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Chair: Ms. Lungu (Vice-Chair) . . . . . (Romania)

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23-20894 (E)

In the absence of Mr. Chindawongse (Thailand), Ms. Lungu (Romania), Vice-Chair, took the Chair.

The meeting was called to order at 4.30 p.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. **Ms. Silva Walker** (Cuba), referring to the topic "Subsidiary means for the determination of rules of international law", said that her delegation appreciated the International Law Commission's work, which should be aimed at establishing greater legal certainty in the use of subsidiary means. In that regard, her delegation was concerned about some of the broad formulations in the draft conclusions provisionally adopted by the Commission. In particular, it would be helpful if the Commission could elaborate on what was included in the category "any other means generally used to assist in determining rules of international law" proposed in subparagraph (c) of draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law).

3. Her delegation considered the general criteria for the assessment of subsidiary means proposed in draft conclusion 3 to be questionable. Furthermore, the draft conclusion did not establish whether there should be a hierarchy among those criteria or what should be done when there was a contradiction between two means of the same or different categories. In that respect, her delegation believed that the degree of acceptance by States should take precedence.

4. There was a view that declarations of recognition or non-recognition of a subsidiary means previously made by a State in a dispute should be treated in the same manner as international treaties. However, Cuba could not accept the use of unilateral political decisions of States as a means for determining rules of international law.

5. Her delegation would submit written comments on the topic in due course.

6. Turning to the topic "Succession of States in respect of State responsibility", she said that the responsibility of States for internationally wrongful acts in respect of State succession should be assessed in the light of the draft articles on succession of States in respect of State responsibility, which the Commission had provisionally adopted at its seventy-third session in the form of draft guidelines. Her delegation advocated the maintenance of consistency between the Commission's work on the current topic and its previous work, in particular its articles on responsibility of States for internationally wrongful acts, in terms of both terminology and substance. State practice on succession of States in respect of State responsibility was scarce and varied; it depended on context and was characterized by the political interests of those involved. The absence of decisions of national and international courts and tribunals that would offer decisive contributions to the issue also posed challenges to establishing a legal position on the matter. Her delegation therefore suggested that the question of responsibility be examined carefully in the light of each specific type of succession.

7. Cuba agreed with the idea that an underlying general guideline applicable to State succession could be established to the effect that State responsibility did not automatically transfer to a successor State, except in specific circumstances. Lastly, her delegation welcomed the form of draft guidelines adopted by the Special Rapporteur and the Commission on the topic.

8. **Ms. Jiménez Alegría** (Mexico), speaking on the topic "Subsidiary means for the determination of rules of international law", said that her delegation agreed with the Special Rapporteur's proposal, referred to in the report of the International Law Commission (A/78/10), to develop draft conclusions that were consistent with the practice of the Commission in relation to other topics dealing with the sources of international law and related issues. The Commission's work on the topic offered an opportunity to clarify the role of subsidiary means, using Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice as a starting point. Her delegation therefore welcomed the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission and supported the Special Rapporteur's proposal, referred to in his report (A/CN.4/760), that a multilingual bibliography be included as part of the Commission's work.

9. With regard to draft conclusion 1, her delegation supported the proposed text, which set out the scope of the draft conclusions. Her delegation was of the view that the word "*auxiliar*" in Spanish, which was consistent with the wording used in the Spanish version of the Statute, and the word "subsidiary" in English, clearly established the ancillary role of the means under discussion.

10. Draft conclusion 2 represented an important update to the categories of subsidiary means for the determination of rules of international law provided for in the Statute. The term “decisions of courts and tribunals” was broader than the term “judicial decisions” used in the Statute, in that it could include, as indicated in paragraph (6) of the commentary, final judgments rendered by a court, advisory opinions and other interlocutory decisions, such as decisions on provisional measures issued by the International Court of Justice. In addition, by referring to the category “teachings” without the qualifying phrase used in the Statute concerning the qualifications of publicists, which represented a historically and geographically charged notion, the draft conclusion emphasized the quality of the research, whether it was in a publication, an audiovisual material or another format. Her delegation would devote particular attention to the development of the draft conclusion in respect of that issue and underscored the importance of promoting more regional, linguistic and gender diversity in the production and distribution of teachings.

11. Her delegation considered the inclusion of an additional category of subsidiary means in subparagraph (c) of the draft conclusion to be an appropriate innovation, as it allowed for the possibility of identifying other means in addition to decisions of courts and tribunals and teachings. The Commission had already analysed the works of expert bodies and treaty bodies in its work on other topics. That discussion should continue, taking into consideration the work of each particular body, the number of States it comprised, its mandate, and whether the interpretation it produced was of a legal nature and was ultimately accepted as such by the States parties to the treaty in question. With regard to draft conclusion 3, her delegation noted that, as indicated in the commentary, the criteria for the assessment of subsidiary means set out therein were intended to be illustrative rather than mandatory. Her delegation found them useful for identifying a methodology in that regard.

12. With regard to draft conclusion 4 (Decisions of courts and tribunals), as provisionally adopted by the Drafting Committee, Mexico attributed significant weight to the decisions of international courts and tribunals as subsidiary means. The Supreme Court of Mexico had even determined that criteria emanating from the jurisprudence of the Inter-American Court of Human Rights, where that jurisprudence was based on an interpretation of the American Convention on Human Rights, were binding when the *pro personae* principle was adopted; that included cases to which Mexico was not a party.

13. Turning to the topic “Succession of States in respect of State responsibility”, she said that her delegation took note of the establishment of the Working Group on the topic and supported its continued analysis of options for the way forward, with a view to concluding work on the topic. That work was based on well-established principles of international law and was consistent with the Commission’s previous work, in particular with regard to State responsibility for internationally wrongful acts. Her delegation was flexible with regard to the final form of the Commission’s work on the topic.

14. **Mr. Peñaranda** (Philippines), speaking on the topic “Subsidiary means for the determination of rules of international law” and referring to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the International Law Commission, said that his delegation noted that draft conclusion 1 (Scope) contained the phrase “the use of subsidiary means” rather than indicating that subsidiary means “are to be used” or referring to “the way in which subsidiary means are used”. That choice of words emphasized that the Statute of the International Court of Justice did not actually obligate the Court to apply subsidiary means. His delegation also took note of the two meanings of “determination”, as described in the commentary to the draft conclusion: “determination” as a noun meant “ascertainment” and was limited to a determination in the sense of finding out what was the existing law, while the verb “determine” could mean to decide or to state the law.

15. With respect to draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), his delegation agreed with the use in subparagraph (a) of the phrase “decisions of courts and tribunals”, rather than the phrase “judicial decisions” used in the Statute, so that the draft conclusions would cover a wider set of decisions from a variety of bodies. Indeed, the decisions of other types of adjudicative bodies and State-created treaty bodies might have value as subsidiary means. His delegation also supported the position, set out in the commentary, that “courts and tribunals” encompassed both international courts and tribunals and national courts, sometimes referred to as municipal courts. Concerning subparagraph (b), his delegation could go along with the use of the word “teachings”, without the phrase “of the most highly qualified publicists of the various nations” used in Article 38, paragraph 1 (*d*), of the Statute, as that formulation was considered to be elitist and too heavily focused on the status of the individual as an author rather than the quality of the individual’s work. In that

regard, his delegation noted that draft conclusion 3 contained relevant general criteria for the assessment of subsidiary means. In the case of teachings, the quality of the reasoning should prevail over the renown of an author. The focus on demonstrated expertise rather than on the renown or the titles of a particular individual was a step in the right direction, particularly in relation to promoting diversity of sources.

16. When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, inter alia, their degree of representativeness, the quality of the reasoning, the expertise of those involved, the level of agreement among those involved, the reception by States and other entities and, where applicable, the mandate conferred on the body. His delegation noted the Special Rapporteur's view, as set out in the Commission's report (A/78/10), that the weight and authority of subsidiary means would depend on, inter alia, the legal context, the way in which they were drafted, the expertise of the individuals involved in the drafting, the mandate of the institution that had produced the material and the level of agreement within and beyond the relevant body. Reference should also be made to the degree of representativeness in the context of the draft conclusions and when assessing subsidiary means. That could include considerations of equitable geographic distribution, legal traditions and gender.

17. In general, concerning scope, the Commission's work should reflect, in addition to decisions and teachings, the extensive practice of international lawyers using a variety of additional subsidiary means and materials to determine rules of international law. His delegation agreed with the view referred to in the Commission's report that the category of subsidiary means for the determination of rules of international law was not exhaustive and supported the proposal that further analysis be done on the works of expert bodies and resolutions of international organizations. On the other hand, it recommended caution regarding the inclusion of certain types of unilateral acts capable of producing legal obligations as part of additional subsidiary means that could be used to determine rules of international law.

18. Commenting on various points made in the Commission's report, he said that his delegation welcomed the clarification regarding the role and status of subsidiary means and their relationship to the sources of international law and noted that Commission members had agreed that the main function of subsidiary means was to assist in the determination of rules. His delegation also noted with interest the view of some Commission members that the term used for "subsidiary means" in Article 38, paragraph 1 (*d*), in the French and Spanish versions of the Statute expressly referred to the auxiliary function of subsidiary means, which confirmed that they were not, in themselves, sources of international law. His delegation could support a proposal for the inclusion of a draft conclusion concerning the functions of subsidiary means, which could also refer to the use of subsidiary means to interpret other sources or to determine the effects and legal consequences of certain rules. A draft conclusion addressing the relationship between subsidiary means and sources of international law could provide further clarity.

19. Concerning the draft conclusions provisionally adopted by the Drafting Committee, his delegation was prepared to consider a proposal to include in draft conclusion 4 (Decisions of courts and tribunals) additional criteria specifically applicable to the decisions of national courts. In that regard, a starting point could be the decisions of national courts applying international law that could be considered as constituting subsidiary means. With respect to draft conclusion 5 (Teachings), his delegation agreed with the Commission's view, referred to in its report, that the lack of diversity in teachings should be addressed. Considerations of diversity and representativeness should not, however, come at the expense of the other criteria for assessing subsidiary means set out in draft conclusion 3, including the quality of reasoning. His delegation wondered whether qualifying the category of teachings, in draft conclusion 5, with the phrase "especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world" could have the effect of limiting the range of relevant teachings that could be used as subsidiary means.

20. Turning to the topic "Succession of States in respect of State responsibility", he said that his delegation welcomed the Commission's decision to re-establish the Working Group on the topic at its seventy-fifth session, with a view to undertaking further reflection on the way forward and reporting to the Commission for further deliberation and decision. His delegation looked forward to hearing from the Commission on the future of work on the topic.

21. **Mr. Ikondere** (Uganda), referring to the topic "Subsidiary means for the determination of rules of international law", said that his delegation welcomed the addition of the topic to the International Law Commission's current programme of work and fully supported the appointment of the Special Rapporteur for the topic, who was one of two experts from Africa playing a leadership role in the capacity of Special

Rapporteur within the Commission. The Commission's study of the topic was a natural next step in the context of its previous work on the sources of international law referred to in Article 38 of the Statute of the International Court of Justice. His delegation welcomed the Special Rapporteur's first report (A/CN.4/760), which was scientifically rigorous and balanced and provided a comprehensive overview of the key issues relating to the topic.

22. His delegation wished to express general support for the draft conclusions on subsidiary means for the determination of rules of international law. With regard to the draft conclusions provisionally adopted by the Commission, his delegation considered draft conclusion 1 (Scope) to be appropriate, as it was in line with the Commission's prior work on Article 38 of the Statute and the sources of international law, in particular the draft conclusions on general principles of law and the conclusions on identification of customary international law.

23. His delegation welcomed the discussion on draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law) and agreed with the wording of the chapeau and subparagraph (c), which indicated the non-exhaustive nature of the list of categories set out in the draft conclusion. His delegation also commended the wording used in subparagraphs (a) and (b), which broadened the categories of subsidiary means mentioned in Article 38, paragraph 1 (*d*), of the Statute. In particular, by omitting the qualifier "judicial" from the category "decisions of courts and tribunals", the Commission was maintaining consistency with its work on general principles of law and customary international law. His delegation welcomed the possibility that a wider set of decisions from a variety of bodies could be covered by the draft conclusions. Similarly, by using the word "teachings" rather than the phrase "teachings of the most highly qualified publicists", used in Article 38, paragraph 1 (*d*), of the Statute, the Commission was following the formulation it had used in its work on general principles of law and customary international law. Furthermore, his delegation agreed with the view expressed by the Commission in the commentary to the draft conclusion that the phrase "most highly qualified publicists" was "a historically and geographically charged notion that could be considered elitist".

24. His delegation supported the inclusion of subparagraph (c) of the draft conclusion, which provided that subsidiary means included any other means generally used to assist in determining rules of international law. His delegation had taken note of the debate in the Commission regarding that category of means and considered that the works of expert bodies and resolutions and decisions of international organizations should be included in the category, but that unilateral acts should not. In terms of the works of expert bodies, his delegation supported the inclusion of the work of both public and private expert bodies, such as the Institute of International Law, the International Law Association and the International Committee of the Red Cross. Given that the work of State-empowered bodies, such as the Human Rights Committee, the special procedures of the Human Rights Council and the Commission, had a different quality owing to the involvement of States, his delegation encouraged the Commission to explore the role of those bodies, including how its own previous work had been relied on for the determination of rules of international law.

25. His delegation acknowledged the usefulness of the general criteria for the assessment of subsidiary means provided for in draft conclusion 3 and especially commended the Commission on the inclusion of subparagraph (a), which referred to the degree of representativeness of the materials used as subsidiary means. His delegation hoped that that provision would foster a more inclusive approach to assessing the weight of subsidiary means, whereby the approaches of the various legal systems and regions of the world, especially those that were typically underrepresented, would be taken into account. His delegation supported the commentary to draft conclusion 3, wherein the Commission cautioned that reference to the criteria was not mandatory, that their use would be dependent on the circumstances under which they were being used and that they would need to be applied flexibly.

26. His delegation took note of the wording of draft conclusions 4 and 5 as provisionally adopted by the Drafting Committee and would wait until the commentaries thereto were submitted before making more substantive comments. It had taken note of the discussion in the Commission regarding the lack of diversity in the teachings that were usually consulted, which had the effect of excluding scholars from Africa and the global South more generally. His delegation commended the Commission for including in draft conclusion 5 a reference to gender and linguistic diversity in the context of assessing the representativeness of teachings, which constituted a significant advance, with gender diversity being included in a product of the Commission for the first time in its history. Noting that the Commission had also discussed whether to include a reference to racial diversity in the draft conclusions, his delegation fully supported the inclusion of such a reference in the draft conclusion.

27. His delegation welcomed the Commission's discussion, referred to in its report (A/78/10), regarding whether it should examine, in the context of the current topic, the unity and coherence of international law, sometimes referred to as the question of fragmentation, at least in terms of the possible conflict between judicial decisions issued by different courts and tribunals. That issue had arisen in practice: for example, the International Court of Justice, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, and the International Tribunal for the Former Yugoslavia, in *Tadić*, had issued conflicting decisions on essentially the same legal question relating to the appropriate test for State responsibility. His delegation agreed with those Commission members who considered that the issue of fragmentation was worth clarifying and appreciated the Special Rapporteur's invitation for input from States on that issue and others, and his commitment to take careful account of their views. Uganda was of the opinion that the Commission had not substantively addressed the fragmentation of international law, which was of great practical importance, especially in view of the risk of conflicting judicial decisions arising from the proliferation of international courts and tribunals. The Commission's work on the topic of subsidiary means for the determination of rules of international law presented an opportunity to clarify the issue of fragmentation, should the Commission wish to do so, since the topic partly concerned judicial decisions and seemed to logically cover the issuance of different decisions on the same legal issue by different international courts.

28. Lastly, his delegation hoped that the Special Rapporteur and the Commission, in their future work on the topic, would examine diverse jurisprudence and judicial and quasi-judicial decisions of African States and of African subregional and regional courts and tribunals and their possible role in determining rules of international law.

29. **Ms. Bhat** (India) said that her delegation recognized the importance of the topic "Subsidiary means for the determination of rules of international law" and believed that the International Law Commission's work on it would contribute to the progressive development of international law and would be in line with its other studies on the sources of international law. However, the Commission should take into account the limitations applicable to subsidiary means, in particular those reflected in Article 59 of the Statute of the International Court of Justice. Furthermore, its work should be rigorous, prudent, inclusive and balanced, and should be focused on the analysis of Article 38 of the Statute and a wide range of State practice.

30. In that context, her delegation believed that the most important question to be addressed was whether subsidiary means were limited to judicial decisions and teachings of the most highly qualified publicists of the various nations or whether they also encompassed additional subsidiary means, taking into account the non-exhaustive nature of Article 38, paragraph 1 (*d*), of the Statute of the Court and, more importantly, the practices of States and international courts and tribunals. Her delegation was aware that there was uncertainty regarding some aspects of subsidiary means and their relationship to the sources of international law and that there was a debate concerning the nature and place of judicial decisions, and the role of teachings, in the determination of rules of international law. Consequently, it was imperative that the Commission help to bring clarity, predictability and uniformity to the use of subsidiary means. Her delegation looked forward to the progress of work on the topic, in particular with regard to the role of the works of jurists or publicists, State-created or State-empowered bodies, private expert bodies, and regional and other codification bodies as subsidiary means for the determination of rules of international law.

31. Turning to the topic "Succession of States in respect of State responsibility" and referring to the fifth report of the Special Rapporteur (A/CN.4/751), she said that the Special Rapporteur had aptly focused on problems relating to a plurality of injured successor States or of responsible successor States, with particular emphasis on the issue of shared responsibility. Her delegation took note of the Special Rapporteur's proposed restructuring of the draft articles on succession of States in respect of State responsibility into Parts I to IV, entitled, respectively, general provisions; reparation for injury resulting from internationally wrongful acts committed by the predecessor State; reparation for injury resulting from internationally wrongful acts committed against the predecessor State; and content of international responsibility. Her delegation also took note, in particular, of draft article 2 (e) [(f)] containing a definition of "States concerned", draft article 4 [6] (No effect upon attribution), draft article 6 [7 bis] (Composite acts) and draft article 8 [X] (Scope of Part II), as well as the entirety of Parts III and IV, set out in annex III to the report.

32. Concerning the conclusion drawn by the Special Rapporteur on the issue of plurality of States involved in continuing or composite acts, the Drafting Committee needed to further examine questions relating to shared responsibility when a predecessor State continued to

exist and also when the obligation of cessation applied in the case of a composite act or a continuing act which occurred during the succession process.

33. Her delegation shared the Special Rapporteur's view that the draft articles, now revised by the Drafting Committee to be draft guidelines, on succession of States in respect of State responsibility were subsidiary in nature and that priority should be given to agreements between the States concerned. However, geographically diverse sources of State practice should be taken into consideration and highlighted so as to make clear the relationship between State practice and each provision.

34. **Mr. George** (Sierra Leone), speaking on the topic "Settlement of disputes to which international organizations are parties", said that his delegation welcomed the International Law Commission's decision to change the title of the topic from "Settlement of international disputes to which international organizations are parties" to "Settlement of disputes to which international organizations are parties", thereby expanding the scope of the topic and making it clear that they would address both international disputes and non-international disputes.

35. With regard to the draft guidelines on settlement of disputes to which international organizations are parties provisionally adopted by the Commission, his delegation wished to highlight the nexus between draft guideline 1 (Scope) and draft guideline 2, which provided for the use of the terms "international organization", "dispute" and "means of dispute settlement", all three of which served to delimit the scope of the topic. As the Commission was still in the early stage of its work on the topic and its output would take the form of draft guidelines, his delegation agreed with the Commission's decision not to qualify the term "dispute" further. His delegation noted that international organizations might be parties to a variety of disputes at both the international and the national levels. However, their disputes with private parties were likely to arise under national law or specifically stipulated applicable rules. When addressing disputes under national law, the Commission would need to examine the question of the immunity of international organizations in the light of human rights considerations, in particular the need for victims to obtain remedies for harm caused to them.

36. His delegation noted that the definition of "international organization" in subparagraph (a) of the draft guideline departed from the definition in article 2 of the articles on the responsibility of international organizations. While his delegation appreciated the reasons for that departure, consistency was a critical issue that the Commission should take into consideration with a view to limiting the fragmentation of international law. His delegation welcomed the clarification that an international organization was an entity possessing its own international legal personality but did not see the need to specify that it should have at least one organ capable of expressing a will distinct from that of its members.

37. His delegation noted that the definition of the term "dispute" in the draft guideline built on the definition contained in the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case and was sufficiently general to encompass legal disputes arising at the international level and under national law whether of a public or private law nature. However, it would be helpful if the Commission could explain why the definition only referred to disagreements on a point of law or fact and not to mere policy disputes and why the fact that a dispute on a point of law might have political aspects did not deprive it of its legal character.

38. His delegation noted that the definition of the term "means of dispute settlement" was inspired by Article 33 of the Charter of the United Nations but excluded the words "of their own choice" contained in that Article. In his delegation's view, there was merit in including the element of choice in the definition and clarifying in the commentary that there were situations where choice might be absent. His delegation was also of the view that, although the term appeared in the draft guideline on use of terms, that should not rule out the possibility of its being given more substantive treatment elsewhere in the draft guidelines if necessary.

39. His delegation welcomed the Special Rapporteur's intention, as stated in his first report (A/CN.4/756), to analyse in detail, in his second report on the topic, the practice of the settlement of "international" disputes to which international organizations were parties, mostly comprising disputes arising between international organizations and States. In deciding whether to address certain issues in more detail in his third report, the Special Rapporteur should be guided by the needs of States as evidenced by their response to his second report.

40. Referring to the topic "Prevention and repression of piracy and armed robbery at sea", he said that draft articles were the most appropriate form for the Commission's output, given that the topic fell within the realm of criminal law, and would allow the Commission to provide States with practical legal solutions to the problems posed by piracy and armed robbery at sea. That could be done without affecting the integrity of the United Nations Convention on the Law of the Sea.

41. With regard to the draft articles on the prevention and repression of piracy and armed robbery at sea provisionally adopted by the Commission, his delegation welcomed the Commission's approach, in draft article 1 (Scope), of studying the two crimes of piracy and armed robbery at sea and looked forward to the Commission's further qualification of those crimes and their geographical scope in subsequent draft articles. With regard to draft article 2 (Definition of piracy), his delegation welcomed the Commission's overall goal, as reflected in paragraph 1 of the draft article, of preserving the integrity of the internationally agreed definition of piracy contained in article 101 of United Nations Convention on the Law of the Sea and the thorough explanations of key terms in the commentary to the draft article, which clarified the Commission's understanding of the scope and content of the definition. His delegation also welcomed the Commission's rationale for the inclusion of paragraph 2 of the draft article, stipulating that paragraph 1 should be read in conjunction with the provisions of article 58, paragraph 2, of the Convention, which referred to articles 88 to 115 of the Convention.

42. Concerning draft article 3 (Definition of armed robbery at sea), his delegation welcomed the Commission's decision to use the term "armed robbery at sea", in line with the practice of the Security Council, instead of "armed robbery against ships", used in resolution A.1025(26) of the Assembly of the International Maritime Organization. It also welcomed the inclusion in the draft article of inchoate offences relating to armed robbery at sea.

43. Turning to the topic "Subsidiary means for the determination of rules of international law", he said that Article 38, paragraph 1, of the Statute of the International Court of Justice was widely recognized as the most authoritative and complete statement of the sources of international law. Under paragraph 1 (*d*), the Court was directed to apply "judicial decisions" and "teachings of the most highly qualified publicists of the various nations" as subsidiary means for the determination of rules of law when deciding disputes between States in accordance with international law. His delegation therefore welcomed the Commission's aim of clarifying the key issues that had arisen in practice in relation to that directive. For the Commission's output on the topic to be useful, it must take into account developments in State and international practice since 1945.

44. With regard to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, his delegation viewed draft conclusion 1 (Scope) as introductory in nature and found it to be clear. In draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), subparagraphs (a) and (b) were rooted in, and largely tracked the wording of, Article 38, paragraph 1 (*d*) of the Statute of the International Court of Justice. The formulations used by the Commission mirrored those used in its conclusions on identification of customary international law and its draft conclusions on general principles of law. With regard to subparagraph (b), his delegation agreed with the Commission's decision to use the term "teachings", omitting the phrase "of the most highly qualified publicists" used in Article 38, paragraph 1 (*d*). That formulation was rooted in a particular historical time; it did not reflect the modern character of international law and could be considered elitist. It also focused not on the scientific quality of an individual's work, but on the individual.

45. The category of subsidiary means set out in subparagraph (c) of the draft conclusion, namely "any other means generally used to assist in determining rules of international law", merited study and would necessarily include any subsidiary means that had developed in practice since 1945, in particular certain resolutions of international organizations and the works of expert bodies established by States, such as the human rights treaty bodies; private expert bodies, such as the Institute of International Law; and hybrid or mixed bodies, such as the International Committee of the Red Cross. His delegation agreed with the Special Rapporteur's proposal, referred to in the Commission's report (A/78/10), that unilateral acts of States be excluded, since such acts were not subsidiary means for the determination of rules of international law.

46. With regard to draft conclusion 3, which addressed the weight to be given to materials that were already considered subsidiary means, the inclusion of the "degree of representativeness" among the criteria for the assessment of subsidiary means served to recognize the importance of taking into account the approaches of the various legal systems and regions of the world. The criterion could be applied flexibly if the rules of international law under consideration were bilateral or regional in nature. His delegation hoped that the Commission would also address concerns regarding the representativeness of teachings in terms of geographic, gender, racial and linguistic considerations. The Commission should also address the issue of conflicting decisions of international courts and tribunals, which was an example of the fragmentation of international law.

47. His delegation noted with interest the provisional adoption by the Drafting Committee of draft

conclusions 4 and 5 and looked forward to the adoption of the commentaries thereto. With regard to the Commission's renewed request for States to submit written comments on the topic, Sierra Leone had already submitted examples of its national practice.

48. Turning to the topic "Succession of States in respect of State responsibility", he said that his delegation took note of the Commission's decision to establish a Working Group to consider the way forward for the topic and looked forward to a decision being taken in that regard at the Commission's next session.

49. **Ms. Abd Karim** (Malaysia), referring to 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 draft conclusion 1 (Scope) was silent on the meaning of the phrase "subsidiary means". In that regard, as noted in the Commission's report (A/78/10), members of the Commission had expressed agreement with the Special Rapporteur that subsidiary means were not sources of international law, and had also emphasized that the function of subsidiary means was to assist in the determination of rules of international law. Given that the purpose of the draft conclusions was to provide greater clarity on the use of subsidiary means, her delegation was of the view that the meaning of the phrase "subsidiary means" and its effect needed to be reflected in the draft conclusion.

50. With regard to draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), her delegation noted the Commission's decision to use the term "teachings" in subparagraph (b) instead of the phrase "teachings of the most highly qualified publicists of the various nations", used in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. The Commission had indicated in the commentary that it viewed the phrase from the Statute as focusing too heavily on the status of the individual as an author, as opposed to the scientific quality of the individual's work, but it had used the phrase in the conclusions on identification of customary international law and the draft conclusions on general principles of law. Therefore, in her delegation's view, "teachings" in the sense of Article 38, paragraph 1 (*d*), were not reflected in the draft conclusion. Furthermore, since the formulation used in the draft conclusion referred to teachings in a general sense, it could cause uncertainty regarding the threshold that would need to be met in considering whether teachings could be considered one of the categories of subsidiary means.

51. Subparagraph (c) of the draft conclusion provided for a category of subsidiary means comprising "any other means generally used to assist in determining rules of international law", which the Commission had left open in order not to foreclose the possibility of other subsidiary means besides those provided for in subparagraphs (a) and (b). However, that non-exhaustive formulation seemed to place excessive emphasis on the broad scope of categories of subsidiary means. The only qualifier was that other subsidiary means should be means "generally used to assist in determining rules of international law". It was unclear what level and significance of assistance would need to be provided by such means in order to meet the requirements of that qualifier. The Commission should therefore include additional qualifiers for greater clarity. Furthermore, although the category of subsidiary means provided for in subparagraph (c) was left open, the Commission had used the word "include" in the chapeau of the draft conclusion, suggesting that there were other categories of subsidiary means. Her delegation therefore sought clarification as to what other categories of subsidiary means there could be apart from those indicated in subparagraphs (a), (b) and (c).

52. With regard to draft conclusion 3, her delegation noted that the six criteria for the assessment of subsidiary means for the determination of rules of international law listed therein were to be used as general factors for determining the relative weight to be given to subsidiary materials under draft conclusion 2 but were not intended for determining whether a particular material was to be considered a subsidiary means. Considering that members of the Commission had expressed agreement with the Special Rapporteur that subsidiary means were not sources of international law but merely assisted in the determination of rules of international law, it was not clear what the purpose of weighing subsidiary means was. Furthermore, the criteria were subjective in nature, since they were not all applicable to all the categories of subsidiary means. That subjectivity could result in inconsistency in interpretations, potentially undermining the reliability of the assessment in practice, and could lead to varying interpretations of the weight and authority of subsidiary means in different cases.

53. With regard to the draft conclusions provisionally adopted by the Drafting Committee, her delegation's comments were of a preliminary nature, given that no commentaries thereto had been provided. Draft conclusion 4 overlapped with draft conclusion 2, as both reflected the fact that the decisions of international courts and tribunals as well as those of national courts comprised a category of subsidiary means. However,

draft conclusion 2 referred to such decisions as "subsidiary means for the determination of rules of international law", while draft conclusion 4 referred to them as "subsidiary means for the determination of the existence and content of rules of international law". Clarification was needed regarding the difference between the expressions "rules of international law" and "existence and content of rules of international law". The same clarification was needed in respect of draft conclusion 5 (Teachings), which also contained the phrase "existence and content of rules of international law". Furthermore, as indicated in the Commission's report, in addition to the criterion that teachings should reflect "the coinciding views of persons with competence in international law from the various legal systems and regions of the world", some Commission members had suggested other criteria that were similar to the criteria listed in draft conclusion 3, which included the quality of the reasoning and the reception by other entities. It would be helpful if the Commission could clarify whether draft conclusion 3 and draft conclusion 5 overlapped.

54. As the draft conclusions were interrelated, they should be read in their entirety to ensure that all concerns had been addressed. Her delegation therefore reserved the right to make further statements on all the draft conclusions once the full text was completed.

55. **Ms. Falconi** (Peru), speaking on the topic "Subsidiary means for the determination of rules of international law", said that the draft conclusions on subsidiary means for the determination of rules of international law would help to clarify the use of subsidiary means and their relationship to the sources of international law. Her delegation appreciated the systematic approach in the report of the Special Rapporteur (A/CN.4/760) to the use of subsidiary means to determine the existence and content of the rules of international law.

56. With regard to the draft conclusions provisionally adopted by the International Law Commission, her delegation fully supported draft conclusion 2, which set out the categories of subsidiary means for the determination of rules of international law. Given that the list of subsidiary means in Article 38 of the Statute of the International Court of Justice was not exhaustive, her delegation acknowledged the existence of the category of subsidiary means set out in subparagraph (c) of the draft conclusion, namely "any other means generally used to assist in determining rules of international law". Her delegation recognized the valuable contribution of the decisions of courts and tribunals and of teachings as subsidiary means for the determination of rules of international law. It also welcomed the broad and practical approach whereby the decisions of courts and tribunals were understood as encompassing the decisions of appropriate adjudicative bodies in addition to the International Court of Justice or other international courts, and not just final judgments rendered by a court, but also advisory opinions and any orders issued as part of incidental or interlocutory proceedings.

57. With regard to the topic "Succession of States in respect of State responsibility", her delegation took note of the recommendation of the Working Group, referred to in the Commission's report (A/78/10), that the Working Group be reconstituted at the seventy-fifth session of the Commission to continue its deliberations on the way forward for the topic. Her delegation trusted that the Working Group, in the working paper that it planned to produce, would weigh the challenges faced, the objectives pursued and the action needed, with a view to deciding on an appropriate way forward.

58. **Mr. Skachkov** (Russian Federation), speaking on the topic "Subsidiary means for the determination of rules of international law", said that it was critically important for the International Law Commission in its work on the topic to focus on explaining and clarifying established rules, rather than on advancing debatable new concepts that could ultimately result in the imposition of international legal obligations on States against their will. In particular, the Commission should not attempt to raise the status of subsidiary means to the level of secondary sources of law, treat judicial decisions as setting a precedent, or arbitrarily expand the range of subsidiary means. In that regard, some of the points contained in the Special Rapporteur's report (A/CN.4/760) raised questions. Nonetheless, his delegation was pleased to note that the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission thus far were fully consistent with Article 38 of the Statute of the International Court of Justice.

59. His delegation welcomed the Commission's detailed explanation of the subsidiary – in the sense of "auxiliary" or "supplementary" – role of subsidiary means in its commentary to draft conclusion 1 (Scope). It also agreed with the Commission's affirmation, in the commentary, that while judicial bodies had the right to apply subsidiary means, they were not obligated to do so. His delegation believed that the word "determination" in the phrase "for the determination of rules of law" in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice was used to mean "identification", not "establishment". That point needed to be more clearly reflected in the commentary or even in the text of the draft conclusions themselves.

His delegation also welcomed the Commission's confirmation in the commentary that there was no doctrine of judicial precedent in general international law. That observation should also be incorporated into the text of the draft conclusions.

60. With regard to subparagraphs (a) and (b) of draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law), the Commission had not reproduced verbatim the formulations used in Article 38 of the Statute of the International Court of Justice. Its arguments for doing so, as set out in the commentary to the draft conclusion, seemed reasonable. However, his delegation would not be able to fully assess that approach without first studying the text of the other draft conclusions yet to be proposed by the Commission. Similarly, it was difficult to comment on the criteria for assessing the weight of subsidiary means set out in draft conclusion 3. His delegation did not rule out the possibility that the criteria would apply differently to judicial decisions and teachings. The same was true of draft conclusions 4 and 5 as provisionally adopted by the Drafting Committee. His delegation assumed that those provisions would be supplemented with new draft conclusions setting out in greater detail the various aspects of the use of judicial decisions and teachings. Otherwise, their practical added value was doubtful.

61. In its future work on the topic, the Commission would need to correct the glaring imbalance in practice in favour of the judicial decisions and teachings of States with common law systems. That imbalance had come about for understandable reasons, but from a contemporary perspective it seemed anachronistic, and it would be difficult to correct, partly because, in the English-speaking world, subsidiary means played a particularly significant role in the determination of rules of law. English-speaking courts and authors tended to be far more active than their counterparts in Romano-Germanic legal systems in the identification of rules of law that were not codified. In addition, judicial decisions and teachings in the English language were much more easily accessible to the public than analogous materials in other languages. The Commission should develop criteria that would ensure that judicial decisions and teachings of "the various nations", as indicated in Article 38, paragraph 1 (*d*), were used as subsidiary means. The Commission should also consider whether the phrase "of the various nations" was applicable only to teachings. In his delegation's view, regardless of the exact wording of Article 38, national judicial decisions as a subsidiary means for the determination of rules of international law must also come from "the various nations".

62. The Commission must also examine the question of the potential existence of other subsidiary means besides judicial decisions and teachings. In doing so, it must take a careful and balanced approach, if only because, by acknowledging the existence of such new subsidiary means, the Commission would be substantively deviating from the text of Article 38. His delegation suggested that the Commission begin by studying in detail the traditional subsidiary means, namely judicial decisions and teachings, given that problems that needed to be addressed in relation to new subsidiary means would become more apparent as work progressed. At the current stage, particular care was required when considering the use as subsidiary means of such materials as decisions of international organizations and the comments of expert bodies, various types of special representatives, rapporteurs and other such mechanisms. Given that such organs and mechanisms had both legal and political functions, the Commission would need to establish criteria to enable the separation of those functions. Otherwise, there was a risk that decisions driven by political rather than legal considerations would be used as subsidiary means.

63. Regarding the five-year time frame set out by the Special Rapporteur in his report, his delegation suggested, as with other topics, that the Commission avoid setting artificial deadlines and focus instead on the quality of its output rather than the speed with which it was produced. The commentaries to the first three draft conclusions were exemplary in their length, style and presentation. By contrast, the Special Rapporteur's report was excessively long, and its level of detail distracted at times from the key ideas. His delegation encouraged the Special Rapporteur to keep his reports within the Commission's established length for such reports, as doing so would only improve their quality and reception. His delegation looked forward to the Commission's continued work on the topic.

64. With regard to the topic "Succession of States in respect of State responsibility", it was telling that the Working Group specifically established to consider the way forward for the topic had recommended that the Commission not appoint a new Special Rapporteur and that it defer consideration of the matter until its seventy-fifth session. The recommendation reaffirmed his delegation's position on the future of the Commission's work on the topic. In view of the paucity and lack of uniformity of relevant State practice and the different, sometimes contradictory, interpretations found in the doctrine, there was currently no need to develop international law rules in the area concerned. It was time for the Commission to conclude its work on the topic.

65. **Mr. Stellakatos Loverdos** (Greece), speaking on the topic "Subsidiary means for the determination of rules of international law", said that his delegation welcomed the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the International Law Commission. It also welcomed the selection by the Commission of draft conclusions as the form of output for its work on the topic, as that was consistent with the Commission's approach to prior related topics. His delegation also appreciated the consistent methodology applied by the Special Rapporteur.

66. With regard to the function of subsidiary means, it would be useful if the Commission could further analyse the distinction between subsidiary means and evidence of the existence of rules of international law. His delegation also wished to express its interest in the suggestion, reflected in the Commission's report (A/78/10), that the Commission elaborate on the distinction between the supplementary means of interpretation provided for in article 32 of the Vienna Convention on the Law of Treaties and the subsidiary means for the determination of rules of international law referred to in Article 38 of the Statute of the International Court of Justice.

67. Greece supported the approach taken in draft conclusion 2, which indicated that the list of categories of subsidiary means contained therein was not exhaustive. However, it was his delegation's opinion that the term "decisions of courts and tribunals" used in subparagraph (a) of the draft conclusion should encompass only decisions and judgments, including advisory opinions and orders, of organs established as courts or tribunals by the relevant international instruments and not those of other bodies of persons or institutions, which might fall under subparagraph (c). In that regard, in paragraph (6) of the commentary to the draft conclusion, the Commission had indicated that the term "decisions" included the views of a State-created treaty body issued in the context of individual complaints procedures. However, in paragraphs (15) to (17) of the commentary, the works of treaty-based expert bodies seemed to be viewed as "any other means generally used to assist in determining rule of international law". His delegation considered the latter option to be the more appropriate one and agreed with the Commission's position, as expressed in paragraph (14) of the commentary to draft conclusion 3, that the work of such bodies needed to be subject to further analysis. Further clarification was also needed regarding the use of the decisions of national courts as subsidiary means for the determination of rules of international law. Such use should be approached with caution and would need to be subject to additional criteria or requirements.

68. Regarding subparagraph (b) of the draft conclusion, Greece was particularly interested to note that, as indicated in the commentary, new materials, including those that might be developed in the future in the context of technological advancements, could be considered "teachings". Such advancements had enabled unprecedented access to and dissemination of international law jurisprudence and doctrine, which made it all the more important to establish criteria, such as those mentioned in draft conclusion 3, for assessing the validity and weight of the doctrine circulating online.

69. Regarding subparagraph (c) of the draft conclusion, which provided for the broad category of any other means generally used to assist in determining rules of international law, Greece welcomed the reference in the commentary to resolutions and decisions of international organizations. In his delegation's view, such means could contribute to the determination of rules of international law; that issue should be further examined.

70. His delegation noted with appreciation the Commission's clarification, in the commentary to draft conclusion 3, that the list of criteria for the assessment of subsidiary means contained in the draft conclusion was non-exhaustive. Nevertheless, the Commission might wish to clarify which criteria could be applied to specific categories of subsidiary means and consider the inclusion of additional criteria.

71. **Mr. Maeda** (Japan), referring to 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, in his delegation's view, Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice referred to judicial decisions and the teachings of the most highly qualified publicists of the various nations not as examples of subsidiary means for the determination of rules of law but as an exhaustive list of such means. However, the draft conclusions provided for an additional category of subsidiary means comprising "any other means generally used to assist in determining rules of international law". Japan believed that elements that were not within the scope of Article 38 could not be added to the list of subsidiary means without the Article being amended and asked the Commission to elaborate on what was included in the aforementioned additional category and on the assessment criteria used in the draft

conclusions and the commentaries thereto. The Commission should also discuss further the general criteria for the assessment of subsidiary means for the determination of rules of international law and provide a detailed explanation of the relationship between those criteria and the weight to be accorded to different subsidiary means.

72. With regard to the topic "Succession of States in respect of State responsibility", his delegation recalled that the form of the outcome of the Commission's work had been changed from draft articles to draft guidelines in view of the limited State practice on the issue concerned. However, his delegation would prefer the outcome to be in the form of a final report prepared by the Working Group on the topic. In future, the Commission should focus on topics that reflected the needs of States and the pressing concerns of the international community as a whole.

73. **Mr. Leal Matta** (Guatemala), referring to the topic "Subsidiary means for the determination of rules of international law", said that subsidiary means might not in themselves be primary sources of international law, but they played a vital role in the international legal system. In view of their inclusion in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, the International Law Commission's work on the topic would help the Court and other judicial organs entrusted with adjudicating the most significant disputes between States in the discharge of their functions, thereby bringing greater predictability and certainty to the way international law was applied in specific cases. It would also help to establish which subsidiary means could contribute to the determination of rules of international law in an area of legal theory in which certainty and uniformity of opinion were lacking. The proper identification of what fell into the category of subsidiary means was vital in order to provide the subjects of international law with the tools to understand and discharge their obligations fully. Recognizing that one of the mandates of the Commission was the progressive development of international law, his delegation also welcomed the idea of studying other categories of subsidiary means beyond those indicated in Article 38.

74. His delegation agreed with the view of the Special Rapporteur, as reflected in the Commission's report (A/78/10), that the category "judicial decisions" should include advisory opinions. International tribunals had already recognized that advisory opinions, including those having no binding force, were elaborated with the same legal rigour as decisions, and that they could play a significant role in clarifying the content of the rules of international law in specific cases. As indicated in Article 59 of the Statute of the International Court of Justice, decisions were binding only for the parties in a particular case and had no binding effect on third parties. Nonetheless, the fact that decisions could be used as subsidiary means had been generally recognized by various international tribunals.

75. With regard to the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, his delegation agreed with the general criteria for the assessment of subsidiary means listed in draft conclusion 3. In view of the constant evolution of the international community, it was necessary to draw upon subsidiary means to interpret the existing rules of international law in the light of current events. The establishment of criteria would be extremely helpful to States, international tribunals and international organizations in the application and interpretation of the rules of international law.

The meeting rose at 6 p.m.