United Nations A/CN.4/781

General Assembly

Distr.: General
29 January 2025

Original: English

**International Law Commission**
**Seventy-sixth session**
Geneva, 14 April–30 May and 30 June–31 July 2025

# Third report on subsidiary means for the determination of rules of international law

**By Charles Chernor Jalloh, Special Rapporteur***

* The Special Rapporteur would like to warmly thank Niccolò Ridi, Eirik Bjorge and Klyde Bedford for their assistance with the research for parts of the present report. All opinions and errors are his responsibility.

# Contents

# I. Introduction

## A. Addition of the topic to the programme of work

1. During its seventy-second session, in 2021, the International Law Commission decided to place the topic "Subsidiary means for the determination of rules of international law" in its long-term programme of work.[1] The General Assembly, during its seventy-sixth session, in 2021, adopted resolution 76/111,[2] in which it took note of the inclusion of the topic in the long-term programme of work.[3]

2. At its seventy-third session, in 2022, given the interest in the topic, the opening of space on the programme of work and the positive feedback of States, the Commission decided to move the topic to its current programme of work,[4] and appointed Mr. Charles Chernor Jalloh as Special Rapporteur for the topic.[5]

3. The Commission, at the same session, also requested information from States on their practices,[6] as well as two memorandums from the Secretariat, to be submitted over the course of the two subsequent sessions in 2023 and 2024 respectively.[7]

4. During the Sixth Committee debate at the seventy-seventh session, in 2022, of the General Assembly, States welcomed the Commission's decision to examine the topic of subsidiary means. The General Assembly, in its resolution 77/103 of 7 December 2022, took note of the Commission's decision to include the topic in the current programme of work.[8] It also drew the attention of Governments to the importance for the Commission of having their views on the various topics on its agenda, including subsidiary means for the determination of rules of international law.[9]

5. In response, the Kingdom of the Netherlands,[10] Sierra Leone[11] and the United States of America[12] submitted information on their national practice on subsidiary means in 2023. This was later followed by submissions received in 2024 from Ireland,[13] the Republic of Korea[14] and the United Kingdom of Great Britain and Northern Ireland.[15]

6. At its seventy-fourth session, in 2023, the Commission held a general debate based on the first report of the Special Rapporteur. The first report sought to comprehensively map out the main issues raised by the work of the Commission on the topic of subsidiary means for the determination of rules of international law, addressed issues of methodology which

[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 302 and annex.
[2] General Assembly resolution 76/111 of 9 December 2021, para. 7.
[3] *Ibid*.
[4] A/CN.4/SR.3583, p. 8.
[5] *Ibid*.
[6] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 29.
[7] *Ibid*., para. 245.
[8] General Assembly resolution 77/103 of 7 December 2022, para. 7.
[9] *Ibid*., para. 5.
[10] The Kingdom of the Netherlands, submission on subsidiary means for the determination of rules of international law (13 January 2023), *ibid*.
[11] Sierra Leone, submission on subsidiary means for the determination of rules of international law (18 January 2023), *ibid*.
[12] United States, submission on subsidiary means for the determination of rules of international law (12 January 2023), available on the website of the Commission, under the analytical guide for the present topic at https://legal.un.org/ilc/guide/1_16.shtml#govcoms.
[13] Ireland, submission on subsidiary means for the determination of rules of international law (5 March 2024), *ibid*. The Special Rapporteur is immensely grateful to the Irish delegation for their substantial submission, together with annexes, on this topic.
[14] Republic of Korea, submission on subsidiary means for the determination of rules of international law, *ibid*.
[15] United Kingdom, submission on subsidiary means for the determination of rules of international law (1 February 2024), *ibid*.

was to be grounded in practice, the theoretical foundations and the nature of subsidiary means and their relationship to the sources of international law, analysed the text and drafting history of Article 38 of the Statute of the International Court of Justice, and proposed the scope and outcome of the topic in the form of conclusions, accompanied with commentaries and a multilingual bibliography, as well as a tentative programme of work.[16] Along with the first report, the Commission also considered the first Secretariat memorandum concerning elements in the previous work of the Commission that could be particularly relevant to the topic.[17]

7. The Commission, following a rich first debate in plenary in which nearly all 34 members participated, referred all five conclusions proposed by the Special Rapporteur in his first report to the Drafting Committee. It subsequently adopted, together with their commentaries, draft conclusions 1 (scope); 2 (categories of subsidiary means for the determination of rules of international law); and 3 (general criteria for the assessment of subsidiary means for the determination of rules of international law). Since they had been considered by the Drafting Committee only during the second half of the 2023 session, leaving insufficient time for translation of their commentaries, the Commission only took note of draft conclusions 4 (decisions of courts and tribunals) and 5 (teachings) as provisionally adopted by the Drafting Committee.[18]

8. The Commission considered the second report of the Special Rapporteur during the seventy-fifth session, in 2024.[19] The report, which will be summarized further below, proposed three draft conclusions. Following the plenary debate on the topic, and the referral to the Drafting Committee of all three draft conclusions proposed by the second report, the Commission adopted three draft conclusions, together with their commentaries, addressing the nature and function of subsidiary means (draft conclusion 6); the absence of legally binding precedent in international law (draft conclusion 7); and the weight of decisions of courts and tribunals (draft conclusion 8). The Commission also, at the 2024 session, adopted the two draft conclusions on decisions of courts and tribunals and teachings, as orally revised, which had been held pending the availability of their commentaries in all the official languages from the 2023 session.

## B. Purpose and structure of the third report

9. In his previous reports, and as also approved by the Commission in the work programme submitted to the Sixth Committee,[20] the Special Rapporteur indicated that his third report would analyse teachings and other subsidiary means for the determination of rules of international law.[21] It was proposed that the Special Rapporteur narrow down the focus of the report to only two aspects – out of the various potential subsidiary means that had been examined previously and considering the state of the current practice – that built on the work of the Commission in prior topics, namely, the work of public and private expert bodies and the resolutions or decisions of certain international organizations. Those two elements are therefore the focus of the present report.

10. The report will also address various miscellaneous issues that had been raised during the previous debates in the Commission or by States in their comments, in particular, the topics of unity and coherence of international law (often referred to as fragmentation) and the relationship between subsidiary means and the supplementary means of interpretation in the context of treaty law. Consistent with the programme of work for the topic, the present report seeks to complete the set of draft conclusions proposed by the Special Rapporteur. The

[16] A/CN.4/760.
[17] A/CN.4/759.
[18] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), chap. VII; see also A/CN.4/L.985 and A/CN.4/L.985/Add.1.
[19] *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), chap. V; see also A/CN.4/760.
[20] A/78/10, para. 261.
[21] *Ibid*., para. 82 and 91.

aim is therefore that the report serve as the basis for the Commission's completion of the first reading on this topic in 2025.

11. Besides this introductory chapter, in terms of structure, the present report is comprised of eight chapters. In chapter II, and consistent with practice, the Special Rapporteur will discuss the previous work to date on the topic. Here, he will summarize the generally positive debate on the various issues addressed in the second report both in the Commission during its seventy-fifth session and in the Sixth Committee at its seventy-ninth session, both in 2024.

12. In chapter III, the Special Rapporteur will briefly examine teachings as a category of subsidiary means rooted in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. The content of the category will be reviewed based on practice. Thereafter, he will examine the remaining issue of the weight to attach to teachings when determining rules of international law.[22] He suggests that the Commission consider adding a new subparagraph addressing the weight to be attributed to teachings in draft conclusion 5. The concluding part of the chapter proposes a draft conclusion on the outputs of private expert bodies.

13. In chapter IV, the Special Rapporteur studies the works of selected expert bodies created or empowered by States to carry out a particular mandate. In that chapter, he addresses the most common types of outputs produced by those bodies to determine how they have been used in practice as subsidiary means for the determination of rules of international law. The chapter concludes with a proposed draft conclusion on the pronouncements of public expert bodies.

14. In chapter V, taking into account the prior work of the Commission in several of its recent topics, the report will examine resolutions of international organizations or intergovernmental conferences as subsidiary means for the determination of rules of international law. The chapter culminates with the proposal of a draft conclusion that addresses the use of resolutions as subsidiary means as well as their weight, in line with the general criteria previously adopted during the seventy-fourth session of the Commission, in 2023.

15. Two outstanding issues, which relate less to subsidiary means generally and more to judicial and other decisions as a subcategory of subsidiary means, will be addressed in the following two chapters. Chapter VI concerns the risk of fragmentation or the coherence and unity of international law: an issue that had been mentioned in the first report. In chapter VII, the Special Rapporteur will consider the question of the relationship between the subsidiary means found in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice and the supplementary means of interpretation in article 32 of the Vienna Convention on the Law of Treaties (1969 Vienna Convention).[23] He proposes two draft conclusions on, respectively, the coherence of court and tribunal decisions and the relationship between subsidiary means and the supplementary means of interpretation.

16. As already mentioned above, the present report seeks to provide the basis for the Commission's completion of the first reading on this topic in 2025. The report therefore also constitutes an opportunity to step back and reassess the entire set of draft conclusions provisionally adopted by the Commission, together with the comments of States received on them so far, with a view to enhancing their overall coherence.[24] For this reason, taking into full account the main suggestions of members of the Commission and delegations to the Sixth Committee, the Special Rapporteur proposes a structured scheme to the draft conclusions as explained in the present chapter (see also chap. VIII).

17. In chapter IX, the Special Rapporteur addresses the future programme of work for the topic. It is anticipated that a first reading on this topic will be completed in 2025 and, taking into account the one-year time frame usually given to Governments and observers to make their written observations on Commission topics, a second reading in 2027.

[22] A/CN.4/760, para. 389.

[23] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[24] A/78/10, para. 261.

18. For convenience, the draft conclusions provisionally adopted by the Commission to date are annexed to the present report (annex I). They are followed by the five new draft conclusions proposed by the Special Rapporteur in the present report (annex II). Annex III sets out the proposed division of the draft conclusions, separated into parts, as they would be adopted on first reading.

19. Lastly, consistent with the Commission's work plan, the Special Rapporteur will circulate a first version of a multilingual bibliography on the topic of subsidiary means. He recalls that, in both his first report in 2023,[25] and since then,[26] he has invited members of the Commission and delegates to the Sixth Committee to recommend relevant primary and secondary materials that could be suitable for inclusion in a bibliography intended to serve as a starting point for future researchers addressing this topic. He is grateful to the members of the Commission who have supplied recommendations, including references to materials written in official United Nations languages other than English.[27]

20. In this regard, since there is a wealth of literature on subsidiary means, the Special Rapporteur had recommended that items be selected for the bibliography based primarily on the quality and representativeness of the works in terms of the principal legal systems, regions and languages of the world. The first version of the bibliography, which will in due course be issued by the Secretariat as an addendum to the present report, will reflect that approach.

# II. Previous consideration of the topic

## A. Second report of the Special Rapporteur and the second debate in plenary

21. In his second report, the Special Rapporteur addressed three key substantive issues. First, he examined the nature and general function of subsidiary means, recalling that they were distinct from and subordinate to the sources of international law found in subparagraphs (*a*) to (*c*) of Article 38, paragraph 1, of the Statute of the International Court of Justice. Their primary function was assistive to the sources of international law. This conclusion was supported by both the text and the drafting history of Article 38, paragraph 1 (*d*), of the Statute and confirmed in the actual practice of the International Court of Justice and other international courts and tribunals, the practice of domestic courts, and the works of scholars. It was also observed that, beyond the general functions, there may be more specific functions of specific subsidiary means that may serve as an independent basis for the rights and obligations of States and international organizations as subjects of international law.

22. Second, the Special Rapporteur also addressed the general nature of precedent in domestic and international adjudication. He first defined the notion of precedent, based on an ordinary understanding of the term and a more technical/legal understanding of the term, distinguishing between them as reflecting either a narrow or broad approach. For comparative purposes, he thereafter examined the approaches to precedent in the common law and civil law legal systems before turning to the unique approach of international law. He showed that international law has developed its own unique system, which is neither common law nor civil law, that has generally worked well. As part of this, although international law lacked a formal theory or doctrine of precedent within the technical/narrow sense of the term, the International Court of Justice, the International Tribunal for the Law of the Sea and other international courts and tribunals followed the reasoning of prior decisions and judgments where, *inter alia*, there was no reason to depart from previous legal reasoning that might still be regarded as sound.

[25] A/CN.4/760, para. 68.

[26] In addition, in December 2024, the Special Rapporteur further requested, through the secretariats of the Sixth Committee and the Commission, the input of States and the Commission members for the bibliography.

[27] Warm thanks are due to Mathias Forteau, George Galindo, Mario Oyarzabal and Bimal Patel.

23. As a third substantive issue, the second report also examined the relationship between Article 38, paragraph 1 (*d*), and the caveat set out in Article 59 of the Statute of the International Court of Justice, which provides that the decisions of the Court are binding only on the parties to the case, thereby qualifying the use of judicial decision as subsidiary means; the link between Articles 59, 61 on the revision of judgments and 62 concerning the option to seek to intervene in a case where there is an interest of a legal nature; and the practice of courts and tribunals, in particular the International Court of Justice and the International Tribunal for the Law of the Sea. He concluded that, although there is no doctrine of *stare decisis* in international law, the legal effects of decisions were not constraining on the parties alone, as the effects were also felt by third parties due to the force of the decisions of the International Court of Justice as authoritative expressions of rules of international law. Prior decisions are frequently invoked by governments and are followed by courts for reasons of legal certainty, predictability and the persuasive and practical value of past decisions in helping resolve a later dispute.

24. The Special Rapporteur proposed three draft conclusions on the nature and function of subsidiary means (draft conclusion 6); the absence of a rule of precedent in international law (draft conclusion 7); and the persuasive value of decisions of courts or tribunals (draft conclusion 8).

25. Members of the Commission welcomed the Special Rapporteur's comprehensive second report. They agreed that subsidiary means were not a source of international law. They also concurred that, in general, there was no system of binding precedent in international law. However, they also acknowledged that the reasoning in judicial decisions is usually followed, including for reasons of legal certainty and predictability, which was the essence of any legal system based on the rule of law. Some members sought clarification of the reference made by the Special Rapporteur in his report not only to the general function of subsidiary means, but also to specific functions that one or other of the subsidiary means might have. A number of members expressed caution in relation to the latter.[28]

26. Following the debate in plenary, the Commission referred draft conclusions 6 to 8, as presented in the second report, to the Drafting Committee. The deliberations led to the adoption of three separate conclusions. Upon consideration of the report of the Drafting Committee,[29] towards the end of the seventy-fifth session, the Commission provisionally adopted draft conclusions 6, 7 and 8 along with the commentaries thereto.[30]

27. Concerning draft conclusion 6 on the nature and function of subsidiary means, the Drafting Committee stated that subsidiary means were not a source of international law; and held that their function is assistive when determining the existence and content of international legal rules; and clarified that this was without prejudice to their use as materials for other purposes. The Special Rapporteur recommended that the placement of draft conclusion 6 on function be revisited at the first reading stage in 2025, which was endorsed by the Commission.

28. Regarding draft conclusion 7, on the absence of legally binding precedent in international law, the Drafting Committee formulated in the first sentence a general rule providing that decisions of international courts and tribunals may be followed on points of law to the extent that those decisions address the same or similar issues. A second sentence stated the exception to the general rule under which such decisions would not constitute legally binding precedent, except where provided for in a specific instrument or other rule of international law.

29. As to draft conclusion 8, the Drafting Committee adopted three factors to assess the weight of decisions. The assessment entails, *inter alia*, determining whether the court or tribunal has a specific competence, whether the decision at issue is a sole decision or part of a wider set of such decisions and whether the reasoning had not been overtaken by subsequent developments. These non-exhaustive criteria for assessing the weight to be accorded to

[28] See summary of the debate contained in A/79/10, paras. 20–23.
[29] A/CN.4/L.999.
[30] See A/79/10, para. 24.

decisions of courts and tribunals were to be supplemental to the general criteria found in draft conclusion 3.

## B. Debate in the Sixth Committee of the General Assembly

### 1. Generally positive comments on the topic

30. During the debate in the Sixth Committee of the report of the Commission on the work of its seventy-fifth session, in 2024, 81 States (including the Nordic countries, which were represented by Denmark), together with the European Union (in its capacity as observer, speaking also on behalf of the candidate countries namely , Albania, Bosnia and Herzegovina, Montenegro, the Republic of Moldova, Serbia and Ukraine) and three further observers (the Holy See and the State of Palestine, and the African-Asian Legal Consultative Organization), specifically addressed chapter V of the report of the Commission on the work of its seventy-fifth session, which concerned subsidiary means for the determination of rules of international law.[31] This represented a substantial increase in the number of States participating in the debate on the topic, which the Special Rapporteur welcomes.

31. Many of the States participating in the debate complimented the Commission for the significant progress achieved on the topic during the seventy-fifth session. Several delegations commended the rigour of the Special Rapporteur's second report, while also expressing their strong support for both the Commission and the Special Rapporteur's approach to the topic so far.[32] The speakers, in general, welcomed the continuation of the Commission's work on the topic, while underlining its importance, especially due to its close relationship to and interaction with the sources of international law.

32. At the same time, a number of delegations expressed caution or requested clarification on some of the provisionally adopted draft conclusions or the commentaries thereto. Most delegations reiterated their strong support for the output taking the form of draft conclusions.

33. Only one delegation expressed a different view.[33] That said, given the decision of the Commission on this point, and its settled practice for studies relating to Article 38 of the Statute of the International Court of Justice, the Special Rapporteur considers that there is no reason to deviate from the decision to prepare final conclusions as the output of the work on this topic. It is his hope that the delegation that expressed that different view, which referred to maintaining an open mind on the form of the output, will join the consensus and the overwhelmingly support for the decision of the Commission to prepare a set of conclusions accompanied by commentaries.

### 2. Comments on draft conclusions 6 to 8

34. Delegations also offered specific comments on the text of each of the provisionally adopted draft conclusions, with several delegations also providing some helpful suggestions

[31] The full list of delegations that addressed the topic during the debate of the Sixth Committee is: Algeria, Argentina, Armenia, Australia, Austria, Belarus, Brazil, Cameroon, Canada, Chile, China, Colombia, Croatia, Cuba, Czech Republic, Denmark (on behalf of the Nordic countries), Ecuador, Egypt, El Salvador, Estonia, France, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Jamaica, Japan, Kenya, Lebanon, Malaysia, Mexico, Micronesia (Federated States of), Netherlands (Kingdom of the), Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Sri Lanka, Thailand, Türkiye, Uganda, United Kingdom, United States, and Viet Nam, and Holy See (the) and State of Palestine (the); African-Asian Legal Consultative Organization and the European Union.

[32] For instance, see Belarus (A/C.6/79/SR.26) (arguing that the draft conclusions "reflected a comprehensive analysis of the legal nature of subsidiary means and their role for the determination of the existence and content of rules of international law"); see also Australia (*ibid.*) (reiterating the value of the Commission's work and recognizing the "significant progress that had been made on the topic since its inclusion in the Commission's programme of work in 2021"); United States of America (*ibid.*) (reiterating its support for the "important topic" of subsidiary means).

[33] See the United Kingdom (A/C.6/78/SR.31, para. 35) (suggesting that the Commission "maintain an open mind as to the form of its final output").

for the commentaries. The Special Rapporteur finds that, while there are some new elements, the comments of delegations on draft conclusions 4 and 5 were broadly similar to those made by them in 2023.[34] For that reason, while he can assure each of the States commenting that he has carefully studied and taken their previous and the new comments into account in the substance of his work, he will focus the present summary on the observations made on draft conclusions 6 to 8.

35. Turning now to those specific conclusions, the Special Rapporteur considers that it might be useful to recall that draft conclusion 6 addressed the nature and functions of subsidiary means in two paragraphs.[35] The first paragraph indicates that subsidiary means are not a source of international law and that their function is to assist with the determination of the existence and content of rules of international law.[36] The second paragraph aims to highlight the myriad functions of differing materials to show the importance of identifying such functions when contemplating whether the materials should, in fact, be utilized as subsidiary means.[37] In order to properly utilize such materials for their multiple purposes, that paragraph contemplates a necessary differentiation between them, such as national court decisions, which can function as both subsidiary means and evidence of customary international law.[38]

36. Many delegations expressed their support for draft conclusion 6. Specifically, a vast majority of States agreed that distinguishing the sources of international law from subsidiary means was of critical importance and expressed support for the inclusion of text to that effect in the draft conclusions. Those States included Estonia, Israel, Mexico, the Kingdom of the Netherlands, Philippines, Portugal, the Republic of Korea, Romania, the Russian Federation, Sierra Leone and Thailand.[39] Romania, for example, considered that draft conclusion 6 "succinctly, appropriately and clearly set forth" the role of subsidiary means.[40] Estonia and Slovenia both expressed agreement with the negative formulation of draft conclusion 6.[41]

37. Lebanon expressed the view that the first paragraph of draft conclusion 6 clarified "the nature and function of subsidiary means," making it clear that their function "was to assist with the determination of the existence and content of rules of international law".[42] Mexico commended the "effort to incorporate the reasoning from the Commission's prior work on the main sources of international law … allowing for a comprehensive analysis of the nature and complementary function of the subsidiary means".[43] Algeria expressed support for the content of the draft conclusion, which clarified the role of the subsidiary means in determining the rules of international law *vis-à-vis* the sources of international law.[44]

38. Many delegations, while expressing overall agreement with the content, suggested revisiting the placement of draft conclusion 6, as the Commission itself had decided based on the Special Rapporteur's recommendation. Views were more varied, however, on the right

[34] The Special Rapporteur notes that, while the text of draft conclusions 4 and 5 were not yet formally adopted by the Commission, which only took place in 2024 to allow for translation of the commentaries thereto into the official languages of the United Nations, the text was included in the Commission's 2023 report to the General Assembly (A/78/10, para. 65, footnote 215). For that reason, a number of States have already had occasion to comment on the text. The summary of the debate on draft conclusions 4 and 5 was already included in the second report of the Special Rapporteur (see A/CN.4/769, paras. 51–56).

[35] See commentary to draft conclusion 6, as provisionally adopted by the Commission at its seventy-fifth session, A/79/10, para. 75, at pp. 41–43.

[36] Paras. (2)–(5), *ibid*., at pp. 41–42.

[37] Paras. (6)–(8), *ibid*., at pp. 42–43.

[38] *Ibid*.

[39] See Estonia (A/C.6/79/SR.27), Israel (A/C.6/79/SR.26); Mexico (A/C.6/79/SR.27), the Kingdom of the Netherlands (A/C.6/79/SR.26), the Philippines (*ibid*.), Portugal (*ibid*.), Romania (*ibid*.), the Russian Federation (A/C.6/79/SR.27) and Thailand (*ibid*.).

[40] See Romania (A/C.6/79/SR.26).

[41] See Estonia (A/C.6/79/SR.27) and Slovenia (A/C.6/79/SR.25).

[42] See Lebanon (A/C.6/79/SR.28).

[43] See Mexico (A/C.6/79/SR.27).

[44] See Algeria (A/C.6/79/SR.28).

place to place the conclusion. France,[45] Ireland,[46] the Kingdom of the Netherlands[47] and the European Union,[48] all suggested placing it as a new draft conclusion 3, owing, in their views, to the intrinsic relationship with draft conclusion 2 (categories of subsidiary means).

39. On the other hand, the Republic of Korea proposed that draft conclusion 6 be placed immediately after draft conclusion 1,[49] while Chile suggested placing it above draft conclusion 4, as Chile believed that its general nature rendered it applicable to the subsequent texts addressing the different types of subsidiary means.[50] Chile asserted that there might be some unnecessary repetition between draft conclusions 4, 5, and 6, suggesting that draft conclusion 6 be moved up to become the new draft conclusion 4, "considering that the current draft conclusion 6 was general in nature and applied both to judicial decisions and to teachings, while the current draft conclusions 4 and 5 addressed each of those means individually".[51] While there was no consensus as to its placement, these suggestions demonstrated a belief that the descriptive and general nature of the provision relating to the functions of subsidiary means warranted placement at the beginning of the draft conclusions.

40. To respond to the question of which of these invariably thoughtful suggestions the Commission should follow, the Special Rapporteur will indicate his recommendation to revisit the structure of the draft conclusions in a later part of the present report. In essence, he agrees with most of the delegations and members of the Commission that the provision on the nature and functions of subsidiary means should, logically, be placed after current draft conclusion 2.

41. A number of delegations also called for some of the commentary to be clarified. The European Union encouraged the Commission to further clarify, in its commentary, the differences between subsidiary means and the sources of international law by stressing that the role of subsidiary means was to assist in the interpretation, application and development of the will expressed by subjects of international law.[52] The Special Rapporteur agrees and will make proposals to that effect in due course.

42. Brazil sought clarification regarding draft conclusion 6, paragraph 2, highlighting the uncertainty as to what other purposes subsidiary means would serve.[53] Malaysia similarly noted that the usage of the term "materials" in paragraph 2 "could cause uncertainty and ambiguity regarding the scope or category of such subsidiary means".[54] The United States shared this criticism, arguing that the "without prejudice" clause was either unnecessary or required "some parameters", as without some limitations, the draft conclusion could contradict the principle that subsidiary means should not be used to fill gaps in international law.[55] Cuba, Egypt, Hungary and Singapore also sought additional clarity as to the content of the "other means" category,[56] with Singapore cautioning against an "undue expansion" of the category beyond those "that were currently widely accepted".[57]

43. While agreeing on the need to explain the other uses of subsidiary means, and endorsing the first part of the draft conclusion, Egypt expressed apparently more serious concerns over the second paragraph of draft conclusion 6.[58] It asserted that the text, as written, could be read to mean that, beyond the inability to create binding rules, subsidiary means and the actors engaged in their application were "just as empowered as States to apply and

[45] See France (A/C.6/79/SR.26).
[46] See Ireland (*ibid.*).
[47] See the Kingdom of the Netherlands (*ibid.*).
[48] See European Union (Representative of the European Union in its capacity as observer) (A/C.6/79/SR.25).
[49] See the Republic of Korea (A/C.6/79/SR.26).
[50] See Chile (A/C.6/79/SR.27).
[51] See Chile (A/C.6/79/SR.27).
[52] See the European Union (A/C.6/79/SR.25).
[53] See Brazil (*ibid.*).
[54] See Malaysia (A/C.6/79/SR.27).
[55] See the United States (A/C.6/79/SR.26).
[56] See Cuba (A/C.6/79/SR.26), Egypt (A/C.6/79/SR.27), Hungary (A/C.6/79/SR.26) and Singapore (*ibid.*).
[57] See Singapore (A/C.6/79/SR.26).
[58] See Egypt (A/C.6/79/SR.27).

interpret treaties and to identify and ascertain rules of customary international law".[59] The Special Rapporteur understands the concern, but respectfully disagrees with this interpretation, which is contradicted by a reading of the entire text and commentary provisionally adopted by the Commission to date. Moreover, while States are of course the principal actors in international law, the international courts and tribunals are also mandated to assist in interpreting their obligations under treaties and customary international law.

44. Delegations also generally welcomed draft conclusion 7, which confirms the general rule that there is no system of legally binding precedent in international courts or tribunals under international law. Despite this reality, however, international courts often refer to the reasoning of other courts and tribunals in order to uphold legal security, stability and consistency, although of course they are not generally obligated to do so.[60] As the text indicates, when citing other courts and tribunals, it is generally understood that a case must address the same or similar issues as the matter at hand.[61] Article 59 of the Statute of the International Court of Justice, among other applicable treaties, is also impliedly referenced, considering that it established the foundation for the principle that no decisions of international courts are legally binding on States unless they are a party to a case before the said body.[62]

45. Delegations were overwhelmingly in agreement with the inclusion of draft conclusion 7 and the underlying principles referenced therein. Many delegations also expressed their satisfaction with the language of the conclusion as adopted by the Commission, namely, Algeria, Denmark (on behalf of the Nordic Countries), Estonia, Guatemala, the Islamic Republic of Iran, Malaysia, Mexico, the Philippines, Portugal, Romania, the Russian Federation, Thailand and the United Kingdom.[63]

46. Several delegates requested[64] additional examples of international practices intended to be encompassed within draft conclusion 7. Ireland expressed its desire for the Commission to further expound on the "circumstances in which international courts and tribunals were likely to follow or depart from previous case law".[65] Egypt supported including draft conclusion 7, and with the principles as defined, but nonetheless suggested that draft conclusions 7 and 8, when read together, could create "a *de facto* rule of *stare decisis* or open the door to unwarranted judicial activism".[66] Egypt requested more specific examples of State practices of citing to international courts and tribunals to better define the circumstances in the text.[67] The United States similarly requested further explanation as to what the "circumstances might be, such as what the 'same or similar issues' constituted".[68] The Republic of Korea also requested further examples of instances where *stare decisis* was being applied exceptionally under international law.[69] Sierra Leone supported the examples provided in the Commission's commentary, including the reference to the East African Court

[59] *Ibid*.
[60] See commentary to draft conclusion 7, as provisionally adopted by the Commission at its seventy-fifth session, A/79/10, para. 75, at pp. 43–47.
[61] Paras. (1)–(2), *ibid*., at p. 43.
[62] *Ibid*.; see also Statute of the International Court of Justice, Article 59.
[63] See Algeria (A/C.6/79/SR.28), Denmark, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/79/SR.25), Estonia (A/C.6/79/SR.27), Guatemala (A/C.6/79/SR.26), the Islamic Republic of Iran (A/C.6/79/SR.27), Malaysia (*ibid*.), Mexico (*ibid*.), the Philippines (A/C.6/79/SR.26), Portugal (*ibid*.), Romania (*ibid*.), the Russian Federation (A/C.6/79/SR.27), Thailand (A/C.6/79/SR.26) and the United Kingdom of Great Britain and Northern Ireland (A/C.6/79/SR.27).
[64] In addition to the comments specifically addressed, see the European Union (A/C.6/79/SR.25) (pointing to the Court of Justice of the European Union and its competency to provide binding decisions); and Brazil (*ibid*.) (stating that the absence of *stare decisis* in international law could be further developed in the commentaries).
[65] See Ireland (A/C.6/79/SR.26).
[66] See Egypt (A/C.6/79/SR.27).
[67] *Ibid.*
[68] See the United States (A/C.6/79/SR.26).
[69] See the Republic of Korea (*ibid*.).

of Justice, and suggested adding pertinent examples of the Community Court of Justice of the Economic Community of West African States to future revised commentaries.[70]

47. Austria, Brazil and the United States all shared similar suggestions as to the construction of draft conclusion 7. Austria argued that its construction was counter-intuitive, with the title indicates the importance of *stare decisis*, but the language thereafter beginning with an oppositional point that, despite the lack of precedent, decisions might be followed in certain circumstances.[71] To address their concern, Austria suggested a two-paragraph construction, the first intended to lay out the general rule of the lack of binding precedent, and a second to set out the criteria under which decisions may be followed.[72]

48. The United States suggested that "it would be clearer to start the draft conclusion with a reference to the general rule regarding the lack of legally binding precedent and exceptions thereto, followed by" an explanation that "the legal reasoning or legal conclusions of such decisions" may be considered under certain circumstances.[73]

49. Brazil also hinted at similar restructuring, suggesting "redrafting the provision to state that the decisions of international courts or tribunals did not constitute legally binding precedent, in line with the title".[74] This would coincide with the recommendations from Austria and the United States to outline the underlying principle first.

50. Several delegations seemed cautious about draft conclusion 7. Specifically, Colombia expressed uncertainty about the "added value"[75] brought by the conclusion altogether given that, in its view, the draft conclusion only reflected the contents of Article 38 of the Statute of the International Court of Justice. Poland suggested that draft conclusion 7 contradicted draft conclusion 4, as the latter acknowledged the importance of national court decisions, yet the former "referred only to decisions of international courts or tribunals as being followed on points of law".[76]

51. The Special Rapporteur finds draft conclusion 7, especially when read together with the commentary, sufficiently clear. The clarifications sought by the States commenting can be made in the commentary without reopening draft conclusion 7, which was a compromise text adopted by the Commission.

52. The Special Rapporteur recalls the Commission's provisional adoption of draft conclusion 8, which sets out the more specific criteria to assist those who seek to employ, as subsidiary means, decisions of courts and tribunals "in the determination of the existence and content of rules of international law".[77] Building on draft conclusion 3, which lays out general criteria to assess the weight to be given to subsidiary means, draft conclusion 8 clarifies how to specifically assess the weight of decisions of courts and tribunals.[78] The criteria was intended to supplement the text contained in draft conclusion 3 and follows a similar formulation in the opening paragraph. That said, the list sets out the three more specific considerations the Commission believes are particularly relevant when assessing the weight of decisions of courts and tribunals.[79]

53. Many delegations, including Algeria, Australia, El Salvador, Israel, Japan, Malaysia, Mexico, Sierra Leone, Slovakia and the United Kingdom,[80] welcomed the inclusion of draft conclusion 8 and agreed with the text as provisionally adopted. Australia commended the

[70] See Sierra Leone (A/C.6/79/SR.27).
[71] See Austria (A/C.6/79/SR.25).
[72] *Ibid*.
[73] See the United States (A/C.6/79/SR.26).
[74] See Brazil (A/C.6/79/SR.25).
[75] See Colombia (A/C.6/79/SR.27).
[76] See Poland (A/C.6/79/SR.25).
[77] See paras. (1)–(2) of the commentary to draft conclusion 8, as provisionally adopted by the Commission at its seventy-fifth session, A/79/10, para. 75, at p. 48.
[78] *Ibid*.
[79] *Ibid*.
[80] See Slovakia (A/C.6/79/SR.26); see also Algeria (A/C.6/79/SR.28), Australia (A/C.6/79/SR.26), Israel (*ibid*.), Japan (*ibid*.), Malaysia (A/C.6/79/SR.27), Mexico (*ibid*.) and the United Kingdom (*ibid*.).

Commission on the framing of and commentary to draft conclusion 8, giving particular praise as to the relevance of subsequent developments in analysing court decisions.[81] Slovakia noted that, "while the wording of that draft conclusion might *prima facie* lead to the understanding that the criteria set out therein were additional to, and thus distinct from, those contained in draft conclusion 3", when read together with the commentary, it was clear that "the specific criteria in draft conclusion 8 were intended to be read together with the general criteria in draft conclusion 3".[82]

54. Some States expressed their agreement with draft conclusion 8 but suggested other ways of reframing it. Slovenia and Thailand believed that, because of its close relation to draft conclusion 3, draft conclusion 8 should either be placed immediately after draft conclusion 3 or otherwise read together with it.[83] Singapore sought the replacement of the word "should" in the *chapeau* with the word "may", to reduce the possibility of misconstruing the subparagraphs as mandatory elements instead of as guidance for analysis.[84]

55. Several delegations sought clarity regarding the relationship between draft conclusion 3 and draft conclusion 8. For instance, Colombia and Greece sought further explanation regarding the relationship between those conclusions and, in particular, confirmation of which of the draft conclusions applied to decisions of courts and tribunals.[85] It was also suggested that the wording of the three criteria in the draft conclusion could be improved. Austria expressed doubt as to whether the additional criteria reflected in draft conclusion 8 would have meaning, finding that the significant overlap between the two draft conclusions rendered the need for additional criteria questionable.[86] Slovenia suggested mirroring the titles of the conclusions, considering their mirroring text.[87]

56. The European Union asserted the need to take into account the level of national courts when undergoing assessments of the weight of decisions, as "[n]ot all court decisions necessarily carried the same weight".[88] Ireland also suggested the inclusion of commentary as to "national judicial hierarchies", highlighting the need to inquire as to appellate practices.[89] The Republic of Korea also noted the "diversity of legal traditions and systems across States" suggesting "further clarification" was needed "on how to ensure the representativeness of domestic judicial decisions" as subsidiary means.[90] The Islamic Republic of Iran, similarly to the European Union, suggested expounding on the term "courts and tribunals", so as to answer key questions such as "how they were established; whether their decisions and jurisdiction were binding and compulsory; whether they interpreted or applied rules of law; and whether their operations were consistent with the principles of independence, impartiality and due process".[91]

57. While most States expressed support for the Commission's draft conclusion, other delegations expressed their concerns over the applicability of draft conclusion 8 to decisions of non-judicial bodies, such as human rights treaty bodies. Part of the concern seems to be that they did not consider the decisions of such bodies as judicial decisions. It was also unclear to some other delegations what was encompassed in the third category of subsidiary means.[92] China asserted that "since human rights treaty bodies were not judicial bodies, their decisions could not be used as a subsidiary means for the determination of rules of international law".[93] China suggested that special attention be paid to the "differences

[81] See Australia (A/C.6/79/SR.26).
[82] See Slovakia (*ibid.*).
[83] See Slovenia (A/C.6/79/SR.25) and Thailand (A/C.6/79/SR.26).
[84] See Singapore (A/C.6/79/SR.26).
[85] See Colombia (A/C.6/79/SR.27) and Greece (*ibid.*).
[86] See Austria (A/C.6/79/SR.25).
[87] See Slovenia (*ibid.*).
[88] See the European Union (A/C.6/79/SR.25).
[89] See Ireland (A/C.6/79/SR.26).
[90] See the Republic of Korea (*ibid.*).
[91] See the Islamic Republic of Iran (A/C.6/79/SR.27).
[92] See Brazil (A/C.6/79/SR.25).
[93] See China (A/C.6/79/SR.26).

between human rights treaty bodies and judicial bodies, in terms of their respective natures, mandates and due process requirements".[94]

58. The United States specifically commented on subparagraph (*b*) and whether decisions were a part of a body of concurring decisions.[95] Their delegation concurred that a single or handful of decisions might carry considerable weight, but requested an equal acknowledgment of the contrary possibility.[96] Specifically, it was submitted that, "[w]hile a series of concurring decisions might demonstrate a pattern, that did not mean they were correct or should be afforded greater weight as subsidiary means".[97] The United States argued that employing the criteria within draft conclusion 8 could result in, if no other criteria were met, unfounded reliance on nothing more than a similar pattern of decisions that might not necessarily be correct.[98]

59. For its part, Hungary noted "a potential contradiction" between the criterion in subparagraph (*b*), which refers to the extent to which a decision is part of a body of concurring decisions, and the criterion in subparagraph (*c*), which emphasizes "the relevance of reasoning in light of subsequent developments".[99] Hungary stressed the importance of taking "subsequent developments into account", highlighting the ongoing acknowledgment by international bodies of evolving standards in environmental law and thus the creation of new norms that "must be considered even if the decision in question was not part of settled case law, in order to ensure that international law remained responsive to changing circumstances".[100]

60. The Special Rapporteur notes that several States have expressed uncertainty regarding the relationship between the general criteria for assessing the weight of subsidiary means in draft conclusion 3 and the specific criteria for assessing the weight of decisions in draft conclusion 8. By way of response, it might be helpful to underline two key points.

61. First, as Sierra Leone and several other delegations rightly noted, the text of the draft conclusion itself does indicate that the criteria in draft conclusion 8 is to be used to assess the weight of decisions of courts or tribunals "*in addition* to the criteria set out in draft conclusion 3" (emphasis added). Consistent with this text, the commentary went on to explain that draft conclusion 8 is to be "read together" with the factors in the earlier draft conclusion 3 and "are intended to supplement" the general criteria.

62. That said, and this is the second point that is likely the understandable source of confusion for some delegations, the commentary to the first of the three criteria expressly recalled the earlier factors given in draft conclusion 3, while the remaining two did not. Yet, on closer examination, the commentary to the latter can be read as giving greater specificity, and also as repeating some of the considerations set out in draft conclusion 3.

63. To address the concern of the States commenting, the Special Rapporteur recommends that the Commission further clarify the relationship between the two draft conclusions. He recommends that the Commission take a *lex specialis* approach, under which, the more specific criteria set out in draft conclusion 8 will be solely used to assess the weight of decisions of courts and tribunals. The more general criteria contained in draft conclusion 3 would then only apply to the subsidiary means for which no specific criteria to assess weight are provided. This approach makes sense given that some States were also concerned that some of the general criteria in draft conclusion 3 might be subjective and thus not easily applicable to judicial and other decisions.[101]

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[94] *Ibid*.
[95] See the United States (*ibid*.).
[96] *Ibid*.
[97] *Ibid*.
[98] *Ibid*.
[99] See Hungary (A/C.6/79/SR.26).
[100] *Ibid*.
[101] See, for instance, Sierra Leone ("His delegation nevertheless considered some general criteria to be inappropriate for assessing decisions of courts and tribunals. For example, political or other inherently subjective factors could not be used to assess the quality of such decisions, which might, in some

64. If the proposal is acceptable, the Commission would adjust the text of draft conclusion 8 to eliminate the point about the criteria being additional to the ones in draft conclusion 3. The remaining points raised by delegations could be usefully clarified in the commentary and, in some cases, the commentary to the two interrelated draft conclusions.

## C. Approach to the issues arising from the debates and the way forward

65. In big picture terms, as demonstrated by the preceding sections, the comments by States on the work of the Commission on this topic so far, including the work during the seventy-fifth session in 2024, have been quite positive. The Special Rapporteur reiterates his deep gratitude to all delegations that have shared their views on the topic, whether in the context of the debate in the Sixth Committee or via written information submitted to the Secretariat. He welcomes further comments from States on the topic, as he considers them part of the invaluable dialogue between States, as the primary intended beneficiaries of the work, and the Commission on the present topic.

66. It should be noted that, in general, there are two main sets of substantive issues arising from the debate which warrant some brief responses. First, those that concern proposed changes to the text of the various draft conclusions provisionally adopted so far by the Commission. Some of those changes should lead to some adjustments to the provisionally adopted draft conclusions in the Drafting Committee. The second set of issues relate to proposals by States that are for the strengthening of the commentaries or that are to the text of the draft conclusions but that, in the view of the Special Rapporteur, may be better accommodated in the commentaries.

67. The Special Rapporteur recommends that the Commission adopt a flexible approach. First, with respect to the first category of issues, namely, the proposal for actual textual adjustments to the draft conclusions, he proposes that the Commission keep an open mind. This would mean revisiting certain provisionally adopted texts in the Drafting Committee with the view to strengthening them. This could be done as soon as possible, including as early as the upcoming (i.e. 2025) session, depending on the Commission's progress on this and its other topics on the programme of work. Two such candidates are draft conclusion 8, as discussed above (see para. 63), and draft conclusion 5 on teachings (as will be explained in chap. III below).

68. Concerning the second category of issues, namely proposals for strengthening of the commentaries to particular draft conclusions, the Special Rapporteur welcomes just about all those proposals. There are, as usual, comments that may pull in one direction or in opposite directions. In the case of the former, where on balance there appears to be a measure of agreement that adjustments are necessary, the Commission should proceed to do so. The more challenging situation is where the comments pull in opposite directions such that they could be seen as cancelling each other out. The latter might suggest that the Commission struck the right balance. In any case, all proposals should be reviewed on a case-by-case basis and, where they might indicate that the Commission struck the right balance, the text should probably be retained.

69. Generally, in the view of the Special Rapporteur, calls for additional explanations in the commentary, especially requests for inclusion of more practical examples or supporting authorities, should be heeded. He notes, in this regard, that there were cases where he had himself already offered additional explanations and examples for some of the text proposed in the draft commentaries submitted to the Commission during the seventy-fourth and seventy-fifth sessions, in 2023 and 2024, respectively. The adoption process of the commentary, however, led to a shortening of some of that text to meet the preference of, in some cases, a few insistent members. He proposes revisiting his initial proposals, especially where those tend to coincide with the input received from States. The idea would be to reflect the State requests to provide additional clarification and examples in the commentary for the first reading text to be adopted in 2025.

cases, be legally sound but politically sensitive. Such was the case in both domestic and international legal practice."). See A/C.6/79/SR.27.

70. A final substantive issue, which arose during the debate in the Sixth Committee, in 2024, is perhaps the most challenging. It therefore needs a brief comment here, although in many respects the present report is the response to the issue raised. The issue is that various delegations expressed doubts over two interrelated matters. The first matter concerns the scope of the term "decisions", which some have raised to question whether – or rather to argue that – they should encompass only judicial decisions issued by courts of law and not quasi-judicial or other types of decisions.

71. That said, most of the participating delegations have endorsed the Commission's choice to follow its previous work from 2018 in the topic "Identification of customary international law", which referred to the broader term "decisions" instead of the narrower "judicial decisions". This is because, as was already clarified in the commentary provisionally adopted in 2022, "the term 'decisions' refers to a judgment, decision or determination by a court of law or a body of persons or institution, as part of a process of adjudication with a view to bringing to an end a controversy or settling a matter".[102] The choice to use that language seeks to reflect, as further explained in the report of the Commission to the General Assembly on its seventy-fifth session, the contemporary practice that evidences the "use of a wider set of decisions from a wide variety of bodies, not just judicial ones, as part of the process of identifying or determining the existence and content of rules of international law".[103] The International Court of Justice and other bodies' use of such decisions is illustrated by the Secretariat's memorandums on the present topic.[104]

72. The second interrelated matter relates to the types of entities that may issue such decisions. Several commenters, such as the European Union, have argued that only courts of law or judicial bodies can issue judicial decisions. In this view, other types of bodies may be entrusted with various types of functions, including adjudication over individual complaints. Those decisions, whatever they may be called, would not or should not be considered judicial decisions.

73. The Special Rapporteur generally concurs with the European Union. He observes that the Commission's commentaries to draft conclusions 2 and 5 have already explained that there are practical differences between different types of decisions, with judicial ones emanating from courts of law, such as the International Court of Justice, while other types of decisions (whether characterized as quasi-judicial decisions or not) may be issued by other types of adjudicative bodies. Still, it is possible that what might seem like a semantic point speaks to a more substantive concern about the content of the third category of "any other means generally used to assist in determining rules of international law" found in draft conclusion 2, paragraph, 1 (*c*). The Special Rapporteur recalls that, since the summing up of the debate in plenary on the first report in 2023, both the Special Rapporteur[105] and the Commission[106] have indicated that the future work would address the details of the third category. This discussion was planned to follow the analysis of judicial decisions and teachings as subsidiary means recognized about a century ago in what is now Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.

74. On the other hand, to be clear, the Special Rapporteur is sympathetic to concerns about having an open-ended "any other means" category, especially one that is not anchored in State practice. In fact, the text of the draft conclusion provisionally adopted by the Commission clarified that the subsidiary means of interest are not an amorphous category of any other means, but instead, only those "*generally* used to assist in determining rules of international law" (emphasis added). It is also for this reason that he argued in his first report that, while the practice and literature suggested that there are many plausible candidates for inclusion in the third category of subsidiary means, the future analysis of that category should

[102] See para. (6) of the commentary to draft conclusion 2, as provisionally adopted by the Commission at its seventy-fourth session, A/78/10, para. 127, at p. 81.

[103] See para. (3) of the commentary to draft conclusion 4, as provisionally adopted by the Commission at its seventy-fifth session, A/79/10, para. 75, at p. 32.

[104] A/CN.4/759 and A/CN.4/765.

[105] See A/CN.4/769, paras. 25–26.

[106] See para. (3) of the commentary to draft conclusion 4, as provisionally adopted by the Commission at its seventy-fifth session, A/79/10, para. 75, at p. 32.

not be left open ended and should be limited to those subsidiary means derived from the practices of States or international organizations.[107] Subsequently, based on the Commission and Sixth Committee debates, he found that there was support to examine the works of expert bodies and the resolutions and decisions of international organizations. The remainder of the present report takes up those issues.

# III. Teachings

## A. Previous discussion of teachings

75. The Commission's work plan for the present topic, as well as the debates in both the Commission and the Sixth Committee since 2021, indicate that part of its mandate is to examine the category of teachings as subsidiary means for the determination of rules of international law and their relationship to the sources of international law. Teachings were discussed at length in the first report of the Special Rapporteur. They were also discussed, where appropriate, in the second report, even if the focus was on judicial decisions. For that reason, the current report will not engage in a general discussion of teachings. Such a general approach might add little value given that the Commission has also already, after comprehensive debates in both the plenary and in the Drafting Committee, provisionally adopted a specific draft conclusion on teachings explaining how they may be used to determine the existence and content of rules of international law. The draft conclusion on teachings has been well received by States in the Sixth Committee.

76. It should also be recalled that, in addition to the consideration of teachings in the present topic, aspects of teachings have also been considered by the Commission in the context of several of its recent sources and related topics. This was the case in the topics "Identification of customary international law",[108] "Subsequent agreements and subsequent practice in relation to the interpretation of treaties",[109] "General principles of law"[110] and the "Identification and legal consequences of peremptory norms of general international law (*jus cogens*)".[111] The substantive provisions adopted in those topics address the use of teachings as subsidiary means in the process of interpretation, identification, determination and application of rules of customary international law, general principles of law and peremptory norms of general international law.

77. Taking the above into account, the present chapter will focus on two remaining issues concerning teachings that arose during the consideration of the present topic. First, and particularly important, is the question of the scope of teachings. That is to say, what is included within the category of teachings and what is *not* included in the category, and their relationship to the other subsidiary means for determining rules of law.

78. Second, much as the Commission has determined that there are specific criteria that could be used to determine the weight of judicial decisions, the question necessarily arises how to determine the weight of teachings. The need for this inquiry, which was also

[107] A/CN.4/760, draft conclusion 2, subparagraph (*c*) as proposed by the Special Rapporteur, para. 381; see also *ibid*., paras. 352–354 and 374.

[108] See para. (17) of the commentary to draft conclusion 2, as provisionally adopted by the Commission at its seventy-fourth session, A/78/10, para. 127, at p. 84; see also the conclusions on identification of customary international law and commentaries thereto: the conclusions adopted by the Commission and the commentaries thereto are reproduced in *Yearbook of the International Law Commission, 2018*, vol. II (Part Two), paras. 65–66 (see also General Assembly resolution 73/203 of 20 December 2018, annex).

[109] *Ibid*.; see also the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties and commentaries thereto: the conclusions adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2018*, vol. II (Part Two), paras. 51–52 (see also General Assembly resolution 73/202 of 20 December 2018, annex).

[110] *Ibid*.; see also the draft conclusions on general principles of law, as adopted by the Commission on first reading, A/77/10, paras. 40–41.

[111] *Ibid*.; see also *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 43.

commented upon by several delegations, will require that consideration be given to the applicability of the general criteria for the assessment of subsidiary means already adopted by the Commission to teachings as a specific category.

## B. The meaning and place of teachings in determining rules of international law

79. It was already pointed out in previous reports that the obvious starting point of any analysis of teachings is Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, which essentially directed the Court when resolving disputes between States in accordance with international law, to *inter alia*, "apply"[112] "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". In his first report, the Special Rapporteur addressed the preliminary question whether the Court is required to apply teachings as the plain term would suggest. Practice confirms that courts, starting with the International Court of Justice, do not generally read the language of Article 38, paragraph 1(*d*), as requiring or obligating them to apply teachings. Quite the reverse. Courts use teachings in other ways to help them identify, interpret or determine whether a rule of international law exists, and if so, the scope and application of the rule. In other words, although teachings can be especially helpful in the determination of the existence and content of rules of international law, teachings are not a source of law applied as such.

80. In the present topic, as recalled earlier, the Commission has already adopted both text and commentaries that must be kept in mind in its further discussion. First, in 2023, the Commission provisionally adopted draft conclusion 2. The purpose of that conclusion was to set forth the categories of subsidiary means for the determination of rules of international law. The *chapeau* explained that the subsidiary means "include": "decisions of courts and tribunals", "*teachings*" (emphasis added) and "any other means generally used to assist in determining rules of international law". The Commission explained that with the use of the term "include" at the end of the *chapeau*, as well as the express mention of the third category, the listing in draft conclusion 2 was meant to be illustrative instead of exhaustive.

81. In any event, whether exhaustive or not, the listing of subsidiary means captures teachings as a standalone category alongside the category of "decisions of courts and tribunals"[113] and the third "any other means generally used to assist in determining rules of international law".[114] In the general commentary, under the provision on scope, the Commission has clarified that, by adoption of draft conclusion 2, its intention was not to cover all the possible subsidiary means or candidates for inclusion in the category in the present topic as it is the "process of applying the established subsidiary means to determine rules of international law and of determining the scope of new subsidiary means that may emerge in the future",[115] which would likely benefit from the guidance to be provided by the draft conclusions.

82. Second, and besides the three categories of subsidiary means mentioned in draft conclusion 2, the Commission, in 2024, provisionally adopted draft conclusion 5 providing 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. In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity.[116]

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[112] The issue of whether the Court must apply teachings as subsidiary means is considered in the first report (A/CN.4/760).

[113] See para. (1) of the commentary to draft conclusion 2, as provisionally adopted by the Commission at its seventy-fourth session, A/78/10, para. 127, at p. 80.

[114] *Ibid*.

[115] Para. (8) of the general commentary, *ibid*., at p. 76.

[116] A/79/10, para. 74.

This substantive draft conclusion builds on the prior work of the Commission, especially the topics relating to Article 38, paragraph 1, of the Statute of the International Court of Justice: "Identification of customary international law" (Article 38, para. 1 (*b*)) and "General principles of law" (Article 38, para. 1 (*c*)).

83. The draft conclusion, as framed in the present topic, addresses teachings as subsidiary means for the determination of the rules of international law, reflecting the prior approach for reasons of consistency, while also incorporating new and clarifying elements. The language of the draft conclusion was updated compared to the language used in the topics mentioned. Thus, the wording of the presently discussed draft conclusion indicates more definitively that "teachings are" instead of "teachings may" serve as subsidiary means. The revision was meant to ensure greater consistency of the draft conclusion in the present topic with the text of Article 38, paragraph 1 (*d*), of the Statute. Plainly, the language of Article 38, as well as the Commission's draft conclusions provisionally adopted to date in this topic, did not establish judicial decisions as a higher and more important category than teachings with the former being subsidiary means while the latter possibly being subsidiary means.

84. Finally, a particularly important addition to the previous work of the Commission is the stress in the new second sentence of draft conclusion 5 (added during the drafting process) on the need for representativeness of teachings in terms of considering the various languages, regions and legal systems of the world. The previous work did allude to representativeness in a limited way (by reference to the most highly qualified publicists of the "various nations") in the relevant conclusions. The references to legal systems and regions and languages of the world were included in the commentary but qualified. The Commission now explicitly notes in the new draft conclusion, when assessing teachings, that there is need to have due regard to an illustrative list of criteria which, among others, include gender and linguistic diversity. Significantly, gender as a consideration was, for the first time, acknowledged expressly in a text proposed as output of the Commission. The illustrative guidance points were further fleshed out in the commentary, confirming the need for greater accounting of diversity in the use of teachings, which may benefit the legitimacy of international law.

85. That said, neither draft conclusion 5 nor the others previously adopted by the Commission on identification of customary international law or general principles of law provided a specific definition of the term "teachings". Nonetheless, in the prior work of the Commission addressing subsidiary means and in the present topic, the Commission has addressed the definitional question in the commentary. It rightly pointed out, in the commentary to draft conclusion 2, that "teachings" as a term are not further defined in the founding documents of the Court, such as in Article 38 or elsewhere in the Statute, nor in its secondary documents (such as the Rules of the Court or its practice directions). It was also observed that the Court, or for that matter its predecessor the Permanent Court of International Justice, has not had reason to define the term. This implied that part of the added value of the work being carried out by the Commission in this and the prior topics is offering a common understanding or definition of the term "teachings".

86. The Commission has explained that, both when understood ordinarily and when also taken together with its synonyms, the term "teachings" is in practice a "broad category".[117] In the main, it is a reference to "written works". But it also includes not just writings or, but also teachings in "non-written form, such as lectures and audiovisual materials".[118] Ultimately, it concluded that "teachings are comprised of writings or doctrine, as well as recorded lectures and audiovisual materials and, for that matter, materials in any other format for dissemination, including those which might be developed in the future".[119]

[117] See para. (13) of the commentary to draft conclusion 2, as provisionally adopted by the Commission at its seventy-fourth session, A/78/10, para. 127, at p. 83.

[118] *Ibid.*

[119] *Ibid.*

## C. Classifying teachings and assessing their weight

87. As the work to date has clarified the role of teachings as subsidiary means, and offered a useful definition of teachings, which, as was shown above, ultimately encompasses a wide category, the remaining question now is which types of authors can produce the works that are to be included in the category of teachings. In the broadest understanding, the teachings refer to the works of scholars, whether written individually or as part of a group of writers who co-author a work. The Commission's approach has not formally distinguished between teachings based on who the authors are. However, the way scholars and institutions use teachings indicates that there is a difference in the value or weight that can be ascribed to teachings based on whether they emanate from a single author or not.

88. Part of the way to differentiate between teachings is to examine the origin or author of the teaching. Another way is to differentiate the teachings based on the content of the teachings. With regard to the former, even Article 38, paragraph 1 (*d*), suggests that there is a difference between publicists. It is not just all publicists whose works are of interest to a user of international law, it is only the most highly qualified publicists of the various nations. While the Commission has, in the conclusions adopted so far moved away from the latter language, which was perceived as archaic, the text of the provision remains relevant in understanding and assessing the category and the ambit of it.

89. Besides authorship, and this is perhaps the most important part, it is really the content and the quality of the teaching that matter. The idea of qualifying the teachings to comprise only those from certain authors is in fact an attempt to establish some criteria to give an indication of quality. That much is clear from the drafting history of the Statute, which was extensively discussed in the first report of the Special Rapporteur.[120]

90. As regards form, teachings can take a wide range of forms and serve multiple purposes. Some teachings might be aimed at helping to identify a rule or be used for pedagogical purposes, such as a textbook or casebook that teaches a student what international law is. There are also monographs, that is, books written by an author giving an exposition of a certain topic of international law. There are also treatises, which might seek to state learned views of the law, or restatements of the law, providing a kind of systematic exposition of the entire body or parts of the wider body of international law. There are commentaries, encyclopaedia and practical manuals, articles published in journals and newspapers and, currently, even websites or online blogs or other content produced for digital or electronic platforms, such as audiovisual content or podcasts. These will all constitute teachings. Within them, however, some of those materials, such as commentaries or treatises would be particularly helpful in discerning the applicable law.

91. It might be necessary to have a combination of assessment of who the author of a work is and the content of their work. This combination of the authorship and content of a given work can assist an international lawyer to determine the weight to attach to a teaching when engaged in the process of determining the rules of international law. For example, there are materials that may have an important, if not decisive, influence in the understanding of international law. Here could be included documents such as government legal opinions, diplomatic correspondence, military manuals, treaty databases or collections, digests of State practice or even official or unofficial drafting history or *travaux préparatoires*, official or unofficial commentaries, or declarations and statements made by government officials. This differentiation based on the author of the work, as well as the quality of it and where it is found, occurs naturally and is reflected in practice, including in the work of national and international courts and tribunals, and as the Secretariat's first memorandum confirms, the Commission itself.

92. For our purposes, drawing on the literature in this area and keeping in mind the suggestion above that the types of authors appear to be useful in assessing the relevance of their work, it is suggested that there are at least three different classes or categories of authors that are capable of producing teachings. First are publicists or writers, that is to say, authors – usually scholars but the can also be practitioners – and others capable of publishing a work

[120] A/CN.4/760, chap. VII.

found to be relevant for a resolution of the issue at hand. Second are authors organized into collectives or expert groups, whether permanent or *ad hoc*, typically created privately by a group of individuals. Last, the most important category for our purposes, are official bodies or institutions affiliated with the States or international organizations that created them. While the various categories are not watertight, and overlap and feed into each other, recognizing them might help us better understand the wealth of materials produced that might be considered teachings.

### 1. Ordinary/individual publicists

93. Article 38, paragraph 1 (*d*), directs the International Court of Justice, in addition to examining judicial decisions, to also examine teachings of the most highly qualified publicists of the various nations. The dictionary meaning of the term "publicists" is "an expert or writer on the law of nations or international law".[121] For the Commission, the term "publicist" evokes essentially the same meaning.[122] It has used the terms "jurists", "writers" or "commentators" to describe publicists. In the commentary to conclusion 14 of the conclusions on identification of customary international law, it explains that the term "covers all those whose writings may elucidate questions of international law".[123] The current Special Rapporteur agrees.

94. If the term, in ordinary parlance, refers to a "writer" and is synonymous with "author", the use of it in the plural form in the Statute of the Court (that is, publicists), especially when taken alongside the word "teachings", would appear to suggest that the intent was to draw on not so much one author as much as on the collective views of multiple writers.[124] This understanding is explained in the first report and is now confirmed by the Commission's text adopted in draft conclusion 5, which interprets the term "teachings of publicists" to mean writers or authors to whom greater weight might attach where they reflect the coinciding views of scholars.

95. International law, whether historically or in modern times, has obviously benefited from the works of individual scholars. There are numerous examples of individual scholars, who are deemed eminent, whose works have been quite influential. Their names are often found in leading international law textbooks. In this regard, one can often find mentioned such writers as Alberico Gentili and Hugo Grotius (who has been dubbed the father of international law), as well as others such as Francisco de Vitoria, Francisco Suárez, Samuel von Pufendorf, Richard Zouche and Emerich de Vattel. What is common among all these authors is that they were European authors of works that proved to be quite influential in their time and, in some cases, up to this day. That is not to say that there were not authors from other parts of the world who have contributed in similar ways; it is to suggest that, for various complicated reasons, they are not as well acknowledged and therefore may not be as well known. Whether the authors were classified as positivists or naturalists, some of their works were so respected that they were required reading for diplomats or others in government service. Their continued influence makes some of them frequently mentioned authors in international tribunals up to this day.

96. The works of individual scholars may also be influential in particular fields of international law. For example, in the nineteenth century, the work of Professor Francis Lieber of Columbia Law School set out the rules governing the conduct of hostilities promulgated by President Abraham Lincoln for the United States federal army during the American Civil War on 24 April 1863. The Lieber Code, or "General Orders No. 100: Instructions for the Government of the Armies of the United States in the Field" as it came to be known, later proved influential in inspiring and shaping codification efforts of the laws of war in many other countries. These included Prussia (1871), Netherlands (1871), France

[121] "Publicist", *Oxford English Dictionary*, 3rd ed. (2013). Available at www.oed.com.

[122] Para. (4) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 110.

[123] *Ibid*.

[124] See Omri Sender, "The importance of being earnest: purpose and method in scholarship on international law", *Case Western Reserve Journal of International Law*, vol. 54 (2022), pp. 53–69, at p. 58.

(1887), Switzerland (1878), Serbia (1879), Spain (1889), Portugal (1890), Italy (1896) and the United Kingdom (1884). It would later form the basis for the Brussels Declaration of 1874 and the Hague Conventions on Land Warfare of 1899 and 1907.[125]

97. That said, as explained at length in the first report, the practice of international courts varies in their use of writings. Whereas some tribunals use and acknowledge the works of scholars, for example in the field of international criminal law and in human rights courts, others – such as the International Court of Justice – rarely cite individual scholarship. This is true of the judgments or decisions of the Court, but not true of separate concurring or dissenting opinions, where references to writings are more common. Separate opinions could be closer in nature to teachings, but, in the view of the current rapporteur, have an official quality that makes it difficult to describe them just as teachings. After all, they are officially sanctioned reasoned decisions of judges charged with resolving a specific case or issuing an advisory opinion, even if they go beyond the main judgments to address issues not addressed by a tribunal as a whole.

98. For the Court, and for that matter its predecessor, so far teachings hardly feature in the judgments/majority opinions. According to one empirical study, which tracked about seventy years of practice, of well over 155 cases at the time of the study, the Court had only cited teachings on seven occasions:[126] the judgment in *Land, Island and Maritime Frontier Dispute*;[127] the *Namibia* advisory opinion;[128] the *Kasikili/Sedudu Island* judgment;[129] the *Nicaragua* judgment;[130] the judgment in the *Bosnian Genocide* case;[131] the *Nottebohm (second phase)* judgment;[132] and the *Nuclear Weapons* advisory opinion.[133] The Permanent Court of International Justice, the predecessor of the International Court of Justice, in a sense developed that practice[134] as seems evident from only the handful of references to teachings in the *Lotus* case,[135] *Certain German Interests in Polish Upper Silesia*,[136] the *Jaworzina* case,[137] the *Wimbledon* case[138] and the advisory opinion on the Austro-German Customs Union.[139]

99. If citations to teachings are relatively less common in the main judgments of the Court, the question might be asked who are the privileged few whose works may be cited by the Court. According to the same study by Helmersen, which has analysed the top 40 writers based on citation count, the most cited writers include Shabtai Rosenne, Hersch Lauterpacht, Gerald Fitzmaurice, Manley O. Hudson, Lassa Oppenheim, Robert Jennings, Charles de

[125] For commentary, see R.R. Baxter, "The first modern codification of the law of war: Francis Lieber and General Orders No. 100", *International Review of the Red Cross*, vol. 25 (1963), pp. 171–189, and Theodor Meron, "Francis Lieber's Code and principles of humanity", *Columbia Journal of Transnational Law*, vol. 36 (1998), pp. 269–282.

[126] Sondre Torp Helmersen, *The Application of Teachings by the International Court of Justice* (Cambridge, Cambridge University Press, 2021), p. 45.

[127] *Ibid*., p. 44, citing *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), I.C.J. Reports 1992*, p. 3, at p. 92.

[128] *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 267 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

[129] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045.

[130] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14.

[131] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43.

[132] *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4.

[133] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66.

[134] See *Yearbook … 2016*, vol. II (Part One), document A/CN.4/691, para. 18.

[135] *The Case of the S.S. "Lotus" (France v. Turkey), Judgment No. 9, 7 September 1927, P.C.I.J. Reports Series, Series A, No. 10* (1927).

[136] *Certain German Interests in Polish Upper Silesia (Germany v. Poland), Judgment No. 6, 25 August 1925, P.C.I.J. Reports Series, Series A, No. 6* (1925).

[137] *Question of Jaworzina, Advisory Opinion, 6 December 1923, P.C.I.J. Series B, No. 8* (1923).

[138] *S.S. Wimbledon, Advisory Opinion, 17 August 1923, P.C.I.J. Series A, No. 1* (1923).

[139] *Customs Régime between Germany and Austria, Advisory Opinion, 5 September 1923, P.C.I.J. Series A/B, No. 41* (1923).

Visscher, Ian Brownlie, Arthur Watts and Julius Stone.[140] This listing captures the top 10 most cited writers in that order. Again, the regional and gender origin of the top 40 cited authors is noticeable, with the first person from the Global South (for lack of a better way to explain this) coming at number 14. The representativeness of the scholars cited in pleadings by States is no better.

100. The seeming tradition to not proffer copious references to teachings in International Court of Justice judgments can be misleading, as was pointed out in the first report.[141] It does not mean that scholarship is not consulted or useful to the judges in the deliberation process. To the contrary, scholarship seems to be used extensively, not only in the pleadings of States[142] before the International Court of Justice and other international courts, but also as part of clarifying the context of given legal rules. The value of teachings, used as background materials, indicates that they may in fact carry greater influence than can be presumed from citation counts alone. Moreover, in some international courts, there are often ample references to teachings, if not in support of legal propositions then as confirmation of them, as explained in detail in the first report.[143]

101. Only one of the two issues to be addressed in the present section remains pending: the question of weight of ordinary teachings. Given the above discussion on classifying teachings and taking into account the advanced stage of the topic, which gives the opportunity to the Commission to reconsider previously adopted text, the Special Rapporteur recommends that the weight of teachings produced by scholars be addressed. One way to do so might be to add text to current draft conclusion 5 on teachings. If this proposal is acceptable, the text, adopted during the Commission's seventy-fifth session, in 2024, would remain in place. It would become a first paragraph with the same two sentences included. The revised draft conclusion would have a new second paragraph, using the previously adopted formulation for weight adopted for the other subsidiary means in this topic. It would then simply provide in a new paragraph:

> "2. When assessing the weight of a teaching under paragraph 1, regard should be had to, as appropriate, the criteria set out in draft conclusion 3."

In the light of the debates in and suggestions from the Commission and the Sixth Committee, the most important elements of that criteria will then be further explained in the commentary.

102. Another option for the Commission would be to include a separate conclusion on weight. But, so far, that has only been done for decisions of courts and tribunals. All other draft conclusions, including the additional ones formulated by the Special Rapporteur, will have the question of weight addressed in the same conclusion.

### 2. Private expert bodies and groups

103. Based on the scheme set out above, the second category of teachings produced by publicists includes the works of private organizations whether they are organized into expert bodies, learned societies of professionals of international lawyers, groups, public charities or not-for-profit organizations. These entities are normally legally established under the domestic law of one or more States. They are usually permanent, although it is also possible to have an expert group that is *ad hoc* in character to work on a specific project or question for a particular period. They can also be established informally without necessarily being legally registered.

104. Such groups, being comprised of individuals, are often driven by key players whose private or individual work might interact with that of the group. Perhaps the most important feature of such expert groups, for our purposes, is that, in some cases, they may have a particular focus on the codification of international law or certain specific aspects of it and are not affiliated with States even if they try to influence States. Among the most well-known private societies are the Institut de Droit International (the Institute of International Law),

[140] Helmersen, *The Application of Teachings by the International Court of Justice*, pp. 94 and 185–188.
[141] See A/CN.4/760, para. 318.
[142] For example, in its submission for this topic discussed in chapter II above of the present report, the United States confirms it often cites scholarly works in its pleadings in international cases.
[143] See A/CN.4/760, para. 318.

which was the only such society actually mentioned in the deliberations of the Advisory Committee of Jurists in 1920, and the International Law Association. There also other more nationally focused organizations, such as the American Law Institute.

105. Besides the above, there are dozens of research centres in international law, whether affiliated with universities or not. Often such groups focus on studying international law. Some of these are research groups of scholars that maybe associated with an academic institution, such as the Harvard Law School. In addition to such bodies, there are also multitudes of professional societies of international lawyers organized and structured in different ways in many countries around the world. These groups, again typically organized under the domestic law of the countries concerned, may be fully fledged organizations in their own right, for instance, the African Association of International Law, the American Society of International Law, the British Institute of International and Comparative Law, the Chinese Society of International Law, the Canadian Council on International Law, the Czech Society of International Law, the French Society of International Law and the Japanese Society of International Law. There are also hundreds of special interest groups on international law within professional national bar associations.

106. All these groups may produce a wide variety of texts, in the form of studies, resolutions, reports and occasional papers, all of which may to varying degrees constitute teachings. Historically, professional expert groups of academic and practising international lawyers have produced works that have proven to be quite influential in understanding and even shaping the development of international law. There are many such examples, some of which have even benefited the work of the Commission. Of many possible examples, these include the work of the Institute of International Law as well as the International Law Association's influential work in terms of the Helsinki Rules on the Uses of the Waters of International Rivers.[144] Here, as was noted in the first report of the Special Rapporteur, the works of individual scholars might even intersect with the works of expert groups to produce enormous influence shaping core rules of international law. The Commission's commentaries to conclusion 14 of the conclusions on identification of customary international law[145] and draft conclusion 9 of the conclusions on general principles of law,[146] both on teachings, are among those that have formally recognized a special relevance for the work of collective bodies, including the Institute of International Law and the International Law Association.

107. There are other examples in other areas of international law, for example the law of armed conflict, in relation to which the Institute of International Law adopted a manual at Oxford on 9 September 1880. The Institute, which did not propose a treaty, sought to state clearly the accepted ideas of its age which it felt could be used as a basis for national legislation. The document, *The Laws of War on Land*, proved enormously influential.[147] More recent examples include the International Institute of Humanitarian Law San Remo Manual on International Law Applicable to Armed Conflicts at Sea,[148] the work of the International Group of Experts that produced the Tallin Manual on the International Law Applicable to Cyberwarfare[149] or the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.

108. The Princeton University Program in Law and Public Affairs, sponsored by four non-governmental organizations, produced the Princeton Principles on Universal Jurisdiction, which were intended for legislators, judges and other users to guide the prosecution of

144 International Law Association, *Report of the Fifty-second Conference, Held in Helsinki, 1966* (London, 1967), p. 496.

145 *Yearbook … 2018*, vol. II (Part Two), para. 66.

146 A/78/10, para. 41.

147 Institute of International Law, *The Laws of War on Land* (Oxford, 1880). Available from the University of Minnesota Human Rights Library, at umn.edu.

148 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, International Institute of Humanitarian Law (Cambridge, Cambridge University Press, 1995).

149 Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge, Cambridge University Press, 2013).

international crimes in national courts in conformity with international law.[150] A similar effort was undertaken by an African non-governmental organization, giving rise to the Cairo-Arusha Principles on Universal Jurisdiction in respect of Gross Human Rights Offences: An African Perspective, a document that was later cited by the International Court of Justice in the *Arrest Warrant* judgment.[151] The Harvard Program on Humanitarian Policy and Conflict Research produced a Manual on International Law Applicable to Air and Missile Warfare.[152] Another relatively more recent example includes the Michigan Guidelines on the International Protection Alternative.[153] The outcomes of those projects, which can be classified as teachings, have exerted influence by, in some cases, providing useful materials for international and national courts and tribunals.

109. To take one key example, in the *Kasikili/Sedudu Island (Botswana/Namibia)* case, the Court referred to the "Draft concerning the international regulation of fluvial navigation", by the Institute of International Law, adopted at Heidelberg on 9 September 1887, where it was indicated that: "'The boundary of States separated by a river is indicated by the thalweg, that is to say, the median line of the channel' (*Annuaire de l'Institut de droit international*, 1887-1888, p. 182)".[154]

110. In *Différend concernant l'interprétation de l'article 79, par. 6, lettre C, du Traité de Paix*, which predated the 1969 Vienna Convention, the arbitral tribunal referred to the 1950 *Yearbook* of the Institut de Droit International (Institute of International Law) containing a report on the rules of the interpretation of treaties, and noted that the report prepared by Mr. Lauterpacht as rapporteur, which had received nearly unanimous support by the members of the relevant commission within the Institute, reflected the prevailing view in the doctrine of public international law, noting that for the purpose of interpretation there is no difference between normative treaties and other treaties ("les traités-lois ou traités normatifs").[155]

111. The arbitration commission in the *Case of the Government of the Kingdom of Greece (on behalf of Apostolidis) v. the Federal Republic of Germany* referred to the use of *travaux préparatoires* as tools for the interpretation of treaties indicated that it shared:

> the opinion of the Institut de Droit International which, in its Resolution adopted at the Granada session of April 19, 1956, brought about a decisive advance in international law by deciding that the problem of resorting to the *travaux préparatoires* of a multilateral treaty, even if they had not been published or made accessible to one of the Parties, must be left to the discretion of the judge and solved according to the special circumstances of the case at issue (*Annuaire*, 1956, p. 347).[156]

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[150] Stephen Macedo (ed.): *The Princeton Principles on Universal Jurisdiction* (Princeton University, Program in Law and Public Affairs, 2001); and *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia, University of Pennsylvania Press, 2004).

[151] See Africa Legal Aid, Cairo-Arusha Principles in respect of Gross Human Rights Offences: An African Perspective, AFLA Policy Documents, adopted in Arusha, the United Republic of Tanzania, October 2002. https://www.africalegalaid.com/afla-policy-documents.

[152] Harvard Program on Humanitarian Policy and Conflict Research, *HPCR Manual on International Law Applicable to Air and Missile Warfare* (Cambridge, Cambridge University Press, 2013).

[153] See James C. Hathaway, "International refugee law: the Michigan Guidelines on the Internal Protection Alternative", *Michigan Journal of International Law*, vol. 21 (1999), pp. 131–133. National authorities have used the guidelines. The first adoption was acted by the New Zealand Refugee Status Appeals Authority in Decision No. 71684/99 of 29 October 1999 (https://www.refugee.org.nz/index.htm) (arguing of the Michigan Guidelines, "the collective wisdom of an otherwise distinguished body of persons cannot be lightly ignored").

[154] *Kasikili/Sedudu Island* (see footnote 129 above), para. 25.

[155] *Différend concernant l'interprétation de l'article 79, par. 6, lettre C, du Traité de Paix (Biens italiens sen Tunisie)*, Decision No. 136, 25 June 1952, *Reports of International Arbitral Awards* (UNRIAA), vol. XIII, pp. 389–439, at p. 396.

[156] Arbitral Commission on Property, Rights and Interests in Germany established by the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn on 26 May

112. In the case of the *Interpretation of the air transport services agreement between the United States of America and France*, the tribunal referred to the consideration of the purpose of the treaty as a criterion for interpretation and referred to the judgment of the International Court of Justice in the *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*[157] and stated that:

> Article 19 of the "Draft Convention" of Harvard Law School in point of fact begins with the assertion that "A treaty is to be interpreted in the light of the general purpose which it is intended to serve". The "taking into consideration of the purpose of the treaty" also figures under c) of Article 2 of the Resolution of Granada of the Institut de Droit International.[158]

113. The French-Italian Commission in *Différend interprétation et application des dispositions de l'Article 78, par. 7, du Traité de Paix au territoire éthiopien* referred to the rules of the interpretation of treaties contained in the work of the Institute of International Law, indicating that it was a universally recognized principle of interpretation that the provisions of a treaty must be interpreted in their context.[159]

114. In the *Fubini* case, the Italian-United States Conciliation Commission noted that:

> [t]he rules on the art of interpreting international treaties require that the interpreter rely, first of all, on the text that must be applied, in giving the terms employed by the contracting States their natural meaning. In that direction is the Resolution of the Institut de droit international of April 19, 1956, Grenade session (*Annuaire*, vol. 46, p. 365)
>
> …
>
> In its jurisprudence, the Permanent Court of International Justice rendered the same opinion and refused to give any consideration to the provisions that were not to be found in the text.
>
> …
>
> The jurisprudence of the present International Court of Justice is in no way different.[160]

115. In the *H. G. Venable v. United Mexican States* case, the General Claims Commission referred to Ralston's publications on the Venezuelan Arbitrations of 1903, the rules on bankruptcy law adopted by the Institute of International Law in 1902 and the draft convention on bankruptcy law "inserted in the final protocol of the Hague Conference on Private International Law of October-November, 1925", where a syndic or bankruptcy trustee acted as a representative of the estate and was not considered a representative of the government.[161]

116. In *James H. McMahan (U.S.A.) v. United Mexican States*, the Mexican-American Claims Commission was discussing the boundary dividing Mexico and the United States in the Rio Grande. It indicated that, up to such point, both States may exercise full territorial

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1952, *Case of the Government of the Kingdom of Greece (on behalf of Apostolidis) v. the Federal Republic of Germany*, decision of the Second Chamber, 11 May 1960, UNRIAA, vol. XXIX, pp. 445–484, at p. 468.

157 *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of November 28th, 1958: I.C.J. Reports 1958*, p. 55.

158 *Interpretation of the air transport services agreement between the United States of America and France*, Award, 22 December 1963, vol. XVI, pp. 5–74, at p. 56.

159 French-Italian Conciliation Commission, *Différend interprétation et application des dispositions de l'Article 78, par. 7, du Traité de Paix au territoire éthiopien — Décisions nos 176 et 201*, Award No. 201, 16 March 1956, UNRIAA, vol. XIII, pp. 636–661, at p. 643, citing Hersch Lauterpacht, *De l'interprétation des traités, nouveau projet définitif de résolutions à l'issue du débat de Sienne au sein de l'Institut de Droit International*, p. 1, art. 1, para. 2.

160 Italian-United States Conciliation Commission, *Fubini Case — Decision No. 201*, Award, 12 December 1959, UNRIAA, vol. XIV, pp. 420–434, at p. 425.

161 Mexico/United States, General Claims Commission, *H. G. Venable (U.S.A.) v. United Mexican States*, Award, 8 July 1927, UNRIAA, vol. IV, pp. 219–261, at p. 228, para. 22.

rights, referring to scholarly writings, treaties concluded after the Congress of Vienna in 1815 and the regulations adopted by the Institute of International Law in 1887 concerning the navigation of international rivers separating two or more States to indicate that such instruments recognized the right of riparian States to exercise police powers in the river.[162]

117. A final illustration shows how the works of both individuals and scholars may be used in practice. The umpire in the *Bembelista* case analysed a claim concerning damage caused near an area where a military attack took place and took into account the Manual of the Institute of International Law,[163] analysed several writings, including De Vattel,[164] and concluded that he "has made careful examination of nearly all of the international law text-books, and finds the principles herein laid down to receive their unqualified sanction".[165]

118. In the event, as is confirmed by the above nine examples of cases drawn from the second memorandum of the Secretariat prepared for this topic, it is true that the teachings of some private expert groups such as the Institute of International law have been influential.

## D. Proposed draft conclusion 9 – outputs of private expert groups

119. In light of this analysis, which demonstrates the established use of the works of private bodies, including in the work of tribunals and the Commission, the Special Rapporteur proposes a draft conclusion indicating that the outputs of such organizations may serve as a subsidiary means for determining the existence and content of rules of international law. Much of the second half of that language is drawn from previously agreed text adopted during the work on the present topic, with the use of "may serve as" indicating that the use of such works would depend on the situation at hand. The second paragraph speaks to the question of weight of such outputs. It equally follows the formulations from previous sessions, with necessary adjustments to fit the context. It is hoped that, since this is already agreed language, the deliberations on that formulation in this and later draft conclusions will be smooth going.

120. He proposes the following draft conclusion for consideration by the Commission.

Draft conclusion 9

Outputs of private expert groups

1. Outputs authored by individuals or collectives of individuals, organized independently of State or international organization involvement, may serve as a subsidiary means for the determination of the existence and content of rules of international law.

2. When assessing the weight to be given to such outputs, regard should be had to, as appropriate, the criteria set out in draft conclusion 3.

### 3. Public or State-created and State-empowered expert bodies

121. The third and final category of collectives of experts concerns what was referred to as "public" as opposed to "private" expert groups in the first report of the Special Rapporteur. In this group of expert bodies would be found the expert groups that are affiliated with States. There would be different degrees of affiliation, depending on whether they are created by

[162] Mexico/United States, General Claims Commission, *James H. McMahan (U.S.A.) v. United Mexican States*, Award, 30 April 1929, UNRIAA, vol. IV, pp. 486–496, at p. 490, referring to Lassa Oppenheim, *International Law: A Treatise*, vol. I, *Peace*, 3rd ed. (London, Longmans, 1920), pp. 314-322; Paul Fauchille, *Traité de droit international public*, vol. 1, Part 2, 8th ed. (Paris, Rousseau, 1925) pp. 453 *et seq*.; John Bassett Moore, *A Digest of International Law*, vol. I (Washington, Government Printing Office, 1906), pp. 616. *et seq*.; Jan de Louter, *Le droit international public positif*, vol. I (Oxford, Oxford University Press, 1920), p. 445, also p. 490.

[163] Netherlands-Venezuelan Commission, *Bembelista Case*, Award, 1903, UNRIAA, vol. X, pp. 717–720, at p. 718.

[164] *Ibid*., p. 719, referring to Emmerich de Vattel, *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains* (Washington, Carnegie Institution of Washington, 1916), Book III, chap. XV, sect. 232, p. 204.

[165] *Ibid*., p. 719.

States (State-created entities) or, having been already created by others, they are empowered to carry out certain functions (State-empowered entities). Sivakumaran seems to also distinguish between the two in the sense that he argued that "[a] State-empowered entity is essentially an entity that States have empowered to carry out particular functions."[166] Their defining feature, under this understanding, is that they are created or empowered "by two or more states and granted authority to make decisions or take actions."[167]

122. But, given the broad nature of this classification, they encompass a wide range of actors ranging from intergovernmental organizations at the universal or regional levels, international and regional courts and tribunals, treaty bodies to other actors, such as the International Committee of the Red Cross (ICRC) or even individuals such as the United Nations High Commissioner for Refugees. The category of State-empowered entities is admittedly an amorphous one that "exists along a spectrum", with disparate actors that can be further subdivided into "distinct classes of bodies, by type of actor, such as international organizations, international courts and tribunals, codification bodies, and so on, or by legal personality".[168] In the end, as one author suggests and consistent with the work of the Commission, the broad criteria for assessing them would include not only their establishment, composition and mandate, but also quite importantly the quality of the work and the objectivity with which it was carried out.

123. From the above definition, a wide range of institutions can be examined to assess whether their works constitute teachings. These include, first and foremost, bodies comprised of independent experts created specifically and mandated to assist States with the codification and progressive development of international law. Foremost among these at the universal level, as set out in the first report, are the Commission itself, along with the United Nations Commission on International Trade Law.

124. Regional bodies with similar mandates created to assist States or international organizations with codification and progressive development, such as the Inter-American Juridical Committee, the African Union Commission on International Law, the Asian–African Legal Consultative Organization and the Council of Europe's Committee of Legal Advisers on Public International Law.

125. In addition to such bodies are such treaty bodies as the Human Rights Committee,[169] the Committee on Economic, Social and Cultural Rights,[170] the Committee on the Elimination of Racial Discrimination,[171] the Committee against Torture,[172] the Committee on the Elimination of Discrimination against Women,[173] the Committee on the Rights of the Child,[174] the Committee on Migrant Workers,[175] the Committee on Enforced Disappearances[176] and the Committee on the Rights of Persons with Disabilities.[177] These

[166] See Sandesh Sivakumaran, "Beyond States and non-State actors: the role of State-empowered entities in the making and shaping of international law", *Columbia Journal of Transnational Law*, vol. 55 (2017), pp. 343–394, at p. 351.

[167] *Ibid*.

[168] *Ibid*., p. 352.

[169] International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[170] International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), *ibid*., vol. 993, No. 14531, p. 3.

[171] International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965), *ibid*., vol. 660, No. 9464, p. 195.

[172] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid*., vol. 1465, No. 24841, p. 85.

[173] Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), *ibid*., vol. 1249, No. 20378, p. 13.

[174] Convention on the Rights of the Child (New York, 20 November 1989), *ibid*., vol. 1577, No. 27531, p. 3.

[175] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990), *ibid*., vol. 2220, No. 39481, p. 3.

[176] International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), *ibid*., vol. 2716, No. 48088, p. 3.

[177] Convention on the Rights of Persons with Disabilities (New York, 13 December 2006), *ibid*., vol. 2515, No. 44910, p. 3.

expert bodies play a variety of functions, including providing views and interpreting the nature and scope of obligations of States parties under the relevant instruments through, for instance, the issuance of general comments and in some cases the hearing of individual complaints brought against States.

126. In the view of the Special Rapporteur, unlike the works of private bodies, the texts produced by State-created or State-empowered entities such as those mentioned above, in particular the Commission and the United Nations Commission on International Trade Law, as well as the human rights treaty bodies, should be considered separate from the teachings. Their final outputs, which may take a wide range of forms, are produced under the auspices of official institutions and usually reflect the involvement of States and/or their representatives in their work. A crucial further distinction would need to be drawn between State-affiliated bodies composed of persons serving as independent experts and those composed of persons serving as representatives of States. For the limited purposes of the present topic, the work of these bodies will therefore not be considered as teachings. Only the works of private expert bodies not created by States or organizations should be considered teachings. They are therefore analysed separately in the next chapter of the present report, which focuses on the work of the Commission and the human rights treaty bodies. The focus on those bodies, from among the many other such bodies, can be justified given their formal role in the codification or development of international law.

### E. The general criteria for assessing the weight of outputs of private expert bodies

127. At this stage, the only matter remaining is the question of how to assess the weights of the outputs of private expert bodies. The Commission has found that, in relation to all subsidiary means, there are factors that may be useful in determining their weight. In draft conclusion 3, the Commission specified the general criteria for the assessment of subsidiary means for the determination of rules of international law. The Special Rapporteur recalls in this regard the text of that draft conclusion, which provided for the use of various indicia to assess weight. The Special Rapporteur considers that the guidance provided by the Commission for assessment of the weight of subsidiary means should also apply for the purposes of assessing the weight to attach to the outputs produced by the private expert groups discussed above (see sect. C 2 above). A determination should be made as to whether to include an express reference to that draft conclusion as a second paragraph of the proposed draft conclusion on the outputs of the work of private bodies. Another possibility is for the matter of how to assess weight to be addressed in the commentary.

## IV. The works of State-created or State-empowered expert bodies

128. Based on the distinction drawn above between private expert groups and public expert bodies, the place of the Commission in this discussion must necessarily be examined. For that purpose, the term “expert body” means a body created or empowered by States and consisting of independent experts nominated and elected by States and serving in their personal capacity instead of as delegates of States. The expert bodies could be created by treaty, resolution or another instrument. The Commission is one such example, created by resolution to which was annexed its statute. While there is also a similarly anchored body assisting the General Assembly with the promotion and progressive development of international trade law, the difference between that body and the Commission lies in its composition of representatives of States, putting it outside the scope of the discussion for the present purposes.[178]

[178] The Commission has similarly excluded, in another topic examining expert bodies, those entities such as the United Nations Commission on International Trade Law comprised of “State representatives”. As was pointed out in that context, which is similar to the situation here, the outputs of such bodies constituted a form of practice by those States.

129. The next section of the present chapter addresses the role of the 10 human rights treaty bodies created by States to assist with the implementation of core human rights treaties. Lastly, the role of ICRC is examined, which, unlike the rest of the bodies mentioned in this section, is not State-created but State-empowered and plays a special role in the field of the law of armed conflict. It is, in other words, a hybrid body that could – due to its characteristics and role – be described as *sui generis*.

## A. The Commission's work as subsidiary means

130. Already in the first report, it was observed that texts produced by State-empowered or better yet State-created bodies, such as the Commission, should be considered separate from the "teachings of publicists". This point found broad support among members of the Commission. The general view agreed that texts produced under the auspices of official institutions and reflecting the involvement of States and/or their representatives in the work should have a different status. The role of both the body and their interaction with States make their final outcomes qualitatively different from the "teachings of publicists". Some of these bodies may, of course, produce preparatory works, such as reports, that could be classified as "teachings" in their own right.

131. Appreciating the proper place of the Commission requires a brief mention of its two-pronged mandate of assisting States with the promotion of (*a*) the progressive development of international law; and (*b*) its codification. Both prongs of the mandate are further defined in article 15 of the statute of the Commission, in which it is explained that:

> the expression "progressive development of international law" *is used for convenience* as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.[179]

Similarly:

> the expression "codification of international law" is used *for convenience* as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.[180]

132. The statute sets out different procedures for the Commission's work depending on whether the work was mandated under codification or progressive development. Thus, articles 16 and 17 addressed progressive development, with the central role played in that regard by General Assembly or State referrals, as well as principal organs, specialized agencies or official bodies established by intergovernmental agreement. Articles 18 to 22 addressed codification, setting out a different procedure for the Commission's work. Under that work the Commission surveys the whole field of international law and then proposes to the General Assembly the codification of topics deemed suitable before embarking upon the work. In practice, however, the Commission has not been able to adhere to this apparent statutory distinction. This was the case from the earliest years of its work until now. Essentially, it found the distinction too simple for the practical work required for successful codification and progressive development of the law.

133. The next relevant statutory provision is article 23, which gives the Commission authority to make recommendations to the General Assembly, which could include taking note of or adopting texts produced by the Commission in a resolution; recommending drafts to States with the view to concluding a convention; or asking them to convoke a conference to conclude a convention. Finally, under article 24, the Commission was tasked with considering the ways and means for making the evidence of customary international law more readily available, including through compilation of State practice and decisions of national and international courts on questions of international law.

134. From the above, the Special Rapporteur can subscribe to what B.G. Ramcharan has described as the three features of the Commission's work: (*a*) its role in the law creating

[179] Art. 15 of the Commission's statute (emphasis added).
[180] *Ibid*. (emphasis added).

process through the preparation of draft articles bound to serve as a basis for future conventions to be negotiated by States; (*b*) the role of the Commission as a consolidator and collector of State practice or even crystallizer of customary international law, by recognizing in some cases such rules and expressly saying so; and (*c*) finally, the Commission as a body of respected international lawyers.[181] Thus, in the case of sources of international law, the work of the Commission could: give rise, as it has historically, to the development of binding conventions as per Article 38, paragraph 1 (*a*), of the Statute of the International Court of Justice based on its draft articles (of which there have been many in a diverse range of subfields of international law); or assemble or consolidate State practice and generate *opinio juris* thereby contributing to the development of customary international law or clarify the general principles of law (Article 38, para. 1 (*b*) and (*c*)), with its membership counting among "experts of high repute", such as to have their work qualify at a minimum "as a high-ranking body of publicists" under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.

135. Of course, despite its official role, the final pronouncements of independent expert bodies like the Commission are not "judicial decisions" or "decisions". They therefore do not fit under that plank of Article 38, paragraph 1 (*d*). Thus, the outputs of the Commission fall into neither the category of decisions nor teachings. It therefore falls into the third category, easily fulfilling the criteria for "any other means generally used to assist in determining rules of international law". Since the outputs of the Commission do not generally create, but do sometimes elucidate or deduce, rules that can be said to be binding on States, the pronouncements of expert bodies like the Commission could be considered as integral to the third category of subsidiary means for the determination of rules of international law.

136. The Commission's "Survey of international law in relation to the work of codification of the International Law Commission" of 1949 argued that some Commission texts "would be at least in the category of writings of the most qualified publicists, referred to in Article 38 of the Statute of the International Court of Justice" but adds that "their authority would be considerably higher", in part owing to "the resources of the United Nations".[182] Writers have agreed with this assessment: some, such as Clive Parry writing back in 1965, observed that: "its drafts, even when accorded the least authoritative form of expression available, represent the teachings of the most highly qualified publicists".[183] Parry goes on to note that:

> the work of the Commission, … even when considered only as work in draft or work in progress, has two features which the writings of publicists normally lack.
>
> In the first place, it has an international quality about it …
>
> Secondly, through the Commission is composed of scientifically qualified persons, they are not pedants in a closet … they represent "a confrontation on the scientific plane of the varied interests of different States".[184]

137. More recently, in his work on the identification of customary international law, the Special Rapporteur for that topic discusses Commission texts under the heading "teachings" or "writings",[185] but this position was not endorsed by the Commission.[186] The compromise was for the commentaries to Part V, which concerns the significance of certain materials to the process of identifying customary international law, to say that the Commission's works

[181] B.G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (The Hague, Martinus Nijhoff, 1977).

[182] Memorandum entitled "Survey of international law in relation to the work of codification of the International Law Commission", document A/CN.4/1/Rev.1 (United Nations publication, Sales No. 1948.V.1(1)), para. 20.

[183] Clive Parry, *The Sources and Evidences of International Law* (Manchester, Manchester University Press, 1965), p. 114.

[184] *Ibid*. See also *ibid*., pp. 23–24 and 114–115.

[185] Third report on identification of customary international law, *Yearbook … 2015*, vol. II (Part One), document A/CN.4/682, paras. 55–67.

[186] Commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 110.

"merit[] special consideration",[187] but that such works rightly not be mentioned under the draft conclusion on the teachings of publicists.[188] Some writers argue that the works of the Commission are teachings,[189] while others take the opposite view.[190] Yet others seem unsure.[191]

138. Uncertainty may exist for writers about how to classify the Commission's work. But, despite such uncertainties, the practice of States and others, such as the International Court of Justice and numerous permanent and *ad hoc* international and national courts and tribunals, is crystal clear. They often rely, whether in pleadings or in judgments or opinions of legal advisers, on the various works of the Commission.

139. Observation 57 of the Secretariat memorandum for this topic confirms that the Court has "referred on multiple occasions" to the work of the Commission for a wide range of purposes.[192] Those purposes range from referring to rules or principles that the Commission has identified as part of customary international law, for example, the Commission's articles on responsibility of States for internationally wrongful acts (articles on State responsibility),[193] which are cited – even in the absence of their formal status as a treaty – in cases like *Pulp Mills*; references to the Commission's work "as a basis upon which the Court determined the existence or content of international law";[194] as the basis to develop "its reasoning"; use of the work as *travaux préparatoires* of treaties negotiated based on draft articles prepared by the Commission or as material to aid in interpreting other treaties concerning the same subject matter. Well-known examples include the references to the Commission's works in: the *North Sea Continental Shelf* cases concerning issues regarding the law of the sea;[195] the *Nicaragua* case, where reference was made to the draft articles on the law of treaties;[196] *Jurisdictional Immunities of the State*,[197] to assess whether the status of customary international law removed State immunity in the case of serious human rights violations or the law of armed conflict; *Certain Iranian Assets*;[198] and in *Silala*.[199]

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187 Para. (2) of the commentary to Part Five of the conclusions on identification of customary international law, *ibid*., at pp. 104–105.

188 Commentary to conclusion 14, *ibid*., at p. 110.

189 E.g. Michael Wood, "Teachings of the most highly qualified publicists (Art. 38 (1) ICJ Statute)", *Max Planck Encyclopedia of International Law* (2017), para. 11; American Law Institute, *Restatement of the Foreign Relations Law of the United States*, 3d ed. (Philadelphia, Pennsylvania, American Law Institute Publishers, 1987), p. 38; Fernando Lusa Bordin, "Reflections of customary international law: the authority of codification conventions and ILC draft articles in international law", *International and Comparative Law Quarterly*, vol. 63 (2004), pp. 535–568, at p. 537.

190 Gerald Fitzmaurice, "The contribution of the Institute of International Law to the development of international law", *Collected Courses of the Hague Academy of International Law*, vol. 138 (1973), pp. 203–260, at p. 220.

191 André Oraison, "L'influence des forces doctrinales académiques sur les prononcés de la C.P.J.I. et de la C.I.J", *Revue Belge de droit international*, vol. 32 (1999) pp. 205–236, at p. 208; John Dugard and Dire Tladi "Sources of international law", John Dugard *et al*. (eds.), *Dugard's International Law: A South African Perspective*, 5th ed. (Cape Town, Juta & Company, 2018), pp. 28–56, at pp. 47–48; Aldo Zammit Borda, "A formal approach to Article 38(1)(d) of the ICJ Statute from the perspective of the international criminal courts and tribunals", *European Journal of International Law*, vol. 24 (2013), pp. 649–661, at pp. 656–657.

192 A/CN.4/765, observation 57, at para. 125.

193 The articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76-77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

194 A/CN.4/765, observation 57, at para. 125.

195 *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3.

196 *Military and Paramilitary Activities in and against Nicaragua* (see footnote 130 above), para. 190.

197 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99.

198 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2023*, p. 51.

199 *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. Reports 2022*, p. 614.

140. Similarly, as per observations 84 to 86 made in the second Secretariat memorandum,[200] the International Tribunal for the Law of the Sea has referred on multiple occasions to the work of the Commission in, for instance, the *M/V "Saiga" (No. 2)*, *Responsibilities and obligations of States with respect to activities in the Area Advisory Opinion* and the *M/V "Norstar"* cases[201] when determining the rules of State responsibility, interpreting texts of law of the sea related treaties or determining customary international law. For reasons of brevity, given the wide range of pending issues that needed to be covered in the report, the Special Rapporteur has not included those excerpts and encourages members to review them as they can be found in the relevant parts of the second Secretariat memorandum.

141. The Commission has, in what might be an uncomfortable conversation, taken a view of its own works. Consistent with its mandate, it did not consider its final outputs to be teachings, much less judicial decisions. But, given what was said above, it has not sought to ascribe value to its own work in a manner that could seem unseemly and self-interested. Thus, in pointing out that its own work might merit special consideration, it is unsurprising that the Commission referred to the measure of authority that has been ascribed to its scientific outputs by "the International Court of Justice and other courts and tribunals". This was the right approach, indicating that its assessment was based on the merit of the question and the views of others, rather than a claim of special status for itself.

142. In that regard, the Commission addressed the matter in the general commentary to Part Five of the conclusions on identification of customary international law.[202] It referred to its own unique mandate to assist States in progressively developing and codifying international law, its status as a subsidiary organ of the General Assembly, its comprehensive working methods and its close interaction with the General Assembly among the relevant considerations (even though the ultimate weight to be derived from its works would depend on several additional factors).

143. The final outcomes of its deliberative process, whether styled as draft articles, draft principles or draft conclusions, are often ascribed a measure of authority by international lawyers from all walks of life – those in governments, legal practice, academia, and courts and tribunals. References to the work of the Commission – sometimes without even distinction between the final works and the preparatory reports, or between adopted draft articles and commentaries thereto – are ubiquitous in the field of international law.

144. Ultimately, like other subsidiary means, in assessing the weight to give to the work of the Commission, regard should be had to the same factors set out in the general criteria in draft conclusion 3. The universal nature of the body and its mandate, the quality of the reasoning employed, the expertise and globally representative nature of the membership of the Commission, the level of agreement among the members, and the reception by States and other entities of the Commission's work (whether individually or in the context of the General Assembly) are all important considerations that ought to be taken into account. The stage of the work and whether one is examining the work of the Commission or its special rapporteurs or working groups will also matter, as would the level of State input and how representative it is of the international community of States. The decision of the General Assembly on the final outcome and statements made in that regard to the topic are also relevant.

## B. The work of human rights treaty bodies as subsidiary means

145. There are 10 core universal treaties addressing human rights, reflecting a significant elaboration of a body of binding law that followed the adoption of the 1948 Universal Declaration of Human Rights, which is now firmly embedded as part of customary international law. These human rights "treaty bodies"[203] are a fundamental part of the post-

[200] A/CN.4/765, observations 84–86, at paras. 197–205.

[201] *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, and *M/V "Norstar" (Panama v. Italy), Judgment, ITLOS Reports 2018–2019*, p. 10.

[202] *Yearbook … 2018*, vol. II (Part II), para. 66, at pp. 104–105.

[203] These entities are widely referred to as such. However, technically, their treaties refer to them as "committee".

Second World War international legal architecture that could not have been predicted by the drafters of Article 38 in the Advisory Committee of Jurists in 1920. Most of these treaties, some of which address human rights generally such as the International Covenant on Civil and Political Rights and others specifically such as the International Convention on the Elimination of All Forms of Racial Discrimination or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, requires States to adopt measures to implement their obligations.[204] These bodies, comprised of independent experts, serve as treaty monitors and perform a range of functions mandated under their respective instruments.

146. Against the above backdrop, the question of whether the various types of outputs produced by those bodies can be considered subsidiary means for the determination of rules of international law is one that is ripe for discussion by the Commission, since international lawyers have, for several decades now, been engaging with the question of the status of those outputs. An extensive body of literature has assessed the legal effect of the concluding observations, views and general comments issued by such bodies. The Commission itself has considered and adopted guidelines on reservations and conclusions on pronouncements of such bodies in the topics "Reservations to treaties"[205] and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[206] In the latter topic, the Commission clarified that there is a connection between the works of such bodies and the supplementary means of interpretation under article 32 of the 1969 Vienna Convention and, significantly, Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. It was established that both are materials that can be used when determining or applying the rules of international law.

147. A preliminary point to note is that human rights treaty bodies perform a range of activities. While their treaty provisions and working methods might differ, in general terms, they all consider the reports of States parties and frame concluding observations, while many address individual communications or petitions brought against States that have opted in to such procedures under the relevant convention or protocol thereto and issue general comments interpreting the obligations of States. As the Commission has observed in the past, various terms such as views, recommendations, comments or measures are used alongside others, such as jurisprudence and output, to describe the outcome of the works of such bodies. After careful consideration, it was determined that the term "pronouncements" would be used.

148. There has been a debate on how to characterize the various outputs of treaty bodies. For present purposes, a key question has been whether decisions issued by adjudicative

[204] The Special Rapporteur notes that, while he has elected to focus on human rights treaty expert bodies, there are also other treaties in international law that have established expert bodies at the regional as well as international levels. Key examples include the Commission on the Limits of the Continental Shelf established under the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3) and the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997, *ibid*., vol. 2303, No. 30822, p. 162). See, in this regard, the United Nations Convention on the Law of the Sea and annex II to the Convention, art. 76, para. 8, and Report of the Conference of the Parties on its Seventh Session, Marrakech, 29 October–10 November 2001, Addendum, Part Two: Action taken by the Conference of the Parties, vol. III (FCCC/CP/2001/13/Add.3) (albeit implicitly created on the basis of article 18 of the Kyoto Protocol). These mechanisms may also exist at regional levels. At the regional level, for example in Africa, the African Charter on the Rights and Welfare of the Child adopted on 1 July 1990 (Addis Ababa; available from the website of the African Commission: https://au.int/, under "Treaties") provided basis for the creation of the African Committee of Experts on the Rights and Welfare of the Child on 29 November 1999.

[205] See the Guide to Practice on Reservations to Treaties. The Guide adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Two), para. 75, and *ibid*., vol. II (Part Three). See also General Assembly resolution 68/111 of 16 December 2013, annex.

[206] See the conclusions on subsequent agreements and subsequent practice, *Yearbook … 2018*, vol. II (Part Two), para. 51.

committees addressing individual petitions in an essentially adversary way constitute judicial decisions, decisions or quasi-judicial decisions.

149. The Special Rapporteur submitted in his first report that the term "'judicial decisions' is to be taken to be a reference to a judgment, decision or determination by a court of law". He also suggested that the term "decisions" could cover decisions issued by arbitral panels, whether *ad hoc* or permanent. Specifically, he argued that decisions taken in relation to individual complaints procedures of the treaty bodies such as the Human Rights Committee constitute "quasi-judicial decisions".[207] These outputs share certain characteristics with court decisions since they are often preceded by an adversarial procedure, are decided by an independent and impartial body comprised of legal experts acting in their personal capacity and apply the law instead of equity.

150. This approach is supported by the views of the International Law Association, when it explained the term "decisions" and the meaning of "courts and tribunals". It argued that the "judicial bodies" in the area of human rights as the three human rights courts from Africa, Europe and Latin America while "quasi-judicial bodies" "comprises the ten [United Nations] human rights treaty committees and the regional commissions of the Inter-American and African systems".[208]

151. General comments, which could be inspired by treaty provisions and case law, may share certain features with decisions or quasi-judicial decisions. They are, in some respects, closer in nature to teachings thereby perhaps having a dual character of not necessarily being in one category. The Commission, after canvassing various ways that outputs of treaty bodies are described in one of its recent topics, has concluded that the better phrasing is to use the term "pronouncements", explaining the matter as follows:

> Treaties use various terms for designating the forms of action of expert treaty bodies, for example, "views",[582] "recommendations",[583] "comments",[584] "measures"[585] and "consequences"[586] Draft conclusion 13 employs, for the purpose of the present draft conclusion, the general term "pronouncements".[587] This term covers all relevant factual and normative assessments by expert treaty bodies. Other general terms that are in use for certain bodies include "jurisprudence"[588] and "output".[589] Such terms are either too narrow, suggesting a particular legal significance of the output of such a body, or too broad, covering any act of an expert treaty body, to be appropriate for the purpose of this draft conclusion, which applies to a broad range of expert treaty bodies.[209]

[582] International Covenant on Civil and Political Rights, art. 42, para. 7 (*c*); Optional Protocol to the International Covenant on Civil and Political Rights, art. 5, para. 4; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 9, para. 1.

[583] International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 2; Convention on the Elimination of All Forms of Discrimination against Women, art. 21, para. 1; Convention on the Rights of the Child, art. 45 (*d*); International Convention for the Protection of All Persons from Enforced Disappearance, art. 33, para. 5; and United Nations Convention on the Law of the Sea, art. 76, para. 8.

[584] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 3; International Covenant on Civil and Political Rights, art. 40, para. 4; and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 74.

[207] A/CN.4/760, para. 273.

[208] International Law Association, International Human Rights Law Committee, "Final report on international human rights law and the International Court of Justice (ICJ): the domestic implementation of judgments/decisions of courts and other international bodies that involve international human rights law", *Report of the Seventy-seventh Conference held in Johannesburg, 7-11 August 2016* (2017), at para. 3.

[209] See para. (6) of the commentary to conclusion 13 (Pronouncements of expert treaty bodies) of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook … 2018*, vol. II (Part Two), para. 52, at p. 85.

[585] Decision I/7 on review of compliance, adopted at the first meeting of the parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters …, annex, paras. 36–37; 1961 Single Convention on Narcotic Drugs, art. 14.

[586] Decision 24/CP.7 on procedures and mechanisms relating to compliance under the Kyoto Protocol to the United Nations Framework Convention on Climate Change …, annex, sect. XV.

[587] *Yearbook … 2015*, vol. II (Part Two), para. 26 (*b*); see also International Law Association, "Final report on the impact of findings of the United Nations human rights treaty bodies", *Report of the Seventy-first Conference* …, pp. 626–627, para. 15; and European Commission for Democracy through Law (Venice Commission), "Report on the implementation of international human rights treaties in domestic law and the role of courts" (CDL-AD(2014)036), adopted by the Venice Commission at its 100th plenary session (Rome, 10–11 October 2014), p. 31, para. 78.

[588] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment [of 30 November 2010], I.C.J. Reports 2010*, p. 639, at pp. 663–664, para. 66; Rodley, "The role and impact of treaty bodies" …, p. 640; A. Andrusevych and S. Kern (eds.), Case Law of the Aarhus Convention Compliance Committee (2004–2014), 3rd ed., Lviv, Resource and Analysis Center "Society and Environment", 2016; and "Compilation of findings of the Aarhus Convention Compliance Committee adopted 18 February 2005 to date", available from www.unece.org/fileadmin/DAM/env/pp/compliance/Compilation_of_CC_findings.pdf.

[589] R. Van Alebeek and A. Nollkaemper, "The legal status of decisions by human rights treaty bodies in national law", in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge, Cambridge University Press, 2012, pp. 356–413, at p. 402; Rodley, "The role and impact of treaty bodies" …, p. 639; K. Mechlem, "Treaty bodies and the interpretation of human rights", *Vanderbilt Journal of Transnational Law*, vol. 42 (2009), pp. 905–947, at p. 908.

152. While the definition used in the above conclusion was only for the purposes of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the current Special Rapporteur does not recommend deviating from that approach in the current topic. The present topic evidently addresses a different matter. That said, there are close connections given the link between Article 38 of the Statute of the International Court of Justice and article 32 of the 1969 Vienna Convention mentioned above (and described in a separate chapter of the present report). In terms of substance, the key advantage of the broader formulation is that the term "pronouncements" is a neutral term that covers "all relevant factual and normative assessments by expert bodies". The use of such materials, whether decisions of the treaty bodies or general comments, in State practice and the jurisprudence of international courts and tribunals is reflective of their practical role in determining rules of international law. Therefore, the merits of changing the nomenclature, to something other than pronouncements, seems outweighed by the potential negative consequences that could follow from the legal uncertainty that might be introduced. Additionally, States and other users of the Commission's work are already familiar with the language.

## C. International Committee of the Red Cross: *sui generis*?

153. The unique nature of ICRC was discussed briefly in the Special Rapporteur's first report. It also was the subject of thoughtful comments by a number of members of the Commission during both the first and second debates on the present topic.

154. In the first report, the Special Rapporteur cited ICRC as an example of a private body that is also empowered by States to carry out certain responsibilities and benefits from a dialogue and or close interaction with States.[210]

155. In formal terms, ICRC has been described as having a "hybrid nature",[211] as a Swiss-incorporated "private association" whose "functions and activities" are nonetheless "mandated by the international community of States".[212] The hybridity stems from the fact that, while it was not created by States, it is empowered by States to carry out some special

[210] A/CN.4/760, para. 327, citing *Prosecutor v. Tadić*, et al., Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Appeals Chamber, *Judicial Reports 1994–1995*, vol. I, p. 353, at para. 109.

[211] Gabor Rona, "The ICRC's status: in a class of its own", ICRC, 17 February 2004.

[212] *Ibid.*; similarly Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford, Oxford University Press, 2007), pp. 204–205.

functions and appears to enjoy a somewhat privileged position *vis-à-vis* its area of competence.

156. The Secretariat's first and second memorandums are replete with examples of approving citations to the various works and outputs of ICRC, not only by the Commission, but also by other international bodies such as the International Court of Justice, the *ad hoc* and permanent international criminal tribunals, and regional and national courts and tribunals, as well as in the writings of scholars. The work of ICRC carries authority.

157. In the law of armed conflict, ICRC plays a significant role; among its many contributions has been producing the monumental and widely cited Pictet commentaries to which "great weight" has been ascribed by numerous international courts and tribunals, often as a preferred and sole source.[213] Perhaps even more significant has been the broad reliance on those commentaries in State practice, including the military manuals of States, which constitute State practice. Similarly, other ICRC commentaries to the Additional Protocols have demonstrated some influence and assisted in clarifying the obligations of States in the law of armed conflict. A more sensitive undertaking, but nonetheless still of significance, has been the effort of ICRC experts to carry out an in-depth study of State practice resulting in a volume restating customary international humanitarian law.[214] While that volume has attracted, like other works, both praise and criticism, the practice shows extensive use of those materials or aspects of them in the process of interpretation and rule determination.

158. States have little, if any, role in the creation of ICRC texts.[215] Texts produced by ICRC could, as a starting point, qualify as "the teachings of publicists".[216] This was the view taken by the English Court of Appeals in *Serdar Mohammed and others v. Secretary of State for Defence*, where it held that "[t]he institutional views of the ICRC also qualify as 'the teachings of the most highly qualified publicists of the various nations', so that they qualify as a subsidiary source for the determination of rules of international law: ICJ Statute, Article 38(1)(d)".[217] If this interpretation is accepted, the ICRC text, like other teachings, could inspire or encourage State to take certain actions, such as engaging in subsequent practice of the parties that may carry legal effects. Any such decision, however, does not stem from a special mandate or legal obligation to do so.

159. ICRC has both historically, and in contemporary times, played a vital role in the development of law of armed conflict.[218] Nonetheless, from a purely technical perspective,

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[213] See Jean-Marie Henckaerts, "Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict", *International Review of the Red Cross*, vol. 87 (2005), pp. 175–212. On the other hand, given the dynamic interactions between the work of expert bodies and States, aspects of the ICRC study were not necessarily embraced by all States. See, for example, John B. Bellinger, III and William J. Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", *International Review of the Red Cross*, vol. 89 (2007), pp. 443–471; and Jean-Marie Henckaerts, "*Customary International Humanitarian Law*: a response to US comments", *International Review of the Red Cross*, vol. 89 (2007), pp. 473–488.

[214] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vols. I and II (Cambridge, Cambridge University Press, 2005).

[215] Boyle and Chinkin, *The Making of International Law*, p. 205.

[216] Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Cheltenham, Edward Elgar, 2012), p. 115.

[217] *Serdar Mohammed and others v. Secretary of State for Defence* [2015] EWCA Civ 843, para. 171.

[218] ICRC has been accorded a high level of authority, for example by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (see footnote 210 above), para. 109 ("As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law …. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with

some States and scholars have questioned whether the general mention of ICRC in the Geneva Conventions and the Additional Protocols thereto gives it a formal status as the guardian of the law of armed conflict and, if so, whether that extends beyond a role as a factual example of a competent humanitarian aid organization that could be entrusted with certain responsibilities in the field. Whereas some authors, including experts associated with ICRC itself have argued that it has such a role, others have considered that the evidence confirming that the relevant treaties granted ICRC "any competence to interpret or ascertain rules of [international humanitarian law]" is thin.[219] States, albeit only a handful of them, have indicated that they are uncomfortable with an interpretation that ICRC has a mandate "to interpret authoritatively the 1949 Geneva Conventions and their Additional Protocols".[220] They went on to note that the body lacks the authority to issue "binding interpretations" of the law of war treaties.[221]

160. That said, for the purposes of the present topic, the question is not whether the ICRC texts, including its interpretative guidance, constitute binding interpretations of the law. Rather, the question is whether they can be useful materials, in the sense of the work of expert bodies that are empowered by States but acting independently, to study matters and potentially offer useful elements for interpretation of the sources of law found in Article 38, paragraph 1, of the Statute of the International Court of Justice.

## D. Proposed draft conclusion 10 – pronouncements of public expert bodies

161. The Special Rapporteur, having considered the works of the Commission and ICRC as either State-created and State-empowered bodies, proposes that the Commission build on its previous work to propose a draft conclusion addressing the pronouncements of expert bodies as subsidiary means for the determination of rules of international law. He considers that, like the previous draft conclusions included in the "any other means" category, a measure of consistency might be warranted. This would require the Commission to adopt a draft conclusion structured in three paragraphs that – like the draft conclusion on resolutions of international organizations or at intergovernmental conferences – will start by making a general proposition in the first paragraph. This would then be followed by a paragraph on assessing the weight of such works. Finally, in the last paragraph, would be included a "without prejudice" clause that recognizes that the pronouncements of expert bodies have other purposes, as already established in the Commission's prior work in other topics. The language used in the proposed draft conclusion builds on previously adopted text of the Commission to frame all its elements.

162. Taking the above analysis into account, the Special Rapporteur, building on the prior work of the Commission, proposes the following draft conclusion:

> Draft conclusion 10
>
> Pronouncements of public expert bodies
>
> 1. A pronouncement of an expert body may serve as a subsidiary means for the determination of the existence and content of rules of international law.
>
> 2. When assessing the weight of a pronouncement under paragraph 1, regard should be had to, as appropriate, the criteria set out in draft conclusion 3.

international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.").

219 Linus Mührel, *The Authority of the International Committee of the Red Cross: Determining What International Humanitarian Law Is* (Leiden, Brill, 2024), pp. 37 and 48–49.

220 See United States, comments on draft conclusion 5 of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as adopted on first reading, contained in A/CN.4/712, p. 15.

221 *Ibid*.

3. The use of pronouncements of expert bodies as subsidiary means for the determination of rules of international law under paragraphs 1 and 2 is without prejudice to their use for other purposes.

# V. Resolutions of international organizations and intergovernmental conferences

163. As has been noted in the preceding chapters, while Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice provides a starting point, it is not necessarily exhaustive, and the practice of States and international courts and tribunals has evolved considerably since its drafting. In this context, the question of whether resolutions of international organizations can be considered subsidiary means for the determination of rules of international law is one that warrants careful consideration. As the Special Rapporteur noted in his first report, this question frequently arises in the literature,[222] indicating the need for a thorough analysis of the issue.

164. The Special Rapporteur has previously observed that international tribunals have, in practice, examined sources of obligations for States that go beyond the traditional sources of law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice. He specifically noted that "arguably, the two most frequently cited modern sources of obligations for States in international law are unilateral acts/declarations of States and/or resolutions of international organizations".[223] This observation highlights the need to consider the role of resolutions of international organizations in the context of an examination of the role of subsidiary means, as it is possible that they can be used both to identify and evidence obligations for States as part of the determination of rules of international law. The fact that resolutions can play a role in determining the existence and content of a rule of customary international law or contributing to its development,[224] alongside the other subsidiary means (namely decisions of courts and tribunals[225] and teachings[226]), has been a matter of interest to both the Commission and States.

165. Following the plenary debate of the first report, in which some members of the Commission generally supported examining resolutions of international organizations, the Special Rapporteur indicated his intention to address the issue of resolutions of international organizations in his third report.[227] He reiterated that position following the first debate in the Sixth Committee on the topic during the General Assembly in 2023.[228]

166. The Commission, at its seventy-third session, in 2022, noted that some members supported the inclusion of resolutions of international organizations as additional subsidiary means.[229] This position reflects a view that these resolutions, while not explicitly listed as sources of law, may nonetheless play a role in the determination of rules of international law, beyond simply being evidence of other sources. This view is consistent with the Special Rapporteur's observation that international tribunals have, in practice, examined sources of obligations for States that go beyond the traditional sources of law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice.

167. However, the Commission also noted that other members held the view that resolutions of international organizations could serve as evidence of the elements of other sources of law, such as customary international law, but were not subsidiary means themselves.[230]

[222] A/CN.4/760, para. 18.
[223] *Ibid*., para. 49.
[224] Conclusion 12, paragraph 2, of the conclusions on identification of customary international law and the commentary thereto, *Yearbook … 2018*, vol. II (Part Two), para. 66, at pp. 107–109.
[225] Conclusion 13 and commentary thereto, *ibid.*, pp. 109–110.
[226] Conclusion 14 and commentary thereto, *ibid.*, at p. 110.
[227] A/CN.4/760, para. 49.
[228] A/C.6/78/SR.33, para. 73.
[229] A/78/10, para. 88.
[230] *Ibid.*, para. 121.

168. The Special Rapporteur observed on this point that, in practice, much as was the case with decisions of national courts, there was no reason why resolutions could not play a dual function as elements that could be considered either in the determination of rules of law derived from the established sources or as subsidiary means for the determination of such rules.[231] In his second report, the Special Rapporteur noted that "[m]ost members supported further analysis of certain resolutions and decisions of international organizations and the works of private and public expert bodies", with some, though not all of those members urging "express recognition of those categories, including in specific conclusions".[232]

169. The Commission, at its seventy-fourth session, in 2024, again noted that some members supported the inclusion of the resolutions of international organizations as additional subsidiary means, while others believed they could only serve as evidence of other sources.[233]

## A. The status of resolutions of international organizations in the work of the Commission

170. The Commission has previously addressed the role of resolutions of international organizations in the context of the sources of international law, most notably in its work on the identification of customary international law. It has also considered the question of subsidiary means for the determination of rules of international law, although not specifically in relation to resolutions. In its work on identification of customary international law, the Commission clarified that the conclusions adopted aimed to explain how rules of customary international law are to be identified, without attempting to explain the relationship between customary international law and other sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice.[234] This meant that the Commission did not make an exhaustive list of subsidiary means, focusing instead on judicial decisions and teachings.[235] A similar approach was taken in the work on general principles of law, where the Commission, again, did not provide an exhaustive list of subsidiary means.[236]

171. Still, the prior work of the Commission, specifically in its conclusions on identification of customary international law, provides further context for understanding the potential role of resolutions of international organizations as potential subsidiary means.[237] While those conclusions do not directly address the question of whether resolutions of international organizations can be considered subsidiary means, they are relevant to how resolutions relate to the established sources of international law, namely customary international law[238] and general principles.[239]

172. Conclusion 4, paragraph 2, of the conclusions on identification of customary international law acknowledges that, in certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law. Thus, international organizations may, in some circumstances, have a degree of agency in the development of international law, beyond simply serving as a forum for the development of State practice. The commentary to that conclusion clarifies that it primarily refers to the practice of international organizations that are entrusted by States with exercising their own competencies, such as the European Union. It also clarifies that the

231 *Ibid*.
232 A/CN.4/769, para. 26.
233 A/79/10, para. 296.
234 Para. (6) of the commentary to conclusion 1 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 93.
235 Commentaries to conclusions 13 and 14, *ibid*., at pp. 109–110.
236 Second report on general principles of law, by Marcelo Vázquez-Bermúdez, Special Rapporteur, A/CN.4/741 and Corr.1, para. 72; third report on general principles of law, by Marcelo Vázquez-Bermúdez, Special Rapporteur, A/CN.4/753, para. 84.
237 Para. (4) of the general commentary to the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 92.
238 *Ibid*.
239 Para. (6) of the commentary to conclusion 1, *ibid*.

practice of organs consisting of State representatives within international organizations is to be assessed as practice of those States. The carefully circumscribed wording of this conclusion, particularly the phrase "in certain cases", indicates that the practice of international organizations is not automatically relevant to the formation of customary international law and that a careful, case-by-case assessment is required.[240]

173. Conclusion 10 addresses forms of evidence of acceptance as law (*opinio juris*). Paragraph 2 of this conclusion provides a non-exhaustive list of such forms, including "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference". The commentary to conclusion 10, in paragraph (6), elaborates on this point, stating that multilateral drafting and diplomatic processes may afford valuable and accessible evidence as to the legal convictions of States. Paragraph (7) of the commentary clarifies that paragraph 2 applies *mutatis mutandis* to the forms of evidence of acceptance as law (*opinio juris*) of international organizations. This means that the conduct of international organizations in connection with resolutions can also be evidence of their own acceptance of a rule as law, to the extent that such acceptance is relevant to the identification of customary international law.[241]

174. Conclusion 12 specifically addresses the role of resolutions of international organizations and intergovernmental conferences in the identification of customary international law. Paragraph 1 of this conclusion states that a resolution "cannot, of itself, create a rule of customary international law". However, paragraph 2 recognizes that a resolution "may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development". This acknowledges that resolutions can play a significant role in the process of identifying customary international law, even if they are not themselves a source of law. Paragraph 3 further clarifies that a provision in a resolution "may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*)".[242]

175. Finally, conclusions 13 and 14,[243] which address decisions of courts and tribunals and the teachings, respectively, is not directly relevant to the question of resolutions of international organizations. However, it is relevant to the broader discussion of subsidiary means for the determination of rules of international law, as it provides guidance on how such means can be used.

176. The fact that neither conclusion addresses resolutions of international organizations might be taken as evidence that the Commission did not consider them to be subsidiary means in the same way as judicial decisions and teachings. However, it must be observed that the Commission was not concerned, at the time, with the identification of an exhaustive list of subsidiary means. It was only concerned with how those two subsidiary means mentioned in Article 38, paragraph 1 (*d*), were relevant to the identification or determination of rules of customary international law.

177. Thus, as the current rapporteur has emphasized on several occasions and as the decision of the Commission to take up the present study confirms, the Commission's conclusions in that context are to be understood as being without prejudice to the possibility that resolutions may be used in other ways in the identification of customary international law, as recognized in the prior conclusions—specifically, as subsidiary means.

178. A similar conclusion was reached in the Commission's work on general principles of law. The second report of the Special Rapporteur for that topic clarified that the Special Rapporteur considered that the Commission should avoid entering into matters relating to other sources of international law that are better addressed separately.[244] This suggests that the Commission's approach to subsidiary means in the context of general principles of law was not intended to be exhaustive, leaving open the possibility that other materials, such as resolutions of international organizations, could also serve as subsidiary means.

[240] Commentary to conclusion 4, *ibid*., pp. 96–98.
[241] Commentary to conclusion 10, *ibid*., pp. 98–99.
[242] *Ibid*., para. 65.
[243] *Ibid*.
[244] A/CN.4/741, paras. 121–130 and 165.

179. This interpretation is further supported by the Special Rapporteur in his third report, which explicitly addresses the role of resolutions of international organizations in the context of general principles of law.[245] While the report does not directly equate resolutions with judicial decisions and teachings, it does recognize that such resolutions may be relevant to the identification of general principles of law, particularly those formed within the international legal system.[246] The report notes that resolutions can be one of the elements that evidence the recognition of a principle at the international level, although the mere existence of a principle in international instruments is not sufficient to establish it as a general principle of law.[247]

180. This suggests that resolutions of international organizations can play a role in the identification of general principles of law in a manner that is analogous, though not identical, to their role in the identification of customary international law. They can serve as evidence, albeit not conclusive, of the recognition of a principle, much like they can provide evidence of both State practice and *opinio juris* on the formation of custom. Therefore, much as was concluded in the context of the identification of customary international law, the fact that resolutions are not explicitly mentioned as subsidiary means in the context of general principles of law either should not be taken as definitive evidence that they cannot play such a role.

## B. The legal significance of resolutions of international organizations and their potential role as subsidiary means

181. Thus, the debate surrounding resolutions of international organizations as potential subsidiary means is not simply about whether they are relevant, but about how they are relevant. As the present Special Rapporteur has noted, the question is whether they are a direct means of determining rules of law (not unlike judicial decisions and teachings) or whether they simply serve an evidentiary function. This distinction is important because it affects the process by which these materials are employed, as well as the weight that should be given to them in the determination of rules of international law.

182. This requires understanding whether and how "subsidiary means" function distinctly from materials that serve as evidence of other sources, particularly customary international law. This challenge is particularly acute when considering the potential role of resolutions of international organizations. It is not sufficient to simply acknowledge that such resolutions are relevant to the determination of rules of international law. Rather, it is necessary to analyse whether and how they may operate as subsidiary means as opposed to merely serving as evidence of State practice or *opinio juris*.

183. The difficulty arises because resolutions of international organizations, like other materials, can be used for both purposes. For example, as the Commission has recognized in its prior work (taking a position that has not been contested by States), a series of General Assembly resolutions condemning a particular practice, if supported by consistent State practice and *opinio juris*, could be used as evidence of the emergence of a new rule of customary international law prohibiting that practice.[248] In this scenario, the resolutions are part of the process of rule creation, contributing to the formation of a new customary rule. A resolution interpreting a specific provision of the Charter of the United Nations could be relied on in treaty interpretation as subsequent practice in order to clarify the scope and application of that provision.

184. The key to understanding the distinction lies 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. This phrase suggests that subsidiary means are not sources of law in themselves, but rather

[245] A/CN.4/753.
[246] *Ibid*., para. 31.
[247] *Ibid*., para. 32.
[248] Conclusion 12 and commentary thereto of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at pp. 107–109.

tools that are used to determine the content and scope of rules that are derived from the primary sources.

185. The distinction also relates to the authority of the materials. The significance of a resolution as evidence of custom stems from how good a proxy it is for the assessment of the practice and *opinio juris* of States. The authority of subsidiary means, however, might stem from other considerations, such as the ones that have been suggested thus far in relation to both judicial decisions and teachings. Thus, questions might arise in relation to whether the significance of resolutions of international organizations stems from the collective will of States (as evidence of custom) or from the mandate, representativeness, expertise and analysis of the organization itself (as a subsidiary means). The context of adoption, the voting pattern and explanation of votes are all relevant in assessing the weight to ascribe to such resolutions.

186. There are some additional complications. For example, if resolutions are considered an independent source of obligations, say because they are Security Council resolutions which would be mandatory for States under the Chapter VII of the Charter of the United Nations, can they still be considered "subsidiary" in the same way as judicial decisions and teachings? This is a question calls for an examination of the notion of "subsidiarity" and an analysis of whether or not resolutions actually are used as subsidiary means.

## C. The distinction between the use of subsidiary means

### 1. Subsidiarity versus evidence in general

187. The term "subsidiary means" denotes the ancillary role of these materials in elucidating existing law and furnishing evidence thereof, as opposed to being themselves a source of international law. In this connection, the approach adopted in the first report bears recalling:

> ... If a decision is made to address one of the above issues, for instance the place of resolutions of international organizations, such subsidiary means will have [to] be distinguished from sources that serve as evidence of the existence of a rule or the elements of a rule. While this issue could be addressed in a future report, as necessary, it may be helpful to lay down a number of points at this stage.
>
> ... A treaty collection may be used to show that a treaty exists. It would not be correct to call the treaty collection a subsidiary means for the determination of rules of international law. The treaty collection as such plays no role in the interpretation of the treaty. Subsidiary means for the determination of rules of international law are means that are, by contrast, used for the content, quality and persuasiveness of their ideas about the law. They may, for example, aid in the interpretation of a treaty.
>
> ... Non-binding resolutions and similar documents can be used as evidence of the existence of a rule of customary law or of a general principle of law. They may alternatively be used for the content, quality and persuasiveness of their ideas about general principles of law. The Special Rapporteur's first report on general principles of law recognized that, in order "to identify a general principle of law, a careful examination of available evidence showing that it has been recognized is required". The second report noted that "[o]ther types of materials" (than judicial decisions and the teachings of publicists), "such as public and private codification initiatives, have also been considered when determining the existence and content of a principle common to national legal systems".
>
> ... To conclude the present section, the definition of subsidiary means depends not only on a typology of instruments but also on their application in a particular case. Any source, instrument or text, whether binding or non-binding, that can inspire legal arguments can be used as a subsidiary means for the determination of rules of law in a particular case. At the same time, an instrument that has the potential to be used as

a subsidiary means may instead be used as evidence of the existence of rules of international law.[249]

188. When materials serve as evidence of customary law, they directly demonstrate the existence of State practice or *opinio juris*. In contrast, when serving as subsidiary means, they assist in "collecting, synthesizing or interpreting practice relevant to the identification of customary international law".[250] The subsidiary nature of these means does not diminish their practical importance. Rather, it clarifies their methodological role in the identification process. As was famously explained, such materials are consulted "not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is".[251]

189. The distinction between evidential and subsidiary roles becomes particularly clear when examining how adjudicators evaluate these materials. When used as subsidiary means, the focus is on their capacity to systematically collect and analyse practice, rather than their authority *per se*.[252] This is reflected in the observation of the United States Court of Appeals that such materials provide evidence of State practice "only insofar as they rest on factual and accurate descriptions of the past practices of states".[253]

190. The subsidiary character of these means requires that consulting them does not obviate the need to examine other evidence. They are "among the materials to be taken into account" rather than conclusive determinants.[254] This approach ensures that the identification of customary rules remains anchored in State practice and *opinio juris* while benefiting from the systematic analysis these subsidiary means can provide.

191. A resolution adopted by an international organization or an intergovernmental conference may function as direct evidence of customary international law in several ways. First, the voting patterns and explanations of vote may demonstrate *opinio juris* of participating States.[255] Second, the resolution itself may record actual State practice, as illustrated by General Assembly resolution 75/183 of 16 December 2020 which recorded "the fact that many States are applying a moratorium" on the death penalty. Third, statements made during negotiations and adoption may provide evidence of States' views on the existence and content of customary rules.

### 2. Resolutions as subsidiary means?

192. Distinct from this evidential role, resolutions may serve a subsidiary function in determining rules of customary international law by providing systematic analysis and precise formulation of rules. This is particularly apparent when resolutions undertake to restate existing customary law.[256] In such cases, the resolution serves not merely as evidence but as a reasoned determination of customary rules, analogous to how judicial decisions and teachings assist in "collecting, synthesizing or interpreting practice".[257]

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[249] A/CN.4/760, paras. 375–378.

[250] Para. (1) of the commentary to Part Five of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 104. For an example drawing from judicial decisions as subsidiary means, see International Centre for Settlement of Investment Disputes, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 277, where the tribunal emphasized that the evidentiary weight of sources depends on whether "the conclusions therein are supported by evidence and analysis of custom".

[251] *The Paquete Habana and The Lola*, United States, Supreme Court 175 US 677 (1900), at p. 700, cited in para. (3) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 110.

[252] Omri Sender and Michael Wood, *Identification of Customary International Law* (Oxford, Oxford University Press, 2024), pp. 268–269.

[253] *Ibid*., p. 269.

[254] *Ibid*., p. 253.

[255] *Ibid*., pp. 241–242.

[256] *Ibid*., pp. 239–240.

[257] Para. (1) of the commentary to Part Five of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 104.

193. The subsidiary function is most evident where resolutions contain careful legal analysis connecting State practice and *opinio juris* to specific formulations of rules. As demonstrated by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, such resolutions may clarify the content and scope of customary rules through systematic exposition. This analytical function goes beyond mere evidence to provide a reasoned basis for determining the existence and content of customary rules.

194. When adjudicators examine resolutions for their subsidiary value, they focus on different aspects than when considering resolutions as direct evidence. Rather than counting votes or analysing explanations of vote, they examine the resolution's reasoning and analytical framework. The practice of the International Court of Justice, as surveyed in the Secretariat memorandum, provides several examples of resolutions being used in a manner consistent with their role as subsidiary means. Indeed, Judge Yusuf, in his 2019 statement to the Sixth Committee, emphasized that the Court has shown ingenuity in taking into account developments in international society when engaging with unwritten sources of law, including the role of General Assembly resolutions in the formation of customary rules.[258]

195. In the *Nuclear Weapons* advisory opinion, the Court considered General Assembly resolutions as potentially providing evidence of *opinio juris*.[259] However, the Court did not simply take the resolutions at face value. It carefully examined the content of the resolutions, the conditions of their adoption and the extent to which they reflected a genuine legal conviction on the part of States. This demonstrates the Court's engagement with resolutions not merely as evidence, but as materials requiring careful analysis to determine their legal significance.

196. Similarly, in the *Chagos* advisory opinion, the Court's analysis of General Assembly resolution 1514 (XV) of 14 December 1960 went beyond merely noting its adoption.[260] The Court examined the resolution's role in the broader process of decolonization, its declaratory character regarding the right to self-determination and its affirmation by subsequent resolutions. This demonstrates the Court's use of the resolution as a means of determining the content and scope of an existing rule of customary international law, rather than simply as evidence of the rule's formation.

197. The case of *The Gambia v. Myanmar* provides another example.[261] Here, the Court referred to General Assembly resolution 47/121 of 18 December 1992 to support its interpretation of article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide.[262] While the resolution was not the sole basis for the Court's interpretation, it served as a supplementary means of confirming the Court's understanding of the provision's meaning.

198. The distinction between evidential and subsidiary roles becomes particularly important when examining a series of resolutions over time. While repeated, similar resolutions may provide cumulative evidence of *opinio juris*,[263] they may also, through progressive refinement of analysis and formulation, serve to systematically determine the precise content of customary rules the existence of which has been already clarified.[264]

199. The dual nature of the potential contribution of resolutions to identifying customary law requires careful attention to be paid to their different aspects. When a resolution contains both a record of State practice or expressions of *opinio juris* and a systematic analysis of

[258] Abdulqawi Ahmed Yusuf, President of the International Court of Justice, statement before the Sixth Committee of the General Assembly, 1 November 2019, para. 40.

[259] *Nuclear Weapons* (see footnote 133 above), para. 70.

[260] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, at paras. 150–155.

[261] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022*, p. 477, at paras. 88–90.

[262] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

[263] Sender and Wood, *Identification of Customary International Law*, p. 237.

[264] *Ibid*., p. 239.

customary law, each aspect should be evaluated according to its respective function. This is reflected in the approach of the International Court of Justice requiring examination of both "content and conditions of adoption".[265]

## D. Assessing the weight of resolutions

200. The assessment of resolutions as subsidiary means begins with the application of the general criteria established in draft conclusion 3 of the present draft conclusions, which provides that regard should be had to: (*a*) their degree of representativeness; (*b*) the quality of the reasoning; (*c*) the expertise of those involved; (*d*) the level of agreement among those involved; (*e*) the reception by States and other entities; and (*f*) where applicable, the mandate conferred on the body.[266]

201. When examining resolutions specifically, several of these criteria take on particular significance in the following ways. First, regarding the quality of reasoning (criterion (*b*)), resolutions must demonstrate thorough and methodical legal analysis rather than merely political statements or aspirational declarations. The analysis should clearly identify and examine relevant State practice and *opinio juris* where relevant.

202. Second, the institutional factors – including the expertise of those involved (criterion (*c*)), level of agreement (criterion (*d*)) and mandate of the body (criterion (*f*)) – require careful scrutiny. The procedures followed in adoption, including opportunities for deliberation, bear directly on these criteria.

203. Third, the reception by States and other entities (criterion (*e*)) provides a crucial indication of a resolution's utility in determining rules of international law. The States' use of such resolutions subsequent to adoption could also be important indication of their view of them. This includes consideration of how courts and tribunals have relied upon or referenced the resolution, as evidenced by the practice reviewed in the Secretariat's memorandum.[267]

204. The degree of representativeness (criterion (*a*)) remains significant but takes on specific characteristics in the context of resolutions, requiring assessment of both geographic representation and diversity of legal systems in the adoption process. These considerations collectively inform determination of the weight to be accorded to resolutions as subsidiary means. Only those resolutions demonstrating strong legal analysis, emerging from bodies with the relevant expertise and mandate, and receiving meaningful engagement from the international community of States might warrant being accorded significant weight in determining rules of international law.

## E. Proposed draft conclusion 11 – resolutions of international organizations

205. Given the above analysis, the Special Rapporteur recommends that the Commission adopt a draft conclusion addressing the role of resolutions of international organizations as subsidiary means for determining the rules of international law. The proposed language included below builds on the prior work of the Commission in the present and previous topics. It would provide, in three successive paragraphs, a general statement about their role as subsidiary means ,followed by a second statement about how to assess their weight and, finally, a "without prejudice" clause recognizing that resolutions of international organizations may play other roles in international law, for instance, as evidence used to determine the existence or otherwise of rules of customary international law.

206. The first paragraph of the proposed draft conclusion would state that "a resolution adopted by an international organization or at an intergovernmental conference may serve as

[265] *Ibid*., p. 243.
[266] A/79/10, para. 74.
[267] Memorandum by the Secretariat on subsidiary means for the determination of rules of international law, A/CN.4/765.

a subsidiary means for the determination of the existence and content of rules of international law". This straightforward sentence recognizes that resolutions are, in practice, adopted by both international organizations and intergovernmental conferences. It also indicates, following the language of previous draft conclusions, that they can serve as but do not necessarily always amount to subsidiary means. This explains the use of the terms "may serve" as subsidiary means. The formula "determination of the existence and content of rules of international law" aligns with the idea expressed in in several conclusions adopted by the Commission: specifically, draft conclusions 4, 5 and 6 – with the first two analogously applied to two other categories of subsidiary means (namely, decisions of courts and tribunals, and teachings).

207. The first paragraph is followed by a second which answers the question of when, and if so how, to attribute weight to such resolutions. The idea is to provide guidance to future users of the work when engaging in the analysis of resolutions as subsidiary means. In this regard, as already explained in the present chapter, the Special Rapporteur considers that the general criteria adopted by the Commission for the use in relation to the categories of subsidiary means should be considered to underline the important elements that users of international law ought to take into account. He notes, however, the possibility of having a specific draft conclusion on assessment of weight of resolutions of international organizations if that is the wish of the Commission on the topic – as it has done in relation to decisions of courts and tribunals under draft conclusion 8.

208. As regards the textual formulation of the second paragraph of the draft conclusion, on assessing weight, it would be comprised of a *chapeau* that draws on the opening phrasing of current draft conclusions 3 and 8 with the appropriate adjustments. It would simply provide that "when assessing the weight of resolutions of international organizations or intergovernmental conferences, regard should be had to, as appropriate, the criteria set out in draft conclusion 3". The inclusion of "as appropriate" is meant to signal that not all factors in the general criteria might be relevant. The nuances particular to resolutions would be explained in the commentary.

209. Finally, as discussed earlier in the present chapter, the Commission should adopt a "without prejudice" clause, which can be drawn almost *verbatim* from paragraph 2 of current draft conclusion 6. The latter already addresses the same point of substance. It would state that "[t]he use of resolutions as subsidiary means for the determination of rules of international law under paragraphs 1 and 2 is without prejudice to their use for other purposes". That clause recognizes that resolutions may be used in a variety of ways in the process of interpretation of international law, including as evidence of the law or as contributors to the development of the law – as the Commission itself has recognized in several of its recent topics.

210. Based on the reasoning in the immediately preceding paragraphs, the Special Rapporteur proposes the text of the draft conclusion be as follows:

> Draft conclusion 11
>
> Resolutions of international organizations and intergovernmental conferences
>
> 1. A resolution adopted by an international organization or at an intergovernmental conference may serve as a subsidiary means for the determination of the existence and content of rules of international law.
>
> 2. When assessing the weight of resolutions of international organizations or intergovernmental conferences, regard should be had to, as appropriate, the criteria set out in draft conclusion 3.
>
> 3. The use of resolutions as subsidiary means for the determination of rules of international law under paragraphs 1 and 2 is without prejudice to their use for other purposes.

# VI. The question of unity and coherence of international law

## A. Previous discussions of unity and coherence

211. The first report of the Special Rapporteur flagged the question of the unity or coherence of international law, otherwise referred to as fragmentation of international law, noting both the importance of the topic to contemporary debates in international law and the possible implications it might have for the utility and complexity of the present topic.[268] It was observed that, when it comes specifically to judicial decisions which are subsidiary means for determining rules of law under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, some concerns have arisen in practice due to the multiplicity of international courts and tribunals that might concurrently address similar legal issues. And that, when they do so, they could potentially issue conflicting decisions on the same issues. The Special Rapporteur sought the Commission's guidance on whether this aspect of fragmentation should be addressed within the scope of the present topic.

212. In the Commission's first debate in plenary on the issue, many members supported taking up the issue.[269] Generally, they considered that doing so would enhance coherence and legal certainty. Nonetheless, in the summing up of the debate, the Special Rapporteur recommended that the Commission, which should ultimately decide the question, defer a decision on the matter pending further deliberations and to enable it to seek the views of States on the issue. Following the conclusion of the debate in the Sixth Committee on the first report, in 2023, in which several delegations expressed support for examination of the question of fragmentation, the Special Rapporteur found that there was support for a study of the issue both among members of the Commission and States. Consequently, in summing up that debate in the Sixth Committee, he announced his intention to address the issue in his next report.

213. In his second report, which focused on judicial decisions, the Special Rapporteur returned to fragmentation. But, for various reasons explained in that report, he considered it better to take up the fragmentation issue in the third report.[270] Part of his rationale was to ensure that the unity question could be taken up alongside the suggestion of some members of the Commission and some States that the present topic also address the relationship between the subsidiary means for determining rules of law, under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, and the supplementary means of interpretation under article 32 of the 1969 Vienna Convention. In the Commission's second debate in plenary, only a few members addressed the issue, either to express or reiterate their support for examining fragmentation or to call for caution.

214. In the present chapter, in fulfilment of his prior undertaking, the Special Rapporteur will now address the question of unity or coherence of international law. The next chapter takes up the relationship between the subsidiary means mentioned in the Statute of the International Court of Justice and the supplementary means for interpretation under treaty law. The current chapter proceeds as follows. First, the concept of fragmentation will be defined, then the Commission's work on the topic will be examined. Second, this will then be followed with a discussion of the best examples of conflicting decisions by two separate international tribunals. Third, the subsequent section demonstrates the role of the subsidiary means in promoting greater coherence of international law by discussing key decisions of the International Court of Justice to promote greater unity of international law. The last section will, on the basis of the analysis contained in the chapter, propose a draft conclusion aimed at promoting the unity and coherence of international law through avoidance of conflicting decisions.

[268] See A/CN.4/760.
[269] See A/78/10, para. 122.
[270] A/CN.4/769, para. 63.

## B. Defining conflict and fragmentation

215. Before turning to the most interesting aspect of the question of unity or coherence, for the limited purposes of the present topic, it appears convenient to begin by defining the most important concepts of conflict and fragmentation. The Commission's study on fragmentation of international law[271] remains the most relevant benchmark for present purposes. Various phases of the fragmentation debate have been identified in the literature. The issue of fragmentation continues to be discussed for theoretical or practical reasons, or both. That said, in the view of the Special Rapporteur, it is not the purpose of the present report, nor the Commission's work more broadly, to seek to resolve those debates. Its task is more focused on the most important practical aspects of the question and, in that spirit, seeks to contribute to resolving the instability for international law that will come from conflicting interpretations of the law arising from judicial decisions on the same legal issue by different courts or tribunals.

216. The notion of conflict must first be defined. In the report on fragmentation of international law, the Commission explains that there is a conflict of norms where "two rules or principles suggest different ways of dealing with a problem".[272] These rules and principles will normally be found in the sources of international law, but, in the nature of things, they could also be stated in subsidiary means, such as in a prior judicial decision. Either way, for reasons of legal stability and legal security, there has to predictability to the rules. Coherence may be defined as "the avoidance of contradictory rules",[273] but may also require more than non-contradiction such that, in order to be coherent, it is necessary that a set of propositions, "taken together, 'makes sense' in its entirety".[274] Fragmentation, or more precisely the aspect of it concerning potentially conflicting decisions that is our concern, is the opposite of such coherence.[275]

## C. The Work of the Study Group on Fragmentation of International Law

217. Between 2002 and 2006, the Commission undertook work on the issue of fragmentation of international law, culminating in the adoption of 42 conclusions which were taken note of in General Assembly resolution 61/34 of 4 December 2006 together with the analytical study on which they were based. Early in the work of the Study Group, the Commission identified two potential approaches to the fragmentation topic that guided the rest of the work. It was concluded that the fragmentation of international law takes two predominant forms: (*a*) institutional and (*b*) substantive. Regarding the former, that is the institutional element, "the proliferation of implementation organs—often courts and tribunals—for specific treaty regimes has given rise to concern over deviating jurisprudence and 'forum-shopping'". [276] The latter, that is to say, the substantive aspect of the fragmentation problem, was the focus of the study group and its conclusions. Whereas the institutional aspects were, save for one element, set aside.

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[271] "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Yearbook … 2006*, vol. II (Part One), Addendum 2, document A/CN.4/L.682 and Add.1.

[272] *Ibid*., para. 25.

[273] Campbell McLachlan, *The Principle of Systemic Integration in International Law* (Oxford, Oxford University Press, 2024), p. 71, citing Lon L. Fuller, *The Morality of Law*, rev. (New Haven, Yale University Press, 1977), pp. 65–70. The Commission did not seek to define "coherence" in report of the Study Group on fragmentation, *Yearbook … 2006*, vol. II (Part One), Addendum 2, document A/CN.4/L.682 and Add.1, para. 491.

[274] McLachlan, *The Principle of Systemic Integration in International Law*, p. 72, citing Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford, Oxford University Press, 2005), p. 190.

[275] *Yearbook … 2006*, vol. II (Part One), Addendum 2, document A/CN.4/L.682 and Add.1, paras. 5–20.

[276] *Ibid*., para. 489.

### 1. The institutional aspect – Proliferation of international courts and tribunals

218. The first and more institutional aspect had been described in legal literature as the "proliferation of international courts and tribunals", given that more than ever before, the international community was witnessing an explosion – especially in the 1990s – of the creation of a variety of specialized courts and tribunals. The decade that started out with about five international tribunals (the International Court of Justice, the European Court of Human Rights, the European Court of Justice, the Inter-American Court of Human Rights, and the Dispute Settlement Body of the World Trade Organization (WTO)) increased by the end of the decade to at least twelve such (mostly specialized) *ad hoc* or permanent bodies and tribunals (the International Tribunal for the Law of the Sea, the Iran-United States Claims Tribunal, the *ad hoc* International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the International Criminal Court and the African Court on Human and Peoples' Rights). This "judicialization"[277] of international law through the establishment of a wide range of tribunals in a decentralized and horizontal legal system that lacked formal structures of coordination gave rise to searching questions about the risks of competing jurisdictions between such tribunals as a consequence of the expansion and diversification of international law.[278]

219. In other words, the creation of many courts by States, while seen as a positive development that put international law more in the centre of international affairs, also brought to the fore "institutional questions of practical coordination, institutional hierarchy, and the need for the various actors–especially international courts and tribunals–to pay attention to each other's jurisprudence".[279]

### 2. The substantive aspect – the fragmentation of international law into disparate sub-regimes

220. Regarding the more substantive aspects of fragmentation, which the Commission study focused on over the institutional aspect, the issue was more fundamental since its strikes at the core of international law. Put briefly, it concerned whether, and if so how, "the substance of the law itself may have fragmented into special regimes which might be lacking in coherence or were in conflict with each other".[280] The basic fear being that, if not handled correctly, the multiplication of increasingly specialized sub-regimes such as environmental law, human rights law, humanitarian law, the law of the sea or trade law operating in "clinical isolation"[281] from each other, risked breaking international law up into silos of subsystems that are hard to reconcile with each other.[282]

221. However, rather than hiving off international law into specialized self-contained regimes full of contradictions and without meaningful relationships to each other, the Commission's study underlined that addressing fragmentation required treating international law as a unified legal system – a point that has occasionally also been stressed by some judges, including some that take a more positive view of fragmentation.[283] Indeed, the very

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[277] Chiara Giorgetti and Mark Pollack (eds.), *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals* (Cambridge, Cambridge University Press, 2022). There is an extensive literature on fragmentation, including several volumes and special issues of journals. The Special Rapporteur refers readers to the thoughtful summary of that literature and its ebbs and flow in the book cited above.

[278] Benedict Kingsbury, "Foreword: Is the proliferation of international courts and tribunals a systemic problem?", *New York University Journal of International Law and Politics*, vol. 31 (1999), pp. 679–696.

[279] See Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, reproduced in *Yearbook … 2003*, vol. II (Part Two), paras. 415–435, at para. 416.

[280] See *Yearbook … 2006*, vol. II (Part One), Addendum 2, document A/CN.4/L.682 and Add.1.

[281] *Ibid*., para. 487.

[282] *Ibid*., para. 489.

[283] See International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324, Declaration of Judge Greenwood, p. 391, at p. 394, para. 8 ("[I]t is entirely appropriate that the Court, recognizing that

architecture of international law as an accumulation of a range of subsystems has in the past raised ontological questions of whether it can be described a "legal system".[284]

222. In the final fragmentation report, it was explained that "the emergence of 'special laws', treaty regimes and functional clusters of rules and specialized branches of international law and their relationship *inter se* and to general international law"[285] reflected essentially a new shade to an older problem. In the view of the Study Group, "international law's traditional 'fragmentation' has already equipped practitioners with techniques to deal with rules and rule systems that point in different directions".[286] That means that bringing those to bear should help offer a solution. This explained why the focus of the conclusions was on the 1969 Vienna Convention, which offered techniques of legal reasoning and interpretation that served as a ready "toolkit" to assist international lawyers, judges and other practitioners to address and resolve normative conflicts.

223. In consequence, from a substantive perspective, modern international law can respond to the more complex international regulatory environment arising from technological advances and globalization and the increased emergence of specialized regimes and courts. This is because it is not unusual in legal systems, including at the domestic level, for rules and principles to engender some tension or perhaps even conflict. The response to such situations takes multiple forms at the domestic level, including a centralized legislative process and a system of hierarchy of courts, with the highest courts resolving interpretational conflicts. This, of course, is not possible in the international legal system where there are no centralized legislative or judicial processes. Courts, with few exceptions, are generally standalone international institutions without any formal relationships with each other.

224. In international law, conflicts – as defined in the fragmentation study – are said to arise in three principal ways. First, where there are relationships between the special and general law and there is a particular unorthodox interpretation of the general law.[287] Second, where there is a conflict between the prior and subsequent law, that is to say, where conflicts arise between the general law and a particular rule that claims to exist as an exception to it.[288] Third, and more problematically, where there is a relationship of normative conflict between two types of special law.[289]

225. Fragmentation manifests differently in each of the three types of normative conflict just mentioned. The fragmentation report held that the last two mentioned categories were the "genuine types"[290] of normative conflict. This is because they concerned situations where the law itself, instead of "some putative interpretation of it" by a judicial tribunal, "appears differently depending on which normative framework is used to examine it".[291] The first type of normative conflict, however, where one court might rule in one way and another court rules another way on the same issue, is really "about the effects of differing legal interpretations in a complex institutional environment, and therefore falls strictly speaking outside the scope of the Commission's study".[292] The first two types of normative conflicts were thus addressed, at length in the study using interpretation rules found predominantly in

there is very little in its own jurisprudence on which it can draw, has made a thorough examination of the practice of other international courts and tribunals, especially the main human rights jurisdictions, which have extensive experience of assessing damages in cases with facts very similar to those of the present case. International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.").

284 See *Yearbook … 2006*, vol. II (Part One), Addendum 2, document A/CN.4/L.682 and Add.1, para. 17.

285 *Ibid*., para. 489.

286 *Ibid*., para. 20.

287 See Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, reproduced in *Yearbook … 2003*, vol. II (Part Two), paras. 415–435, para. 419.

288 *Ibid*.

289 *Ibid*.

290 *Yearbook … 2006*, vol. II (Part One), Addendum 2, document A/CN.4/L.682 and Add.1, para. 48.

291 *Ibid*.

292 *Ibid*.

the 1969 Vienna Convention and in case law, while institutional conflicts were only mentioned in passing.

226. In view of the decision of the Commission to exclude the aspect of conflicting decisions from its core consideration in the fragmentation study, in the context of this present study of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice wherein one aspect concerns centrally the role of judicial decisions (which can be used to promote unity and coherence of international law), the Special Rapporteur considers it beneficial to examine this specific issue.

227. Indeed, commentators criticized the decision of the Commission to omit the institutional aspects of the fragmentation question from its study, while it undoubtedly advanced reasons that might be regarded as strong. Unsurprisingly, it was argued that, in the face of the proliferation of courts and tribunals, international law must strive to retain its unity and coherence. "[I]nternational courts and tribunals will eventually be called upon to address this problem directly",[293] for which reason, "the [Commission] missed out on an opportunity to get an early start in resolving the huge complexities that will certainly be involved in the future".[294]

## D. Promoting coherence in decisions of courts and tribunals

228. The current topic of subsidiary means for the determination of rules of international law gives the Commission an opportunity to address a critical element of the institutional question. Given the Commission's central role in assisting States in clarifying international law, the general sentiment seems to be that it should seize the opportunity to act. As the report of the fragmentation study group underlined,

> [w]hatever the prospects for "codification and progressive development" today, it seems clear that most of the development of international law will take place within specialized law-making conferences and organizations on the basis of specialist preparatory work and will lead to complex treaty regimes with their own institutional provisions and procedures. This is indeed part of the background from which the concern about fragmentation once arose.[295]

The report goes on to note that:

> [i]n an increasingly specialized legal environment, few institutions are left to speak the language of general international law, with the aim of regulating, at a universal level, relationships that cannot be reduced to the realization of special interests and that go further than technical coordination. The Commission is one such institution.[296]

Ultimately, keeping in mind the Commission's mandate and experience in addressing topics of general international law, the Study Group recommended that the Commission could, in an age where codification is no longer a priority matter, add value for States by engaging in "restatements" that, in this case, should assist in guiding the practice of international courts and tribunals.

229. While it is self-evident that matters of judicial policy are in the first place for States to address via the constituent instruments that they adopt to regulate the relationship between such bodies, and thereafter for the international courts and tribunals themselves when seized of concrete cases raising concrete questions,[297] the Commission can shed some light on the

[293] Christian Leathley, "An institutional hierarchy to combat the fragmentation of international law: has the ILC missed an opportunity?", *New York University Journal of International Law and Politics*, vol. 40 (2007), pp. 259–306, at p. 306.

[294] *Ibid*.

[295] *Yearbook … 2006*, vol. II (Part One), Addendum 2, document A/CN.4/L.682 and Add.1, para. 501.

[296] *Ibid*., para. 502.

[297] See Jonathan Charney, "Is international law threatened by multiple tribunals?", *Collected Courses of the Hague Academy of International Law*, vol. 271 (1998), pp. 101–382, at p. 115. The empirical study by Jonathan Charney suggests that international judicial bodies are remarkably consistent in interpreting the law and in drawing on each other's decisions.

issue of conflicting decisions. This is a narrow subset of the wider inter-institutional question that the Commission largely set aside in its previous work.

230. The focus on this aspect in the present topic seems justified given the narrower scope of the topic of subsidiary means. Such study, which is aimed at drawing conclusions based on what is found in practice, is not only consistent with the Commission's mandate to assist States in the promotion of the progressive development of international law and its codification, in line with article 1 of its statute, but also helps to contribute to legal stability and the rule of law in international affairs.

## E. Risks of fragmentation through conflicting decisions

231. In his well-known speeches on fragmentation delivered over two decades ago, President Gilbert Guillaume of the International Court of Justice, addressing the Sixth Committee of the General Assembly on 27 October 2000, observed that "the proliferation of international fora is already influencing the operation of international law, both in procedural terms and as regards the actual content of that law. Its long-term consequences should not be underestimated".[298] He then suggested the existence of two main negative consequences.

### 1. Forum shopping

232. The first negative consequence was that it permitted litigants to engage in forum shopping. He identified relevant factors that potential initiators of cases would generally likely take into account to select the forum deemed most favourable to them, such as access to the court, the procedure followed, the composition of the court, its case law and power to issue certain types of orders.[299] Observing that, while in principle competition between courts might not be problematic, the risk was that the parties' choice of court may be motivated, for example, by "the fact that the case-law of a particular court happens to be more favourable to certain doctrines, concepts or interests than that of another".[300] He suggested that "certain courts could, as a result, be led to tailor their decisions so as to encourage a growth in their caseload, to the detriment of a more objective approach to justice. Such a development would be profoundly damaging to international justice".[301] The risks of forum shopping and its potential to undermine the rule of law in international affairs carry significant implications that ought not be overlooked.

### 2. Conflicting decisions

233. The second negative consequence, according to President Guillaume, is the risk of "conflicting judgments" which was especially "worrying".[302] In this respect, he explained the issue could take the form of "two courts" being asked to address "the same issue and render contradictory decisions".[303] In the view of the then President of the International Court of Justice, while judges of the various courts had tried to avoid inconsistency in a number of cases (essentially due to comity since there was no obligation to do so), "the proliferation of international courts engenders serious risks of inconstancy within the case-law".[304] That risk remained "substantial"[305] despite the efforts of various courts, on their own initiative, to engage in a form of judicial dialogue that seeks to ensure a measure of harmony in their

[298] Judge Gilbert Guillaume, President of the International Court of Justice, "The proliferation of international judicial bodies: the outlook for the international legal order", speech to the Sixth Committee of the General Assembly, 27 October 2000, p. 2, and Cesare P.R. Romano, "The proliferation of international judicial bodies: the pieces of the puzzle", *New York University Journal of International Law and Politics*, vol. 31 (1999), pp. 709–751.

[299] President Guillaume, speech to the General Assembly 27 October 2000 (see footnote 298 above), pp. 1–2.

[300] *Ibid*., p. 3.

[301] *Ibid*.

[302] *Ibid*.

[303] *Ibid*., pp. 3–4.

[304] *Ibid*., pp. 3–4.

[305] *Ibid*., p. 5.

judgments by taking into account each other's case law.[306] The need to avoid contradictions in rulings, which would introduce legal instability and undermine confidence in international law, has been emphasized by the judges of various courts, such as at the International Criminal Tribunal for the Former Yugoslavia, the International Tribunal for the Law of the Sea and the International Court of Justice itself. The effort of most judges of one tribunal to take into account the rulings of others of course must be encouraged in a system where there is no *stare decisis*, but it can by no means be said to be sufficient to address the substance of the problem. From the perspective of parties, who are the subjects of the law, it is simply "undesirable to have two courts … having conflicting decisions on the same issue".[307]

234. This second negative consequence will be the focus of the rest of the present chapter. There are several rulings by certain international courts and tribunals which are typically used to illustrate the risks of fragmentation of international law. But, by far, the best examples concern a number of decisions on State responsibility that, on the one hand, were issued by the International Court of Justice regarding the standard for attribution of the conduct of non-State actors to a State and, on the other hand, by the International Criminal Tribunal for the Former Yugoslavia, which seemingly offered a contrary interpretation in several cases. It is to the analysis of these four decisions and select literature around them that the Special Rapporteur now turns.

*(i) The "Effective control" test of the International Court of Justice in the* Nicaragua *judgment*

235. As a preliminary point, it should be recalled that the International Court of Justice to date remains the only court with general international law subject-matter jurisdiction. The Court, as the principal judicial organ of the United Nations, therefore, occupies an important place in promoting the unity and coherence of international law as a legal system – an element that was already expressly underlined by the work of the Commission, including in draft conclusions in the present and prior topics addressing subsidiary means for determining the rules of international law. Indeed, in draft conclusion 4 and the commentary thereto, the Commission underlined that "[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content rules of international law".[308] It is against this backdrop that the Court's decisions, like the work of the Commission itself, are known to have exerted influence – in some cases substantial influence – in clarifying and shaping the modern international law of State responsibility, including when it comes to the standard for the attribution of conduct to a State in customary international law. Thus, as was pointed out in the first report of the Special Rapporteur,[309] in as much as the Court itself increasingly refers to the judgments of other courts and tribunals as international law becomes more specialized, the decisions of the Court on general international law and specifically on the issue of State responsibility are frequently quoted by national, regional and other *ad hoc* or permanent international courts and tribunals. Tribunals take inspiration from each other's decisions, and in so doing, help to ensure a greater degree of coherence in international law.

236. As is well known, the modern law of State responsibility, to which the Commission[310] itself has made substantial contribution through arguably its most influential project after the law of treaties, is centred around the basic proposition that every internationally wrongful act of the State gives rise to its international responsibility. However, for responsibility to accrue to a State, the conduct at issue must be attributable to the State under international law. This means, in terms of the conduct of the State (which can be both an act or an omission), the conduct is usually carried out by the organs of government. Where the conduct is carried out by others that are not organs of the State, the conduct must occur under the direction,

306 *Ibid*., pp. 4–5.

307 International Criminal Tribunal for the Former Yugoslavia, *Zejnil Delalić,* et al. (*Čelebići* Case), Case No. IT-96-21-A, Judgment, 20 February 2001, Appeals Chamber, para. 21.

308 A/79/10, paras. 74–75.

309 A/CN.4/760, para. 347.

310 See, in this regard, Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General, A/74/83.

instigation or control of the organs or agents of the State. What is required for the latter is what has proven to be a somewhat divisive point.

237. In a couple of important judgments worth highlighting for the specific purposes of the present topic, the International Court of Justice set out the standard of attribution required for the responsibility of States for internationally wrongful acts under international general law. First, in the judgment on merits in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, decided in June 1986, Nicaragua requested the Court to adjudge the United States responsible, for *inter alia*, training, arming, equipping, financing and supplying the *contra* rebels (forming part of an armed force known as FDN) or otherwise encouraging, supporting and aiding their military and paramilitary activities against Nicaragua in violation of its sovereignty and the United States' obligation under customary international law not to intervene in the internal affairs of another State or to unlawfully use force against it.[311] The Court thereafter ruled in favour of Nicaragua on the basis that the United States had violated both the prohibitions on the use of force and non-intervention in the internal affairs of other States.[312] The Court also determined that the conflict in Nicaragua was of a mixed character. In this regard, the conflict between the Nicaraguan government and the *contra* rebels was of an internal character, while the acts of the United States in and against Nicaragua gave rise to an international armed conflict. The classification of the conflict triggered the application of different rules of international humanitarian law.[313]

238. The Court subsequently examined another major Nicaraguan contention that the United States was effectively in control of the *contras*. That, according to Nicaragua, meant that all the acts carried out by them were imputable to the United States. The Court agreed with Nicaragua that a number of the military operations were decided and planned if not led by the United States or designed together with the *contras*. However, the Court was "not satisfied that *all* the operations launched by the *contra* force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States".[314] Rather, as it explained in response to the argument made by Nicaragua, what it had to determine:

> is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and *control* on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.[315]

239. The Court found in the negative. It went on to explain, in a later paragraph, that:

> United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. Al1 the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.[316]

[311] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 130 above), para. 15.
[312] *Ibid*., para. 292.
[313] *Ibid*., para. 188.
[314] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 130 above), para. 106 (emphasis added to "all").
[315] *Ibid*., para. 109.
[316] *Ibid*., para. 115 (emphasis added to "effective control").

240. Overall, there are essentially three main takeaways from the Court's ruling in *Nicaragua* for present purposes. First, that the United States could be held responsible for its own conduct *vis-à-vis* Nicaragua, for which it may be responsible directly in connection with the activities of the *contras*. This included the unlawful use of force and the violation of the non-intervention principle.[317]

241. The second takeaway was that the *contras*, being a separate entity, remained responsible for their own acts, including their violations of humanitarian law *vis-à-vis* Nicaraguan government forces and society.[318] The third, and perhaps the most important, takeaway for the present, specific discussions, was that the general control of the United States over the *contras* as a force with a high degree of dependency on it, would not in and of itself mean that the United States directed or enforced the perpetration of the acts breaching humanitarian and human rights law as Nicaragua had alleged.[319] In essence, what was ultimately required, under international law, was to show that the United States exercised effective control over the specific military or paramilitary activities of the *contras* group for which it could then be held legally responsible.[320] From the International Court of Justice then, the test for State responsibility in such circumstances is the effective control test.

*(ii) The "Overall control" test of the International Criminal Tribunal for the Former Yugoslavia in the* Tadić *case*

242. On 15 July 1999, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia issued a judgment in the prosecution's case against Duško Tadić in which it faced a similar question as that addressed by the International Court of Justice in *Nicaragua*. This was the first case of the tribunal, which was the first truly international criminal court to be established by the United Nations, to investigate and prosecute persons allegedly responsible for crimes in the former Yugoslavia, including war crimes, crimes against humanity and genocide. The Security Council, having determined that the so-called ethnic cleansing occurring in the country constituted a threat to international peace and security, established the Tribunal based on a resolution adopted under Chapter VII of the Charter of the United Nations. This made the Tribunal the first Chapter VII court. This meant that all States were obligated to cooperate with it, and that it had primacy over the national courts of all Member States of the United Nations.

243. The defendant Tadić was a member of the Bosnian Serb militia, which was affiliated with the Federal Republic of Yugoslavia, one of the parties to the conflict against Bosnia and Herzegovina. Whether there was an armed conflict turned on whether the Federal Republic of Yugoslavia was using force against Bosnia Herzegovina through the Bosnian Serb Army of the Republika Srpska (VRS), which would transform the conflict from an internal civil war to an international armed conflict. This meant that the Tribunal was therefore asked to determine whether the militia, in whose hands the victims found themselves, were acting as *de jure* or *de facto* organs of the Federal Republic of Yugoslavia as a foreign power.

244. In deciding the issue before it, noting that correctly classifying the conflict could give rise to State responsibility for international law violations perpetrated by armed groups acting on its behalf, the Appeals Chamber of the Tribunal carried out a detailed survey of the relevant body of law with reference to the judgment of the International Court of Justice in *Nicaragua*, as well as the practice of States and other tribunals. The Tribunal focused on the notion of control as laid down in general international law, since the law of armed conflict did not contain specific criteria. It considered that it was imperative to "*specify what degree of authority or control* must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is *prima facie* internal".[321] The

[317] See, generally, *ibid.*

[318] *Ibid.*

[319] *Ibid.*

[320] *Ibid.*

[321] See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, Appeals Chamber, para. 97; see also *Prosecutor v. Zejnil Delalić, et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, Trial Chamber.

Tribunal's analysis was quite detailed, but for present purposes, only key points need to be stressed.

245. First, in identifying the legal conditions required for individuals to act as *de facto* State officials, the Tribunal pointed out that the Trial Chamber in the judgment under appeal had regarded the *Nicaragua* test as persuasive. The Appeals Chamber did not find the Trial Chamber's ruling convincing for two main reasons. To begin with, noting that "a high degree of control has been authoritatively suggested"[322] by the International Court of Justice, it considered that the law enabled the attribution to States of the conduct of individuals who are not formally regarded as organs of States where they do in fact act on behalf of the State. The Appeals Chamber went on to explain that "[t]he requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals".[323] That said, according to the Appeals Chamber, "[t]he *degree of control* may, however, vary according to the factual circumstances of each case".[324] Consequently, the Appeals Chamber was not convinced "why in each and every circumstance international law should require a high threshold for the test of control".[325] This was the first element of their seeming disagreement with the reasoning of the International Court of Justice.

246. Much as in the *Nicaragua* case, the Appeals Chamber considered situations of organized and hierarchically structured armed groups, such as military units or armed rebels, instead of private individuals acting on behalf of a State without specific instructions. The Appeals Chamber determined that, "in the case of an organised group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, *whether or not each of them was specifically imposed, requested or directed by the State*."[326] It followed that, since the Bosnian Serb armed forces constituted a "military organization", the control of the Serb authorities over those armed forces "required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations."[327]

247. Having distinguished between the different scenarios of individuals acting as individuals and groups, which in its view – and unlike the view of the International Court of Justice – gave rise to different legal standards for attribution, the Appeals Chamber of the Tribunal offered a second reason why it found the *Nicaragua* effective control test "unpersuasive".[328] It found it to be at "variance with international judicial and State practice".[329] In so far as the test concerned individuals and unorganized groups of individuals acting on behalf of States, the effective control test could be upheld. On the other hand, the law applied a different and less demanding test (that is, of overall control) to military or paramilitary groups such as the *contras*. The point here is that the Tribunal accepted the test of the International Court of Justice but only to the extent that it concerned individuals instead of paramilitary groups. So, in some respects, the gulf in the interpretations by the two tribunals was not as large as might at first appear.

248. That said, even before the Appeals Chamber of the Tribunal issued its judgment, concern was already expressed that it might not have been necessary to go as far as it did in its consideration of the *Nicaragua* test of the International Court of Justice. Judge Shahabudeen, in his separate opinion, concurred generally with his colleagues in the Appeals Chamber but expressed serious doubt about "the necessity to challenge"[330] *Nicaragua*. He considered that, on the most relevant point of the judgment as to whether the conflict in the

[322] *Tadić*, Judgment, 15 July 1999, Appeals Chamber (see footnote 321 above), para. 99.
[323] *Ibid*., para. 117.
[324] *Ibid*.
[325] *Ibid*.
[326] *Ibid*., para. 122.
[327] *Ibid*., para. 145.
[328] *Ibid*., para. 124.
[329] *Ibid*.
[330] *Ibid*., para. 5 (citing *Military and Paramilitary Activities in and against Nicaragua* (see footnote 130 above).

Balkans in the *Tadić* case could be classified as international, the International Court of Justice ruling "was both right and adequate".[331] It appears that, as a legal matter, he did not consider the ruling of the Court to be inconsistent with the position of the Tribunal. Reasons of judicial economy and judicial comity might have also been on his mind. Indeed, in a later separate opinion in a different case (*Aleksovski* where the defendant had unsuccessfully argued before the Appeals Chamber of the Tribunal that it should overturn itself and follow the *Nicaragua* ruling as *precedent* despite its own *Tadić* ruling[332]), Judge Shahabudeen was quite critical. He pointed out various risks of serious disagreements among courts and noted that the Tribunal could look at the International Court of Justice "jurisprudence on relevant matters" and "can draw some persuasive value from the ICJ's decisions, without being bound by them".[333]

249. As it would happen, the seeming disagreements between the two tribunals generated reactions in the scholarly community, as well as in the Commission, which at the time, was dealing with the topic of attribution in the context of the articles on State responsibility. In those articles, the Commission adopted, *inter alia*, article 8, which indicated that the conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[334] In the commentary, the "under the direction or control of" language was equated to the *Nicaragua* standard when the Commission stated that "such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation".[335]

250. The Commission went on to state the position of the International Criminal Tribunal for the Former Yugoslavia in the commentary as well, but essentially disagreed with it in favour of the position it had already previously adopted on the basis of the *Nicaragua* ruling of the International Court of Justice. It was critical of the *Tadić* ruling, noting that the "legal issues" and the "factual situation" dealt with by the Tribunal and the Court differed. It further suggested, picking up on arguments made in the Tribunal's proceedings, that the Tribunal was meant to address individual not State responsibility and the applicability or not of international humanitarian law, and finally and in any case, assessment of whether a particular conduct was carried out under the control of a particular State was a "matter for appreciation in each case".[336]

251. In the final analysis, the fragmentation study concluded that the "the contrast between *Military and Paramilitary Activities in and against Nicaragua* and *Tadić* is an example of a normative conflict between an earlier and a later interpretation of a rule of general international law."[337] In this view, it illustrated "the type of normative conflict where two institutions faced with analogous facts interpret the law in differing ways".[338] It was noted that, while such disagreements are common occurrences in any legal system, its "its consequences for the international legal system, which lacks a proper institutional hierarchy, might seem particularly problematic".[339] Two main problems were identified as following from the expressions of differing views of the content of the general law.

252. First, "they diminish legal security"[340] for the subjects of the law. And second, "they place legal subjects in an unequal position *vis-à-vis* each other".[341] This is because "the rights they enjoy depend on which jurisdiction is seized to enforce them".[342] Consequently, in terms

[331] *Ibid*.
[332] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, Appeals Chamber.
[333] *Delalić*, Judgment, 20 February 2001, Appeals Chamber (see footnote 307 above), para. 22.
[334] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76.
[335] Para. (3) of the commentary to art. 8, *ibid.*, para. 77, at p. 47.
[336] Para. (5), *ibid.*, at p. 48.
[337] *Yearbook … 2006*, vol. II (Part One), Addendum 2, document A/CN.4/L.682 and Add.1, para. 50.
[338] *Ibid*., para. 51.
[339] *Ibid*.
[340] *Ibid*., para. 52.
[341] *Ibid*.
[342] *Ibid*.

of solutions for situations like this, what would be required is "either" for States to "adopt a *new law* that settles the conflict" (emphasis added), which it is submitted in the context of this specific example is unrealistic, "or the institutions will seek to coordinate their jurisprudence in the future".[343] The Commission clearly saw great merit in legal stability.

253. The *Tadić* ruling generated some concern, including, among judges in the Tribunal itself and at the International Court of Justice itself. In the Tribunal, Judge Shahabudeen, who had initially found it unnecessary that the Tribunal would question the *Nicaragua* ruling of the International Court of Justice in 1999, gave a strong rebuke in 2001 that:

> so far as international law is concerned, the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal. […] The Appeals Chamber cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern.[344]

While the majority's response of the Tribunal's Appeals Chamber was to point out that the Tribunal was not in hierarchical relationship with the International Court of Justice, it did accept that it "will necessarily take into consideration other decisions of international courts",[345] but, as might be expected, that "it may, after careful consideration, come to a different conclusion".[346]

254. The then President of the International Court of Justice, in his several speeches to the General Assembly cited above (see paras. 231 and 233 above), issued warnings about the risks of fragmentation arising from contradictory rulings. He went on to express serious regret that the *Tadić* ruling "rejected" the Court's test in *Nicaragua* and advanced, in his view, "a new interpretation of international law in the matter of State responsibility".[347]

*(iii) The response of the International Court of Justice in the* Bosnian Genocide *judgment*

255. Against that backdrop, unsurprisingly, in a subsequent judgment in the *Bosnian Genocide* case, the Court in 2007 responded to the ruling of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia. It proceeded in three steps of argumentation. First, like the Tribunal, the Court distinguished between three separate situations of attribution for conduct: (*a*) where the persons who committed the acts of genocide had the status of organs of the State under its internal law; (*b*) where the question is whether those persons should be equated with State organs *de facto*, even though not they did not enjoy that status under internal law; and (*c*) whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the respondent State's instructions, or under its direction or control.[348] It pointed out that different rules applied to the different situations, as indicated in the Commission's articles on State responsibility.[349]

256. In the second step, while accepting the first two scenarios and finding that neither of them had been fulfilled in this case, the Court turned to the third. It explained that, in principle, international law allowed for imputation of responsibility in the first two scenarios, although none of them were met in the case at bar.[350] Turning specifically to the third issue, the Court invoked customary international law of the articles on State responsibility. It considered that customary international law as set out in article 8 of the Commission's articles on State responsibility was to be understood in light of its "jurisprudence" in the *Nicaragua*

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343 *Ibid*.

344 *Delalić*, Judgment, 20 February 2001, Appeals Chamber (see footnote 307 above), para. 24 (citing International Criminal Tribunal for Rwanda, *Laurent Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, Appeals Chamber, Separate Opinion of Judge Shahabuddeen, para. 25).

345 *Ibid*.

346 *Ibid*.

347 President Guillaume, speech to the General Assembly 27 October 2000 (see footnote 298 above), p. 5.

348 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 131 above), para. 397.

349 *Ibid*., paras. 397–398.

350 *Ibid*., paras. 402–403.

judgment.[351] The Court reiterated that, what is in this case required for attribution of conduct to a State, is showing "that they acted in accordance with that State's instructions or under its "effective control".[352] What would effective control require? It required that "the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations."[353]

257. The Court further examined whether genocide, given its specific nature, should be considered differently perhaps by applying a different standard than the effective control test set out in *Nicaragua* – as one of the parties had argued. The Court considered that "the particular characteristics of genocide do not justify the Court in departing from the criterion"[354] it had previously elaborated in its judgment. It determined that:

> [g]enocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control.[355]

258. The Court thereafter, in taking up the last argument by one of the parties that it should instead follow the *Tadić* overall control test, instead of the *Nicaragua* effective control test, did not find that ruling relevant. It pointed out that adopting the *Tadić* test would imply that:

> acts committed by Bosnian Serbs could give rise to international responsibility of the [Federal Republic of Yugoslavia] FRY on the basis of the *overall control* exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.[356]

259. In the third step of its analysis, the Court squarely turned to the overall control test of the International Criminal Tribunal for the Former Yugoslavia. It explained why it felt unable to accept the Tribunal's test for three reasons. Firstly, in the view of the Court:

> the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction.[357]

260. Secondly, the Court stated it attached "utmost importance to the factual and legal findings" of the Tribunal on the criminality of the persons accused of crimes before it, but it did not consider that to be the same "situation" "for positions adopted by the ICTY on issues of *general international law* which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it."[358] It found the latter to be the case with the "overall control" test as laid down in *Tadić*.[359]

261. The Court went on to add that the "overall control" test could well be suitable to determine whether or not an armed conflict is international, which was the sole question that the Tribunal had been called upon to decide. At the same time, the Court did not consider it "appropriate" that the Tribunal presented the overall control test as equally applicable in circumstances governing State responsibility. Here, it noted that the two tests could coexist if the Tribunal's test is confined to the determination of the nature of an armed conflict, without having any logical inconsistency. It nonetheless ultimately held that it had not found the Tribunal's test "[]persuasive",[360] since, in addition to the other challenges that can be

[351] *Ibid*., para. 399.
[352] *Ibid*., para. 400.
[353] *Ibid*.
[354] *Ibid*., para. 401.
[355] *Ibid*.
[356] *Ibid*., para. 402 (emphasis added).
[357] *Ibid*., para. 403.
[358] *Ibid*. (emphasis added).
[359] *Ibid*., para. 404.
[360] *Ibid*.

foreseen, the "overall control" test has the "major drawback"[361] of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility whereby "a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf".[362] In the final analysis, the Court thus indicated that it preferred to follow its own jurisprudence setting out the rule of customary international law which was to be found in article 8 of the Commission's articles on State responsibility.[363]

262. Although the International Court of Justice is the "principal" judicial organ of the United Nations, it is not a supreme court with appellate powers over other tribunals such as the International Criminal Tribunal for the Former Yugoslavia (which was created by the Security Council under Chapter VII of the Charter of the United Nations). This means that the conflicting interpretations of the standard of attribution has now been put in jurisprudential doubt due to the impasse between the two courts. Here was a situation where, in the International Criminal Tribunal for the Former Yugoslavia, the losing party asked the Appeals Chamber to overturn itself by following the stricter "effective control" *Nicaragua* test set out by the International Court of Justice. At the Court, the exact reverse happened with the respondent State arguing that the broader "overall control" *Tadić* test of the International Criminal Tribunal for the Former Yugoslavia was more appropriate. For reasons of legal stability, for all parties and indeed the rule of law itself, like cases should be treated alike – even in a system such as international law where there is no formal requirement that one tribunal must as a matter of law follow the rulings of the other.

263. In retrospect, in the view of the Special Rapporteur, the Commission, being a neutral body with no direct institutional connection to either of the two courts (both of which were courts created by the United Nations – the one the principal judicial organ and the other created under Chapter VII of the Charter of the United Nations), could have played a role in bridging the two sides by examining further the State practice in the area. This would have required a thorough re-examination of the relevant practice in a manner that goes beyond what the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia had each undertaken in their respective cases. Such an approach would have provided additional evidence on which to assess State practice. It would have certainly assisted in alleviating the subsequent criticism, by an admittedly not so distant observer (a law professor who had also served in the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia as judge when the *Tadić* case was decided), that the Commission might have been in an essentially conflicted position because "(1) The Court in *Nicaragua* enunciated the test … (2) the ILC upheld the same test (based only on *Nicaragua*); (3) hence the test is valid and reflects customary international law".[364]

## F. The promotion by the International Court of Justice of unity and coherence of international law

264. Empirical studies have shown that there is, for the most part, a tendency for judges to be aware of each other's decisions and to take them into account when deciding cases even though there is no doctrine of precedent in international law. In practice, there is a remarkable degree of convergence on both questions of substance and procedure.

265. Against that backdrop, the seeming difference of views between the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia on one legal question of attribution should not be given outsized standing to suggest there is a "chaos" of conflicting decisions being issued by international courts and tribunals. Recognizing that there is a shared endeavour in building up the common language of international law is quite important to advance the rule of law in international affairs, since as Hersch Lauterpacht argued decades ago, "the development of international law by

[361] *Ibid*., para. 406.
[362] *Ibid*.
[363] *Ibid*., para. 407.
[364] Antonio Cassese, "The *Nicaragua* and *Tadić* tests revisited in light of the ICJ Judgment on genocide in Bosnia", *European Journal of International Law*, vol. 18 (2007), pp. 649–668, at p. 651.

international tribunals is, in the long run, one of the important conditions of their continued successful functioning and of their jurisdiction".[365] Indeed, comity and mutual respect pervades the judicial dialogue at the international level. So much so that, in a remarkable example, one arbitral tribunal decided to suspend for several months making a ruling on a particular matter to avoid the risks of a conflicting decision by the European Court of Justice. The matter was explained by Thomas Mensah, President of the International Tribunal for the Law of the Sea, sitting as President of a Permanent Court of Arbitration arbitral tribunal under the United Nations Convention on the Law of the Sea in the *Mox Plant Case*[366] between Ireland and the United Kingdom:

> The Tribunal considers that a situation in which there might be two conflicting decisions on the same issues would not be helpful to the resolution of this international dispute. Nor would such a situation be in accord with the dictates of mutual respect and comity that should exist between judicial institutions deciding on rights and obligations as between States, and entrusted with the function of assisting States in the peaceful settlement of disputes that arise between them.[367]

266. The International Court of Justice does not function as an appellate court even though it is the "principal judicial organ" of the United Nations. But it is clear that its decisions are rightly carefully examined by other tribunals, including specialized courts or *ad hoc* tribunals settling inter-State disputes as well as numerous national courts. They take guidance from pronouncements of the Court on a wide range of issues in general international law. Most of the focus in the fragmentation debate has rightly been on those institutions that produce judicial decisions, not for their own sake, but for the benefit of States and other persons that possess rights and duties under international law.[368] At the same time, the conversation can extend more broadly to other bodies applying international law that may not easily fall into the category of judicial body. Over time, for its part, the Court has moved from being a tribunal that reluctantly cites the works of others to taking a more liberal approach to examining the works of other adjudicative bodies, such as regional courts and tribunals, including human rights courts and the *ad hoc* international criminal tribunals, as well as human rights treaty bodies.

267. As the Court explained in a passage that reflects its serious concern about coherence and unity of international law: "The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled".[369] Here, the Court appears to consider, as a matter of judicial policy, "the interpretation given by the relevant human rights committee and strive to retain consistency with the views expressed by that committee".[370] The Court has placed particular emphasis on consistency when the same instrument is to be applied and the decision-making body is charged under it with a particular competence to interpret and apply its terms.[371]

268. The finding of the Court in *Diallo*, set out above, is hardly unique. In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*,[372] the Court in determining the question of the temporal scope of

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[365] Daniel Bethlehem, "The greening of international dispute settlement? Stepping back a little", *Proceedings of the Annual Meeting, Published by the American Society of International Law*, vol. 114 (2020), pp. 225–234.

[366] International Tribunal for the Law of the Sea, *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures*.

[367] Thomas Mensah, "Statement by the President," Permanent Court of Arbitration, para. 11. Available at https://pcacases.com/web/sendAttach/877/.

[368] McLachlan, *The Principle of Systemic Integration in International Law*, p. 72.

[369] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 664, para. 66.

[370] Giorgio Gaja, "The role of human rights treaty bodies in the interpretation of human rights conventions", Jorge Viñuales *et al*. (eds.), *The International Legal Order in the XXIst Century: Essays in Honour of Professor Marcelo Gustavo Kohen* (Leiden, Brill, 2023), pp. 973–981, at p. 979.

[371] McLachlan, *The Principle of Systemic Integration in International Law*, p. 238.

[372] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Preliminary Objections*, Judgment, 12 November 2024, para. 53.

the International Convention on the Elimination of All Forms of Racial Discrimination, noted the decision rendered by the Committee on the Elimination of Racial Discrimination in the inter-State communication submitted by the State of Palestine against Israel, where the Committee had taken the view that articles 11–13 of the Convention "do not indicate that the use of the mechanism" was limited to "breaches that have occurred after ratification by the State party [of the Convention]" that initiated the procedure.[373] The Court observed that there was:

> a difference in nature between the inter-State communications procedure established under Articles 11 to 13 of [the International Convention on the Elimination of All Forms of Racial Discrimination] and the judicial mechanism provided for in Article 22. The first aims to monitor compliance by States parties with their obligations under the Convention and can be used "[i]f a State Party considers that another State Party is not giving effect to the provisions of [the] Convention" (Article 11). The latter aims to settle disputes relating to obligations which States, by becoming parties to the Convention, have accepted to undertake vis-à-vis each other, and the judicial settlement may result in the engagement of the respondent's responsibility towards the applicant. This mechanism can therefore only be used to settle disputes relating to events that occurred at a time when both States concerned were bound by the obligations in question.[374]

269. To describe the determination of the Committee on the Elimination of Racial Discrimination in the inter-State communication submitted by the State of Palestine against Israel, the Court used the term "decision", which is redolent of the category "judicial decision" in Article 38, paragraph 1 (*d*), of the Statute. The Court's assessment of the decision rendered by the Committee on the Elimination of Racial Discrimination in the inter-State communication submitted by the State of Palestine against Israel highlighted that there are differences between a judgment of the Court and a decision by a body such as the Committee. In the event, these differences were vital to the conclusion that there would be no conflict of norms, as the decisions were addressing different problems.

270. It could be asked whether, as some have argued, the inclusion of judicial decisions in Article 38 supports a more general "principle of systemic institutional integration".[375] This idea is to be supported insofar as it gives expression to the function of Article 38, paragraph 1 (*d*), as being to empower the Court to take account of judicial decisions in determining the rules of international law. It is less clear, however, that the provision imports an "obligation" to take account of the judicial decisions of other international courts and tribunals.[376] Framing it as a matter of obligation would miss the point. What matters more is that, in practice, the Court looks at decisions issued by other bodies to the extent that they might prove useful for its resolution of a given dispute. It need not be formally bound to do so, much in the same way that other bodies examine the Court's jurisprudence for help in resolving specific cases before them, although they are themselves not required to do so either.

271. It follows that reliance on subsidiary means for the determination of rules of international law, notably judicial decisions but also others such as teachings, may assist in providing a principled solution to certain – what has been called – "negative consequences of the fragmentation of international law".[377] In this view, beyond being materials that can be used to identify sources of obligations, the subsidiary means for the determination of rules of

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[373] Committee on the Elimination of Racial Discrimination, "Inter-State communication submitted by the State of Palestine against Israel: preliminary procedural issues and referral to the Committee", CERD/C/100/3 (decision adopted on 12 December 2019), para. 14.

[374] *Application of the International Convention on Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)* (see footnote 372 above), para. 54.

[375] Mads Andenas and Johann Ruben Leiss, "The systemic relevance of 'judicial decisions' in Article 38 of the ICJ Statute", *Heidelberg Journal International Law*, vol. 77 (2017), pp. 907–972, at p. 970.

[376] McLachlan, *The Principle of Systemic Integration in International Law*, p. 234.

[377] A/C.6/76/SR.16, para. 93.

international law can serve as a means to ensure the coherence of the international legal system.[378]

272. At the risk of oversimplification, two aspects of the subsidiary means for the determination of rules of international law, especially in relation to judicial decisions, stand out in this regard, taking into account the prior provisionally adopted draft conclusions: (*a*) the application of judicial decisions and teachings involve an examination not of disaggregated single instances, but of some more general essence of either judicial decisions or teachings or the other means generally used to determine rules of international law; (*b*) in order to achieve the necessary coherence in international law, international courts and tribunals ascribe great weight to judicial decisions of other international courts and tribunals, on account, in particular, of the quality of their reasoning and their expertise.

273. First, turning to the idea that the application of judicial decisions or teachings involve an examination not of disaggregated single instances, but of some more general essence of either judicial decisions or teachings in general: this appears evident from the wording of Article 38, paragraph 1 (*d*). The descriptors used for the two "subsidiary means for the determination of rules of law" in Article 38, paragraph 1 (*d*), are different in the French and the English versions of the Statute. As regards the first, "*les décisions judiciaires*"/"judicial decisions", the French text uses a definite article, whereas the English does not.[379] What is at issue is, therefore, not something disaggregated, but instead some more general essence of either judicial decisions or teachings, "a cumulated overall sense".[380]

274. In keeping with this understanding, the tribunal in *Arbitration between Barbados and the Republic of Trinidad and Tobago* refused to apply an alleged principle to the effect that an international maritime boundary between two States could be determined on the basis of traditional fishing on the high seas by nationals of one of those two States.[381] The tribunal held that support for such a principle in customary and conventional international law was largely lacking: "Support is most notably found … in the singular circumstances of the judgment of the International Court of Justice in the *Jan Mayen* case ... That is insufficient to establish a rule of international law."[382]

275. It may occur, however, that a single judicial decision is relied on as a subsidiary means for the determination of rules of international law. In *Land, Island and Maritime Frontier Dispute*, concerning the waters of the Gulf of Fonseca, a Chamber of the International Court of Justice considered that a 1917 judgment by a the Central American Court of Justice to be "a relevant precedent decision of a competent court, and as, in the words of Article 38 of the Court's Statute, 'a subsidiary means for the determination of rules of law'".[383] This meant, observed the Chamber, that it "must make up its own mind on the status of the waters of the Gulf, taking such account of the 1917 decision as it appears to the Chamber to merit".[384] In the event, even though it maintained the position of principle that it is not bound to follow the earlier case, in practice, the Chamber broadly followed the reasoning contained in the earlier decision of the Central American Court.[385]

276. In conclusion, based on the preceding review, this aspect of the character of the subsidiary means for the determination of rules of international law may have a bearing on

[378] Andenas and Leiss, "The systemic relevance of 'judicial decisions' in Article 38 of the ICJ Statute", p. 940; see also *Semanza*, Separate Opinion of Judge Shahabuddeen (footnote 344 above), paras. 27–29.

[379] Franklin Berman, "Authority in international law", KFG Working Paper Series, No. 22 (Berlin, 2018), p. 7.

[380] *Ibid*., pp. 7–8.

[381] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Decision, 11 April 2006, UNRIAA, vol. XXVII, pp. 147–251, at p. 222, para. 269. See also *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 40, para. 63.

[382] *Arbitration between Barbados and the Republic of Trinidad and Tobago* (see previous footnote), p. 222–223, para. 269 (One Commission member has in the same vein noted the need for discipline in the extracting of principle from single instances).

[383] *Land, Island and Maritime Frontier Dispute* (see footnote 127 above) , p. 601, para. 403.

[384] *Ibid*.

[385] *Ibid*., para. 404.

the extent to which they may provide a solution to certain of the negative consequences of the fragmentation of international law. The Special Rapporteur can even go further to argue that the subsidiary means for the determination of rules of international law operate not so much as single instances as the general essence, a cumulative overall sense, of either judicial decisions or teachings. Taking the subsidiary means individually or in some cases together might give a strong indication of either the applicable legal rules or the correct interpretation of such rules for the purposes of resolving a given case. The shift of the argumentative burden is clearly found in practice where, even though there is no doctrine of precedent, a litigant seeks to overturn the beaten path found in an analogous judgment. The idea that courts would choose to follow their reasoning in prior cases, to the extent that it remains relevant, is uncontroversial and provides stability both in terms of shaping the conduct of the parties to the case but also upholding the principles of the international legal order.

277. Secondly, in order to achieve coherence in international law, international courts and tribunals may ascribe "great weight" to judicial decisions of other international courts and tribunals. Thus, in *Diallo* the Court referred to "the jurisprudence" of the specialist body the Human Rights Committee, noting that, although it was:

> in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the 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.[386]

278. Similarly, in discerning a treaty provision, the Court found relevant the general comments issued by the Human Rights Committee in understanding certain obligations specified in article 9 of the International Covenant on Civil and Political Rights. While it emphasized the international instruments, it did not neglect the regional human rights system and indeed also alluded to the decisions of the African Commission on Human and Peoples' Rights, noting that they ought to be taken into "due account". It put it this way:

> Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question.[387]

These remarks were not necessarily "based on arguments concerning the specific provision of the treaty" in question; they apparently applied generally to "the interpretation that other treaty bodies give [in their jurisprudence and general comments] to their respective treaty."[388]

279. It was not clear whether "great weight" and "due account" were meant to be two different standards or essentially a reflection of the same idea. Whatever the case, the point is that the Court rightly did not consider it appropriate to ignore the views of those specialized bodies with primary competence to interpret the obligations of States in those situations. If for nothing else, it is clear that such bodies can provide helpful interpretations of the international rules found in the treaties which they are charged specifically by States to uphold. The Special Rapporteur shall return to the work of State-created expert treaty bodies in chapter IV of the present report.

280. Although there is an obligation to take into account the judicial decisions of other international courts and tribunals,[389] there is "no obligation to follow the decisions adopted by other judges or arbitrators".[390] Thus, the Court has shown a certain reluctance to rely on the arbitral awards handed down by claims commissions and investment tribunals. In *Barcelona Traction*, where the parties had relied on general arbitral jurisprudence, the Court observed that "in most cases the decisions cited rested upon the terms of instruments

[386] *Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment* (see footnote 369 above), para. 66.

[387] *Ibid*., para. 67.

[388] Gaja, "The role of human rights treaty bodies …", p. 974.

[389] See, however, the caveat in draft conclusion 7 adopted by the Commission in 2024.

[390] Gilbert Guillaume, "The use of precedent by international judges and arbitrators", *Journal of International Dispute Settlement*, vol. 2 (2011), pp. 5–24, at p. 19.

establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case."[391]

281. Similarly, in *Obligation to Negotiate Access to the Pacific Ocean*, the Court reaffirmed its conclusion in *Barcelona Traction*:

> The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.[392]

282. On the other hand, without in anyway suggesting that it was bound to follow the practice of other bodies, the Court will on some occasions find it useful to seek inspiration from such practice that is relevant to its determination in the case at bar. This is especially the case where its own jurisprudence on a given point might, for whatever reason, be thin. Such was the case when it comes to the issue of compensation for damages, which had not arisen for several decades and in fact only arose once before in *Corfu Channel*[393] which was decided back in 1949.

283. Thus, in *Diallo,* in its compensation judgment, it transparently explained that:

> The Court has taken into account the practice in other international courts, tribunals and commissions (such as the International Tribunal for the Law of the Sea, the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and the United Nations Compensation Commission), which have applied general principles governing compensation when fixing its amount, including in respect of injury resulting from unlawful detention and expulsion.[394]

284. In his separate declaration, Judge Greenwood expressed his full agreement with the Court's approach:

> As this is the first occasion on which the Court has had to assess damages since the *Corfu Channel* case (*United Kingdom v. Albania*) (*Assessment of the Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 171), it *is entirely appropriate that the Court, recognizing that there is very little in its own jurisprudence on which it can draw, has made a thorough examination of the practice of other international courts and tribunals*, especially the main human rights jurisdictions, which have extensive experience of assessing damages in cases with facts very similar to those of the present case.[395]

285. Judge Greenwood also referenced additional points that spoke to the role of the courts in ensuring coherence of international law. He observed that international law "is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions."[396]

286. That said, in *Diallo*, the Court observed that, although in the context of that case its own interpretation was "fully corroborated by the jurisprudence" of the Human Rights Committee, the Court was "in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee".[397] The same is

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391 *Barcelona Traction* (see footnote 381 above), para. 63.

392 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018*, p. 507, at p. 559, para. 162.

393 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*.

394 *Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment* (see footnote 283 above), para. 13.

395 *Ibid*., Declaration of Judge Greenwood, p. 324, para. 8 (emphasis added).

396 *Ibid*.

397 *Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment* (see footnote 369 above), para. 66.

apparent from *Land, Island and Maritime Frontier Dispute*[398] and *Bosnian Genocide*.[399] In *International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, the Court recalled that it had indicated in *Diallo* that it must "ascribe great weight" to the interpretation adopted by the Human Rights Committee, but also that it was "in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee".[400] The Court added that, in the context of the case before it, which concerned the interpretation of the Convention, it had "carefully considered the position taken by the [Committee on the Elimination of Racial Discrimination] … on the issue of discrimination based on nationality. By applying, as it is required to do …, the relevant customary rules on treaty interpretation, it came to [a different conclusion]".[401]

287. While, in *Diallo*, the Court had pointed out that its own interpretation of the International Covenant on Civil and Political Rights was "fully corroborated by the jurisprudence of the Human Rights Committee", in *International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, the Court "did not follow the interpretation given by the [Committee on the Elimination of Racial Discrimination] and concluded that, contrary to the Committee's view, nationality was not one of the factors of discrimination covered by the [the Convention]".[402]

288. It would seem incorrect to say that the Court in *International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* "reconsidered" its approach from *Diallo*.[403] If that case follows *Diallo* by making it apparent that there is no duty to follow the judicial decisions of other courts and tribunals, and declined to follow the jurisprudence of the Committee on the Elimination of Racial Discrimination even when the Court dealt with matters within the special field of competence of that treaty body, the case was a special one given that, for the Committee, the customary international law rules on treaty interpretation are, to quote *Bosnian Genocide*, "issues of general international law which do not lie within the specific purview of its jurisdiction".[404] The customary international law rules on treaty interpretation, which are among the issues of general international law that the Court is particularly well suited to determine, militated against the Committee's solution.

289. Other international tribunals have also taken the view that they are obliged to consider but not necessarily follow the decisions of other bodies. In the case of the International Criminal Tribunal for the Former Yugoslavia, for example, as discussed above, the Appeals Chamber in *Tadić* declined to follow the ruling of the International Court of Justice as a "precedent". It took pains to state that "[a]lthough the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion".[405]

290. The point is that international courts freely choose to examine the works of other courts and tribunals where those may have a bearing on the resolution of the issue at hand. In the same vein, and this is a significant point, States parties appearing in proceedings before such courts and tribunals routinely cite a wide range of materials, including prior decisions, teachings and other materials; it is obvious that they consider them relevant to resolution of

[398] *Land, Island and Maritime Frontier Dispute* (see footnote 127 above), para. 403.

[399] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 131 above), para. 403.

[400] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71, at p. 104, para. 101.

[401] *Ibid*.

[402] Gaja, "The role of human rights treaty bodies …", p. 975.

[403] *Cf.* Marius Emberland, "The Committee on the Rights of the Child's admissibility decisions in the 'Syrian Camps Cases' against France: a critique from the viewpoint of treaty interpretation", *Human Rights Law Review*, vol. 23 (2023), pp. 1–11, at p. 11.

[404] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 131 above), para. 403.

[405] *Delalić*, Judgment, 20 February 2001, Appeals Chamber (see footnote 307 above), para. 24.

their cases. The value and weight to attach to the materials may vary. But the practice is almost always the same.

291. In some cases, besides the tribunals themselves, their creators have sought to ensure unity and coherence of international law by seeking to link the case law of the different courts. This effort, although not as frequent as it should be, has taken different and interesting turns in some contexts. For example, when establishing the Special Court for Sierra Leone, the United Nations and the Government of Sierra Leone included in the Court's Statute an express provision aimed at avoiding fragmentation by linking two courts in order to enhance consistency in their jurisprudence, as the Security Council had done as between the International Criminal Tribunals for the Former Yugoslavia and Rwanda in 1993 and 1994, respectively. Article 20, paragraph 3, of the Statute of the Special Court for Sierra Leone, which was adopted by the United Nations and Sierra Leone pursuant to a bilateral treaty, sought to limit the prospect of conflicting judicial decisions and the fragmentation of international criminal law,[406] by providing that the judges of the Appeals Chamber of the Court "*shall* be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone".[407]

292. Even in that context, the Appeals Chamber of the Special Court for Sierra Leone, in interpreting the first part of that provision, determined in *Norman* a posture that gave judicial flexibility to the tribunal when deciding cases:

> Without meaning to detract from the precedential or persuasive utility of decisions of the [International Criminal Tribunal for Rwanda] and the [International Criminal Tribunal for the Former Yugoslavia], it must be emphasized, that the use of the formula "shall be guided by" in Article 20 of the Statute does not mandate a slavish and uncritical emulation, either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals.[408]

293. The Appeals Chamber of the Special Court essentially underlined that the authority of another decision also turns on its persuasiveness to the later decider, not just a formal statutory requirement. This is consistent with the finding of the Commission in this topic, i.e., that what matters more is the quality of the reasoning in the later decision. Moreover, the Appeals Chamber of the Special Court considered that, as the highest chamber in the Special Court's two-level system, it was duty bound to ensure interpretations given to the law by other courts even if addressing the same issues would need to be consistent with its own specific statutory context:

> the Special Court is empowered to develop its own jurisprudence having regard to some of the unique and different socio-cultural and juridical dynamics prevailing in the *locus* of the Court. This is not to contend that sound and logically correct principles of law enunciated by [the International Criminal Tribunal for Rwanda] and [the International Criminal Tribunal for the Former Yugoslavia] cannot, with necessary adaptations and modifications, be applied to similar factual situations that come before the Special Court in the course of adjudication so as to maintain logical

[406] See Report of the Security-General on the establishment of a Special Court for Sierra Leone, S/2000/915, para. 41.

[407] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137, at p. 152, art. 20 (emphasis added). See also Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Judgment, 2 March 2009, Trial Chamber, para. 295. For commentary on the jurisprudential contributions of the Special Court for Sierra Leone, see Charles Chernor Jalloh, *The Legal Legacy of the Special Court for Sierra Leone* (Cambridge, Cambridge University Press, 2020).

[408] Special Court for Sierra Leone, *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2003-08-PT, Decision the Prosecutor's motion for immediate protective measures for witnesses and victims and for non-public disclosure, 23 May 2003, Trial Chamber, para. 11.

consistency and uniformity in judicial rulings on interpretation and application of the procedural and evidentiary rules of international criminal tribunals.[409]

294. The principal question at stake in every decision of an international tribunal on a legal issue is the determination of the substantive content of the relevant and applicable rules.[410] The analysis engages "a much wider set of considerations and potential sources, of which judicial decisions are only one element".[411] For that reason, as has been emphasized by several international court judges and by numerous scholars, international law benefits from consistency and predictability. And in seeking such consistency, it is the quality of the decision or the argument that matters most.

295. The value of consistency and reasoning in interpreting the law is also assisted by the other subsidiary means well beyond judicial decisions. For instance, teachings can be of assistance to confirm a particular interpretation even where they are not cited by the tribunal. Here, owing to the paucity of use of teachings in judgments of the International Court of Justice, there are limitations (although, as pointed out in the first report, the Court stands apart from other tribunal practices in this regard). Here, there is a tendency to cite only a certain few writers, such as Anzilotti, Basdevant, Lauterpacht, Fitzmaurice and Oppenheim.[412] Certain writers who wrote in more specialized fields of international law, such as Gidel and his writings in the law of the sea, have also attained a similar status.[413] Thus, to give two examples, Gidel's *Le droit international public de la mer*[414] has been cited by Court,[415] arbitral tribunals[416] and the International Tribunal for the Law of the Sea,[417] and successive editions of *Oppenheim* have been cited by, e.g., the Court,[418] arbitral tribunals[419] (including the tribunals of the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law[420]) and the European Court of Human Rights.[421] When international courts and tribunals, and others who apply international law, in different fields read and rely on the same teachings, that may contribute to obviating the problems of fragmentation.[422]

296. Where an international court or tribunal is called upon to consider the relevance of decisions of other tribunals on a question of law, the frame for its consideration is laid down in Article 38, paragraph 1 (*d*), of the Statute. The decisions of other tribunals are not sources of law in themselves; they serve as one of the means by which the tribunal seised of the matter

409 *Ibid*.

410 McLachlan, *The Principle of Systemic Integration in International Law*, p. 233.

411 *Ibid*.

412 Pierre-Marie Dupuy, "La pratique de l'article 38 du Statut de la Cour internationale de justice dans le cadre des plaidoiries écrites et orales", *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations publication, Sales No. E/F/S.99. V.13), pp. 377–394, at p. 393; Helmersen, *The Application of Teachings by the International Court of Justice*, p. 94.

413 J.P.A. François, "L'influence de la doctrine des publicistes sur le développement du droit international", *Mélanges en l'honneur de Gilbert Gidel* (Paris, Sirey, 1961), pp. 275–281, at p. 281.

414 Gilbert Gidel, *Le droit international public de la mer*, vols. I–III (Chateauroux, Mellottée, 1932–1934).

415 *Land, Island and Maritime Frontier Dispute* (see footnote 127 above), para. 394.

416 *La Bretagne (Canada/France) International Law Reports*, vol. 82 (1986), p. 591, at p. 627, para. 50.

417 *M/V "Norstar"* (see footnote 201 above), Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad, and Judge *ad hoc* Treves, para. 19.

418 *Land, Island and Maritime Frontier Dispute* (see footnote 127 above), para. 394.

419 *Saudi Arabia v. Arabian American Oil Co. (Aramco)*, Award, 23 August 1958, *International Law Reports*, vol. 27 (1963), p. 117, at p. 211.

420 International Centre for Settlement of Investment Disputes, *Sudapet Company Limited v. Republic of South Sudan*, ICSID Case No. ARB/12/26, Award, 30 September 2016, para. 324; *Sandline International v. Papua New Guinea*, Interim Award, 9 October 1998, *International Law Reports*, vol. 117 (1998), pp. 555–565, at p. 561, para. 10.2.

421 *Bankovic v. Belgium*, Decision, 12 December 2001, *International Law Reports*, vol. 123 (2003), p. 94, at paras. 59–60.

422 Helmersen, *The Application of Teachings by the International Court of Justice*, p. 175.

may ascertain the content of rules of law, whether they be found in customary international law, conventions, or general principles.[423]

## G. Proposed draft conclusion 12 – coherence in decisions of courts and tribunals

297. Given the above analysis of situations that could undermine the unity and coherence of international law as a legal system, the Special Rapporteur proposes the following draft conclusion that is aimed at promoting unity and coherence in interpretation of international law. The draft conclusion, as proposed, is comprised to two paragraphs. The first paragraph builds on the uncontroversial proposition stressed throughout the Commission's work on fragmentation that international law is a single and unified legal system. The framing, while implicitly accepting that the legal basis of international tribunals may differ, provides that international courts and tribunals mandated to interpret and apply international law should promote consistency, stability and predictability of the international legal system.

298. The second sentence, whose opening links back to the statement of principle set out in paragraph 1, addresses specifically the question of conflicting decisions as manifested in the decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Court of Justice discussed in the present chapter. It provides that regard shall be had to the interest of achieving the necessary clarity and the essential consistency of international law when determining the rules of international law, in line with the sources of international law, between the legal interpretations or reasoning provided in decisions of different courts or tribunals on essentially the same issue where there appears to be a conflict.

299. Several comments on the reasoning of the Special Rapporteur could be helpful. First, the reference to the determination in a "given case" is mean to encompass both contentious cases and advisory opinions. Second, note that the reference is not to conflicting decisions but conflicting legal interpretations that may be contained in such decisions. The reason for this nuance is simple. Barring the specified circumstances, as confirmed the draft conclusions for the topic adopted by the Commission at its seventy-fifth session, in 2024, there is no doctrine of *stare decisis* in international law. It follows that there can be no requirement that one tribunal must follow the decisions of another, except of course if specifically provided for in an instrument or rule, as set out in draft conclusion 7 on the absence of legally binding precedent in international law.

300. Third, the issue at hand must be on a similar legal question and therefore potentially useful in resolving the situation. Fourth, the words "appears to be" are meant to cover both the situation where there is a real conflict and where there is only an apparent conflict. Application of what is set out in paragraphs 1 and 2 could show that an apparent conflict is not in fact a real one. The words "achieving the necessary clarity and the essential consistency of international law" in paragraph 2 are inspired by the judgment of the International Court of Justice in *Ahmadou Sadio Diallo Case.*[424] The Court stressed that such an approach provides greater legal security to both States, and in the context of that case, to individuals to whom the States have guaranteed certain rights. The notion of stability in paragraph 1 also captures the idea of legal security.

Draft conclusion 12

Coherence in decisions of courts and tribunals

1. Courts or tribunals charged with interpreting and applying international law should promote, as far as possible and within the limits of their mandate, the consistency, stability and predictability of the international legal system.

2. In accordance with paragraph 1, when determining the rules of international law to apply in a given case, and there appears to be a conflict between the legal interpretations contained in decisions of different courts or tribunals on essentially the

[423] McLachlan, *The Principle of Systemic Integration in International Law*, p. 259.

[424] See *Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment* (see footnote 369 above), para. 66.

same issue, regard shall be had to the interest of achieving the necessary clarity and the essential consistency of international law.

# VII. The relationship between "subsidiary means" for determining rules of law and "supplementary means" of interpretation

301. The present chapter addresses the relationship between "subsidiary means" for the determination of rules of international law and the "supplementary means of interpretation" under treaty law. In doing so, it seeks to responds to calls from both Commission members and States to clarify the issue.

302. The origin of this inquiry can be traced to the Commission's early work on the present topic, when members suggested examining the implications of this relationship for the purposes of the determination and interpretation of rules of international law. While not initially included in the topic's syllabus, the question gained prominence through State interventions in the Sixth Committee and subsequent discussions in the Commission. The Special Rapporteur, in paragraphs 62 and 63 of his second report, explicitly acknowledged the importance of the issue and committed to addressing it comprehensively as had been requested by some members of the Commission and States.[425]

303. It is undisputed that the two notions, as used in the provisions that put them forward, serve distinct functions. Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice identifies "judicial decisions and the teachings of the most highly qualified publicists" as subsidiary means for determining rules of international law. This means that they are a mechanism for applying the sources of international law. Meanwhile, article 32 of the 1969 Vienna Convention establishes the use of "supplementary means of interpretation", including preparatory work and the circumstances of the conclusion of a treaty, to confirm meaning or determine it when primary interpretation leaves the meaning ambiguous or obscure or leads to manifestly absurd or unreasonable results. Resort to the supplementary means will only follow the application of the analytical steps set out in the general rule of treaty interpretation contained in article 31 of the 1969 Vienna Convention. Critically, both provisions are said to constitute customary international law meaning that they have a wide scope of application.

304. Nevertheless, the relationship between these provisions raises several fundamental questions. First, there is the matter of their conceptual distinction—whether they represent truly separate legal tools or whether there exists meaningful overlap in their application. Second, their hierarchical relationship, if any, requires examination—particularly in cases where both might be applicable. Third, their practical interaction in judicial reasoning deserves attention, especially given the diverse approaches taken by different international courts and tribunals.

305. The timing of this analysis is particularly apt. As international courts and tribunals increasingly engage with both provisions in their jurisprudence, understanding their relationship becomes crucial for maintaining coherence in reasoning. This importance is heightened by the growing specialization of international tribunals and the potential for divergent approaches to the processes of interpretation and determination across different forums. Some of these questions are addressed in the preceding chapter devoted to the "fragmentation" of international law.

306. This analysis aims to address these questions while acknowledging certain parameters. A key point in this regard is that there is a fundamental difference between sources and subsidiary means since the treaty interpretation rules contained in articles 31–33 of the 1969 Vienna Convention concern the law of sources. This conceptual distinction provides an important starting point for understanding their relationship.

[425] See A/CN.4/769, paras. 62–63.

## A. The work on the topic to date in relation to the determination process

### 1. The two previous Special Rapporteur reports

307. In his first report, the Special Rapporteur indicated that the function of subsidiary means would be examined in detail in the second report.[426] During the debates in both the Commission and the Sixth Committee, several members and States emphasized the importance of clarifying the precise nature and function of subsidiary means.[427]

308. The second report addressed this issue through a comprehensive analysis of the auxiliary nature of subsidiary means and their relationship to the sources of international law.[428] Based on this analysis, the Special Rapporteur then proposed draft conclusion 6, which aimed to crystallize the essential characteristics of subsidiary means and their operation in practice. The following sections examine the key aspects of this draft conclusion and its relationship to the broader analytical framework developed in the second report.[429]

309. The draft conclusion develops several key aspects of the nature and function of subsidiary means. Its layered structure—addressing first their nature (subpara. (*a*)) and then their function (para. (*b*))—provides a framework for understanding both what subsidiary means are and how they operate in practice.

310. Subparagraph (*a*) establishes the fundamental relationship between subsidiary means and formal sources, characterizing subsidiary means as "auxiliary in nature", as a consequence of the analysis presented in the second report regarding the hierarchical distinction between Article 38, paragraph 1 (*a*)–(*c*), and 38, paragraph 1 (*d*).[430] The choice of "auxiliary" echoes the language debates noted in the first session, where translation issues between "subsidiary", "auxiliary" and "auxiliaire" highlighted conceptual nuances.[431]

311. Significantly, subparagraph (*b*) expands the functional scope of subsidiary means beyond mere "determination", encompassing three distinct but related functions: identification, interpretation and application. This tripartite formulation represented an important effort to develop earlier discussions that focused primarily on determination alone. It acknowledges that subsidiary means play a more complex role than simply helping to determine whether rules exist.

312. This expanded functional understanding aligned with the discussion in the second report of the two levels of legal determination.[432] The first level involves direct engagement with sources, while the second level involves the indirect use of subsidiary means to identify, interpret, and apply rules.

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426 See A/CN.4/760, para. 388.

427 A/78/10, paras. 84–98.

428 See A/CN.4/769, paras. 64–126.

429 Comments in the present section pertain to draft conclusion 6 as proposed by the Special Rapporteur in his second report (A/CN.4/769):

"Draft conclusion 6

Nature and function of subsidiary means

(a) Subsidiary means are auxiliary in nature vis-à-vis the sources of international law found in treaties, customary international law and general principles of law.

(b) Subsidiary means are mainly resorted to when identifying, interpreting and applying the rules of international law derived from the sources of international law."

Draft conclusion 6 as provisionally adopted by the Commission (A/79/10, para. 74) reads as follows:

"Conclusion 6

Nature and function of subsidiary means

1. Subsidiary means are not a source of international law. The function of subsidiary means is to assist with the determination of the existence and content of rules of international law.

2. The use of materials as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes."

430 A/CN.4/769, para. 78.

431 See A/CN.4/SR.3633, p. 5.

432 See A/CN.4/769, paras. 79–82.

313. The formulation of the draft conclusion sought to recognize interpretation as one of the core functions of subsidiary means across all sources of international law. This broader approach acknowledges that subsidiary means can assist in interpreting not just treaty provisions but also customary rules and general principles of law.

314. The phrase "mainly resorted to" in subparagraph (*b*) suggested that, while these are the primary functions of subsidiary means, they might also serve other purposes. This aligns with the discussion in the second report of the historical compromise reached during the drafting of Article 38, where it was recognized that jurisprudence could potentially "mould, shape or even develop international law" while still maintaining its auxiliary character.[433]

315. The structure of the draft conclusion also reflected the two-level approach to legal determination outlined in the second report. By first establishing the auxiliary nature of subsidiary means and then detailing their specific functions, it maintained the crucial distinction between sources and subsidiary means while acknowledging the latter's practical importance.

316. The reference to "rules of international law derived from the sources" in subparagraph (*b*) reinforced the auxiliary relationship established in subparagraph (*a*). It emphasized that subsidiary means always operate in reference to primary sources, supporting the Special Rapporteur's assertion in the second report that they "cannot stand alone but must refer back to other legal sources".[434]

317. This formulation addressed the historical tension identified in the report between those who saw subsidiary means as merely identifying existing rules and those who recognized their potential role in the development of the law.[435] By acknowledging multiple functions while maintaining their auxiliary nature, instead of a single all-encompassing function that does not take into account granularity in the ways the subsidiary means manifest in practice, the draft conclusion sought to strike a balance between these perspectives.

318. The approach in the draft conclusion also has practical implications. It suggests that subsidiary means may be legitimately used not just to establish the existence of rules but also to understand their meaning and application. This broader functional scope reflects the reality of international legal practice.

### 2. The discussion of supplementary means in the Commission

319. The Commission's discussion of the Special Rapporteur's second report initiated a substantial debate on the relationship between subsidiary means and interpretation, particularly concerning draft conclusion 6. The Special Rapporteur's acknowledgment of the need to address the link between subsidiary means and supplementary means of interpretation under the 1969 Vienna Convention in a future report[436] was an important area for future analysis, specifically the connection between Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, and article 32 of the 1969 Vienna Convention.

320. The proposed formulation of draft conclusion 6, subparagraph (*b*), stating that subsidiary means are "mainly resorted to when identifying, interpreting and applying the rules of international law",[437] became a focal point of discussion. A critique[438] was put forward that this formulation described when subsidiary means are used, not their function, and that the emphasis should be on determining rules' existence and content. This intervention highlighted the potential tension between interpretation as a function and the more fundamental role of determination. The use of "mainly" and the omission of other

[433] *Ibid*., para. 87.
[434] *Ibid*., para. 82, quoting Andenas and Leiss, "The systemic relevance of 'judicial decisions' in Article 38 of the ICJ Statute", p. 927.
[435] *Ibid*., paras. 84–87.
[436] *Ibid*., para. 8.
[437] *Ibid*., para. 126.
[438] A/CN.4/SR.3663 (provisional), p. 11 (Mr. Oyarzábal).

functions such as ensuring predictability and consistency [439] further complicated the understanding of the scope of subsidiary means.

321. The discussion then broadened to consider the practical application of subsidiary means for interpretation. The role of national courts was examined, with the suggestion[440] that, while not bound by decisions of the International Court of Justice, national courts nevertheless use them for interpretative authority and feel an obligation to consider them. This revealed a nuanced relationship between subsidiary means and interpretation at the national level. Further emphasizing the variations in practice, the example of the Costa Rican Constitutional Chamber's approach to Inter-American Court interpretations[441] demonstrated how some legal systems adopt a more expansive view of the interpretative function of subsidiary means. This prompted calls[442] for a broader methodological approach, examining practice beyond the International Court of Justice and the International Tribunal for the Law of the Sea, including regional human rights courts, investor-State dispute settlement and the WTO Dispute Settlement Body.

322. Finally, the discussion touched upon broader theoretical considerations. The rule of law principle of treating like cases alike, regardless of legal tradition,[443] provided a wider context for understanding the function of subsidiary means in interpretation. The Inter-American Court's practice of "conventionality control"[444] illustrated how some tribunals extend the impact of their interpretations, blurring the lines between the interpretative function in Article 38, paragraph 1 (*d*) and the broader development of international law.

323. A crucial contribution[445] provided a comparative analysis of article 32 of the 1969 Vienna Convention and Article 38, paragraph 1) (*d*), of the Statute of the International Court of Justice, highlighting their fundamental differences. This analysis emphasized that article 32 focuses solely on treaty interpretation, while Article 38, paragraph 1 (*d*), addresses the broader task of determining rules of law, encompassing more than just interpretation. The distinction between "supplementary" means under the 1969 Vienna Convention and "subsidiary" means under the Statute of the International Court of Justice was underscored, along with the different purposes and intended audiences of the two provisions. This distinction between formation, interpretation, and determination of law was further supported,[446] referencing the Secretariat's memorandum.

324. Despite this clarification, the question of whether interpretation should be considered a distinct function or a component of determination remained a point of contention. The inclusion of "identifying" and "applying" alongside "interpreting" in draft conclusion 6, subparagraph (*b*), was questioned, [447] suggesting a preference for maintaining a clear separation between interpretation and the broader determinative role of subsidiary means.

325. Further complexities arose from terminological ambiguities. The need to differentiate between "auxiliary" and "assistive", as well as between "determination" and "identification", was highlighted. [448] Some members suggested that "determination" was equivalent to "identification", or at least, was subsumed by it. An examination of the language of the judges of the International Court of Justice when using subsidiary means for different purposes—terms like "declare" and "support" for identifying rule existence versus "interpret", "define" and "clarify" for identifying rule content[449]—revealed nuanced functional variations. This linguistic analysis suggested a more complex relationship between determination and interpretation than initially apparent.

[439] *Ibid.*
[440] *bid.*, p. 8 (Mr. Reinisch).
[441] *Ibid.*, pp. 13–14 (Mr. Galindo).
[442] *Ibid.*, p. 13.
[443] *Ibid.*, p. 9 (Mr. Reinisch).
[444] *Ibid.*, p. 14 (Mr. Galindo).
[445] A/CN.4/SR.3664 (provisional), p. 12 (Ms. Mangklatanakul).
[446] A/CN.4/SR.3664 (provisional), p. 3 (Mr. Forteau).
[447] *Ibid.*, p. 12 (Mr. Asada).
[448] A/CN.4/SR.3665 (provisional), p. 3 (Ms. Ridings).
[449] *Ibid.*, pp. 3–4.

326. The distinction between subsidiary means and the interpretation principles of the 1969 Vienna Convention was further emphasized;[450] it was argued that the latter related to the law of sources and differed in nature from subsidiary means. Concerns about the ambiguous use of terms like "auxiliary", "subsidiary" and "gap-filling" were raised, with a particular focus on the potential implications of "gap-filling" for understanding subsidiary means.[451] The need for clearer definitions and distinctions between these terms was highlighted,[452] along with the question of whether draft conclusion 6, subparagraph (*b*), comprehensively captured the range of subsidiary means' functions.

327. Adding a linguistic perspective, it was noted[453] that the Chinese translation of "subsidiary means" clearly denoted their non-source status, reinforcing the argument that they serve primarily as aids in ascertaining rules of law. The importance of adhering to established treaty interpretation rules under the 1969 Vienna Convention was emphasized,[454] referencing the 1950 *Asylum Case* judgment of the International Court of Justice. Translation challenges across different languages were also acknowledged[455] and it was suggested that focusing on the non-source nature of subsidiary means might help overcome those linguistic hurdles.

328. Finally, the implications of deferring the discussion on judicial decisions as supplementary means of interpretation were explored[456] and the *LaGrand* case and its impact on other tribunals' interpretation of their constitutive treaties was highlighted. The retrospective application of the *LaGrand* interpretation and the distinction between de facto precedent and formal interpretation rules[457] further underscored the complex interplay between subsidiary means, interpretation, and the development of international law.

329. Although he deeply appreciates the engagement of all members on the present topic, including the divergent views expressed by members on both sides of the "determination" versus, or better yet, "identification" debate, the Special Rapporteur finds himself in a difficult position. The comments of many members of the Commission point to accepting only a sole function for subsidiary means. Whereas those of other members indicate that there are perhaps multiple functions performed by the subsidiary means. Or, in less oppositional terms, the views of some members reflect an overarching function but a willingness to acknowledge, if not accept, the existence in practice of subfunctions of subsidiary means.

### 3. Comments by States in the Sixth Committee

330. During the debate in the Sixth Committee, a spectrum of views emerged on the topic of subsidiary means, particularly in relation to treaty interpretation. The more general aspects of the debate were considered in chapter II of the present report. Here, their comments are reviewed insofar as they relate directly to the subject of the present chapter, namely, the relationship between the supplementary means of interpretation and subsidiary means for determining rules of international law.

331. While States generally acknowledge the auxiliary nature of subsidiary means, their positions diverge on the extent to which these means should influence the interpretation of international law and how they relate to the supplementary means of interpretation outlined in article 32 of the 1969 Vienna Convention. A few examples will perhaps suffice to make the most essential points. The European Union, while primarily concerned with the nature of subsidiary means and their relationship to sources of law, explicitly linked subsidiary means to the interpretation process.[458] Their statement goes beyond simply acknowledging that subsidiary means determine rules; they actively assist in the "interpretation, application and

[450] *Ibid*., p. 6 (Mr. Paparinskis).
[451] A/CN.4/SR.3666 (provisional), p. 15 (Mr. Lee).
[452] *Ibid*., p. 3 (Ms. Oral).
[453] *Ibid*., p. 18 (Mr. Huang).
[454] *Ibid*.; see also *ibid*., pp. 11–12 (Mr. Fife).
[455] *Ibid*., pp. 5–6 (Mr. Zagaynov).
[456] A/CN.4/SR.3667 (provisional), pp. 6–7 (Ms. Okowa).
[457] *Ibid*., pp. 7–8.
[458] See the European Union (A/C.6/79/SR.25).

development of the will expressed by subjects of international law".[459] This suggests a dynamic role for subsidiary means, not just in identifying existing rules, but also in shaping their meaning and application in evolving contexts. The emphasis of the European Union on "development" further implies that subsidiary means can play a role in the progressive development of international law through interpretation.

332. Denmark, on behalf of the Nordic countries,[460] also focused on the interpretative function of subsidiary means.[461] They characterized Article 38, paragraph 1 (*d*), as referring to a "material source" which provides "helpful, material evidence that might assist in and influence interpretation".[462] This language positions subsidiary means as actively contributing to the process of interpretation, rather than simply providing a static answer. The use of the word "influence" suggests that subsidiary means can shape the outcome of interpretation, highlighting their potential impact on the meaning of international law.[463]

333. Brazil,[464] like a number of other delegations, raised the issue of the purposes of subsidiary means, asking for clarification on what other purposes they might serve beyond determining the existence and content of rules.

334. Israel[465] made a clear distinction between sources of international law and subsidiary means, emphasizing that the latter serve as "interpretative tools to help identify and clarify existing rules". This statement explicitly links subsidiary means to the process of interpretation. The view of Israel is that subsidiary means are not meant to create new law, but rather to assist in understanding the meaning of existing rules. This aligns with the traditional understanding of Article 38, paragraph 1 (*d*), as providing tools for understanding the law, rather than constituting a source of law itself. By emphasizing the "clarifying" function of subsidiary means, Israel suggests that they can be used to resolve ambiguities or uncertainties in the meaning of international law, which is a key aspect of interpretation.

335. Canada highlighted the practical role of subsidiary means in situations where States cannot agree on the interpretation of rules. This acknowledges that interpretation is not always a straightforward process, and that subsidiary means can be particularly useful in resolving disputes over meaning. Canada's statement suggests that subsidiary means can be used to provide a common understanding of a rule, found in the sources of binding obligations, even when States have different initial interpretations.[466]

336. The Kingdom of the Netherlands explicitly linked the topic of subsidiary means to the interpretation and application of international law, noting the potential of the topic to help identify how so-called soft law may contribute to these processes. This suggests that subsidiary means are not limited to traditional sources of law but can also include non-binding instruments.[467]

337. Australia[468] directly addressed the relationship between subsidiary means and the supplementary means of interpretation under article 32 of the 1969 Vienna Convention.[469] This highlights the potential overlap between these two sets of tools.[470] The invitation of Australia to the Commission to outline its views on this relationship suggests that there is a need for greater clarity on how these tools interact.[471]

338. Egypt raised a question about the relationship between primary sources of international law and subsidiary means, specifically questioning how to distinguish between

[459] *Ibid*.
[460] See Denmark (speaking on behalf of the Nordic Countries) (*ibid*.).
[461] *Ibid*.
[462] *Ibid*.
[463] *Ibid*.
[464] See Brazil (*ibid*.).
[465] See Israel (A/C.6/79/SR.26).
[466] See Canada (*ibid*.).
[467] See the Kingdom of the Netherlands (*ibid*.).
[468] See Australia (*ibid*.).
[469] *Ibid*.
[470] *Ibid*.
[471] *Ibid*.

"interpretation, application, identification and ascertainment" and the process of "determination of the rules of law".[472] The concern of Egypt suggests that the line between interpreting a rule and determining its existence or content may not always be clear, and that subsidiary means may play a role in both processes.[473]

339. The Federated States of Micronesia emphasized the critical role of subsidiary means for the "identification, interpretation and application of the rules of international law".[474] This explicitly links subsidiary means to all three of these processes.

340. Chile stated that subsidiary means are used to "determine the existence of a … rule" and to "interpret rules whose existence was not in question".[475] This explicitly links subsidiary means to both the identification and interpretation of international law. The view of Chile is that subsidiary means are not just tools for finding new rules, but also for understanding the meaning of existing rules. Sierra Leone, for its part, noted that the broader application of subsidiary means, especially in developing areas of international law, can contribute to a "more dynamic and responsive legal framework".[476]

341. To conclude this brief review, it is clear that States hold different views on the link between interpretation and determination of rules. Broadly, based on the debates in plenary within the Commission in the past two years, the Special Rapporteur considers that a similar difference of view exists among members of the Commission. It is for these reasons that, while not initially included in his proposed programme of work, he considers that the lack of clarity on the issue warrants an examination of the topic. In addition to addressing a potentially important substantive issue that could enable the addition of greater value in the topic, the Special Rapporteur's decision to take up the invitation to proceed with the present examination serves as a valuable example of the constructive nature of the dialogue between the States in the Sixth Committee and members of the Commission –starting with its special rapporteurs.

## B. The problem in brief and the relevant provisions

342. As noted in paragraphs 62 and 63 of the second report, an important aspect remaining to be addressed is the relationship between subsidiary means under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice and the means of interpretation contained in article 31 of the 1969 Vienna Convention (stating the general rule) and the supplementary means of interpretation under article 32.[477] This relationship warrants careful analysis given the potential overlap and interaction between these two key provisions that guide States, international organizations, international courts and tribunals and others in their work. The Commission's own work, as set out in both the first and second Secretariat memorandums, indicates acceptance of other role for such materials in other topics, including subsequent agreements and subsequent practice in relation to the interpretation of treaties.

343. One of the main reasons for the confusion stems from the wording of the two provisions, with the words "subsidiary" and "supplementary" suggesting that there may be similarities in the role played by the "means" in question. As to the relevant provisions themselves, Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice provides that the Court shall apply:

> subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[478]

[472] See Egypt (A/C.6/79/SR.27).
[473] *Ibid*.
[474] See the Federated States of Micronesia (*ibid*.).
[475] See Chile (*ibid*.).
[476] See Sierra Leone (*ibid*.).
[477] See A/CN.4/769, para. 62–63.
[478] Statute of the International Court of Justice, Article 38, para. 1 (*d*).

344. Article 32 of the 1969 Vienna Convention, after specifying a clear sequence to the four parts in the general interpretation rule in Article 31, states:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (*a*) leaves the meaning ambiguous or obscure; or
>
> (*b*) leads to a result which is manifestly absurd or unreasonable.

345. The overlap becomes apparent when considering how courts utilize these tools in practice. For instance, when an adjudicator or a practitioner consults previous judicial decisions or scholarly works to interpret a treaty provision, the adjudicator may be simultaneously drawing on them as subsidiary means for determining rules under Article 38, paragraph 1 (*d*), and as means of interpretation, supplementary or otherwise, with a view to ascertaining the correct interpretation of a rule that has already been determined.

346. It is undisputed that there is a clear difference between the purposes of the two provisions. As explained in great detail in the first report, Article 38 1 (*d*), of the Statute is the applicable law provision and thus a directive to the Court listing "means" to be used for the purposes of determination of the law as contained in the earlier paragraph 1 (*a*) to (*c*), whereas Article 32 of the 1969 Vienna Convention considers questions of treaty interpretation and is part of a set of three provisions in the well-known Section 3 of Part III on treaty observance, application and interpretation. Even assuming the admissibility of more exotic scenarios dealing with the purported possibility of "interpreting" rules of customary rules of international law, the two roles are clearly distinct.

347. That said, it is clear that distinguishing between the two operations—that is to say, between the determination of rules of law and the interpretation thereof—is far easier in theory than it is in practice. In this connection, two main scenarios may be considered. The first, which the present report does not aim to address, concerns those cases where, in determining the rules to be applied, the need may arise to interpret materials. In this sense, the exercise may be said to be part of the process of determination of the rule, the interpretative process is not so much a necessary and logical antecedent for determining the existence and content of the rule as it is part of the determination process itself. It is true that a rule thus determined might require interpretation to ascertain the content of it, but the operation may, at the intellectual level, be distinguished from it.

348. The second, which forms the object of the present chapter, arises instead where a treaty provision is at stake and materials that qualify as subsidiary means as discussed in the present work of the Commission are employed, as it has been suggested throughout the two previous reports they may, for purposes of rule-interpretation. Thus, two further possibilities arise: first, the "subsidiary means" in question may play a role for the purposes of treaty interpretation under the general rule of treaty interpretation found in article 31 of the 1969 Vienna Convention. Second, and consistent with the discussion thus far in the Commission, the same materials might be relevant as supplementary means for the determination of rules of law as governed by article 32 of the 1969 Vienna Convention.

## C. Limitations to the use of subsidiary means as interpretative tools

### 1. The distinction between the general and granular functions of subsidiary means

349. The previous reports distinguished interpretation as a specific function of subsidiary means, separate from their role in determining or identifying rules. This interpretative function is explicitly recognized when the reports state that subsidiary means can serve as "a means of interpreting or complementing the rules of international law".[479] This interpretative role helps advance "the coherence or the systemic nature of international law as a legal

[479] See A/CN.4/769, para. 124.

system".[480] The practical operation of this interpretative function was demonstrated through several examples, including relating to the International Criminal Court[481] and domestic practice.[482] This interpretative function is particularly evident in complex areas like international humanitarian law.[483]

350. The reports emphasize that interpretation remains distinct from determination, while acknowledging their interrelated nature in practice. This was reflected in the Special Rapporteur's proposed draft conclusion 6, which explicitly included interpretation alongside identification and application[484] The interpretative function serves to ensure meaningful integration of rules as determined into the broader framework of international law, demonstrating how subsidiary means can operate flexibly while maintaining their auxiliary character.[485] This interpretation function appears particularly important when dealing with broad legal concepts that require detailed elaboration to be meaningfully applied.

### 2. The special case of *res interpretata* scenarios

351. There is however one special case that stands somewhat apart from the general framework outlined above— Article 63 of the Statute of the International Court of Justice. This provision creates a unique mechanism whereby States parties to a convention under interpretation can intervene in proceedings and become bound by the Court's construction.[486]

352. Three fundamental questions arise regarding the scope of this binding effect. The first concerns its temporal scope: whether the construction binds intervening States only for the particular case (following the approach in Article 59) or creates a broader obligation to follow that interpretation in all future cases.[487] The latter would impose a greater burden on interveners than Article 59 places on parties. As a leading commentary notes, "[t]his must also be limited to the judgment in the case, for it would be illogical for a third State to have a greater commitment under a judgment than the parties".[488]

353. The second question concerns reciprocity: whether the binding effect operates only unilaterally on the intervener or creates mutual obligations between the intervener and parties. Judge Gaja argues convincingly that the reference in Article 63 to being "equally binding" suggests reciprocal obligations – otherwise, the provision would "unduly penalize the intervener".[489] This interpretation aligns with the principle that interveners should not bear greater burdens than parties.

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480 *Ibid.*

481 *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, Trial Chamber II, para. 47 (noting that when primary texts need interpretation, "the Chamber may ... refer to the jurisprudence of the ad hoc tribunals and other courts on the matter").

482 Referring, *inter alia*, to United States, *United States v. Yousef*, 327 F.3d 56 (United States Court of Appeals, Second Circuit, 2003), para. 86 (subsidiary means can be "useful in explicating or clarifying an established legal principle").

483 Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge, Cambridge University Press, 2014), p. 65. See also Kanstantsin Dzehtsiarou and Niccolò Ridi, "The use of scholarship by the European Court of Human Rights", *International and Comparative Law Quarterly*, vol. 73 (2024), pp. 707–746 (finding that the European Court of Human Rights is more likely to use scholarship for the interpretation of international humanitarian law instruments and concepts).

484 See A/CN.4/769, para. 126.

485 *Ibid*., para. 124.

486 *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013*, p. 3, at para. 20.

487 Alina Miron and Christine Chinkin, "Article 63", in Andreas Zimmermann (ed.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford, Oxford University Press, 2019), pp. 1741–1774, at para. 65.

488 *Ibid*., footnote 187, citing J.H.W. Verzijl, *Jurisprudence of the World Court: A Case by Case Commentary*, vol. I: *The Permanent Court of Justice (1922–1940)* (Leiden, Sijhoff, 1965), p. 21.

489 *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand* (see footnote 486 above), Declaration of Judge Gaja, pp. 41–42.

354. The third question relates to the nature of the binding effect itself, which differs from traditional *res judicata* in several ways. While *res judicata* primarily attaches to the operative part of judgments, the binding effect of Article 63 operates mainly through the Court's interpretative reasoning.[490] Furthermore, the intervener achieves this binding effect without becoming a party to the case.[491] This creates what has been defined as a unique hybrid-binding among participants to the proceedings, but distinct from full *res judicata.*[492] These questions highlight the unique position of Article 63. However, the better view appears to be that this binding effect: (*a*) remains temporally limited to the particular case; (*b*) operates reciprocally between interveners and parties; and (*c*) focuses specifically on treaty construction rather than the broader dispute.

### 3. The notion of *res interpretata* in human rights law

355. The principle of *res interpretata*, though not explicitly mentioned in the European Convention on Human Rights,[493] plays a significant role in the jurisprudence of the European Court of Human Rights, particularly concerning the domestic application of its judgments. Articles 1, 19, and 32 of the Convention, alongside the principle of *res interpretata*, have been seen as underpinning the Court's approach to giving domestic effect to its pronouncements.[494] This aligns with the emphasis of the Steering Committee for Human Rights on States integrating Strasbourg case law into national law.[495]

356. The *erga omnes* effect of the Court's judgments stems from the legal obligation of the contracting States to abide by the Court's interpretation of the Convention.[496] This obligation is rooted in articles 19 and 32, which establish the Court's authority to interpret the Convention and the States' duty to comply with its decisions. The Court's interpretation, once rendered, becomes an integral part of the Convention itself, binding on all contracting parties.[497] This approach ensures consistent application of Convention rights and prevents States from reinterpreting provisions to evade their obligations, echoing Besson's argument for a general "interpretational" authority of judgments of the European Court of Human Rights.[498]

357. However, the *erga omnes* effect operates primarily through the principle of subsidiarity, which emphasizes the primary role of domestic authorities in implementing Convention rights.[499] The Court's role is supervisory, intervening only when national authorities fail to comply with their obligations. This interplay between *res interpretata*, *erga omnes* effect and subsidiarity is operationalized through the margin of appreciation doctrine.[500]

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490 Miron and Chinkin, "Article 63", para. 63.

491 *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand* (see footnote 486 above), para. 18.

492 Miron and Chinkin, "Article 63", para. 63.

493 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.

494 Oddný Mjöll Arnardóttir, "*Res interpretata, erga omnes* effect and the role of the margin of appreciation in giving domestic effect to the judgments of the European Court of Human Rights", *European Journal of International Law*, vol. 28 (2017), pp. 819–844, pp. 839–843.

495 Council of Europe, "Steering Committee for Human Rights (CCDH) Meeting Report" 29 November 2024 (CDDH(2024)R101), paras. 36–37.

496 Arnardóttir, "*Res interpretata, erga omnes* effect and the role of the margin of appreciation …", pp. 842–843.

497 *Ibid*.

498 Samantha Besson, "The *erga omnes* effect of judgments of the European Court of Human Rights: what's in a name?" in Besson *et al.* (eds.), *La Cour européenne des droits de l'homme après le Protocole 14 / The European Court of Human Rights after Protocol 14* (Schulthess, 2011), pp. 125–175, at p. 132.

499 Arnardóttir, "*Res interpretata, erga omnes* effect and the role of the margin of appreciation …", p. 843.

500 *Ibid*.

## D. Supplementary means

358. The present section examines the potential relevance of "subsidiary means," as defined in Article 38 of the Statute of the International Court of Justice and elaborated in the previous reports, for the purposes of treaty interpretation. Reflecting the discussions within the Commission, the analysis begins by focusing on the potential role of subsidiary means as supplementary means of interpretation under article 32 of the 1969 Vienna Convention, addressing the non-exhaustive nature of that provision and the implications of characterizing subsidiary means as supplementary. This is an example of the more granular functions of subsidiary means, which though still auxiliary, are specific.

359. The section then broadens its scope beyond the debate surrounding Article 32 to consider the relevance of subsidiary means for treaty interpretation under the general rule of interpretation provided for in Article 31 of the 1969 Vienna Convention. This includes exploring how subsidiary means might inform the determination of ordinary meaning, subsequent practice, and relevant rules of international law applicable between the parties. Finally, the section addresses the interplay of subsidiary means and treaty interpretation under specialized regimes, where the principle of *lex specialis* may apply, examining how such regimes might call for different approaches to the use of subsidiary means in the interpretative process.

### 1. The non-exhaustive nature of the list in article 32 of the 1969 Vienna Convention

360. The list in article 32 is manifestly non-exhaustive, as evidenced by both its text and subsequent practice. It should be recalled that the provision's text provides for the examination of two situations as part of assessing the supplementary means for interpreting treaty obligations, namely, the preparatory work of the treaty and the circumstances of its conclusion. The use of "including" before mentioning preparatory work and circumstances of conclusion signals an illustrative rather than comprehensive enumeration.[501] This reading is supported by the Commission's deliberate choice to focus only on codifying general principles that appeared to constitute rules for interpretation, rather than attempting an exhaustive codification of all potential interpretative tools.[502]

361. The approach of Special Rapporteur Waldock, in the Commission's work on the law of treaties, further confirms this understanding. He characterized traditional interpretative principles as "guides to assist in appreciating the meaning", suggesting a flexible framework rather than a closed system.[503] Subsequent practice has embraced this flexibility, particularly regarding academic commentaries and explanatory materials. Courts and tribunals have readily accepted such materials as supplementary means when they provide insight into treaty interpretation.[504] This includes both contemporaneous explanatory reports and guides subsequent to the conclusion of the treaty that compile analysis, references to preparatory work, or practice.[505]

362. Investment arbitration tribunals have provided particularly clear articulation of the non-exhaustive nature of article 32. The view has emerged that excluding relevant interpretative materials merely because they fall outside the enumerated categories would conflict with the fundamental requirement of good faith interpretation, thereby frustrating the broader purpose of supplementary means in elucidating treaty meaning.[506]

363. The WTO dispute settlement system has also contributed to developing this understanding. Panels and the Appellate Body have considered various materials beyond

[501] Richard Gardiner, *Treaty Interpretation*, 2nd ed. (Oxford, Oxford University Press, 2015), p. 399.

[502] Paras. (1) and (4)–(5) of the commentary to draft articles 27 and 28 of the draft articles on the law of treaties, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 218–219.

[503] *Yearbook … 1964*, vol. II, document A/CN.4/167 and Add.1-3 (third report on the law of treaties), p. 54, paras. (5)–(6).

[504] *R v. Secretary of State for the Home Department*, Ex parte *Read* [1989] AC 1014, 1052.

[505] *Sepet v. Secretary of State for the Home Department* [2003] UKHL 15.

[506] Permanent Court of Arbitration, *HICEE B.V. v. Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, para. 126–130.

traditional preparatory work when interpreting agreements.[507] However, this flexibility operates within defined parameters. Any additional supplementary means must still function within the prescribed roles of article 32—either confirming a meaning reached through article 31 or determining meaning when application of article 31 proves insufficient.[508] The distinction between examining materials and basing determinations upon them remains crucial, as emphasized in the Commission's preparatory work.[509]

### 2. Materials qualifying as subsidiary means may also qualify as supplementary means under article 32 of the 1969 Vienna Convention

364. When judicial and other decisions, scholarly works and other means are used to interpret treaties, they potentially operate in a dual capacity: both as supplementary means under article 32 of the 1969 Vienna Convention and as subsidiary means under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. This dual characterization raises important theoretical questions about the relationship between these two roles and which might take precedence.

365. A compelling argument can be made that when these materials are used specifically for treaty interpretation, their character as supplementary means under article 32 should override their general status as subsidiary means through the principle of *lex specialis*. This is because the framework under the 1969 Vienna Convention for treaty interpretation represents a specialized regime specifically designed for determining treaty meaning. The general role of judicial decisions and scholarly works as subsidiary means under Article 38, paragraph 1 (*d*), would thus yield to their more specific function within the 1969 Vienna Convention framework when treaties are being interpreted.

366. This has important implications for how these materials may be used. Under Article 38, paragraph 1 (*d*), judicial decisions and scholarly works serve as subsidiary means for determining rules of law generally. However, when used as supplementary means under article 32, their role is more narrowly confined to confirming or determining the meaning of specific treaty provisions within the interpretative framework of the 1969 Vienna Convention. The specialized nature of treaty interpretation therefore shapes and potentially limits how these materials can be deployed.

367. Treaty interpretation represents a distinct legal exercise focused on uncovering the meaning of specific texts. Regarding sources, treaty interpretation, implicates only one subparagraph of Article 38, paragraph 1, of the Statute. This differs from the broader law-determining function for which judicial decisions and scholarly works serve as subsidiary means under Article 38, paragraph 1) (*d*). The careful calibration in the 1969 Vienna Convention of interpretative elements suggests that materials should be assessed primarily through its specialized lens when treaties are at issue.

368. Thus, while judicial decisions and scholarly works maintain their general status as subsidiary means, their operation may be modified when they intersect with the specialized regime of treaty interpretation under the 1969 Vienna Convention.

## E. Limitations in the use of supplementary means

369. Despite the structure of article 32 apparently suggesting limitations on the use of supplementary means, these restrictions have proven largely theoretical. Moreover, the drafting history of the 1969 Vienna Convention itself is not consistent with such stringent limitations. As Special Rapporteur Waldock emphasized, the provision was specifically designed to enable "frequent and quite normal recourse to *travaux préparatoires* without any

[507] See WTO, Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, *Dispute Settlement Reports* 2005:XII, p. 5663 (and Corr.1, *Dispute Settlement Reports* 2006:XII, p. 5475).

[508] Gardiner, *Treaty Interpretation*, pp. 399–400.

[509] *Yearbook … 1964*, vol. II, document A/CN.4/167 and Add.1-3, p. 58, para. (21).

too nice regard for the question whether the text itself is clear".[510] Among other things, it deliberately avoided defining "preparatory work" to prevent "the possible exclusion of relevant evidence".[511] This suggests a preference for inclusivity over limitation in using supplementary means. This resonates with the view that the interpretative process should not be artificially compartmentalized, especially given the interconnectedness of the norms governing treaty interpretation. The Commission deliberately crafted a flexible framework rather than rigid preconditions. When discussing the relationship between articles 31 and 32, the Commission emphasized that their provisions form a single, closely integrated rule with elements arranged for logic rather than hierarchy.[512]

370. It is true that the relationship between the general rule and the recourse to supplementary means of interpretation calls, in principle, for the satisfaction of a gateway test—the ambiguity, obscurity, or absurdity of the meaning determined through the application of the general rule. However, as the *Rhine Chlorides* Tribunal confirmed,[513] article 32 does not limit these additional interpretative tools to such situations, but allows in all cases their use in order to confirm their meaning. This is consistent with both the letter of the provision and the practice of international adjudicators.

371. As shown in *Qatar v. Bahrain*,[514] examining preparatory work may reveal ambiguities not apparent from initial textual analysis, effectively transforming confirmation into determination[515]—a scenario foreshadowed by Yasseen since the early days.[516] This fluidity between confirmation and determination further supports the argument against a strict separation of the interpretative process under articles 31 and 32. The ultimate objective in both instances is to understand the treaty rule, often its contested scope, and the means employed to achieve this understanding are more important than rigid adherence to a prescribed sequence.

372. Courts and tribunals regularly integrate supplementary means into their interpretative analysis without explicitly identifying which "gateway" they are using. Thes approach of the International Court of Justice in *Avena* demonstrates how preparatory work can be woven into the interpretative process naturally, without rigid categorization.[517] Similarly, in *Whaling in the Antarctic*, while the Court drew on historical materials including the 1931 Convention for the Regulation of Whaling, 1937 International Agreement for the Regulation of Whaling and the circumstances of the conclusion of the International Convention for the Regulation of Whaling[518,519] it did not explicitly characterize these as supplementary means. It integrated historical materials into its general interpretative analysis without clear demarcation of their status and, when examining subsequent practice through International Whaling Commission resolutions, the Court explicitly rejected their qualification as subsequent agreement or

[510] Julian Davis Mortenson, "The *travaux* of *travaux*: is the Vienna Convention hostile to drafting history?", *American Journal of International Law*, vol. 107 (2013), pp. 780–822, at p. 801, citing *Yearbook … 1966*, vol. II, document A/CN.4/186 and Add.1-7 (Sixth report on the law of treaties), para. 20.

[511] Para. (20) of the commentary to draft art. 28 of the draft articles on the law of treaties, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, at p. 223.

[512] Gardiner, *Treaty Interpretation*, p. 351.

[513] Permanent Court of Arbitration, *The Rhine Chlorides Arbitration concerning the Auditing of Accounts (The Netherlands/France)*, PCA Case No. 2000-02, Arbitral Award, 12 March 2004.

[514] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6.

[515] Gardiner, *Treaty Interpretation*, p. 369.

[516] *Yearbook … 1964*, vol. I, 769th meeting, p. 313, para. 56 (as Mr. Yasseen had warned during the Commission's discussions, "sometimes one had to refer [to] the preparatory work ... to determine whether the text was really clear and whether the seeming clarity was not simply a deceptive appearance"); see also Mortenson, "The *travaux* of *travaux*", p. 795.

[517] Gardiner, *Treaty Interpretation*, pp. 361–362.

[518] Convention for the Regulation of Whaling (1931), League of Nations, *Treaty Series*, vol. 155, p. 349; International Agreement for the Regulation of Whaling (1937), *ibid*., vol. 190, p. 79; International Convention for the Regulation of Whaling (Washington, 2 December 1946), United Nations, *Treaty Series*, vol. 161, No. 2124, p. 72.

[519] *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at paras. 43–45.

practice under article 31, paragraph 3, of the 1969 Vienna Convention,[520] demonstrating a cautious approach to evolutive interpretation. This stands in contrast to the Court's treatment of the practice of Committee on the Elimination of Racial Discrimination in recent cases, where such materials were more clearly positioned as supplementary or confirmatory elements.[521] This varied practice underscores the difficulty, and perhaps the artificiality, of attempting to neatly categorize every interpretative tool as belonging exclusively to either article 31 or 32.

373. Modern practice has further eroded practical limitations through increased transparency and availability of materials. The *HICEE* tribunal explicitly recognized that excluding relevant interpretative materials merely because they fall outside enumerated categories would conflict with good faith interpretation.[522] The reality reflects what Waldock described as the "unity of the process of interpretation",[523] where supplementary means serve as an integral part of understanding treaty meaning rather than a strictly separated secondary consideration. This integrated approach better serves the fundamental purpose of treaty interpretation—ascertaining the parties' intentions through all appropriate available means while maintaining text as the presumptive object of interpretation.[524] In relation to the use of materials otherwise qualifying as "subsidiary means", neither Article 38 nor article 32 explicitly mandate a single, combined operation for treaty interpretation that would preclude a unitary and flexible approach.

### 1. Materials qualifying as supplementary means

374. An argument is sometimes made that when materials, including judicial decisions and scholarly works, are used as supplementary means under article 32 of the 1969 Vienna Convention, they must be temporally connected to the Treaty's conclusion. This argument misunderstands both the nature of subsidiary means and the structure of treaty interpretation. First, nothing in article 32 suggests that supplementary means must be limited to materials existing at the time of a treaty's conclusion. While "circumstances of conclusion" is one category explicitly mentioned, the reference in article 32 to supplementary means is illustrative rather than exhaustive. As a WTO Panel noted, "in theory, there is no temporal limitation on what may qualify as 'circumstances of conclusion' [under Article 32 and] relevance is the more appropriate criterion".[525]

375. Second, such a temporal limitation would conflict with a textual reading of the article 31 framework. The interpretative process under article 31 explicitly incorporates subsequent practice and agreements. It would be illogical to suggest that supplementary means under article 32 must be frozen in time when article 31 clearly contemplates evolution in treaty interpretation.

376. Third, while judicial decisions may in specific instances qualify as circumstances of conclusion, they do not do so automatically or categorically. As a WTO Panel recognized, judgments that demonstrably influenced treaty drafting might constitute circumstances of conclusion.[526] However, this is not an inherent characteristic of all such means or a prerequisite for their consideration as supplementary means.

377. When subsidiary means operate as supplementary means, therefore, their temporal relationship to the treaty's conclusion may affect their weight but not their admissibility. Some judicial decisions or scholarly works may indeed qualify as circumstances of conclusion when they demonstrably influenced the treaty's drafting. However, this is merely

[520] *Ibid*., para. 83.
[521] *Ibid*.
[522] Gardiner, *Treaty Interpretation*, pp. 408–409.
[523] Mortenson, "The *travaux* of *travaux*", p. 800, citing para. (10) of the commentary to draft art. 26 of the draft articles on the law of treaties, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, at p. 220.
[524] Gardiner, *Treaty Interpretation*, pp. 347–348.
[525] WTO, Panel Reports, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts* (*EC – Chicken Cuts*), *Complaints by Brazil and by Thailand*, adopted on 27 September 2005, WT/DS269/R and WT/DS286/R, at para. 7.344, respectively.
[526] *Ibid*., para. 7.391, respectively.

one way in which subsidiary means might inform treaty interpretation—not a temporal limitation on their broader role as supplementary means.

### 2. The general rule

378. Under the general rule of interpretation, materials qualifying as subsidiary means for the determination of rules of law may be relevant in at least three ways. First, as the Commission has recognized in its recent work, because they may amount to subsequent agreement or subsequent practice under the relevant treaty framework, or because they may be indirectly relevant to the identification of such agreement or practice.[527] Second, because they may allow, through the determination of relevant rules, identification of the rules of international law applicable between the parties under article 31, paragraph 3 (*c*), of the 1969 Vienna Convention. In residual cases, they may provide evidence of subsequent agreement, for example where a judgment or award is reached on the basis of a specific jurisdictional agreement or consent award. However, these are highly specific cases in which there can be no doubt that the relevant means to be employed is the actual additional agreement, rather than the adjudicatory decision based on or leading to it.

379. As to the second scenario, all "subsidiary means" may have a role to play. As the purpose of their use would simply be to identify the relevant rules to be used for the purposes of interpretation, it would be unnecessary and unhelpful to prohibit reliance, for example, on teachings. Other "means generally used to assist in determining rules of international law", as defined in draft conclusion 2, might be relevant too. However, limitations might constrain the use of subsidiary means in the first case. To start with, teachings may not amount to "subsequent practice" on their own, while it is difficult to deny that, in appropriate cases, decisions of adjudicators or treaty bodies may qualify as such. This is of course not to say that other non-State actors may not have an indirect role to play in assessing said subsequent agreement or subsequent practice, or even in prompting the unfolding of said practice as a direct result and reaction to their statements.[528]

380. That said, the argument has been made that decisions of an adjudicator may constitute subsequent practice. Notably, in the WTO context, the WTO Appellate Body rejected a view which purported to equate the two in *Japan—Alcoholic Beverages II*, choosing a rather exacting standard of what may constitute subsequent practice.[529] It disagreed with the Panel's conclusion that adopted panel reports constitute subsequent practice within the meaning of article 31, paragraph 3 (*b*), of the 1969 Vienna Convention. While the Panel argued that the act of adoption reflected the agreement of the WTO Members, the Appellate Body emphasized that adoption of a report binds the parties only in respect of the particular dispute and may not be seen establishing agreement on the legal reasoning contained within the report.[530]

381. However, the Appellate Body acknowledged that adopted panel reports "are an important part of the [General Agreement on Tariffs and Trade] *acquis*. They are often

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[527] See, in this sense, conclusion 4 and commentary thereto of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook … 2018*, vol. II (Part Two), para. 52, at pp. 38–39 (arguing that subsequent practice "in the broad sense (under article 32) covers any application of the treaty by one or more (but not all) parties. It can take various forms. Such 'conduct by one or more parties in the application of the treaty' may, in particular, consist of a direct application of the treaty in question, conduct that is attributable to a State party as an application of the treaty, a statement or a judicial pronouncement regarding its interpretation or application").

[528] A/CN.4/759, Observation 45, at paras. 186 and 187.

[529] See WTO, Appellate Body Report, *Japan – Taxes on Alcoholic Beverages (*Japan – Alcoholic Beverages II), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, *Dispute Settlement Reports* 1996:I.

[530] The Appellate Body also noted the distinction between adopted panel reports and interpretations under General Agreement on Tariffs and Trade (Geneva, 30 October 1947, United Nations, *Treaty Series*, vol. 55, No. 814, p. 187), where decisions to adopt reports under article XXIII differed from joint actions under article XXV. Historically, adoption of a panel report did not imply agreement on its reasoning, and this understanding continues under the General Agreement on Tariffs and Trade 1994 and WTO. *Ibid*., pp. 13–14.

considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute".[531] Subsequent Appellate Body reports confirmed this view.[532] Notably, in *US — Stainless Steel (Mexico)*, the report in which the strongest view of a kind of precedential role for previous Appellate Body reports was espoused, it further qualified the statement to say that:

> when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system.[533]

382. In other words, the Appellate Body expressly acknowledged that adopted reports do not become part of the *acquis* by themselves. Rather, their "legal interpretation" contained in the adopted reports becomes "part and parcel of the *acquis*" but only to the extent they are acted upon or reacted to by the Membership more broadly.

### 3. *Lex specialis*

383. Although the discussion in the present report focuses on the question of the relationship between determination and interpretation functions of subsidiary means in general international law, it bears noting that the matter may be seen as regulated by law in certain specific regimes.[534] The constitutive instruments of certain international adjudicators provide guidance as to the interpretative value of specific "subsidiary means".

384. The Rome Statute of the International Criminal Court provides a clear example of *lex specialis* regulating this relationship. Article 21, paragraph 2, of the Statute empowers the Court to "apply principles and rules of law *as interpreted* in its previous decisions".[535] This provision, which provides for the application of the rules and principles not as such, but as they are interpreted in its previous decisions, may be seen as representing an "intermediate approach" that differs significantly from Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.[536] However, commentators on article 21, paragraph 2, have also observed that "[a]lthough its terms differ, Article 21(2) goes little further: in both provisions, case law is 'a subsidiary means for the determination of rules of law'".[537]

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[531] *Ibid*., p. 14.

[532] WTO, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 [of the Dispute Settlement Understanding] by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, *Dispute Settlement Reports* 2001:XIII, p. 6481, at paras. 107–109; WTO, Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (*US – Stainless Steel (Mexico)*, WT/DS344/AB/R adopted 20 May 2008, *Dispute Settlement Reports* 2008:II, p. 513, at paras. 158–162 and footnote 309.

[533] *US – Stainless Steel (Mexico)* (see previous footnote), para. 160.

[534] See statement by the Chair of the Drafting Committee, Ms. Phoebe Okowa, on subsidiary means for the determination of rules of international law, 1 July 2024, available from the website of the Commission at https://legal.un.org/ilc/guide/1_16.shtml.

[535] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, at art. 21, para. 2 (emphasis added).

[536] Niccolo Ridi, "Rule of precedent and rules on precedent", Eric De Brabandere, ed., *International Procedure in Interstate Litigation and Arbitration: A Comparative Approach* (Cambridge, Cambridge University Press, 2021), pp. 354–400.

[537] Jean-Pierre Pellet, "Article 21", in Cassese *et al.* (eds.), *Cassese's International Criminal Law*, 3rd ed. (Oxford, Oxford University Press, 2013); Antonio Cassese, Paola Gaeta and John RWD Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002) (Pellet reinforces this by referencing the approach of the International Court of Justice in the *Land and Maritime Boundary between Cameroon and Nigeria* case, where the Court stated that "the real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases". He sees this as the same question that article 21, paragraph 2, invites the International Criminal Court to ask, suggesting functional similarity in how both courts approach prior decisions as subsidiary means.).

385. The relationship is complicated by the fact that the International Criminal Court may find itself needing to interpret rules as contained in the founding texts or seen as treaty law, or to determine their content based on the customary law reflected therein. The application of this specialized approach is evident in the *Katanga* case, where the Court held that "[w]here the founding texts do not specifically resolve a particular issue, the Chamber must refer to treaty or customary humanitarian law and the general principles of law. To this end, the Chamber may, for example, be required to refer to the jurisprudence of the ad hoc tribunals and other courts on the matter".[538] These specialized regimes can be contrasted with the general international law position, where the distinction between the functions of determination and interpretation remains more fluid. The explicit regulation of this relationship in the Rome Statute demonstrates how specific legal regimes can provide clearer guidance on how subsidiary means should function in both determinative and interpretative capacities.

## F. Practice of courts and tribunals on supplementary means

386. This section of the present chapter explores how subsidiary means interact with treaty interpretation in practice, focusing on instances where international courts and tribunals have expressly mentioned supplementary means. This survey is not intended to be comprehensive. Given the focus of this study on Article 38 of the Statute of the International Court of Justice, and the unique role of the Court as the only court of general international law jurisdiction possessing certain features emphasized by the Commission in draft conclusion 4 and commentary thereto, the analysis begins with the Court's jurisprudence. This examination will then provide a basis for comparison with the practice of other bodies, such as WTO dispute settlement organs and investment tribunals.

### 1. The jurisprudence of the Permanent Court of International Justice and the International Court of Justice with express mentions of supplementary means

387. In a handful of instances, the International Court of Justice may be seen as having relied on subsidiary means as "supplementary means" where it was dealing with specific treaty provisions. This use of prior decisions in treaty interpretation has a long history, predating the 1969 Vienna Convention. The approach of the Permanent Court of International Justice in *Readaptation of the Mavrommatis Jerusalem Concessions* demonstrates this.[539] However, that case involved the same parties and the same dispute, making the Court's reliance on the legal reasoning in prior judgments context specific. It does not establish a broad principle of precedent in treaty interpretation.

388. An important caveat to be made at this point is that, when using supplementary means, the Court has not generally made its analytical process too clear, although it has generally acknowledged where it was only using them in order to "confirm" an interpretation that would otherwise follow from the application of the general rule.[540]

389. In *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, the Court was faced with the question of the proper definition of the terms "premises of the mission" that are inviolable and indicated that it would proceed to interpret the Vienna Convention on Diplomatic Relations[541] using the customary rules of treaty interpretation stated in article 31 and 32 of the 1969 Vienna Convention:

> [u]nder these rules of customary international law, the provisions of the Vienna Convention on Diplomatic Relations must be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light

[538] *Katanga* (see footnote 445 above), para. 47.

[539] Permanent Court of International Justice, *Readaptation of the Mavrommatis Jerusalem Concessions, Judgment, 10 October 1927, Series A, No. 11*.

[540] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at p. 30, para. 66; *Qatar v. Bahrain* (see footnote 514 above), para. 40; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at p. 27, para. 55.

[541] Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

> of the object and purpose of the Convention. To confirm the meaning resulting from that process, to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result, *recourse may be had to subsidiary means of interpretation, which include the preparatory work of the Convention and the circumstances of its conclusion*.[542]

390. The Court did not reach the question of supplementary means in article 32 in *Equatorial Guinea v. France*, since it could resolve the interpretative difficulty between the parties on the basis of the general rule contained in article 31. It ended its analysis by reference to the disagreement between the parties regarding the object and purpose of the Vienna Convention on Diplomatic Relations. That said, in a recent case, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*,[543] the Court did rely on supplementary means in this confirmatory fashion. In in its interpretation of the expression "national origin" within the International Convention on the Elimination of All Forms of Racial Discrimination, it meticulously followed a hierarchical approach to treaty interpretation, prioritizing primary methods before turning to supplementary means.[544]

391. Having reached a clear and well-supported interpretation through these primary methods—text, context, and object and purpose—the Court explicitly declared that recourse to supplementary means of interpretation was unnecessary.[545] However, it acknowledged the parties' extensive reliance on the *travaux préparatoires* and its own practice of "confirming, when it deems it appropriate, its interpretation of the relevant texts by reference to the *travaux préparatoires*", turning to the preparatory works,[546] which it found to confirm the interpretation under the general rule.[547]

392. Subsequently, the Court addressed the practice of the Committee on the Elimination of Racial Discrimination.[548] Crucially, the Court did not explicitly categorize this practice as a supplementary means of interpretation. However, its placement after the explicit statement deeming supplementary means unnecessary and after the analysis of the *travaux* strongly indicates that the Court considered the Committee's practice as supplementary and confirmatory rather than a primary interpretative tool.[549] This approach was met with some criticism by one dissenting judge, who argued that the Court should have given "great weight" to the Committee's general recommendation No. 30 on discrimination against non-citizens,[550] invoking the Court's own jurisprudence in *Diallo* and *Wall*.[551] He argued, *inter alia*, that general recommendation No. 30, offered "a consistent interpretation of [the International Convention on the Elimination of All Forms of Racial Discrimination] by the most highly qualified publicists".[552]

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[542] *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Judgment, I.C.J. Reports 2020*, p. 300, at p. 319, para. 61 (emphasis added). While the French version of the same judgment refers to "moyens complémentaires", it is to be noted that the English version of the judgment quoted here states "subsidiary means" instead of "supplementary means". See A/CN.4/765, para. 36.

[543] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* (see footnote 400 above).

[544] *Ibid*., paras. 81–83.

[545] *Ibid*., para. 89.

[546] *Ibid*.

[547] *Ibid*., paras. 90–97.

[548] *Ibid*., paras. 98–101.

[549] *Ibid*.

[550] Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2004) on discrimination against non-citizens (HRI/GEN/1/Rev.9(Vol.II), p. 301).

[551] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* (see footnote 400 above), Dissenting Opinion of Judge Bhandari, p. 133–145, at paras. 21–31 (Judge Bhandari's dissenting opinion viewed the Committee's practice not merely as supplementary, but as persuasive authority deserving of serious consideration in its own right, due to the Committee's expertise and role as "guardian of the Convention" (*ibid*., para. 21). He thus faulted the majority for relegating the Committee's interpretation to a supplementary role after already having reached a conclusion based on other means, thereby diminishing its potential impact on the Court's analysis).

[552] *Ibid*., Dissenting Opinion of Judge Bhandari, para. 22.

393. Finally, the Court briefly considered the jurisprudence of regional human rights courts,[553] but ultimately found it less persuasive than its own analysis grounded in customary rules of treaty interpretation. The structure, depth and sequencing of the Court's analysis unequivocally demonstrate that the practice of the Committee on the Elimination of Racial Discrimination, while not explicitly labelled as such, functioned as a supplementary, confirmatory element, bolstering a conclusion already firmly established through the primary methods of treaty interpretation. In an interesting aside, in his first report, the Special Rapporteur reviewed State practice on the use of subsidiary means in national courts and found that, not only were judicial decisions from other courts and tribunal often used as confirmatory elements, but this was also the case for teachings as well.[554]

394. Returning to the International Court of Justice, in a more recent case, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*,[555] the Court faced a question about the temporal scope of its jurisdiction under article 22 of the Convention. Rather than relying heavily on the views of the Committee on the Elimination of Racial Discrimination, to which the applicant had referred it, the Court framed the issue primarily as a matter of application of the law of treaties, specifically the principle of non-retroactivity and its implications for consent to jurisdiction. The Court's reasoning centred on article 28 of the 1969 Vienna Convention, which codifies the principle of non-retroactivity.[556] By connecting this principle to article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Court established that its jurisdiction could not extend retroactively to acts predating the accession of Azerbaijan to the Convention.[557]

395. Azerbaijan attempted to counter this reasoning by citing a decision of the Committee on the Elimination of Racial Discrimination regarding inter-State communications,[558] in which it was said that articles 11 to 13 of the International Convention on the Elimination of All Forms of Racial Discrimination, which establish the inter-State communication procedure, do not explicitly limit their application to breaches occurring after ratification by the initiating State party. Essentially, Azerbaijan argued that the Committee's interpretation suggested a broader temporal scope for claims under the Convention, potentially encompassing pre-accession acts. However, the Court deftly distinguished the Committee's compliance-monitoring function from its own judicial role.[559] It emphasized that the Court's jurisdiction, unlike the Committee's mandate, requires mutual consent and the existence of reciprocal obligations between the parties, a condition absent before Azerbaijan's accession to the Convention. By dismissing the relevance of the Committee's decision in this context,

[553] *Ibid*., Judgment, paras. 102–104.

[554] A/CN.4/760, para. 262.

[555] *Application of the International Convention on Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia)* (see footnote 372 above).

[556] *Ibid*., para. 43.

[557] *Ibid*., para. 51 (It bears noting that Judge Tladi addresses a potential counterargument based on the *erga omnes partes* character of obligations under the International Convention on Elimination of All Forms of Racial Discrimination. While acknowledging the existence of such obligations, he argues that the principles of non-retroactivity and reciprocity, as applied by the Court, do not undermine their effect. He distinguished between two categories of actors to whom obligations under that Convention are owed: other States parties and individuals/groups protected under article 2. The temporal limitations imposed by the Court apply only to the first category (States parties), restricting when a State party can invoke the Court's jurisdiction based on its own accession date. However, the *erga omnes partes* character of the obligations remains relevant to the second category (individuals/groups), meaning any State party can invoke responsibility of Armenia for violations against protected persons, regardless of when those violations occurred or when the invoking State joined the Convention. Judge Tladi illustrates this with a hypothetical scenario He notes that if Armenia engaged in racial discrimination against a protected group, any State party to the Convention could bring a claim, even if that State were not a party at the time of the discriminatory acts. This is because the obligation to prevent racial discrimination is owed to all States parties collectively, and any State party has an interest in ensuring compliance. Therefore, the Court's temporal limitations on jurisdiction do not prevent States parties from upholding the collective guarantee against racial discrimination (*ibid*., Dissenting Opinion of Judge Tladi, paras. 21–25)).

[558] *Ibid*., Judgment, para. 53.

[559] *Ibid*., para. 54.

the Court reaffirmed its reliance on general legal principles as the primary basis for its jurisdictional determination.[560]

396. By framing the issue through these general principles of treaty law and State responsibility, the Court effectively minimized the need to engage with the practice of the Committee on the Elimination of Racial Discrimination. While the Court acknowledged a Committee decision on inter-State communications,[561] it distinguished that context from the Court's judicial function, ultimately finding the Committee's views irrelevant to the interpretation of article 22 of that Convention.

### 2. WTO jurisprudence showing overlap between interpretative and precedential effect

#### *(i) Previous WTO reports as supplementary means*

397. In the WTO context, the use of "supplementary means" of interpretation, as outlined in article 32 of the 1969 Vienna Convention, arises when the application of article 31 leaves the meaning of a term ambiguous or obscure or leads to a manifestly absurd or unreasonable result.[562] The Appellate Body has clarified that article 32 does not offer an exhaustive list of supplementary means, affording interpreters some flexibility.[563] While, as argued above, article 32 explicitly mentions preparatory work and the circumstances of a treaty's conclusion, other sources may be considered.[564]

398. WTO dispute settlement organs have taken a broad view of what may amount to supplementary means. Thus, for example, "circumstances of a treaty's conclusion" encompass the historical background.[565] This can include prior tariff classification practices, even if unilateral, but inconsistent practices are irrelevant.[566] Bilateral agreements can also

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[560] Judge Charlesworth's separate opinion in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* offers insight into the Court's approach to temporal jurisdiction. She analyses two cases where international tribunals accepted jurisdiction over pre-accession breaches: European Commission of Human Rights, *Austria v. Italy* (App. No. 788/60), Decision on admissibility of 11 January 1961,; and Committee on the Elimination of Racial Discrimination, decision adopted on 12 December 2019 on the inter-State communication submitted by the State of Palestine against Israel (see footnote 373 above). However, she distinguishes these cases, noting that the applicants there acted to enforce a "collective guarantee", not as individually injured States. In contrast, Azerbaijan explicitly sought compensation for individual injury. This distinction explains the Court's focus on consent, reciprocity, and State responsibility in limiting its temporal jurisdiction, rejecting arguments based on collective guarantees or treaty body practice. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* (see footnote 372 above), Separate Opinion of Judge Charlesworth, paras. 20–24. Similarly, Judge Tladi's dissenting opinion unpacks the Court's reasoning regarding the relevance of treaty body pronouncements, particularly in relation to the Committee on the Elimination of Racial Discrimination. He argues that, while such pronouncements can be informative, they do not displace the Court's own duty to determine applicable legal rules and principles, especially when those principles, like non-retroactivity and State responsibility, are sufficiently clear. This is consistent with a supplementary role under article 32 of the 1969 Vienna Convention, where recourse to such means is unnecessary when the ordinary meaning is unambiguous. See *ibid*., Dissenting Opinion of Judge Tladi, para. 19; also *ibid*., Judgment, paras. 53–54.

[561] *Ibid*., paras. 53–54.

[562] WTO, Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment (EC – Computer Equipment)*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, *Dispute Settlement Reports* 1998:V, p. 1851, at para. 86.

[563] WTO, Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts (EC – Chicken Cuts)*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, *Dispute Settlement Reports* 2005:XIX, p. 9157, at para. 283.

[564] *Ibid*.; see also WTO, Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products (EC – IT Products)*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, *Dispute Settlement Reports* 2010:III, p. 933, para. 7.694.

[565] *C – Computer Equipment* (see footnote 562 above), para. 86.

[566] *Ibid*., paras. 92–93 and 95.

serve as supplementary means, as in *EC – Poultry*.[567] In *EC – Chicken Cuts* it was also clarified that a direct link between the circumstance and the text is not required.[568] Relevance is key and is to be assessed objectively.[569] The circumstances should be considered over a period, not just the date of conclusion.[570] Official publication suffices for a circumstance,[571] and even domestic court judgments may be considered.[572]

399. The Appellate Body has used supplementary means to interpret both provisions of covered agreements and entries in WTO members' schedules. In *Canada – Dairy*, the ambiguous language in a schedule notation necessitated recourse to supplementary means.[573] Similarly, in *US – Gambling*, supplementary means clarified the scope of a United States schedule entry.[574] In *China – Intellectual Property Rights*, preparatory work resolved ambiguity in article 46 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.[575,576] The weight given to supplementary means can vary depending on the clarity achieved through article 31.[577] Even with clear text, negotiating history may be considered, as in *India – Export Related Measures* where such history confirmed the Panel's interpretation.[578]

400. The Appellate Body has clarified that preparatory work can support and confirm textual interpretations. In *Canada – Periodicals*, the Appellate Body used it to confirm the object and purpose of article III, paragraph 8 (*b*), of the General Agreement on Tariffs and Trade 1994.[579,580] However, the Appellate Body has cautioned against relying, even for these purposes, on negotiating history without a proper record, as in *India – Quantitative Restrictions*.[581] Selective reliance on preparatory work is insufficient.

[567] WTO, Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products (EC – Poultry)*, WT/DS69/AB/R, adopted 23 July 1998, *Dispute Settlement Reports* 1998:V, p. 2031, at para. 83.

[568] WTO, Appellate Body Report, *EC – Chicken Cuts* (see footnote 563 above) , para. 289.

[569] *Ibid*., paras. 290–291.

[570] *Ibid*., para. 293.

[571] *Ibid*., para. 297.

[572] *Ibid*., para. 309.

[573] WTO, Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Canada – Dairy)*, WT/DS103/AB/R, WT/DS113/AB/R, and Corr.1, adopted 27 October 1999, *Dispute Settlement Reports* 1999:V, p. 2057, at para. 138.

[574] WTO, Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/AB/R, adopted 20 April 2005, *Dispute Settlement Reports* 2005:XII, p. 5663 (and Corr.1, *Dispute Settlement Reports* 2006:XII, p. 5475), at para. 197.

[575] Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994), United Nations, Treaty Series, vols. 1867–1869, No. 31874: Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1 C), United Nations, *Treaty Series*, vol. 1869, p. 332.

[576] WTO, Panel Reports, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – Intellectual Property Rights)*, WT/DS362/R, adopted 20 March 2009, *Dispute Settlement Reports* 2009:V, p. 2097, at para. 7.260.

[577] WTO, Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*, WT/DS363/AB/R, adopted 19 January 2010, *Dispute Settlement Reports* 2010:I, p. 3, at para. 403.

[578] WTO, Panel Report, *India – Export Related Measures*, WT/DS541/R and Add.1, 31 October 2019, mutually agreed solution reported, Annex A-2, para. 2.23.

[579] General Agreement on Tariffs and Trade 1994 (Annex 1 to the Marrakesh Agreement Establishing the World Trade Organization), United Nations, *Treaty Series*, vol. 1867, No. 31874, p. 190.

[580] WTO, Appellate Body Report, *Canada – Certain Measures Concerning Periodicals (Canada – Periodicals)*, adopted 30 July 1997, as modified by Appellate Body Report WT/DS31/AB/R, *Dispute Settlement Reports*1997:I, at pp. 33–34.

[581] WTO, Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (India – Quantitative Restrictions)*, adopted 22 September 1999, *Dispute Settlement Reports* 1999:IV, p. 1763, at para. 94.

*(ii) Justifications for the use of earlier reports in interpretation*

401. The question of whether previous WTO cases or decisions constitute "supplementary means" under article 32 is complex. While panels and the Appellate Body frequently consult, and often cite prior rulings, this practice is distinct from using them as supplementary means for treaty interpretation under article 32 of the 1969 Vienna Convention. These citations primarily serve to demonstrate consistency in interpretations that had been themselves arrived at using the accepted rules of interpretation, or to clarify established WTO law principles. In this connection, much as was demonstrated by the practice of the International Court of Justice cited in both the second report of the Special Rapporteur and in the Secretariat memorandum, the notion of "security and predictability" is paramount. It underscores the understanding that WTO rules are not merely abstract principles, but rather operational tools intended to provide a stable and foreseeable framework for international trade.[582] This principle permeates various aspects of WTO law and dispute settlement, serving as a crucial objective of the Marrakesh Agreement Establishing the World Trade Organization itself and the General Agreement on Tariffs and Trade 1994.[583]

402. The dispute settlement system, and particularly the Understanding on Rules and Procedures Governing the Settlement of Dispute, plays a vital role in upholding this security and predictability.[584] By providing a mechanism for resolving disputes and clarifying WTO law, the Understanding safeguards the stability of the multilateral trading system and protects the interests of market participants. The ability to challenge not only specific acts but also general rules and norms further reinforces this objective, preventing future disputes and promoting compliance.[585]

403. The consistent application of WTO law amounts to a key element of security and predictability. The Appellate Body in *US – Stainless Steel (Mexico)* emphasized that, absent cogent reasons, adjudicatory bodies should resolve the same legal questions consistently in subsequent cases.[586] This principle promotes coherence in decision making and avoids arbitrary outcomes by upholding the legitimate expectations of members of WTO. While, of course, panels are not legally bound by prior interpretations, as confirmed by the Commission's conclusion on the absence of legally binding precedent in international law in draft conclusion 7, they may consider and take into account at their discretion the reasoning of previous adopted reports when addressing similar legal issues and often find it appropriate to do so.[587]

404. Perhaps more crucially, not just the interpretation of the provisions in the agreements, but also the use of specific legal techniques, such as *arguendo* assumptions, must be considered in light of their potential impact on security and predictability. While such assumptions can promote efficiency, they can also create uncertainty and detract from clear legal pronouncements.[588]

### 3. Investment treaty arbitration

405. A more challenging area for the discussion of the relationship between subsidiary means and supplementary means is investment treaty arbitration. The reason for this

[582] See *Japan –Alcoholic Beverages II* (see footnote 529 above), p. 31.

[583] *EC – Computer Equipment* (see footnote 562 above), para. 82.

[584] WTO, Panel Report, *United States – Sections 301-310 of the Trade Act of 1974 (US – Section 301 Trade Act)*, WT/DS152/R, adopted 27 January 2000, *Dispute Settlement Reports* 2000:II, p. 815, at para. 7.75.

[585] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan (US – Corrosion-Resistant Steel Sunset Review)*, WT/DS244/AB/R, adopted 9 January 2004, *Dispute Settlement Reports* 2004:I, p. 3, at para. 82.

[586] *US – Stainless Steel (Mexico)* (see footnote 532 above), para. 160.

[587] WTO, Panel Report, *United States – Countervailing Measures on Certain Pipe and Tube Products from Turkey (US – Pipes and Tubes (Turkey))*, WT/DS523/R and Add.1, circulated to WTO Members 18 December 2018, appealed 25 January 2019, para. 7.285.

[588] *China – Publications and Audiovisual Products* (see footnote 577 above), paras. 213–215 (in that case, the Appellate Body cautioned against using *arguendo* assumptions when they risk undermining a Member's implementation obligations or creating ambiguity in WTO law).

complexity is twofold: first, while investment tribunals are not bound by any rule of binding precedent, their awards and decisions are replete with citations to previous ones and, to a lesser degree, to scholarship; second, investment tribunals decide disputes arising, from a substantive standpoint, under bilateral investment treaties, which tend to be pithy, but highly similar to one another. From a procedural standpoint, they tend to be governed by specific frameworks, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[589] In both cases, subsidiary means can be highly useful in matters governed by treaties that are either not too clear to begin with or that have been applied repeatedly.

406. Many of the treaty provisions calling for interpretation are rather open-ended and may either refer to customary international law—this is the case, for example, of standards articulated in broad strokes, such as that of "fair and equitable treatment" in multiple investment treaties—or be deliberately left undefined—this is the case of the notion of "investment". Thus, arbitral tribunals and individual arbitrators have been at pains to point out that they are not bound by previous decisions, lest they risk overriding the parties' consent in relation to the agreement concerned. In fact, some arbitrators have been at pains to clarify that their views of are not influenced by the number of times they have heard an argument.[590]

407. The Tribunal in *Burlington v. Ecuador* provides a useful statement of the position. The majority considers, however, that, subject always to the specifics of a given treaty and to the circumstances of the actual case, it has a duty to adopt solutions established in a series of consistent similar cases, if such exist, absent compelling contrary grounds. Arbitrator Stern does not analyse the arbitrator's role in the same manner, as she considers it her duty to decide each case purely on its own merits as argued before her, independently of any apparent jurisprudential trend.[591]

408. As to the value of the reasoning in previous awards in interpretation, the present subsection will first address the less controversial use of prior decisions as "supplementary means of interpretation" under article 32 of the 1969 Vienna Convention. It will then explore the residual circumstances where prior decisions might be relevant under article 31 of the Convention, which sets out the general rule of interpretation. To avoid needless criticism, it should be noted that it is a deliberate choice of the Special Rapporteur to here invert the order of analysis under the Convention rules of interpretation, for the sole purpose of focusing first on the supplementary means, which is the core issue under discussion in the present chapter and topic, before addressing the general rule of interpretation.

*(i) Supplementary means in arbitral awards*

409. Previous decisions and the reasoning contained therein may be relied upon as "supplementary means of interpretation". The matter has attracted some controversy, in particular because of the terminological confusion, in practice, between the adjectives "subsidiary" and "supplementary". The *Canadian Cattlemen* case highlighted this issue[592] and similar discussions arose around the same time in an inter-State arbitration.[593]

410. Some tribunals have argued that the non-exhaustive nature of article 32 of the Convention, which lists "supplementary means" of interpretation, allows for the inclusion of judicial decisions, especially given their recognition as "subsidiary means" under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. This line of reasoning

[589] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, D.C., 18 March 1965), United Nations, *Treaty Series*, vol. 575, No. 8359, p. 159.

[590] *Tidewater Investment SRL and Tidewater v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010, paras. 25–26.

[591] International Centre for Settlement of Investment Disputes, *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 46.

[592] United Nations Commission on International Trade Law, *The Canadian Cattlemen for Fair Trade v. United States of America*, Award on Jurisdiction, 28 January 2008, para. 50.

[593] London Court of International Arbitration, *Arbitration on Ontario and Québec Programs, United States v. Canada*, LCIA Case No. 81010, Opinion with respect to Selected International Legal Problems in LCIA Case No. 7941, 1 May 2009.

suggests that if judicial decisions are subsidiary, they could also be supplementary within the broader context of article 32 of the Convention.[594]

411. However, this interpretation conflates two distinct concepts. Article 32 concerns treaty interpretation, while Article 38, paragraph 1 (*d*), addresses the use of the subsidiary means in the context of a provision of applicable law stating sources of international law. As Professor Reisman pointed out in an expert opinion,[595] this conceptual leap grafts something onto the 1969 Vienna Convention that may not belong there. He argued that a choice-of-law provision and a rule of interpretation serve fundamentally different functions, and treating judicial decisions as both subsidiary *and* supplementary misconstrues the 1969 Vienna Convention framework.[596] According to Reisman:

> The statement distorts Article 32 in two ways. First, it depreciates the primacy of the text as set out in Article 31 and moves immediately to the contingent "supplementary means" of determining the meaning of the text, even though the text as will be shown later in this opinion, does not suffer from any of the contingencies in … Article 32 [of the 1969 Vienna Convention]. Second, and even more problematic, by leaping from the "supplementary means" in … Article 32 [of the 1969 Vienna Convention] to the words "subsidiary means" in Article 38(l)(d), of the Statute of the International Court of Justice, and introducing "judicial decisions and awards" in the interpretation, the Tribunal fabricates a methodology even further from that of … Article 32 [of the 1969 Vienna Convention].
>
> ICJ Article 38 is a choice-of-law clause for an international tribunal; the function of Article 38(l)(*d*), as the Statute states explicitly, is "the determination of rules of law" which the Court is to apply. The function of … Articles 31 and 32 [of the 1969 Vienna Convention], by contrast, is the interpretation of a specific text. The word "supplementary" in … Article 32 directs the interpreter to material illuminating a part of a text of a specific international agreement. The word "subsidiary" in Statute Article 38(l)(*d*) authorizes the International Court, in trying to identify the content of "international custom" (Article 38(l)(b)) or "general principles" (Article 38(l)(c)) to consult "judicial decisions" and "highly qualified publicists" to help in determining rules of law. By jumping from "supplementary" to "subsidiary" (words which certainly sound similar), the Tribunal grafts something onto the [1969 Vienna Convention] canon of rules for interpretation which is not – and should not – be there.[597]

412. This perspective finds support in Bernardo Cremades' dissent in *Fraport*, where he argued that questions of meaning are matters of treaty interpretation, not precedent. He viewed prior decisions as merely illustrative of standard treaty language, not as binding or inherently supplementary to the treaty text itself.[598]

413. Notwithstanding this doctrinal confusion, this does not mean that prior decisions are not routinely used for the purposes of clarifying the meaning of common treaty provisions, though most tribunals have addressed the matter with caution. Some tribunals have gone as far as to identify criteria for their potential use. Thus, some tribunals have at times found that reliance on previous decisions would have been inapposite because of the lack of textual

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[594] *The Canadian Cattlemen for Fair Trade v. United States of America* (see footnote 592 above), para. 50; *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, para. 121; International Centre for Settlement of Investment Disputes, *Caratube International Oil Company LLP v. Republic* of *Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009, para. 71; International Centre for Settlement of Investment Disputes, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB//7, Award, 21 August 2007, para. 223.

[595] *Arbitration on Ontario and Québec Programs* (see footnote 593 above), paras. 15–16.

[596] *Ibid*.

[597] *Ibid*.

[598] International Centre for Settlement of Investment Disputes, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Award, 16 August 2007, Dissenting Opinion of Mr. Bernardo M. Cremades.

similarity between treaty provisions under the treaty under consideration in the instant decision and in the previous one[599] or the general dissimilarity between the broader legal regime, as precedent within the same regime may be more persuasive.[600]

414. Interestingly, given the draft conclusions provisionally adopted during the seventy-fifth session of the Commission in the present topic, other factors may include the clarity of the previous decision concerned,[601] the standing of the tribunal issuing it, reception of the reasoning by other tribunals and commentators and any history of annulment or challenges.[602] Some commentators similarly propose a sliding scale approach to assessing the weight of prior arbitral decisions as supplementary means of interpretation.[603]

*(ii) Potential relevance of previous awards under article 31*

415. First, in addition to the supplementary means discussed in the preceding subsection, prior decisions and their reasoning are also potentially relevant under article 31 of the 1969 Vienna Convention, which states the general rule. Focusing on article 31, prior decisions can indirectly illuminate various facets of the interpretative process, offering valuable insights into elements such as ordinary meaning, evolutive interpretation, subsequent practice, relevant rules of international law and special meaning.[604] For instance, in *Azurix v. Argentina*, the tribunal considered the interpretations of "arbitrary" offered by other tribunals and the International Court of Justice to help determine its ordinary meaning.[605]

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599 For instance, in *SCB v. United Republic of Tanzania*, the tribunal rejected cited cases due to their irrelevance, stating: "None of these cases speaks to either the facts or the treaty text at issue in this case. None is sufficiently pertinent either to confirm or to determine the meaning of the disputed treaty text in accordance with Article 32 of the Vienna Convention". International Centre for Settlement of Investment Disputes, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 256; see, however, International Centre for Settlement of Investment Disputes, *AWG Group Limited v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, Separate Opinion of Arbitrator Pedro Nikken, para. 24 (cautioning against treating cases as alike, particularly with factual issues like fair and equitable treatment, noting that bilateral investment treaties can differ significantly despite superficial similarities).

600 The tribunal in *Grand River v. United States* found that North American Free Trade Agreement awards were "more relevant and appropriate than decisions in non-[North American Free Trade Agreement] investment cases". United Nations Commission on International Trade Law, *Grand River Enterprises Six Nations Ltd., et al v. United States of America*, Award, 12 January 2011, para. 61.

601 In *Renta 4 et al. v. Russian Federation*, the tribunal highlighted the limited value of a prior award that overlooked a key term, stating: "But that award does not consider whether the word 'payment' may lead to consideration of the reality of its predicate: expropriation. This may be because it was not argued. Nor does the formulation in that treaty include the word 'due'". See Arbitration Institute of the Stockholm Chamber of Commerce, *Quasar de Valores SICAV S.A., et al. v. Russian Federation (Renta 4 S.V.S.A et al. v. Russian Federation)*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009, para. 48.

602 See Wolfgang Alschner, "Correctness of investment awards: why wrong decisions don't die", *The Law and Practice of International Courts and Tribunals*, vol. 18 (2019), pp. 345–398 (showing, however, if it has been proven that that annulled or poorly received awards sometimes "survive" in citations).

603 See Esmé Shirlow and Michael Waibel, "Article 32 of the VCLT and precedent in investor-State arbitration: a sliding scale approach to interpretation", Esmé Shirlow and Kiran Nasir Gore (eds.), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution, and Future* (Alphen aan den Rijn, Kluwer Law International, 2022), pp. 127–150 (This approach evaluates a decision's relevance based on three primary elements: (*a*) comparability (textual/substantive similarity, identity of parties, and regime type); (*b*) the tribunal's standing and the decision's reception (including annulment status); and (*c*) the depth and accessibility of the decision's analysis of the relevant treaty provision. This holistic approach, emphasizing the flexibility of Article 32 of the 1969 Vienna Convention, contrasts with stricter views requiring a "direct link" to the treaty text and the parties' original intentions. It aims to promote a more principled and predictable use of precedent in investment treaty arbitration.).

604 *Ibid*.

605 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras. 299–300.

416. Second and similarly, prior decisions can shed light on whether a term's meaning has evolved. In *Daimler v. Argentina*, the tribunal considered whether the term "treatment" in an most-favoured-nation clause warranted an evolutive interpretation.[606] Third, prior decisions may, but only in principle, serve as evidence of subsequent practice under Article 31, paragraph 3 (*b*). In *Telefónica v. Argentina*, the respondent argued that the position of Spain in other arbitrations supported its interpretation of a most-favoured-nation clause. The tribunal, however, found that these separate positions did not constitute "agreement" as required by article 31, paragraph 3 (*b*).[607] Fourth, prior decisions can be relevant under article 31, paragraph 3 (*c*), as "relevant rules of international law".[608] Fifth, prior decisions might indicate whether a term carries a "special meaning" under article 31, paragraph 4, insofar as they may suggest that prior interpretations can establish a specialized meaning within a particular field.[609]

417. However, characterizing these uses of arbitral precedent as applications of the general rule of interpretation under article 31 could be problematic. While prior decisions undoubtedly inform interpretative exercises, they do so indirectly, by shedding light on elements relevant to analysis under article 31, such as ordinary meaning, subsequent practice or relevant rules of international law. They do not directly determine the meaning of the treaty provision in the same way that the text, context, object and purpose do. This conclusion is justified based on an ordinary reading of article 31, which, as already pointed out, sets out the general rule whereas article 32 follows much later on to provide the possibility of a reference to the supplementary means.

418. The use of earlier decisions to discern "ordinary meaning", for instance, relies on the reasoning of prior tribunals as a shortcut, much like consulting a dictionary. This approach does not interpret the treaty text itself but rather outsources the interpretative task to prior decisions. Similarly, using earlier decisions to establish subsequent practice or relevant rules of international law requires demonstrating that the prior decisions reflect a shared understanding among the treaty parties, not merely the views of individual tribunals.

## G. Proposed draft conclusion 13 – relationship to supplementary means

419. The Commission has already adopted draft conclusion 6, which states that subsidiary means are not a source of international law, but rather function to assist in determining the existence and content of rules of international law. Importantly, this understanding is without prejudice to the use of the same materials for other purposes, including treaty interpretation. That was made clear in the second sentence of the same conclusion.

420. In light of this, and the analysis presented earlier, it seems important to recognize that subsidiary means can play a distinct role in treaty interpretation. This point was already underlined by the Commission in the draft conclusion 6 on the nature and function of subsidiary means. Specifically, materials may serve as supplementary means of interpretation under article 32 of the 1969 Vienna Convention. This is amply demonstrated by the practice discussed in the present chapter of the report. Such materials can also, and this is a second point that should be captured in a different paragraph, inform the application of article 31 of the 1969 Vienna Convention, which sets out the general rule of treaty interpretation under customary international law, for instance, by clarifying the ordinary meaning of terms, shedding light on subsequent practice or elucidating the relevant rules of international law.

606 International Centre for Settlement of Investment Disputes, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 267.

607 International Centre for Settlement of Investment Disputes, *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, paras. 109, 111–112; see also International Centre for Settlement of Investment Disputes, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, 21 November 2007, para. 176.

608 *AWG Group Limited v. Argentine Republic* (see footnote 599 above), para. 63.

609 See *Anatolie Stati et al. v. Republic of Kazakhstan (I)*, SCC Case No. V 116/2010, Award, 19 December 2013; see also International Centre for Settlement of Investment Disputes, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (both in relation to "fair and equitable treatment").

The text of paragraph 2 seeks to reflect this understanding, although it stresses in this regard judicial and other decisions of courts and tribunals.

421. The Special Rapporteur would therefore like to propose a draft conclusion on the relationship between the supplementary means of interpretation and the subsidiary means, which reads as follows:

> Draft conclusion 13
>
> Relationship between subsidiary means and supplementary means of interpretation
>
> 1. Subsidiary means can play a significant role in the interpretation of a treaty. The interpretative function of subsidiary means is distinct from, but complementary to, their role in determining the existence and content of rules of international law.
>
> 2. Subsidiary means, especially decisions of courts and tribunals, may serve as supplementary means of interpretation under article 32 of the Vienna Convention on the Law of Treaties, or inform the application of the general rule under article 31, including by clarifying the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

# VIII. The structure of the draft conclusions

422. The Special Rapporteur recalls that he had left open the question of the structure of the draft conclusions during the course of the consideration of the topic. This was because, during the plenary debate on the first report, a number of members proposed the inclusion of a provision on functions in the early part of the draft conclusions. He recommended instead that the Commission await his second report to provide the analysis upon which to base the adoption of such a provision.

423. The analysis was duly provided in the second report accompanied by a proposed draft conclusion on the nature and function of subsidiary means. During the second debate in plenary in the Commission, the issue of structure returned in relation to the same issue, since the Special Rapporteur had taken the view that the structural issue should be set aside pending the first reading. As set out in chapter II of the present report summarizing the debates both in the Commission and Sixth Committee, a number of members and States presented proposals on the placement of the provision on functions that they or others had suggested in the previous year's session.

424. That said, in the view of the Special Rapporteur, a premature structuring of the draft conclusions was to be avoided. He therefore recommended that the Commission address the question of the placement of the provision on functions during the first reading. This was because, as with other topics, the entirety of the draft conclusions adopted would be clearer then.

425. At this stage, since it is hoped that the Commission will be carrying out the first reading on the topic, it is necessary to return to the structure of the entirety of the draft conclusions. In the view of the Special Rapporteur, the entirety of the draft conclusions on the topic can now be viewed more clearly. It is therefore necessary and desirable to organize them into a logical structure of parts, as the Commission has done in nearly all of its recent topics.

426. The Commission has already provisionally adopted eight of the draft conclusions mentioned above. The remaining five draft conclusions are proposed by the Special Rapporteur in the current report. If those conclusions are adopted by the Commission, bringing the total draft conclusions in the present topic to 13, a part-by-part structure would make them more user friendly. Of course, the analysis supporting the adoption of the proposed draft conclusions have been set out in the relevant chapters of the present report. Here, in this section, they have been distinguished as bolded and italicized text for the ease of reference of members.

427. Bearing in mind the new conclusions proposed in the third report (which are highlighted below in bold), the Special Rapporteur would like to propose the following

general structure to the set of draft conclusions provisionally adopted by the Commission. He notes that, besides the general section, he has included an introductory part, which aligns with the recent practice of the Commission. He has then included a section to address decisions of courts and tribunals and teachings, those being the two express categories included in Article 38, paragraph 1 (*d*) of the Statute of the International Court of Justice and that now form beyond doubt part of customary international law. A fourth and final section addresses any other means that are generally used to assist in determining rules of international law. A long history exists for the use of the work of private expert groups, which had been mentioned during the deliberations of the Advisory Committee of Jurists during the drafting of the provision on subsidiary means. The pronouncements of public expert bodies and resolutions of international organizations are prevalent in practice and form part of those means that are generally used to determine rules both by States and international courts and tribunals.

428. Finally, it should be noted that a certain logic is intended for assessments of the weight of all the subsidiary means other than that for decisions of courts and tribunals (which has a separate draft conclusion 8 provisionally adopted during the seventy-fifth session). The Special Rapporteur's proposal is that, for the remaining subsidiary means, the question of weight be addressed in each category in a separate paragraph by cross-reference back to draft conclusion 3 setting out the general criteria for such assessments. This approach, reflected in his proposal in the present report, then gives the Commission the opportunity to explain the most salient factors of weight to attend to for each category in the relevant commentaries.

429. Taking all the above into account, the proposed structure is as follows:

Part I: Introduction

Draft conclusion 1 (Scope)

Part II: General provisions

Draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law)

Draft conclusion 3 (Nature and function of subsidiary means)

Draft conclusion 4 (General criteria for the assessment of subsidiary means for the determination of rules of international law)

Part III: Subsidiary means under customary international law

Draft conclusion 5 (Decisions of courts and tribunals)

***Draft conclusion 6 (Coherence in decisions of courts and tribunals)***

Draft conclusion 7 (Weight of decisions of courts and tribunals)

***Draft conclusion 8 (Relationship between subsidiary means and supplementary means of interpretation)***

Draft conclusion 9 (Absence of legally binding precedent in international law)

Draft conclusion 10 (Teachings)[610]

Part IV: Other means generally used to determine rules of international law

***Draft conclusion 11 (Outputs of private expert groups)***

***Draft conclusion 12 (Pronouncements of public expert bodies)***

***Draft conclusion 13 (Resolutions of international organizations and intergovernmental conferences)***

[610] The Special Rapporteur notes that he has proposed the inclusion of criteria to assess the weight of teachings in this draft conclusion, as a new paragraph 2, as explained in the present report. The present structure will not be altered if that proposal is accepted. If, however, the Commission decides to have a separate draft conclusion on weight of teachings (and the other draft conclusions for reasons of consistency), he will adjust the present proposed structure in the Drafting Committee.

# IX. Future programme of work

430. The Special Rapporteur indicated in the introduction to the present report that he seeks to complete the draft conclusions on the present topic during the seventy-sixth session in 2025. If the Commission adopts the conclusions proposed in the third report, consistent with the practice followed since the beginning of the topic, the Special Rapporteur will prepare the draft commentaries to those conclusions for the Commission's adoption during the second half of the seventy-sixth session. The commentaries adopted in 2025, together with those previously adopted by the Commission since the addition of the topic to the current work programme in 2023, will also take into account the comments and observations of States made so far on the topic in the annual debates of the Sixth Committee of the General Assembly as well as in written information submitted to the Commission.

431. The Commission would then have successfully adopted, between 2023 and 2025, the full set of draft conclusions with commentaries on the topic of subsidiary means for the determination of rules of international law. Assuming that the Commission provisionally adopts the full set of draft conclusions with their commentaries on first reading this year, a second reading could be envisaged for 2027. This would give States, international organizations and other relevant actors ample time to prepare written observations to the set of draft conclusions and commentaries adopted on first reading. At that stage, the Commission could then make a final recommendation to the General Assembly on the topic.

# Annexes

# Annex I

## Draft conclusions provisionally adopted by the Commission to date

**Conclusion 1**
**Scope**

The present draft conclusions concern the use of subsidiary means for the determination of rules of international law.

**Conclusion 2**
**Categories of subsidiary means for the determination of rules of international law**

Subsidiary means for the determination of rules of international law include:

(a) decisions of courts and tribunals;

(b) teachings;

(c) any other means generally used to assist in determining rules of international law.

**Conclusion 3**
**General criteria for the assessment of subsidiary means for the determination of rules of international law**

When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*:

(a) their degree of representativeness;

(b) the quality of the reasoning;

(c) the expertise of those involved;

(d) the level of agreement among those involved;

(e) the reception by States and other entities;

(f) where applicable, the mandate conferred on the body.

**Conclusion 4**
**Decisions of courts and tribunals**

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of rules of international law.

2. 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.

**Conclusion 5**
**Teachings**

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. In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity.

**Conclusion 6**
**Nature and function of subsidiary means**

1. Subsidiary means are not a source of international law. The function of subsidiary means is to assist with the determination of the existence and content of rules of international law.

2. The use of materials as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes.

**Conclusion 7**
**Absence of legally binding precedent in international law**

Decisions of international courts or tribunals may be followed on points of law where those decisions address the same or similar issues as those under consideration. Such decisions do not constitute legally binding precedent unless otherwise provided for in a specific instrument or rule of international law.

**Conclusion 8**
**Weight of decisions of courts and tribunals**

When assessing the weight of decisions of courts or tribunals, regard should be had to, in addition to the criteria set out in draft conclusion 3, *inter alia*:

(a) whether the court or tribunal has been conferred with a specific competence with regard to the application of the rule in question;

(b) the extent to which the decision is part of a body of concurring decisions; and

(c) the extent to which the reasoning remains relevant, taking into account subsequent developments.

# Annex II

## Draft conclusions proposed in the third report of the Special Rapporteur

**Draft conclusion 9**

**Outputs of private expert groups**

1. Outputs authored by individuals or collectives of individuals, organized independently of State or international organization involvement, may serve as a subsidiary means for the determination of the existence and content of rules of international law.

2. When assessing the weight to be given to such outputs, regard should be had to, as appropriate, the criteria set out in draft conclusion 3.

**Draft conclusion 10**

**Pronouncements of public expert bodies**

1. A pronouncement of an expert body may serve as a subsidiary means for the determination of the existence and content of rules of international law.

2. When assessing the weight of a pronouncement under paragraph 1, regard should be had to, as appropriate, the criteria set out in draft conclusion 3.

3. The use of pronouncements of expert bodies as subsidiary means for the determination of rules of international law under paragraphs 1 and 2 is without prejudice to their use for other purposes.

**Draft conclusion 11**

**Resolutions of international organizations and intergovernmental conferences**

1. A resolution adopted by an international organization or at an intergovernmental conference may serve as a subsidiary means for the determination of the existence and content of rules of international law.

2. When assessing the weight of resolutions of international organizations or intergovernmental conferences, regard should be had to, as appropriate, the criteria set out in draft conclusion 3.

3. The use of resolutions as subsidiary means for the determination of rules of international law under paragraphs 1 and 2 is without prejudice to their use for other purposes.

**Draft conclusion 12**

**Coherence in decisions of courts and tribunals**

1. Courts or tribunals charged with interpreting and applying international law should promote, as far as possible and within the limits of their mandate, the consistency, stability and predictability of the international legal system.

2. In accordance with paragraph 1, when determining the rules of international law to apply in a given case, and there appears to be a conflict between the legal interpretations contained in decisions of different courts or tribunals on essentially the same issue, regard shall be had to the interest of achieving the necessary clarity and the essential consistency of international law.

**Draft conclusion 13**

**Relationship between subsidiary means and supplementary means of interpretation**

1. Subsidiary means can play a significant role in the interpretation of a treaty. The interpretative function of subsidiary means is distinct from, but complementary to, their role in determining the existence and content of rules of international law.

2. Subsidiary means, especially decisions of courts and tribunals, may serve as supplementary means of interpretation under article 32 of the Vienna Convention on the Law of Treaties, or inform the application of the general rule under article 31, including by clarifying the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

# Annex III

## Proposed structure of the draft conclusions as recommended for first reading

(organized into parts per Chapter VIII of the current report; and including the text adopted by the Commission as well as the proposals contained in the present report; with items in regular type already provisionally adopted by the Commission and those in bold constituting proposals of the Special Rapporteur in the current report)

Part I: Introduction

- Draft conclusion 1 (Scope)

Part II: General provisions

- Draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law)
- Draft conclusion 3 (Nature and function of subsidiary means)
- Draft conclusion 4 (General criteria for the assessment of subsidiary means for the determination of rules of international law)

Part III: Subsidiary means under customary international law

- Draft conclusion 5 (Decisions of courts and tribunals)
- ***Draft conclusion 6 (Coherence in decisions of courts and tribunals)***
- Draft conclusion 7 (Weight of decisions of courts and tribunals)
- ***Draft conclusion 8 (Relationship between subsidiary means and supplementary means of interpretation)***
- Draft conclusion 9 (Absence of legally binding precedent in international law)
- Draft conclusion 10 (Teachings)

Part IV: Other means generally used to determine rules of international law

- ***Draft conclusion 11 (Outputs of private expert groups)***
- ***Draft conclusion 12 (Pronouncements of public expert bodies)***
- ***Draft conclusion 13 (Resolutions of international organizations and intergovernmental conferences)***