not as subsidiary means. Her delegation would therefore appreciate further clarification as to whether unilateral acts could serve as both a formal source of international law and as a subsidiary means for the determination of rules of international law.

72. Her delegation also suggested that the Special Rapporteur should address non-legally binding decisions of international organizations and treaty bodies as a particular form of action by States that could be identified as a subsidiary means. Treaty bodies were relevant in that they were a framework within which States sought to discuss and review the implementation of a treaty and the decisions they adopted could contribute to the identification, interpretation and application of rules of international law. The starting point for determining the legal effect of a decision adopted by a treaty body should always be the treaty concerned and any applicable rules of procedure. A focus on non-legally binding resolutions and decisions of international organizations would also help to clarify the relationship between the various subsidiary means. Non-legally binding agreements and instruments did not

produce legal effects by themselves and could not be considered a formal source of law or of international legal obligations. However, they were capable of producing indirect legal effects or having a direct impact on State practice. They might do so as preparatory acts in connection with a legally binding instrument, as interpretative guidance for such binding instruments, or as subsidiary means for the determination of rules of international law.

73. Her delegation supported the general criteria for the assessment of subsidiary means provided in draft conclusion 3. In that respect, it did not believe that greater weight should be attached to decisions and teachings that were collectively supported by groups of judges or groups of experts, such as the members of the Commission.

74. Turning to the topic "Succession of States in respect of State responsibility", she said that her delegation had taken note of the Commission's decision to establish a Working Group to discuss the way forward and of the preponderance of views within the Working Group for the shift to a Working Group-led process, with the goal of producing a final report. Her delegation supported the Working Group's recommendation that a decision on the way forward be taken only at the seventy-fifth session, in order to allow more time for reflection, as well as its recommendation that the Commission should not proceed with the appointment of a new Special Rapporteur. Her delegation would not support an outcome of the work on the topic in the form of draft articles, principles, conclusions or guidelines; a final report would be a suitable outcome.

75. **Mr. Hernandez Chavez** (Chile), speaking on the topic "Subsidiary means for the determination of rules of international law", said that his delegation shared the view expressed in the first report of the Special Rapporteur (A/CN.4/760) that the Commission's study should be based on Article 38 of the Statute of the International Court of Justice, the authoritative statement on the subject. The aim of the Commission's work should be to offer guidance to States, international organizations, courts and tribunals and all those called upon to use subsidiary means to determine the rules of international law. The Commission should not merely reiterate what it had said previously in various studies in which the study of subsidiary means was referenced or contemplated. His delegation therefore concurred with the view expressed by other delegations, when they had assessed in 2021 and 2022 the appropriateness of including the topic in the Commission's long-term programme of work, that the Commission's consideration of the topic should be in line with its prior work on the sources of international law.

76. In his report, the Special Rapporteur had noted that the Commission could take a narrow (traditional) or a broad (modern) in considering the scope and outcome of the topic. His delegation shared the Commission's view, contained in its report (A/78/10) that the category of subsidiary means for the determination of rules of international law was not necessarily exhaustive, as there was no express indication in Article 38 of the Statute of the International Court of Justice that subsidiary means were limited to judicial decisions and teachings. It therefore welcomed the study of other subsidiary means for the determination of rules of international law, and agreed with the Special Rapporteur that "judicial decisions" should be broadly understood to include advisory opinions, as they were used by States and international courts as subsidiary means, together with judgments and other decisions.

77. Indeed, given that there was not a system of precedent (*stare decisis*) in international law, the judgments of international courts and tribunals were only binding on the parties of the relevant cases. Nonetheless, their potential use as subsidiary means had been generally recognized. In the case of advisory opinions, their content and relevance might also justify their value as subsidiary means. The category "teachings" generally referred to the individual and collective work of scholars. As indicated by the Special Rapporteur in his report, texts produced by State-empowered or State-created bodies, such as the Commission itself, should be considered separate from the "teachings of publicists" and could also be considered subsidiary means.

78. His delegation supported the methodology proposed by the Special Rapporteur, which included a careful examination of practice and literature. Concerning the need expressed by some Commission members to include more diverse sources and references in more languages and from the various regions of the world and legal traditions in the consideration of the topic, his delegation suggested that minimum common standards should be established in order to ensure that those sources could be studied and weighted in the same way when contrasting and comparing them.

79. With regard to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Drafting Committee, his delegation approved of the text of draft conclusion 1 (Scope), including the formulation that the draft conclusions concerned "the use of" subsidiary means, which was more reflective of the optional rather than imperative wording used in the Statute of the International Court of Justice in reference to subsidiary means, instead of the phrase "are to be used". His

delegation also supported the use of the phrase “rules of international law”, as opposed to “rules of law” contained in the Statute, as it was consistent with title of the topic and the focus of the draft conclusions was on determining the rules of international law and not the rules of law generally.

80. Draft conclusion 2 proposed three categories of subsidiary means for the determination of rules of international law: decisions of courts and tribunals, teachings, and any other means generally used to assist in determining rules of international law. The first two were based on and tracked Article 38, paragraph 1 (*d*), of the Statute, while the third addressed the fact that there were other means used generally in practice to assist in the determination of rules of international law. His delegation agreed with the view expressed in the commentary to the draft conclusion that decisions were to encompass advisory opinions and any orders issued as part of incidental or interlocutory proceedings. That view was also in line with the Commission’s opinion concerning the identification of customary international law.

81. With respect to teachings, his delegation supported the decision to eschew the wording of the Statute and to simply use the word “teachings”, which necessarily entailed studies that embodied the term and that stood as cases or examples of works with influence on the determination of international law. The reference to teachings therefore did not apply to just any studies, but to those of either individual scholars or groups of scholars who had had influence on the determination of international law. Care should be taken with respect to excessively broadening the definition of the term “teachings” with a view to being able to include works which, as a result of technological advancements, were not expressed in written or audio-visual formats.

82. It would therefore be useful to examine whether products generated by artificial intelligence, essentially using the work of other authors as inputs, could be considered teachings or other subsidiary means. The criteria established to accord weight to the various subsidiary means would be of the utmost importance when assessing products generated using artificial intelligence. His delegation agreed that the work of private expert bodies should be considered in detail in future, as long as the documents consulted had been produced under the auspices of official institutions that were internationally renowned. As previously noted, his delegation supported the Special Rapporteur’s broad approach, which allowed for the inclusion of the category of any other means generally used to assist in determining rules of international law.

83. Referring to the draft conclusions proposed by the Special Rapporteur, he said that his delegation welcomed the various criteria for the assessment of subsidiary means for the determination of rules of law set out in draft conclusion 3. The weight to be accorded to the “quality of the evidence presented” criterion, in the words of the Special Rapporteur as expressed in his report, depended on the care and objectivity with which the subsidiary means had been drafted, the sources relied upon and the stage reached in the Commission’s work. The question of quality was a complex one, as the quality of a text depended not just on the above-mentioned criteria, but also on the circumstances and context in which it was produced. His delegation therefore agreed with the view expressed by the Commission in its report that there might be insufficient practice supporting those criteria at the current stage.

84. Recalling the risk that different international tribunals could issue conflicting decisions, which had occurred on a number of occasions, and that that issue had not been addressed in the Commission’s prior work on the fragmentation of international law, his delegation suggested that it would be useful to clarify in the commentary to draft conclusion 3 or to that of future draft conclusions the weight that had been accorded to such decisions in State practice. Lastly, his delegation agreed with the suggestion that the Commission elaborate on the distinction between the supplementary means of interpretation in the Vienna Convention on the Law of Treaties and the subsidiary means for the determination of rules of international law.

85. **Mr. Carvalho** (Portugal), speaking on the topic “Subsidiary means for the determination of rules of international law”, said that his delegation had consistently expressed its satisfaction with the attention devoted to the topic in the Committee and found that the Commission’s study made a particularly relevant contribution to the codification and progressive development of international law, and to the mitigation of the negative consequences of fragmentation of international law. It was essential that States and other relevant actors have a basic common understanding of how subsidiary means were expected to be applied, which would enhance legal certainty.

86. It was well known that, for several reasons, in the practice of international law, the decisions of national courts and tribunals, teachings and other means, including State practice, that were most often invoked as subsidiary means for the determination of rules of international law came from certain countries, and that most scholarly writings relating to international law were of authors from certain regions. In that regard, the history of international law had shown that there was a

risk that certain views on, and interpretations of, international law would be universalized; the current context was no exception. The Commission should be cautious when advancing its work on the topic.

87. Referring to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Drafting Committee, he said that the categories of subsidiary means set forth in draft conclusion 2 included decisions of courts and tribunals, teachings, and any other means generally used to assist in determining rules of international law. While decisions of courts and tribunals were established subsidiary means, more discernible guidance was required concerning the indication in draft conclusion 4 (Decisions of courts and tribunals) that decisions of national courts might be used, in certain circumstances, to the same effect. States should be made aware in a rigorous manner of the circumstances in which decisions by national courts, potentially those of other States, could influence their international obligations and the international obligations of other States. An explanation of the parameters that enabled national court decisions to function as auxiliary sources would generally be beneficial.

88. Draft conclusion 5 (Teachings) stated that "teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law." His delegation welcomed that guidance, which provided much-needed clarity to all States. It also welcomed the Commission's attention to the need for national, gender and linguistic diversity, which his delegation considered of the utmost importance.

89. The Commission should substantially deepen its analysis of the category described as "any other means generally used to assist in determining rules of international law". Portugal considered the fragmentation of international law a matter of concern and would not wish to see States provided with undefined or insufficiently defined legal sources which could give rise to a wide variety of claims. Stability and predictability were important for the relationship between States and other subjects of international law. In that regard, the Commission's discussions would be particularly useful if they provided relevant actors with a clear idea of what to expect. Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice was not exhaustive by design, which made it malleable and adaptable to help advance the understanding of international law. The use of subsidiary means in the practice of international courts and in the exercise of consolidation of legal practice undertaken in those forums required careful consideration.

90. His delegation therefore hoped that the Commission's discussions would result in a comprehensible and useful definition of those subsidiary means and their scope, amplitude and applicability. It took note of the examples given of possible other means for the determination of rules of international law, which included unilateral acts of States, resolutions or decisions of international organizations, agreements between States and international enterprises, religious law, equity and soft law, but questioned their relevance in the current context. His delegation was not convinced that all of the examples given were unequivocally subsidiary means or that it was in the interests of the international community to establish them as such. His delegation hoped that the Commission's study would translate into a settled international understanding of each of the subsidiary means, rather than a blurring of the lines between the sources of international law and subsidiary means.

91. Turning to the topic "Succession of States in respect of State responsibility", he said that his delegation took note of the establishment of a Working Group on the topic and thanked the Commission for not only providing an overview of the state of play concerning the topic, but also identifying more than one alternative approach for advancing its work. While the lack of coherent and consistent international practice on the topic complicated any exercise of codification, much valuable and enriching work had been carried out under the guidance of the Special Rapporteur since the inclusion of the topic in the Commission's programme of work in 2017. His delegation was confident that the Commission, after further deliberation in its next session, would find the best way to propose a meaningful and useful outcome for the topic.

92. **Mr. Fallah Assadi** (Islamic Republic of Iran), referring to the topic "Subsidiary means for the determination of rules of international law", said that his delegation welcomed the Special Rapporteur's first report (A/CN.4/760) and the memorandum prepared by the Secretariat (A/CN.4/759). The inclusion of the topic in its programme of work would enable the Commission to continue its efforts to clarify the sources of international law. However, given that the Commission's established practice was to refer texts to the Drafting Committee only following several Special Rapporteur's reports, the provisional adoption by the Drafting Committee of five draft conclusions on the basis of the first report of the Special Rapporteur, and

before any comments or observations had been received from Member States, seemed premature. Moreover, the Special Rapporteur's report appeared to be focused on the progressive development, rather than the codification, of international law. Given that Article 38 of the Statute of the International Court of Justice reflected customary international law, it was axiomatic that subsidiary means for the determination of rules of international law were supplementary, ancillary, auxiliary or secondary sources of law.

93. With regard to the Special Rapporteur's report, the argument that Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice was non-exhaustive in nature and scope was not persuasive and lacked sufficient reasoning. As for the terminology employed, it was not clear how "the practice of international courts and tribunals" was different from "judicial decisions". Additionally, his delegation considered that decisions of courts served as subsidiary means and also as evidence of the practice of States. However, such State practice could constitute a rule of customary international law only if it was consistent, widespread and grounded in *opinio juris*, because, in such situations, State practice would intersect with international custom.

94. In order for judgments of national courts to be considered for the purposes of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, they must have been subject to consistent and widespread application. The consent of States played a pivotal role in generating international legal obligations. Despite the critiques and challenges that had been put forward, international law remained a State-centric system. Judicial decisions could contribute to the formation of a rule of customary international law only if they were consistent with established principles and rules of international law and were in widespread application, reflecting the legal traditions of the various legal systems of the world. If a judicial decision was contrary to an established rule of international law, it would not contribute to the formation of a rule of customary international law, even if certain States considered it to have been in widespread application.

95. Unilateral acts of States and resolutions or decisions of international organizations were two distinct sources of obligations that were considered additional subsidiary means. The further study and analysis of those additional means would be required, in the light of developments in State practice and international jurisprudence. While resolutions and decisions of international organizations best fell under the scope of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, there could be an argument for categorizing them under paragraph 1 (*a*), concerning international conventions, in part because although a resolution of an international organization was not a treaty per se, it derived its legal authority from a general international convention, namely the constituent instrument of the organization.

96. Setting aside the argument about the formal sources of international law, some resolutions were sources of obligations for States and thus had legal effects. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had stated that: "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule." Thus, the Court had found that some, but not all, General Assembly resolutions could amount to legal norms.

97. When using proceedings before international courts and tribunals to identify State practice, a distinction should be drawn between pleadings and the speech of State agent. The legal arguments in pleadings were intended to support a party's case in a specific inter-State dispute, with a particular legal and factual background, and did not necessarily reflect State practice. In contrast, the speech of a State's agent reflected both State practice and the official position of the State. There would also be logic in distinguishing between written and oral pleadings, given that written pleadings tended to be signed and submitted by State agents, while oral pleadings were usually made by counsel and advocates. An *amicus curiae* brief submitted to a national or international court or tribunal by an organ or agency of the State, or an officer or agent of the State, in a case concerning international law could, in principle, be considered to reflect State practice and the official position of the State.

98. While it might initially appear that the "judicial decisions" and "teachings" referred to in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice were placed on the same footing, judicial decisions should be given more weight in principle and in practice. They could also be used to elucidate a rule of law, as James Crawford had suggested in *Brownlie's Principles of Public International Law*, noting that: "judicial decisions … are regarded as evidence of the law". The Commission itself made more use of judicial

decisions than teachings. It appeared, therefore that there was a normative difference between those two subsidiary means. As the Special Rapporteur had indicated in his report, that issue had come up during the drafting of the Statute of the Permanent Court of International Justice by the Advisory Committee of Jurists, with Albert de Lapradelle, the French member of the Advisory Committee, taking the view that "jurisprudence was more important than doctrine, since the judges in pronouncing sentence had a practical end in view".

99. That reasoning was logical and persuasive. As the Special Rapporteur had correctly pointed out, the International Court of Justice had cited teachings on only a few occasions. Moreover, such teachings as had been cited did not represent the principal legal systems of the world, as the global South had been neglected. In that regard, his delegation wished to highlight the importance of Islamic legal systems, which were the principal legal systems of many countries and should be given due attention. When teachings were used, the works of prominent and pioneering expert groups, such as the Institute of International Law and the International Law Association, should be given much greater weight than those of individual scholars.

100. Some international lawyers and judges had opined that the phrase "determination of rules of law" in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice referred to the elucidation of the existing law (*lex lata*), as opposed to the creation of new law (*lex ferenda*). However, such a view left no role for international courts and tribunals in the progressive development of international law. Yet, they did play an important role in that regard, as evidenced by the many contributions made by the International Court of Justice to the progressive development of international law. His delegation agreed with the Special Rapporteur that the formal "subsidiary" status of judicial decisions belied in practice their fundamental role and importance in the development and consolidation of international law.

101. While separate or dissenting opinions of individual judges to decisions of the International Court of Justice were likely equivalent to "teachings" rather than "judicial decisions", it would be useful to further examine whether there was any sort of hierarchy between the individual opinions of international judges and the opinions and writings of scholars. The reports and opinions of Special Rapporteurs on thematic issues and situations could not, in principle, be considered to constitute a source of international law, since Special Rapporteurs might not be publicists at all, let alone the "highly qualified publicists" referred to in Article 38 of the Statute of the International Court of Justice.

102. The term "judicial decisions" covered judgments, orders and other decisions handed down by courts of law, including national courts. It did not, however, encompass the decisions of arbitral tribunals. Jurists had long debated whether the term "judicial decisions" would be inclusive of advisory opinions. His delegation agreed with the view that advisory opinions were judicial decisions, but not with the view that they were *erga omnes* statements. Nevertheless, *obiter dicta* in such opinions might have *erga omnes* character. For example, in its 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice had stated that "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction."

103. His delegation had serious doubts about the proposition that "judicial decisions", as envisaged in Article 38, paragraph 1 (*d*), of the Statute of the Court, encompassed the decisions or general comments of the human rights treaty bodies, given that the word "judicial" clearly referred to the functions of a court or tribunal. The Secretariat corroborated his delegation's position in that regard in its memorandum (A/CN.4/759). The Commission should take into account the limitations regarding the application of subsidiary means for the determination of rules of law, in particular the limitation set out in Article 59 of the Statute, which stipulated that "the decision of the Court has no binding force except between the parties and in respect of that particular case."

104. His delegation agreed with the view expressed by the Special Rapporteur in his report that the appropriate form of output of the Commission's work on the topic was draft conclusions with commentaries, which would be in line with the Commission's handling of its work on Article 38, paragraph 1 (*b*) and (*c*), of the Statute of the Court.

105. Referring to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, he said, with regard to draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), that his delegation did not share the view expressed by the Commission in paragraph (2) of its commentary to the draft conclusion that subsidiary means were "part and parcel of customary international law." Subsidiary means could contribute to the formation of a rule of customary international law only

if they were in widespread application and consistent with established principles and rules of international law. The structure of draft conclusion 3 (General criteria for the assessment of subsidiary means for the determination of rules of international law) was clear and well organized.

106. Addressing the draft conclusions provisionally adopted by the Drafting Committee, he said, with regard to paragraph 2 of draft conclusion 4 (Decisions of courts and tribunals), which stated that "decisions of national courts may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law", the Special Rapporteur should, in his future reports, elaborate on what those "certain circumstances" were. Draft conclusion 5 (Teachings) went further than the version of the draft conclusion proposed by the Special Rapporteur in his report towards rectifying the long-standing neglect of the global South, as it contained an explicit reference to the views of persons from "the various legal systems and regions of the world". However, the criteria to be used when assessing the representativeness of teachings should be given further consideration, as the current criteria of "gender and linguistic diversity" were not decisive.

107. As for the topic "Succession of States in respect of State responsibility", he said that his delegation welcomed the decision to establish a Working Group to consider the way forward. It supported the Commission's decision to produce draft guidelines, rather than draft articles, as the outcome of its work. His delegation recalled its remarks on the topic delivered at the seventy-seventh session of the General Assembly, and would provide additional comments and observations on the draft guidelines being considered by the Drafting Committee in due course.

108. **Mr. Escobar Ullauri** (Ecuador) said that his delegation welcomed the positive start to the work on the topic "Subsidiary means for the determination of rules of international law", including the work by the Special Rapporteur, the International Law Commission and the Drafting Committee. It also welcomed the memorandum prepared by the Secretariat (A/CN.4/759). His delegation welcomed the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission and the Drafting Committee. Given that the purpose of the Commission's work was to clarify how subsidiary means should be used to determine rules of international law, Ecuador considered that draft conclusions, accompanied by commentaries, would be the appropriate form of the outcome of the work on the topic. The Commission should take into account and build on the work already done on related topics, in particular "Identification of customary international law", "General principles of law" and "Peremptory norms of general international law (*jus cogens*)".

109. Subsidiary means were not a source of international law in and of themselves. For Ecuador, the term "sources of international law" referred to the legal process and the form through which a rule of law came into existence in the international legal system, namely treaties, international custom and general principles of law. Categorizing subsidiary means as material or documentary sources of international law would therefore be wrong and would create unnecessary confusion. Judicial decisions and teachings were subsidiary means to which a court or tribunal resorted to determine the existence and content of a rule of international law originating in a treaty, customary international law or a general principle of law. The Commission should clarify how subsidiary means were used and determine whether there existed subsidiary means other than judicial decisions and teachings. In doing so, it should base its work on Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, while also taking into account the practice of States, jurisprudence and teachings.

110. Judicial decisions played an important role as a subsidiary means for determining the existence and content of rules of international law. At times, they also served as the basis for the formulation of such rules. As the Commission had said in the past, the term "decisions" included judgments and advisory opinions, as well as orders on procedural and interlocutory matters, while the term "international courts and tribunals" referred to any international body exercising judicial powers. Decisions of national courts and tribunals could also be used, in certain circumstances, as subsidiary means for the determination of rules of international law. However, as the Commission had indicated in the context of other topics, caution was called for when seeking to rely on decisions of national courts and tribunals in the current context, inter alia because they might reflect a particular national perspective and national courts might sometimes lack international law expertise.

111. As with decisions of courts and tribunals, teachings were not themselves a source of international law, but might offer guidance, in certain circumstances, for the determination of the existence and content of rules of international law. Similarly, caution was warranted with respect to the use of teachings, which varied in quality based on the analysis conducted and might reflect national positions. That word of caution should be reflected in the draft conclusions. The works

of expert bodies established by States or international organizations could not be classed as decisions of courts and tribunals, since such bodies did not exercise judicial powers, nor could they be considered teachings, given their intergovernmental mandates. The works of expert bodies could be considered as other subsidiary means for the determination of rules of international law.

112. To his delegation, the suggestion in the Special Rapporteur's report that resolutions and decisions of international organizations and unilateral acts of States could be considered subsidiary means fell outside the ambit of the topic. However, resolutions adopted by international organizations or intergovernmental conferences could reflect or serve as evidence for determining the existence of a rule of customary international law or for determining the recognition of a general principle of law. Those resolutions might also reflect a customary rule or a general principle of law. For example, in its resolution 95(I), the General Assembly had recognized the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal as legal principles.

113. Addressing the topic of succession of States in respect of State responsibility, he said that his delegation welcomed the Commission's decision to establish a Working Group to consider the way forward for the complex topic. It also appreciated the fact that the Commission, based on the recommendation of the Working Group, had decided to re-establish the open-ended Working Group at its seventy-fifth session, with a view to undertaking further reflection on the way forward for the topic on the basis of a working paper identifying the various complexities surrounding the provisions adopted by the Commission thus far and outlining the options open to the Commission, to be prepared by the Chair of the Working Group in collaboration with interested members of the Working Group. The Working Group's analysis should enable the Commission to decide how to move forward with the topic. In that regard, his delegation considered that the best way forward would be to establish a new Working Group, co-chaired by various members of the Commission, to address the substantive aspects of the topic and prepare a final report for the Commission's consideration.

114. **Ms. Jantarasombat** (Thailand), referring to the topic of subsidiary means for the determination of rules of international law, said that her delegation reiterated the view it had expressed at the seventy-sixth session of the General Assembly (see A/C.6/76/SR.18), along with various delegations at that session that the work of the International Law Commission on the topic should be as pertinent for international practice as possible. To that end, it should not be a purely academic exercise but rather one that included a careful appraisal of the utility of subsidiary means and addressed the question of how States could make use of the outcome of the work on the topic.

115. With regard to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, she said that subparagraph (a) of draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law) provided that subsidiary means included decisions of national and international courts and tribunals. Paragraph 2 of draft conclusion 4 (Decisions of courts and tribunals), as provisionally adopted by the Drafting Committee, further specified that decisions of national courts could be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law.

116. In that regard, her delegation wished to highlight the distinction between the use of national court decisions as evidence of State practice, and thus a constituent element of customary international law, and their use as a subsidiary means for the determination of rules of international law. While the former function was undisputed, the latter should be approached with caution. It was also imperative to acknowledge the difference between dualist and monist legal systems in that regard. In dualist States, such as Thailand, international law must be transposed into national law before it could be enforced by national courts. Thus, decisions of national courts in dualist States would generally not pertain directly to the application and interpretation of international law and, consequently, could not easily be used as subsidiary means.

117. Concerning draft conclusion 2, subparagraph (c), which provided that subsidiary means included "any other means generally used to assist in determining rules of international law", her delegation noted that the formulation was open-ended and that the Special Rapporteur intended to consider, inter alia, works of expert bodies and the resolutions of international organizations in his analysis of other subsidiary means in his third report. However, Thailand remained unconvinced of the existence of subsidiary means other than the two enumerated in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, namely judicial decisions and teachings of the most highly qualified publicists of the various nations. The focus of paragraph 1 (*d*) was on those two means, with the term "subsidiary means" being employed to describe how they were to be used. The Commission should limit its analysis to those two means, which had been

explicitly approved by States, because if it attempted to identify additional subsidiary means, it risked misinterpreting the Statute and could create confusion.

118. With regard to draft conclusion 3 (General criteria for the assessment of subsidiary means for the determination of rules of international law), her delegation noted with appreciation the effort made by the Commission and the Special Rapporteur to identify some illustrative factors for determining the weight of subsidiary means. Regarding the weight to be given to judicial decisions, Thailand was of the view that consistency of prior judicial decisions on the specific legal issue in question could also provide evidence of the existence of international law and should therefore be included in the list of general criteria.

119. Turning to the topic "Succession of States in respect of State responsibility", she said that, should the Commission decide to continue its substantive consideration of the topic and produce draft guidelines, those draft guidelines must be grounded in widely accepted State practice and have practical legal significance.

120. **Ms. Orosan** (Romania), addressing the topic "Subsidiary means for the determination of rules of international law", said that her delegation was satisfied with the general direction of the discussions on the topic within the International Law Commission. In particular, it welcomed the fact that the Commission was not limiting its focus to decisions of courts and tribunals and teachings, but was also considering other possible means that could assist in determining rules of international law.

121. Referring to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, she said, with regard to draft conclusion 1 (Scope), that her delegation commended the Commission for establishing, in paragraph (4) of its commentary, the central role of Article 38, paragraph 1, of the Statute of the International Court of Justice. Romania also welcomed the clarification provided by the Commission, in paragraph (6) of the commentary, as to the nature of subsidiary means, which were not sources of law per se, but "are used to assist or to aid in determining whether or not rules of international law exist and, if so, the content of such rules". Paragraph (11) of the commentary required further refinement, to clarify that the study focused on means that assisted in determining the existence and content of rules of international law, and not on means that assisted in interpreting rules of international law whose existence and content had already been determined.

122. With regard to draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), her delegation agreed with the Commission's assessment, expressed in its report (A/78/10), that the list of subsidiary means mentioned was not exhaustive. It encouraged the Commission to further clarify the role of the works of expert bodies and the resolutions and decisions of international organizations as subsidiary means. The Commission should emphasize the particular relevance of the decisions of the International Court of Justice, on questions of general international law, without creating a hierarchy that diminished the relevance of the decisions of other international courts and tribunals.

123. However, a hierarchy between the decisions of international and the decisions of national courts could be useful, given the intrinsic differences between international and national legal systems. That hierarchy was reflected in draft conclusion 4 (Decisions of courts and tribunals), as provisionally adopted by the Drafting Committee, which overlapped with and built upon draft conclusion 2. Her delegation also agreed with the Commission that advisory opinions and orders resulting from non-contentious procedures should be considered "decisions" for the purposes of the draft conclusions. While such decisions did not have an executorial character, they bore the authoritative character of the body that issued them.

124. Concerning draft conclusion 3 (General criteria for the assessment of subsidiary means for the determination of rules of international law), Romania agreed with the statement in paragraph (2) of the commentary that the chapeau of the draft conclusion provided that "reference should be made to various factors when assessing the weight of subsidiary means as part of the determination of rules of international law." It was appropriate for the term "should" to be used, since, as noted in paragraph (4) of the commentary, it "indicates that reference to the criteria is not mandatory, although in many cases, it would plainly be desirable."

125. Turning to the topic "Succession of States in respect of State responsibility", she said that her delegation remained critical of the inclusion of the topic in the Commission's current programme of work and considered that the outcome of its work should be a final report.

126. **Mr. Košuth** (Slovakia), referring to the topic of subsidiary means for the determination of rules of international law, said that draft conclusions were the appropriate form for the outcome of the topic, considering the past practice of the International Law

Commission on similar topics. His delegation commended the Special Rapporteur for his thorough first report (A/CN.4/760) and his efforts to ground his work in State practice. It also wished to highlight the importance of taking the views of Member States into account in the work on the topic.

127. Referring to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, he said that his delegation welcomed the neutral approach taken in respect of the definition of the scope of the draft conclusions in draft conclusion 1, which stated that "the present draft conclusions concern the use of subsidiary means for the determination of rules of international law." However, it would be worth examining whether the phrase "the use of" captured all aspects that the Special Rapporteur intended to address in his work, such as the origin and function of subsidiary means.

128. Slovakia welcomed draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law). The division of subsidiary means into three categories would promote a meaningful and structured discussion. His delegation had no objection to the inclusion of a non-exhaustive list of subsidiary means in the draft conclusion.

129. Regarding draft conclusion 3 (General criteria for the assessment of subsidiary means for the determination of rules of international law), his delegation would appreciate clarification as to how and to what extent each criterion in the list was relevant to each of the categories of subsidiary means set forth in draft conclusion 2. The Commission should also further elaborate on the question of the assessment of the weight of different subsidiary means and clarify whether there was any hierarchical or other relationship between the assessment criteria. If a hierarchical relationship did exist, the criteria should be listed in order of weight, beginning with "the quality of the reasoning".

130. Referring to the draft conclusions provisionally adopted by the Drafting Committee, he said that while it was certainly important to refer to decisions of the International Court of Justice in draft conclusion 4 (Decisions of courts and tribunals), caution should be exercised with regard to setting different standards for or establishing a hierarchy between the decisions of different judicial institutions. While the authority of the International Court of Justice was undeniable, the decisions of international courts and tribunals with specific expertise might be more relevant in certain cases. The wording concerning the decisions of national courts should also be more precise. In that regard, his delegation supported the need expressed by some members of the Commission for additional criteria specifically applicable to the decisions of national courts. It also recalled the need for differentiation between the criteria for the assessment of judicial decisions.

131. Slovakia noted with satisfaction the Drafting Committee's inclusion of the phrase "the various legal systems and regions of the world" in draft conclusion 5 (Teachings). Indeed, in order to develop, interpret and apply international law in such a way as to give it a strong foundation and ensure wide support, it was essential not only to listen to "coinciding" views of scholars, but also to ensure that those "coinciding" views were representative of the various legal systems and regions of the world.

132. As for the topic "Succession of States in respect of State responsibility", it was regrettable that work had not progressed since the Commission's seventy-third session. While Slovakia considered that it would have been most appropriate for the Commission to adopt a set of draft articles as the outcome of the topic, as originally intended, it had been ready to support the decision taken by the Commission at its seventy-third session to prepare draft guidelines instead. Given the significant support expressed by Member States at the previous session of the General Assembly for the elaboration of draft guidelines, it was difficult to understand why the Commission had not proceeded in that direction, but had instead decided to establish a Working Group to consider the way forward for the topic. Should the Commission follow the Working Group's recommendation not to appoint a new Special Rapporteur, the Working Group should steer the work on the topic towards the conclusion of the first reading of the draft guidelines.

133. **Ms. Rubinshtein** (Israel) said that, given the disinformation and exaggeration in comments made within the Committee and in other United Nations forums concerning the war between Israel and Hamas, her delegation wished to provide the Committee with verified, first-hand information about the latest developments.

134. First and foremost, Israel called for Hamas to release the 240 Israeli hostages whom it had now been holding for 26 days. Among the hostages were 33 children, the youngest of whom was only nine months old. On 7 October 2023, 1,400 Israelis had been brutally murdered, and 5,400 had been wounded. In addition, 250,000 Israeli civilians had been internally displaced since that date. Hamas had fired more than 8,500 missiles indiscriminately into Israeli towns, striking homes, hospitals and other specially protected objects, as well as civilians, around the country.

135. Israel had repeatedly stated that its fight was not with the Palestinian people. It was making every effort to avoid civilian casualties and was going above and beyond the letter of the law in taking every precautionary measure possible to mitigate unintended harm to civilians. Her Government was closely monitoring the humanitarian situation in Gaza and making every effort to provide for the civilian population. It had increased the flow of water from Israel to Gaza and was now providing over 28 million litres of potable water every day. It had also facilitated the transfer of humanitarian aid through the Rafah Crossing. As at the previous night, 260 trucks carrying food, medicine and other aid supplies had entered Gaza, and 80 more were expected to enter that day. That rate of provision of aid would continue, and was expected to grow.

136. Under the law of arm conflict, Israel had no obligation to provide for the needs of its enemy, Hamas. Hamas was in possession of 500,000 litres of fuel, which it was using to power its terrorist underground tunnels and to fire rockets into Israel, instead of providing power for hospitals or the civilian population. Any claims regarding fuel shortages in Gaza should be addressed to Hamas, and demands should be made for Hamas to return the fuel it had stolen to the residents of the Gaza Strip and the United Nations Relief and Works Agency for Palestine Refugees in the Near East.

137. Hamas systematically used civilian infrastructure, including schools, hospitals and mosques, to conduct its military activities, which was contrary to international humanitarian law. As an example, the Israel Defense Forces had released intelligence information the previous week regarding the extensive military base and terrorist tunnels under the Shifa' Hospital in Gaza City. Hamas had been using the civilians in Gaza as human shields for 16 long years. It was so well embedded in the civilian population that an entire city of terror had been built under a hospital. Such illegal actions should be unequivocally condemned by any State that cared about the Palestinians in Gaza. Her delegation implored the Committee not to be deceived by erroneous and deceptive information.

138. The topic of subsidiary means for the determination of rules of international law, like all other topics concerning sources of international law addressed by the International Law Commission, was of great importance. There was a crucial distinction between sources of law and subsidiary means for the determination of rules of international law. With regard to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, it was important to note that judicial decisions and teachings could aid in the determination of such rules, but were not sources of law in and of themselves, as recognized in draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law).

139. It might be necessary to emphasize, in the commentary to draft conclusion 3 (General criteria for the assessment of subsidiary means for the determination of rules of international law), that the significance of national or municipal judicial decisions in determining rules of international law depended on the position of the court in the domestic judicial hierarchy. Furthermore, while the general wording in draft conclusion 2, subparagraph (c), concerning "any other means generally used to assist in determining rules of international law", was comprehensible, the provision seemed overly broad and perhaps too flexible. For a more balanced approach, it might be advisable to insert the words "and consistently" after the word "generally".

140. Israel generally agreed with the criteria proposed by the Commission in draft conclusion 3 for assessing the weight of subsidiary means. However, when assessing a given work, it would also be appropriate to take into account the objectivity and impartiality of those involved in its creation, in order to determine its overall credibility.

141. **Mr. Šinigoj** (Slovenia), addressing the topic "Subsidiary means for the determination of rules of international law", said that subsidiary means were essential tools for the interpretation and application of the principles and norms of international law. Subsidiary means, which, pursuant to Article 38, paragraph (1) (*d*), of the Statute of the International Court of Justice, included judicial decisions and the teachings of the most highly qualified publicists, played a vital role in the identification of customary and conventional norms. However, greater clarity was needed regarding their use and their relationship to sources of international law. In that regard, Slovenia supported the International Law Commission's efforts to promote consistency in the use of subsidiary means, which would contribute to the consistency, predictability and stability of the law.

142. Concerning the topic of succession of States in respect of State responsibility, he said that Slovenia recognized the crucial importance of establishing clear and transparent rules to guide the complicated process of succession. The rules embodied in the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts had proved to be crucial during the dissolution of the

former Yugoslavia. Convinced that the question of State succession in respect of State responsibility was just as important as the matters addressed in those Conventions, his delegation strongly supported the sustained efforts that had been made towards the comprehensive codification of all aspects of the relevant law.

143. The results of the substantial groundwork carried out by the Commission under the former Special Rapporteur, including the Special Rapporteur's five comprehensive reports and the draft guidelines provisionally adopted by the Drafting Committee, should serve as the basis for the future efforts of the Commission and the Committee on the topic. The appointment of a new Special Rapporteur was imperative, to enable the Commission to continue its commendable work. The primary objective should be to make progress with regard to the draft guidelines.

144. **Mr. Kirk** (Ireland), speaking on the topic "Subsidiary means for the determination of rules of international law", said that his delegation welcomed the rigorous and in-depth work of the Special Rapporteur and also the excellent memorandum prepared by the Secretariat (A/CN.4/759). The section of the memorandum concerning the International Law Commission's understanding of the use of judicial decisions for the determination of rules of international law was particularly useful.

145. With regard to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, his delegation appreciated the broad focus on the meaning, content and consequences of the use of subsidiary means. It agreed with the Commission's articulation of the auxiliary function of subsidiary means, particularly in paragraph (6) of the commentary to draft conclusion 1 (Scope). Ireland agreed that subsidiary means did not constitute a separate or distinct source of international law, but were rather a means of elucidating the law.

146. Regarding draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), his delegation welcomed the Commission's decision to refer simply to "teachings" in subparagraph (b), rather than to "teachings of the most highly qualified publicists of the various nations", as used in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, in response to the view expressed by some members of the Commission that the formulation "most highly qualified publicists" might be historically and geographically charged. Indeed, the current discussion offered an opportune platform to also examine the "most highly qualified publicists of the various nations" reference contained in Article 38, paragraph 1 (*d*), of the Statute.

147. It was worth noting that despite the decision to refer simply to "teachings" in draft conclusion 2, the "most highly qualified publicists of the various nations" wording was replicated in draft conclusion 5, as proposed by the Special Rapporteur in his first report (A/CN.4/760). His delegation wondered whether, in the modern legal context, it might be more appropriate to use the word "States", rather than "nations", perhaps in a more inclusive formulation, such as "international community of States". That usage would be consistent with in subparagraph (e) of draft conclusion 3, where the word "States" was used. His delegation suggested that a consistent approach be adopted regarding the use of the word "State", rather than "nation", in the draft conclusions and more broadly. His delegation would submit written comments on the topic in due course.

148. **Ms. Motsepe** (South Africa), addressing the topic of subsidiary means for the determination of rules of international law, said that her delegation applauded the Special Rapporteur for ensuring that his first report (A/CN.4/760) contained significant deliverables. In particular, it welcomed the draft conclusions on subsidiary means for the determination of rules of international law proposed by the Special Rapporteur, three of which had been provisionally adopted by the International Law Commission. Her delegation considered the definition of the nature and scope of subsidiary means to be particularly important, since it could shed light on the features, purposes and objectives of the Commission's output.

149. Regarding the scope and utility of the topic, her delegation concurred with the view expressed by the Special Rapporteur in his report that it was important to examine the issue of conflicting judicial decisions on the same legal question. While it was agreed that, in general, there was no notion of precedent under international law, there was nonetheless a need to ensure a degree of uniformity and certainty. In that connection, her delegation would welcome further discussions on the issue of hierarchy among courts or decisions.

150. As for the methodology for determining the rules of international law, her delegation supported the Special Rapporteur's position that materials from all States, regions and legal systems of the world should be used and that judgments from national courts could also be used. However, it had concerns about the wording of subparagraph (c) of draft conclusion 4 (Decisions of courts and tribunals), which provided that: "Decisions of national courts may be used, in certain circumstances, as subsidiary means for the identification or determination

of the existence and content of rules of international law.” It would be prudent for the Commission to elaborate on the nature of those “circumstances” in the commentary to the draft conclusion.

151. Overall, her delegation was pleased with the Special Rapporteur’s approach to the topic, including with regard to the main issues he intended to address and the categories of subsidiary means that he had identified, particularly judicial decisions and teachings, and looked forward to the Commission’s future substantive work on the topic.

152. The topic of succession of States in respect of State responsibility was of significant relevance to the international community. Her delegation had taken note of the Commission’s decision to establish a Working Group to consider the way forward for the topic; its decision not to proceed with the appointment of a new Special Rapporteur; and its decision to re-establish the Working Group at the seventy-fifth session with a view to undertaking further reflection, and making a recommendation, on the way forward for the topic. Her delegation would support further consideration of the topic by the Commission with a view to clarifying the legal issues that States affected by succession might encounter. The Commission’s work on the topic would complement its earlier work that had resulted in the adoption of the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. Her delegation encouraged the Working Group to continue its deliberations on the way forward and looked forward to its recommendations in that regard.

The meeting rose at 1 p.m.