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The ILC Study on Teachings as Subsidiary Means: Arguments for a Pluralist Reading

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I. Introduction

A key finding to emerge from the ongoing work of the special rapporteur of the International Law Commission (ILC or Commission) on subsidiary means for the determination of rules of international law[1] concerns the systemic lack of diversity in the use of teachings.[2] This finding carries important implications for the legitimacy of using subsidiary means, particularly regarding whose voices are privileged or silenced in legal determination.[3] The special rapporteur noted that international courts such as the International Court of Justice (ICJ) had used teachings from a remarkably narrow cohort of predominantly Western, male voices from elite institutions—perspectives that inevitably reflect a limited range of viewpoints and cultural contexts.

The work of the special rapporteur, and the Commission more broadly, has been described as "intellectually courageous"[4] because it is the first time that the ILC is taking steps to address the "structural inequalities in the production and reception of international

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[1] At the time of writing, the ILC had not yet adopted formal conclusions on this topic: ILC, Annual Report of Seventy-Sixth Session (28 April–30 May 2025), para. 285 et seq, UN Doc. A/80/10 (2025) [hereinafter 2025 ILC Report]. This report and other ILC documents are available online at http://legal.un.org/ilc. In addition, UN documents are available online at https://documents.un.org/prod/ods.nsf/home.xsp.

[2] ILC, First Report on Subsidiary Means for the Determination of Rules of International Law, para. 306, UN Doc. A/CN.4/760 (Feb. 13, 2023) (by Charles Chernor Jalloh) [hereinafter First Report on Subsidiary Means] (the term "teachings" is used here to refer to "ideas of a particular person or group on international legal issues that are taught to others"). Teachings do not include final outputs produced by state-created or state-empowered entities. 2025 ILC Report, *supra* note 1, para. 298.

[3] Remarks of a member of the ILC, Provisional Summary Record of the 3629th Meeting, at 12, UN Doc. A/CN.4/SR.3629 (July 10, 2023) [hereinafter 3629th Meeting] ("Those writings that were referred to, particularly in judicial decisions, were largely those of Western men, which raised questions about the legitimacy of recourse to teachings as subsidiary means and highlighted the need for a truly international and multilingual approach, as noted by several other Commission members.").

[4] Remarks of a Member of the ILC, Provisional Summary Record of the 3627th Meeting, at 13, UN Doc. A/CN.4/SR.3627 (July 10, 2023) [hereinafter 3627th Meeting].

legal doctrine."[5] This issue matters because, as an ILC member observed, "such profound inequity undermined the legitimacy of international law and the overall persuasiveness of legal reasoning."[6] It also matters because engagement with diverse, competing perspectives promises to strengthen decision making and lead to more reflexive, and inclusive, determinations.[7]

The ILC's response to this diversity deficit was the invocation of "representativeness"—a concept often associated in UN discourse with geographic and linguistic balance. This Essay argues that "representativeness," when understood narrowly in this geographic or linguistic sense, may be mismatched when applied to teachings under Article 38(1)(d) of the ICJ Statute. Unlike judicial decisions anchored to specific state jurisdictions or resolutions emanating from state-created or state-mandated bodies, teachings emerge from individual scholarship and private expert bodies whose authority derives not from representative mandates but from analytical rigor and intellectual imagination. Their contribution to the determination of legal rules succeeds through argumentative persuasion rather than formal representation. This distinctive characteristic, we argue, demands a correspondingly distinctive approach to addressing the lack of diversity in their use.

The core claims of this Essay are twofold. First, the concept of "representativeness" admits of multiple interpretations. It may be understood narrowly, in its formal and political sense, as engagement focused on achieving sufficient representation in the range of teachings consulted. Or it may be understood more broadly, in its pluralist sense, as a deeper engagement with teachings as gateways to diverse ways of knowing law. Second, the ILC's representativeness criterion should be interpreted in this pluralist sense because it more directly addresses the diversity deficit. By disrupting the assumptions embedded in legalism regarding valid legal determination, a pluralist reading achieves not merely the incorporation of diverse writings but the genuine inclusion of diverse intellectual scholarship in the process of determining rules of law.

Part II examines two co-existing stories on the influence of teachings in legal determination, and outlines the ILC's ongoing work on this subject, including its findings of systemic lack of diversity. Part III analyzes how the Commission defaulted to the concept of representativeness to address this challenge, then examines the conceptual and practical challenges of applying representativeness to teachings. Part IV develops the case for a pluralist approach to teachings, in line with the views of some ILC members, based on three interconnected arguments: epistemological, dialectical, and sociological. We argue that a pluralist approach requires a fundamental shift in expectations, from relying on teachings to "discover" laws to using them as gateways to alternative ways of imagining valid legal

[5] 2025 ILC Report, *supra* note 1, para. 312; *see also* ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017); B.S. Chimni, *International Law Scholarship in Post-colonial India: Coping with Dualism*, 23 LEIDEN J. INT'L L. 23 (2010).

[6] 3627th Meeting, *supra* note 4, at 17.

[7] On reflexivity, see, for instance, ANNA SPAIN BRADLEY, HUMAN CHOICE IN INTERNATIONAL LAW 50 (2021); LEORA BILSKY, TRANSFORMATIVE JUSTICE: ISRAELI IDENTITY ON TRIAL 12 (2004). Engagement with diverse intellectual perspectives may strengthen judicial decision making by, *inter alia*, disrupting "corporate thinking." Thomas M. Franck, Book Review: *Manfred Lachs. The Teacher in International Law (Teachings and Teaching)*, 77 AJIL 169, 170 (1983); *see also* Lee Epstein & Jack Knight, *How Social Identity and Social Diversity Affect Judging*, 35 LEIDEN J. INT'L L. 897, 907 (2022).

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determination, and we examine some limitations of this approach. Part V then offers some concluding reflections.

II. The Lack of Diversity in the Use of Teachings

A. The Influence of Teachings: Two Stories

In sources of international law discourse, views on the influence of teachings differ markedly. Two contrasting narratives have emerged explaining their role in legal determination. Let us call Story 1 the "Past Their Prime" narrative and Story 2 the "Enduring Influence" narrative.[8]

The dominant narrative ("Past Their Prime") suggests that teachings, while "eminently influential in laying the foundations of international law," have experienced decline "with the growth of international judicial activity, the development of the case law of the Court and the new means to gain knowledge of State practice."[9] This account traces a trajectory from essentiality to obsolescence. Lassa Oppenheim's 1908 analysis captures this arc: originally, many rules of international law remained unwritten, with no international courts "which can define . . . rules and apply them authoritatively."[10] Consequently, publicists were compelled "to take the place of the judges" and constituted "the only means of ultimately ascertaining what the law is."[11] As international law matured through progressive codification, the establishment of permanent tribunals, and more systematic methodologies for ascertaining state practice and judicial decisions, however, "the weight of legal doctrine . . . decreased."[12]

The counter-narrative ("Enduring Influence") acknowledges uncertainty around teachings' precise influence while recognizing their continued significance.[13] Various studies employing citation analysis and other methodologies to assess the use of teachings in international tribunals[14] suggest that, while their influence today may be "behind-the-scenes and anonymous," ignoring teachings' influence would be "unjustified."[15] The evidence is

[8] For a range of views on the influence of teachings, see Lori Fisler Damrosch et al., *Scholars in the Construction and Critique of International Law*, 94 ASIL Proc. 317 (2000).

[9] Alain Pellet & Daniel Müller, *Article 38*, *in* The Statute of the International Court of Justice: A Commentary 961 (Andreas Zimmermann et al. eds., 2019); *see also* André Oraison, *Réflexions sur "La Doctrine des Publicistes les Plus Qualifiés des Différentes Nations,"* 2 Revue Belge de Droit Int'l 507 (1991).

[10] Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AJIL 313, 315 (1908).

[11] *Id.* at 314–15.

[12] 3627th Meeting, *supra* note 4, at 4.

[13] *See* Riccardo de Caria & Stefano Montaldo, *L'Influenza della Dottrina sulla Giurisprudenza delle Corti Europee*, Annuario di Diritto Comparato e di Studi Legislativi 89 (2015) (referring to both the direct and indirect influence of scholarship).

[14] For the International Criminal Court, see Neha Jain, *Teachings of Publicists and the Reinvention of the Sources Doctrine in International Criminal Law*, *in* The Oxford Handbook of International Criminal Law 106 (Kevin Jon Heller, Frédéric Mégret, Sarah Nouwen & Jens Ohlin eds., 2020). For the European Court of Human Rights, see Kanstantsin Dzehtsiarou & Niccolò Ridi, *The Use of Scholarship by the European Court of Human Rights*, 73 Int'l & Comp. L. Q. 707 (2024); and La Cour Europeenne des Droits de L'homme et la Doctrine (Sébastien Touzé ed., 2013). For the International Tribunal for the Law of the Sea, see Penelope Jane Ridings, *The Influence of Scholarship on the Shaping and Making of the Law of the Sea*, 38 Int'l J. Marine & Coastal L. 11, 20 (2023).

[15] Sandesh Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, 66 Int'l & Comp. L. Q. 1, 37 (2017); *see also* Sondre Torp Helmersen, The Application of Teachings by the International Court of Justice 2 (2021).

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often indirect and/or anecdotal, not least because international judges are not wont to speak on the subject and citation counts remain imprecise measures of influence.[16] But as a Sixth Committee delegate observed, teachings continue to play "a vital role in the identification of customary and conventional norms,"[17] especially in fields that "were still at an early stage of development ... or for universal treaties without dedicated international tribunals,"[18] and where "there [are] no international judicial decisions on an emerging legal issue."[19] Finally, proponents of this narrative point out that, in order to properly assess the influence of teachings, we have to look beyond just international judgments and assess their use by a broader pool of stakeholders, including advocates general[20] and legal advisors, as well as their "impact in domestic courts and on executive policymaking."[21]

The co-existence of these two competing narratives suggests that the influence of teachings remains difficult to define and measure.[22] But it also speaks to a deeper ambiguity within Article 38(1)(d) itself: what does it mean for teachings to serve as subsidiary means for the "determination" of rules of international law? While a fuller exploration of this debate would go beyond the scope of this Essay, it warrants brief attention here as one's position on the question shapes how one evaluates teachings' influence. Tensions over the precise role of teachings in determining rules of law already emerged during the 1920 Advisory Committee of Jurists' deliberations,[23] and have resurfaced in the ILC's work. At one end, legalists understand legal rules as objectively discoverable phenomena, with subsidiary means functioning merely to "expose" pre-existing normative reality. Or, as the U.S. Supreme Court held in *Paquete Habana*, teachings provide "trustworthy evidence of what the law really is."[24] From this perspective, the functions of law-ascertainment and interpretation of the content of rules remain two theoretically distinct operations—and, as concerns the

[16] Sivakumaran, *supra* note 15, at 23; *see also* Niccolò Ridi & Thomas Schultz, *Tracing the Footprints of International Law Ideas: A Scientometric Analysis*, 64 VA. J. INT'L L. 406, 433 (2024) (many studies of influence are based on citation analysis, which are "only a proxy for influence").

[17] Statement by Slovenia, General Assembly Seventy-Eighth Sess., Sixth Committee, para. 141, UN Doc. A/C.6/78/SR.31 (Dec. 11, 2023), *at* https://docs.un.org/en/A/C.6/78/SR.31.

[18] 3629th Meeting, *supra* note 3, at 5.

[19] 3627th Meeting, *supra* note 4, at 11–12.

[20] See the extensive use of teachings made by the advocate general of the CJEU in the *Western Sahara* case (Case C 266/16): Opinion of Advocate General Wathelet [of the Court of Justice of the European Union], Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs (Jan. 10, 2018). *See also* TAMÁS MOLNÁR & RAMSES A. WESSEL, INTERACTIONS BETWEEN EU LAW AND INTERNATIONAL LAW: JUXTAPOSED PERSPECTIVES (2024).

[21] 2025 ILC Report, *supra* note 1, para. 318. Consider, for instance, the significant role played by teachings in the determination of cyber law: Niccolò Lanzoni, *The Role of Expert Groups in Shaping International Cyberlaw: A Case Study of the Tallinn Manuals and International Law-Making*, J. CONFLICT & SEC. L. 1 (2025); and refugee law: Guy S. Goodwin-Gill, *The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law*, 69 INT'L & COMP. L. Q. 1 (2020).

[22] Some ILC members referred to the "methodological difficulty" of assessing the influence of teachings. ILC, Commentaries to Draft Conclusions 1 to 3, as Provisionally Adopted, para. 98, UN Doc. A/78/10 (2023) [hereinafter 2023 Commentaries] (teachings "were often consulted but not always cited formally in court decisions").

[23] For instance, the president of the Committee emphasized that subsidiary means constituted "elements of interpretation." LEAGUE OF NATIONS, ADVISORY COMMITTEE OF JURISTS, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE, JUNE 16TH–JULY 24TH, 1920, WITH ANNEXES 334 (1920) [hereinafter ADVISORY COMMITTEE PROCÈS-VERBAUX].

[24] The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* Oppenheim, *supra* note 10, at 314–15.

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former, teachings are seen to have a rather limited role, only engaged when other methods fail to ascertain the law.[25]

At the other end, constructivists argue that subsidiary means do not simply uncover existing rules but actively construct legal meaning through interpretation influenced, in part at least, by "political and/or ethical choices or constraints."[26] From this perspective, as a Sixth Committee delegate put it, the process of determining the law could be seen as "lying somewhere between the interpretation and the formation of international law."[27] Here, teachings play a more significant role, for if determining what the law *is* involves interpretive choices, then the perspectives and frameworks that teachings supply become integral to legal determination.[28]

The special rapporteur, seeking practical compromise rather than resolution, acknowledged that "the question of whether interpretation should be considered a distinct function or a component of determination remained a point of contention."[29] He was nodding to legalism when he maintained that "interpretation remains distinct from determination," though he also emphasized "their interrelated nature in practice," and recognized that this distinction "is far easier in theory than it is in practice."[30]

In this Essay, we consider that teachings could potentially exert decisive influence in determining the applicable law, particularly where judges (and other law determiners)[31] face "the blind alley of a *non liquet*."[32] In such cases, teachings continue to fulfill an unmet need by offering expert assistance in identifying and "deciphering the content of international rules,"[33] which often remain unclear and contested, emerging as they do from the complex interaction of judicial and legislative decisions, diplomacy, and scholarship. However, while recognizing that the influence of teachings may be "hidden,"[34] it is not value-neutral. Teachings may be deployed, often implicitly, to support various stated or unstated agendas in legal determination, whether conservative or progressive.[35] The very decision of whether or not to use teachings, which teachings to utilize, which frameworks to deploy, and which scholarly voices to amplify involves choices laden with normative implications that have a direct bearing on how applicable international law is determined. As such, the hidden nature of teachings' influence renders questions of diversity central to understanding how international law develops, whose

[25] JEAN D'ASPREMONT, FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES 160 (2011).

[26] 3627th Meeting, *supra* note 4, at 15.

[27] Statement by Poland, UN Doc A/C.6/78/SR.31, *supra* note 17, para. 43.

[28] Robert M. Cover, *The Supreme Court, 1982 Term: Nomos and Narrative,* 97 HARV. L. REV. 4, 5 (1983) (in the normative world, "law and narrative are inseparably related"); *see also* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 58 (2006).

[29] ILC, Third Report on Subsidiary Means for the Determination of Rules of International Law, para. 324, UN Doc. A/CN.4/781 (2025) (by Charles Chernor Jalloh) [hereinafter Third Report on Subsidiary Means].

[30] *Id.*, paras. 347, 350.

[31] In this Essay, reference to judges also includes, as applicable, other law determiners.

[32] ADVISORY COMMITTEE PROCÈS-VERBAUX, *supra* note 23, at 332 (emphasis in original).

[33] See remarks by Beth Stephens in Damrosch et al., *supra* note 8, at 317–18 (The use of the word "deciphering" here is telling, as it suggests a more complex exercise than "finding.").

[34] HELMERSEN, *supra* note 15, at 13.

[35] A point recognized by the special rapporteur who called, for instance, for teachings (and subsidiary means more generally) to be used to promote the coherence of international law. Third Report on Subsidiary Means, *supra* note 29, para. 271.

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voices shape legal determination and how this could perpetuate the risk that "certain views on, and interpretations of, international law would be universalized."[36]

B. The ILC Study and the Lack of Diversity in the Use of Teachings

Building on a Memorandum prepared by the UN Secretariat,[37] the special rapporteur found a marked lack of diversity in teachings used for legal determination. For instance, he noted that the ICJ, in the rare instances in which it referenced scholars, tended to cite essentially the same group of authors and the ten most cited writers "are all from Western States and all of them are men."[38] The number only marginally improved in terms of diversity, when the study was expanded to identify the top forty most cited persons, which still included only one author from the Global South.[39] While other international bodies fared somewhat better, the structural pattern of exclusions persisted, with courts and tribunals continuing to draw predominantly from Western legal traditions and using materials from a limited range of languages.[40]

Moreover, the formulation "the teachings of *the most highly qualified publicists*" in Article 38(1)(d) was found to be "a historically and geographically charged notion that could be considered elitist."[41] Some members of the ILC Drafting Committee further noted that, in some languages, the term "publicists" could still be understood today as referring primarily to male publicists.[42]

The lack of diversity in the use of teachings was, therefore, identified as a significant problem requiring specific attention and an institutional response. During their discussions, many ILC members highlighted concerns about the over-reliance of some courts and tribunals on materials predominantly from the Anglo-American tradition, often restricted to a few languages and legal systems. Concurrently, some ILC members specifically highlighted concerns about gender representation.[43] The special rapporteur connected this lack of diversity in the use of teachings to a deeper, more systemic issue: the structural inequalities within international law itself.[44] In his view, while the lack of diversity in the use of teachings

[36] Statement by Portugal, UN Doc A/C.6/78/SR.31, *supra* note 17, para. 86.

[37] ILC, First Memorandum by the Secretariat on Subsidiary Means for the Determination of Rules of International Law: Elements in the Previous Work of the International Law Commission That Could Be Particularly Relevant to the Topic, UN Doc. A/CN.4/759 (Feb. 8, 2023).

[38] First Report on Subsidiary Means, *supra* note 2, para. 332; *see also* HELMERSEN, *supra* note 15, at 15.

[39] First Report on Subsidiary Means, *supra* note 2, para. 332 n. 613; Third Report on Subsidiary Means, *supra* note 29, para. 99.

[40] ILC, Second Memorandum by the Secretariat on Subsidiary Means for the Determination of Rules of International Law, para. 406, UN Doc. A/CN.4/765 (Jan. 17, 2024) [hereinafter Second Secretariat Memorandum].

[41] 2023 Commentaries, *supra* note 22, at 83; *see also* Charles Chernor Jalloh, *The International Law Commission's Seventy-Fourth (2023) Session: General Principles of Law and Other Topics*, 118 AJIL 120, 132 (2024).

[42] ILC Drafting Committee, Subsidiary Means for the Determination of Rules of International Law: Statement of the Chairperson of the Drafting Committee: Mārtiņš Paparinskis, at 9 (July 3, 2023) [hereinafter July 3 DC Statement].

[43] ILC, Report of the International Law Commission: Seventy-Fourth Session (24 April–2 June and 3 July–4 August 2023), paras. 95, 106, UN Doc. A/78/10 (2023) [hereinafter 2023 ILC Report].

[44] First Report on Subsidiary Means, *supra* note 2, para. 333; *see also* Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AJIL 613, 615 (1991) ("International law is a thoroughly gendered system."); Nilufer Oral, *Women as Highly Qualified or "Renowned" Publicists in International*

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gave rise to "uncomfortable conversations," it had to be "addressed head-on instead of brushed under the carpet,"[45] with members of the ILC expressing "an openness and even support" for this approach.[46]

Initially, discussions on promoting greater diversification of teachings focused on geographic and linguistic aspects. However, as the ILC engaged in more detailed debates and considered views from the Sixth Committee, the scope of diversity considerations began to expand. In his First Report, the special rapporteur recalled that, in its previous work on customary international law, the ILC had interpreted the phrase "of the various nations" to refer to the importance of having regard to writings from the principal legal systems and regions of the world and in various languages.[47] He argued that today, it makes sense that judges "consult the writings of authors from the various nations of the world."[48] In this regard, he emphasized that "strenuous efforts must be undertaken—more so than at present—to at least loosely be representative of the various nations and regions of the world."[49]

In subsequent discussions at the ILC Drafting Committee, some members saw in the phrase "of the various nations" the opportunity for a more progressive and inclusive interpretation—a springboard to include other diversity dimensions when using teachings, such as "racial, ethnic, cultural, religious diversity, as well as sexual orientation."[50] A further diversity dimension related to teachings by early career scholars. Members of the Drafting Committee were of the view that descriptors such as "the most highly qualified," "persons with competence" and/or "persons with recognized competence" were unhelpful, as they tended to exclude more junior scholars.[51] The recognition that diversity in international law must go beyond geographic considerations to include aspects such as gender and racial diversity was supported by some delegations at the Sixth Committee. They underlined the need for greater inclusivity in this area, with two delegations specifically mentioning the need to include racial diversity.[52]

The ILC, therefore, considered that multiple dimensions of diversity could potentially be, to a greater or lesser extent, relevant to the use of teachings. The Chairman of the Drafting Committee described the ILC's ongoing work on the topic as "a historic opportunity" to "address the imbalance of representativeness" in the use of teachings.[53] He urged the ILC to grasp this opportunity and consider measures to promote greater diversity in this area.[54]

Law, *in* THE OXFORD HANDBOOK OF WOMEN AND INTERNATIONAL LAW (J. Jarpa Dawuni, Nienke Grossman, Jaya Ramji-Nogales & Hélène Ruiz Fabri eds., 2025).

[45] First Report on Subsidiary Means, *supra* note 2, para. 332.

[46] 2023 ILC Report, *supra* note 43, para. 119.

[47] Second Secretariat Memorandum, *supra* note 40, para. 35.

[48] First Report on Subsidiary Means, *supra* note 2, para. 330.

[49] *Id.*

[50] ILC Drafting Committee, Subsidiary Means for the Determination of Rules of International Law: Statement of the Chairperson of the Drafting Committee: Mārtiņš Paparinskis, at 9 (July 21, 2023) [hereinafter July 21 DC Statement].

[51] *Id.* at 7.

[52] Statement by Uganda, para. 26, and Sierra Leone, para. 46, General Assembly Seventy-Eighth Sess., Sixth Committee, UN Doc. A/C.6/78/SR.32 (Dec. 11, 2023), *at* https://docs.un.org/en/A/C.6/78/SR.32.

[53] July 21 DC Statement, *supra* note 50, at 8.

[54] Other members of the ILC emphasized the need to "balance the original context and text of Article 38, paragraph 1 (d) … with the practice of modern international law." 2025 ILC Report, *supra* note 1, para. 314.

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III. Defaulting to "Representativeness"

The ILC therefore took unprecedented steps to confront the lack of diversity in the use of teachings in one of its products.[55] It did so by defaulting to an approach with which it was comfortingly familiar: the concept of "representativeness." This choice was rooted in the ILC's institutional history,[56] and broader communicative practices within the UN. It may be helpful to briefly trace how the concept of "representativeness" found its way into the ILC's draft conclusions.[57] While in his report, the special rapporteur made reference to the need for subsidiary means to be "representative,"[58] he did not himself expressly include that concept in his draft conclusions. On the contrary, the language of his drafts continued mirroring the wording of Article 38(1)(d).[59]

It was the ILC Drafting Committee, in its subsequent deliberations, that frontally framed the issue of lack of diversity in the use of teachings as one that required a "representativeness" solution, building upon its previous work on customary international law. To achieve this, the Drafting Committee adopted a progressive interpretation of Article 38(1)(d), evident in its central consideration: "whether the formulation of the Statute was still fit for purpose for the twenty-first century international legal community."[60] With that question in mind, the Drafting Committee effected a number of changes to the special rapporteur's original draft conclusions. Three of these are particularly pertinent here.[61]

Firstly, in relation to draft conclusion 2, which set out categories of subsidiary means, the Drafting Committee dropped the reference to "of the most highly qualified publicists of the various nations." They simply retained the word "teachings."[62] This was done, as discussed above, to avoid using the charged and outdated term "publicists" and to promote "a more neutral, inclusive and representative formulation."[63] Reference to "most highly qualified" was also dropped, to enable consideration of teachings from a more diverse pool.

Secondly, in relation to draft conclusion 4 [3], which articulated general criteria for assessing the weight of subsidiary means, the Drafting Committee introduced a new criterion, and indeed placed it top of the list, namely their "degree of representativeness." According to the chairperson:

[55] *See* Statement by Uganda, *supra* note 52, para. 26.

[56] ILC, Report of the International Law Commission, Seventieth Session (30 April–1 June and 2 July–10 August 2018), at 151 (commentary, para. 4), UN Doc. A/73/10 (2018) [hereinafter 2018 ILC Report].

[57] ILC Drafting Committee, Titles and Texts of Draft Conclusions 1 to 3 Provisionally Adopted by the Drafting Committee, UN Doc. A/CN.4/L.985 (June 2, 2023).

[58] First Report on Subsidiary Means, *supra* note 2, paras. 36, 330.

[59] *Id.* at 129 (Annex).

[60] July 3 DC Statement, *supra* note 42, at 8.

[61] Reflecting the ongoing nature of this work, the draft conclusions have been reordered and renumbered. This Essay will refer to the new number and indicate the old number in square brackets. ILC Drafting Committee, Subsidiary Means for the Determination of Rules of International Law: Statement of the Chairperson of the Drafting Committee: Mario Oyarzábal, at 2 (May 30, 2025).

[62] July 3 DC Statement, *supra* note 42, at 8–9. The move toward "teachings" originated in the special rapporteur's (Sir Michael Wood) third report on identification of customary international law, in 2015, which made reference to "writings." ILC, Third Report on Identification of Customary International Law by Sir Michael Wood, para. 62, UN Doc. A/CN.4/682 (Mar. 27, 2015). Subsequently, the ILC adopted the language of "teachings" in its 2018 conclusions on identification of customary international law (Conclusion 14). 2018 ILC Report, *supra* note 56, at 150.

[63] July 3 DC Statement, *supra* note 42, at 9.

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> [S]uch a criterion did not appear in the Special Rapporteur's initial proposal. However, the Drafting Committee decided to include it to address some of the concerns expressed in the plenary regarding the importance of taking into account the views and approaches of the various legal systems of the world.[64]

Thirdly, in relation to draft conclusion 8 [5], which focused on the functions of teachings, the Drafting Committee introduced a new sentence that read: "In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity."[65]

While there was broad agreement over the need for teachings to be representative, there remained some interpretive divergence within the Sixth Committee concerning the meaning and scope of this concept. Three broad approaches may be discerned. The first pushed back against inclusion of the above-mentioned sentence in draft conclusion 8 [5], arguing that there seemed to be "insufficient practice supporting" that criterion, and it would be better characterized as "a guideline," rather than normative.[66] The second welcomed inclusion of this sentence, but construed it narrowly to refer primarily to teachings from "different regions and by different judicial systems."[67] The third approach supported a more expansive reading of representativeness, to include other dimensions such as gender diversity.[68] As noted, two delegations, together with several members of the ILC, also urged for "racial diversity" to be explicitly mentioned in draft conclusion 8 [5].[69] However, the ILC Drafting Committee considered the phrase "*inter alia*" to be sufficiently plastic to accommodate additional diversity dimensions such as racial diversity.[70] Moreover, the Commission clarified that:

> since the reference to various regions of the world already reflected various forms of diversity, such as that of race, and the idea was to develop an illustrative instead of exhaustive list of factors to take into account, it was felt necessary to highlight only gender and linguistic diversity.[71]

The debates within the ILC and Sixth Committee suggest that there was broad agreement both on the need to address the diversity deficit in the use of teachings[72] and on "representativeness" as the appropriate remedy, even while divergent understandings of this

[64] *Id.* at 13.

[65] ILC Drafting Committee, Subsidiary Means for the Determination of Rules of International Law: Texts and Titles of the Draft Conclusions Provisionally Adopted by the Drafting Committee on the First Reading, UN Doc. A/CN.4/L.1019 (May 26, 2025).

[66] Statement by the United Kingdom, *supra* note 17, para. 36.

[67] *Id.*, Statement by Italy, para. 27.

[68] *See* Statement by Sierra Leone, *supra* note 52, para. 46; Statement by Estonia, General Assembly Seventy-Eighth Sess., Sixth Committee, para. 33, UN Doc. A/C.6/78/SR.33 (Dec. 11, 2023), *at* https://docs.un.org/en/A/C.6/78/SR.33.

[69] Statements by Uganda and Sierra Leone, *supra* note 52; *see also* ILC, Commentaries to Draft Conclusions 4 to 8, as Provisionally Adopted, UN Doc. A/79/10, at 43 (2024) [hereinafter 2024 Commentaries].

[70] July 21 DC Statement, *supra* note 50, at 9.

[71] 2024 Commentaries, *supra* note 69, at 43.

[72] See summary of debates in ILC, Second Report on Subsidiary Means for the Determination of Rules of International Law, by Charles Chernor Jalloh, para. 56, UN Doc. A/CN.4/769 (Jan. 30, 2024) [hereinafter Second Report on Subsidiary Means].

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concept persisted. This concept, however, raises some conceptual and practical challenges that merit further consideration, particularly when representativeness is understood narrowly in its formal, political sense and applied to either the author or the authority (that is, the teaching itself).

A. Challenges with Applying Representativeness to the Author

According to the special rapporteur, "part of the way to differentiate between teachings is to examine the origin or author of the teaching."[73] When ILC and UN Sixth Committee members advocated for greater "representativeness" of teachings, some may have had in mind the author's identity. For instance, they referenced various personal traits, such as gender, nationality, ethnicity, and career stage.[74] However, this approach is problematic because these criteria for assessing representativeness are inherently personal attributes. Unlike state representatives or intergovernmental officials, academic authors bear no obligation to disclose such identity markers, nor do they necessarily accept categorization within fixed classifications. Many scholars resist external categorization, particularly regarding gender and sexual orientation, as well as race and ethnicity, which often transcend binary or static frameworks. This resistance reflects a fundamental tension: legal scholarship centers on intellectual contribution rather than personal identity, rendering problematic any assumption that authors can or should "represent" specific demographics or regions. The ILC Drafting Committee members themselves acknowledged these difficulties, noting that "some of the proposed criteria could not be easily ascertained by a simple review of the materials and would require a further enquiry into the background and identity of the author."[75] As such, it is both practically difficult to ascertain whether a pool of authors is sufficiently representative, and conceptually problematic to assume that any individual author could "represent" a particular demographic or region.

Intersectionality further complicates classification attempts. Scholars embody multiple, overlapping identities, defying singular representational axes—consider, for instance, a multilingual agender academic from a mixed-race background. Moreover, any categorization inevitably reflects the classifier's perspectives rather than the classified individual's self-identification, potentially reproducing inherent biases.

Similarly, geographic representativeness presents distinct complexities. Dual nationality, migration patterns, and statelessness challenge assumptions that authorial backgrounds map neatly onto national or state-based geographic categories traditionally employed in international law. This framework is particularly unsuitable for academic writings given scholarly mobility and transnational institutional affiliations. As editors of an international law journal recently observed, "academic life, and especially the international law academy, has for many become international: first degree in one country, a second in another, a first job in yet another, and so on."[76] This reality rendered even basic geographic classification

[73] Third Report on Subsidiary Means, *supra* note 29, para. 88.

[74] When the special rapporteur noted, for instance, that the ten most cited authors at the ICJ were men, he seemed to have authorship in mind. First Report on Subsidiary Means, *supra* note 2, para. 332.

[75] July 21 DC Statement, *supra* note 50, at 9.

[76] Sarah Nouwen & Joseph Weiler, *Vital Statistics: Behind the Numbers*, EJIL:TALK! (Apr. 22, 2024), *at* https://www.ejiltalk.org/vital-statistics-behind-the-numbers.

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impractical, forcing the journal to abandon recording "Region of Origin" in favor of "Region of Authors' Affiliation"—a significantly more diffuse metric.[77] This shift exemplifies the fundamental limitations of geographic proxies for diversity, particularly when scholars routinely work outside their countries of origin, publish in non-native languages, and engage legal traditions beyond their primary training.

B. Challenges with Applying Representativeness to the Authority

Another, though not mutually exclusive,[78] interpretation is that ILC members intended the concept to apply to the authority. Indeed, as noted above, both draft conclusions 2 and 8 [5] refer to "teachings" *simpliciter*, shifting focus from the author to the authority, with draft conclusion 8 [5] specifying that, in assessing the representativeness of teachings, due regard should be given to, *inter alia*, "gender and linguistic diversity."

Attempting to apply representativeness to the authority rather than the author may initially seem more feasible, but this approach carries its own set of conceptual and practical difficulties. Firstly, it is hard to see how teachings may be representative of personal characteristics, such as "gender," an attribute ordinarily attaching to persons, not texts. Secondly, attaching representativeness to teachings risks generalizing and essentializing perspectives, proceeding on the assumption that an academic work inherently represents the views of a specific gender, region, or other diversity dimensions. For instance, "Third World Approaches to International Law" (TWAIL) are frequently regarded as a monolithic representation of Global South perspectives, even if TWAIL scholars themselves often stress the internal diversity of thought within these approaches.[79] Similarly, feminist legal theories are often treated jointly as representative of "women's perspectives" in international law, even though feminist scholarship is highly diverse and contested, encompassing liberal, radical, decolonial/post-colonial/anti-colonial, and intersectional perspectives, among others.[80] The assumption that a given work speaks on behalf of an entire group oversimplifies the complexity of legal thought, encourages a "majoritarian" outlook induced by the search for formal representativeness, and marginalizes alternative or dissenting viewpoints within the same intellectual tradition. The risk here is that by designating and, subsequently, deploying specific teachings as "representative" of a particular perspective, not only the nuances and contestations within that body of scholarship are brushed aside but also ongoing debates are essentialized when using one or few works *pars pro toto*.

There is also the question of which teachings get chosen to be representative. As discussed below, ideas about "quality" are influenced by structural biases or practical barriers in international law. Writing in English or French or being institutionally embedded in the Global North, regardless of one's intellectual tradition or background, provides positions of privilege and authority that reproduce the marginalization of scholarship emerging from the Global South or from outside the Anglo-Francophone world.[81] Given these challenges,

[77] *Id.*

[78] In his Third Report, the special rapporteur suggests "a combination of assessment of who the author of a work is and the content of their work." Third Report on Subsidiary Means, *supra* note 29, paras. 88, 91.

[79] Antony Anghie, *Rethinking International Law: A TWAIL Retrospective*, 34 EUR. J. INT'L L. 7 (2023).

[80] *See* GINA HEATHCOTE, FEMINIST DIALOGUES ON INTERNATIONAL LAW: SUCCESS, TENSIONS, FUTURES (2019).

[81] ROBERTS, *supra* note 5, at 5.

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therefore, the concept of "representativeness" may be problematic whether applied to the author or the authority and may also have an unintended consequence.

C. An Unintended Consequence

Representativeness is a complex and contested concept which, when applied to teachings, may have different possible interpretations.[82] As discussed below, some ILC members understood the concept in its broader sense, to mean "intellectual pluralism," while others understood it in its narrower, political sense, to mean using teachings from various nations or linguistic traditions to ensure equitable geographical coverage. The latter aligns with the more conventional usage of the term in UN discourse,[83] and there is a risk that the "representativeness" criterion in the ILC's draft conclusions will, therefore, only be read in this narrower sense by, at least, some of the ILC's intended audience.

For instance, in the Sixth Committee, some delegates seemed to read "representativeness" as referring to geographic or demographic diversity, noting the systemic exclusion of "scholars from Africa and the global South more generally"[84] in the teachings that were generally consulted, and the need, therefore, to cite a broader range of teachings from across different regions to ensure "geographic equity."[85]

When understood solely in this political sense, there is a real risk that the criterion of "representativeness" may be applied formulaically in the selection of teachings. This, in turn, could lead to token representativeness, that is, situations where judges fulfil representativeness requirements through surface-level citations from different regions or demographic groups without substantively engaging with the distinct theoretical and epistemological frameworks that diverse teachings offer.[86] Regardless which diversity criteria are applied, a conventional approach may unintentionally invite users to equate representativeness with a somewhat balanced yet still formulaic selection of teachings, rather than engaging purposefully with the intellectual contributions of diverse scholarship that is intrinsically international, critical and thus diverse. This, in turn, could lead to perpetuating a practice of dominating discourses on international law, yet under the banner of inclusivity and diversification.

IV. Three Arguments for a Pluralist Approach to Teachings

The debates within the ILC and Sixth Committee showed, as noted, a divergence of views on how the "representativeness" criterion should be interpreted and applied to promote diversity in the use of teachings. One strand emphasized geographical diversity: ensuring citations are drawn from various nations and regions of the world. A second focused on demographic diversity: citing authors or texts representing diverse gender, linguistic, and

[82] Hanna Fenichel Pitkin, The Concept of Representation 4 (1967) (noting that the literature "is full of obvious disagreements over its meaning," with theorists offering definitions that often contradict or bear little relation to one another).

[83] Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 Chi. J. Int'l L. 668 (2012). See Article 9 of the Statute of the International Court of Justice and Article 8 of the Statute of the International Law Commission.

[84] Statement by Uganda, *supra* note 52, para. 26.

[85] Statement by El Salvador, *supra* note 68, para. 37.

[86] Rosabeth Moss Kanter, Men and Women of the Corporation (1993) (see Chapter 8 on tokenism).

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other demographic characteristics. A third strand emphasized intellectual diversity: engaging with "the fundamental oppositions between doctrinal trends in international law."[87] We argue that while geographical and demographic diversity are valuable, the most compelling reason for promoting diversity in teachings is to enable genuine engagement with different ways of knowing law and understanding legal determination. This is best achieved through a methodology that prioritizes substantive engagement with competing epistemic frameworks over surface "improvements" of citation practices. We therefore propose reading the ILC's invocation of "representativeness" through a purposive lens that embraces "intellectual pluralism."[88] Such an approach does not simply diversify the voices consulted but disrupts the underlying assumptions about how law is identified, interpreted, and determined. We develop this claim using three interconnected arguments—epistemological, dialectical, and sociological—which, though presented separately for analytical clarity below, are deeply interconnected and mutually reinforcing.

A. The Epistemological Argument: Disrupting Legal Determinacy

A pluralist approach to teachings in legal determination may disrupt formal legalist thinking which, as Judith Shklar notes, is "the operative ideology of lawyers."[89] It progressively incentivizes judges to access "other ways of thinking about law."[90] This disruption targets, *inter alia*, the assumption, noted above, that law exists as objectively identifiable rules awaiting discovery. Within this assumption, as an ILC member put it, "the role of doctrine was limited to 'finding out' what the rule was."[91] This legalist framework presumes that ascertaining the applicable law to any issue represents a neutral process rather than a choice. Yet this presumption conceals how identifying what counts as applicable law involves deep theoretical commitments about the nature, scope, and sources of legal obligation.

The legalist framework operates through several interrelated assumptions that are seen as key to maintaining international law's perceived legitimacy. These assumptions—including the legalist belief that legal rules exist as objective facts awaiting discovery, that law operates independently from political and ethical considerations, and that the processes of "ascertaining" and "interpreting" law are separate, with the former preceding the latter—serve several legitimation functions in international law. They provide legal certainty and predictability through doctrinal stability in a decentralized and "anarchical" system lacking enforcement mechanisms;[92] they offer process legitimacy by positioning states as creators and judges as interpreters of normative obligations; and they preserve the boundary between

[87] 3627th Meeting, *supra* note 4, at 13 (statement by Mingashang).

[88] 3629th Meeting, *supra* note 3, at 4.

[89] JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS viii (1986); Jochen von Bernstorff, *International Legal Scholarship as a Cooling Medium in International Law and Politics*, 25 EUR. J. INT'L L. 977, 979 (2014) (noting that legalism still "shapes our understanding of international law").

[90] SHKLAR, *supra* note 89, at ix, 3.

[91] 3627th Meeting, *supra* note 4, at 4–5.

[92] James Crawford, *Preface*, *in* ESMÉ SHIRLOW, JUDGING AT THE INTERFACE: DEFERENCE TO STATE DECISION-MAKING AUTHORITY IN INTERNATIONAL ADJUDICATION xiii (2021).

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law and politics by "sealing off" legal determination from political contestation.[93] The functions that legalism serves are viewed as essential to secure the continued buy-in of states. Otherwise, as Judge Nolte put it, "States may in the future shy away from accepting new treaty obligations or maintaining procedures that could subject them to unpredictable legal consequences."[94] Yet these same assumptions that legitimize international law also create systematic barriers to recognizing alternative forms of legal knowledge. When judges insist on "exposing" the *lex lata* and maintaining a "distinction between description and evaluation,"[95] they obscure how their methods of finding already determine what can be found. The cumulative effect transforms Eurocentric legal methods into universal standards and, in parallel, marginalizes non-Western forms of legal knowledge. It is these deeply embedded assumptions that a pluralist approach to teachings seeks to disrupt.

The ICJ's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* shows how a pluralist approach may directly influence legal determination by influencing which teachings are rendered visible and, in turn, which general principles are distilled.[96] A brief analysis of the contrasting approaches adopted by Judge Weeramantry and Vice-President Schwebel in their dissenting opinions suggests that this is not simply about different interpretations of the same laws; it is about operating within different epistemological frames of what constitutes valid legal determination.

Judge Weeramantry's pluralist approach used teachings as subsidiary means to identify general principles of law recognized across legal systems. However, his epistemic openness fundamentally expanded the universe of materials he considered relevant "teachings." Where a conventional legalist approach, constrained by its conservative assumptions about quality of reasoning, would have confined itself to a more limited pool of teachings, Judge Weeramantry engaged substantively with teachings examining Hindu legal principles such as the *Laws of Manu*,[97] and African,[98] Buddhist,[99] Christian,[100] and Islamic[101] teachings concerning principles of armed conflict. These teachings, which drew on a range of non-Western legal traditions to identify general principles of law, may not satisfy the conventional criteria of "teachings" as understood through a legalist lens: they did not emerge from recognized centers of international legal scholarship and they could be dismissed as not being of sufficient "quality." Yet by employing a broader temporal and religio-cultural frame that examined humanitarian principles across diverse civilizations and over three thousand years, Judge

[93] Epstein & Knight, *supra* note 7, at 897–98 ("Judges like to claim that they are dispassionate decision-makers fully capable of suppressing their 'personal proclivities.' And yet a century's worth of studies undermines this claim.").

[94] Obligations of States in Respect of Climate Change, Advisory Opinion, 2025 ICJ General List No. 187, para. 32 (July 23, 2025) (dec., Nolte, J.).

[95] CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 6 (2000).

[96] For context around this momentous opinion, see SPAIN BRADLEY, *supra* note 7, at 12.

[97] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, 479 (July 8) (diss. op., Weeramantry, J.).

[98] *Id.* at 480.

[99] *Id.* at 481.

[100] *Id.* at 480.

[101] *Id.*

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Weeramantry was able to distill consistent general principles prohibiting the use of hyper-destructive weapons.[102] This pluralist approach reconceptualized what counted as relevant legal knowledge. By engaging substantively with teachings that legalist methodology would discount, and using them to determine general principles of law, Judge Weeramantry brought into view a vast body of normative constraints regarding means and methods of warfare that a narrower legalist methodology would have rendered invisible. As he later reflected, "the formalism of modern legal systems may cause us to lose sight of such principles, but the time has come when they must once more be integrated into the corpus of the living law."[103]

On the other hand, Vice-President Schwebel's approach exemplified the conventional legalist methodology. He adopted a narrow analytical and temporal frame, confining his analysis to contemporary state practice and judicial decisions primarily from technologically advanced Western legal systems.[104] References to teachings were few and far between, and only to Western scholars like Lauterpacht.[105] As with Judge Weeramantry, Vice-President Schwebel's situatedness within a particular interpretive framework led him to adopt a specific approach to legal determination. These contrasting theoretical frameworks produced starkly different legal determinations and conclusions. Where Judge Weeramantry found an absolute prohibition on the use of nuclear weapons embedded in millennia of human wisdom about warfare's limits,[106] Vice-President Schwebel found that, in certain circumstances, "nuclear weapons may be used or their use threatened."[107]

The epistemological argument therefore posits that, in the process of legal determination, when judges use teachings from pluralist intellectual traditions, they experience a critical interrogation of assumptions so deeply embedded in juridical consciousness that they appear as natural or self-evident truths rather than contingent theoretical choices. A pluralist engagement with teachings "denaturalizes" legal common sense, producing what has been described as a "moment of vertigo—and of freedom" where "things don't add up, . . . coherence fails, . . . incommensurability must be acknowledged."[108] Such an approach offers judges the opportunity to mount an "intellectual escape" from legalism,[109] toward recognition that legalism's seemingly neutral methods rest on culturally-specific choices about what counts as valid legal knowledge and legal determination.[110]

[102] *Id.* at 478.

[103] Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 ICJ Rep. 7, 108–09 (Sept. 25) (sep. op., Weeramantry, V.P.).

[104] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, 311 (July 8) (diss. op., Schwebel, V.P.).

[105] *Id.* at 322.

[106] Dissenting Opinion of Judge Weeramantry, *supra* note 97, at 513.

[107] Dissenting Opinion of Vice-President Schwebel, *supra* note 104, at 312.

[108] David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. REV. L. & SOC. CHANGE 641, 644 (2007).

[109] SHKLAR, *supra* note 89, at xiii–xiv.

[110] For instance, with respect to courts using pluralism to access competing Indigenous knowledges, see José Israel Herrera, *El Pluralismo Jurídico en la Corte Interamericana de Derechos Humanos: El Manejo de la Diversidad*, 10 CIENCIA JURÍDICA 73 (2021).

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B. The Dialectical Argument: Teachings as Human Corrective

The second argument is dialectical and posits that pluralist teachings mediate the fundamental tension between the *body of law* and the *body politic*. Legalism presents itself as thesis—law as autonomous system, "perfect, nonpolitical, aloof [and] neutral,"[111] reflecting the will of states while sealing itself off from the social, moral, and political realities that give it meaning.[112] The body politic stands as antithesis—the messy realm of power, contestation, and lived human experience that law purports to regulate but from which it claims independence. As the only non-state-emanating subsidiary means in Article 38(1)(d), teachings offer the vital connection to this body politic, serving as a "human corrective" to what Judge Yusuf identified as "extreme formalism."[113]

This argument requires careful delineation. We are *not* suggesting that teachings should be used to create new law or even to progressively develop the *lex lata* beyond what states have consented to. Rather, in the process of legal determination, a pluralist engagement with teachings may serve to partially de-center formalist and sovereigntist thinking when this threatens a rigid distortion between law and the human realities it governs.[114] In this way, for instance, teachings may serve as a means to shed light on how a strict commitment to "neutral" legal determination may embed gender-blindness and continue to perpetuate structural inequalities. They could serve as a dialectical antipode to such tendency, enabling a recontextualization of the issues and, as a result, a reformulation of the applicable laws.[115] As such, teachings may function as a "cooling regulator" for the overheating tendencies of a formal legalist approach, preventing law's collapse into either unrestrained activism or nihilistic paralysis.[116] Their role is not to supplant or supplement conventional sources but to strengthen the likelihood that legal determination remains connected to the social contexts from which legal rules emerge and within which they operate. This is particularly crucial given that international law increasingly governs not merely interstate relations but the entire spectrum of human experience.[117]

The ICJ's *Germany v. Italy* judgment,[118] alongside its feminist rewriting, offer a good example of how this dialectical function may influence the process of legal determination within, not beyond, existing law. In its judgment, which does not explicitly cite teachings, the ICJ adopted a narrow framing of applicable law, focusing on whether Italian courts must accord Germany immunity. Italy argued that both the gravity of atrocities and the victims' lack of alternative remedies in this case (the "last resort" argument) should deny Germany's

[111] SHKLAR, *supra* note 89, at x.

[112] KOSKENNIEMI, *supra* note 28.

[113] Obligations of States in Respect of Climate Change, Advisory Opinion, 2025 ICJ General List No. 187, para. 8 (July 23) (sep. op., Yusuf, J.).

[114] FEMINIST JUDGMENTS IN INTERNATIONAL LAW 15 (Loveday Hodson & Troy Lavers eds., 2019).

[115] For an example of such recontextualization, see Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Advisory Opinion, 2024 ICJ General List No. 186, para. 14 (July 19) (dec., Charlesworth, J.).

[116] Von Bernstorff, *supra* note 89, at 978.

[117] SPAIN BRADLEY, *supra* note 7, at 85 ("It is time for international law to acknowledge and accept its humanity.").

[118] Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 ICJ Rep. 99, para. 53 (Feb. 3).

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claim to immunity.[119] The Court rejected both arguments, declaring that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict."[120] While acknowledging that "immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned,"[121] the Court maintained that this unfortunate consequence could not alter the applicable legal framework.

The feminist rewriting of this judgment, in contrast, used extensive pluralist teachings to recontextualize the issues and, as a result, the applicable laws.[122] It brought into focus "[t]he barbaric nature of the unjustified killings, ... rape, slaughtering of pregnant women, beheadings,"[123] not as emotional appeal but as relevant, even inescapable, legal context applicable to the specific circumstances of this case. The feminist panel used teachings, *inter alia*, to reframe immunity's relationship to other legal obligations: "State immunity does not ... exist in a vacuum. It is part and parcel of an international system of rules, principles and regulations, all of which are aimed at achieving harmony in international relations."[124] This dialectical reframing, using teachings to bridge the body of law and body politic, enabled a different determination. In addition to immunity laws, the feminist panel also determined that humanitarian principles were applicable to this specific case, finding that "upholding State immunities at all price would be too formalistic a solution," given Germany's acknowledged illegality and the absence of adequate reparation.[125] This example shows how the dialectical function of teachings may prevent law's blindness to the human realities it governs, ensuring that specific determinations of rules of laws remain responsive to their social contexts without creating new legal obligations. Importantly, the movement here is not toward synthesis but toward ongoing mediation—a continuous process whereby teachings maintain productive tension between law's claim to autonomy and its inescapable embeddedness in the social continuum.[126]

C. The Sociological Argument: Countering Corporate Thinking

The third argument is sociological and posits that pluralist teachings disrupt the corporate thinking that results from judges' socialization within "highly cohesive groups."[127] In the context of legal determination, this socialization creates shared, and often unquestioned, assumptions about what constitutes, *inter alia*, valid legal knowledge, whose expertise matters, and which interpretive methods produce legitimate legal conclusions. When judges

[119] *Id.*, paras. 80 et seq.
[120] *Id.*, para. 91.
[121] *Id.*, para. 104.
[122] Including the Report of the German-Italian Historical Commission on the War Past and Other Teachings cited in Zoi Aliozi, Bérénice K. Schramm & Ekaterina Yahyaoui Krivenko, *Judgment,* Germany v. Italy: Greece Intervening, *in* FEMINIST JUDGMENTS IN INTERNATIONAL LAW, *supra* note 114, at 129 (paras. 5 et seq).
[123] *Id.* at 129, para. 10.
[124] *Id.* at 136, para. 25.
[125] *Id.* at 137, para. 28.
[126] SHKLAR, *supra* note 89, at 3.
[127] Franck, *supra* note 7, at 170; SHKLAR, *supra* note 89, at vii.

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consistently cite teachings from the same narrow pool, they reinforce these inherited assumptions.

This sociological conditioning operates through what cognitive scientists term "confirmation bias," a form of unconscious bias that privileges familiar knowledge that affirms past choices, while discounting contrary or unfamiliar methods and ideas.[128] In legal determination, this does not manifest as explicit prejudice but as seemingly neutral assessments of weight and persuasiveness. It may, of course, be argued that such bias may be avoided by simply focusing on "quality" and, indeed, many Sixth Committee delegates emphasized that the quality of the reasoning (draft conclusion 4 [3](b)) should constitute the primary criterion for evaluating subsidiary means.[129] If judges simply consult high-quality teachings from different regions and intellectual traditions, they would arguably encounter the diverse perspectives that pluralism champions. However, "quality" is itself a perspectival concept that "is capable of multiple meanings largely dependent on the vantage point one adopts and the particular values one endorses."[130] When judges socialized in a particular epistemic community assess quality, they inevitably apply criteria shaped by their own community, such as privileging formal argumentation over narrative reasoning (e.g., written analysis as superior to oral tradition, individual authorship to communal understanding). Engagement with a plurality of competing intellectual frameworks disrupts this cycle by encouraging reflexivity, and surfaces invisible biases into acknowledged perspectives that can be critically examined and addressed.[131] Without a pluralist engagement, citations may be diversified while leaving intact "quality" as an epistemic gatekeeper that systematically excludes non-traditional modes of legal knowledge from serious consideration.[132]

D. Some Limitations

Yet acknowledging pluralism's analytical strengths also requires confronting its practical limitations. The most pressing challenge concerns selectivity: given finite time and resources, judges cannot engage with every intellectual tradition. Which teachings merit consideration? Would pluralism require judges to entertain extreme or fringe positions simply because they exist? This reality-versus-ideal conundrum highlights pluralism's operational difficulty. Moreover, if only one or two teachings exist on a particular issue, must they be dismissed as insufficiently plural?

[128] SPAIN BRADLEY, *supra* note 7, at 113 n. 7; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001); GLEIDER I. HERNÁNDEZ, THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION 126 (2014).

[129] Statement by Austria, *supra* note 17, para. 23 (the Austrian delegation "considered that 'the quality of the reasoning' . . . should be regarded as the paramount criterion and should be mentioned first"); *see also* Statement by the United States, *supra* note 17, para. 18.

[130] Thomas A. Schwandt, *Defining "Quality" in Evaluation*, 13 EVALUATION & PROGRAM PLANNING 177, 186 (1990); *see also* Ian F. Shaw, Jennifer C. Greene & Melvin M. Mark, *On Discerning Quality in Evaluation*, *in* THE SAGE HANDBOOK OF EVALUATION (Ian Shaw, Jennifer Greene & Melvin Mark eds., 2006).

[131] SPAIN BRADLEY, *supra* note 7, at 50 (citing Judge Joan Donoghue: "[t]he most important quality for deciding a case is self-reflection because nobody is truly neutral about anything. We bring to an issue whatever set of biases we have. One must question one's initial reactions. The ideal is to be constantly self-reflective and open to understanding the reasons for one's decisions.").

[132] Arunava Banerjee, *Pluralism Performed, Discipline Preserved: The ILC and the Epistemic Limits of Teachings*, INDIAN BLOG OF INT'L L. (June 30, 2025), *at* https://allaboutil.wordpress.com/2025/06/30/ilc-and-the-epistemic-limits-of-teachings.

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These concerns are substantial but not insurmountable. A thorough engagement with all intellectual traditions is likely impossible, yet we should not let the best become the enemy of the good. Even limited pluralist engagement, consulting just a few alternative frameworks, increases one's capacity to recognize the sociological "acculturation" that tends to perpetuate dominant thinking.[133] This epistemic disruption does not require exhaustive coverage but rather a commitment to seeking intellectual diversity. Judge Weeramantry's engagement with some traditions was enough to expose the temporal and geographical limitations embedded in conventional legalist analysis.

A related practical question arises when we move beyond the judicial context. The bulk of international legal work occurs in the offices of state and other legal advisors who must navigate diverse legal questions with limited time and resources. What would pluralist engagement mean for generalist lawyers in thinly-resourced legal offices? At minimum, it would require a conscious effort to move beyond familiar legal commentaries. This need not be unduly onerous: today peer-reviewed international law journals explicitly promote diverse and critical perspectives, offering accessible gateways to pluralist ideas.[134] Consulting such means when determining the applicable law and advising on novel questions can surface alternative framings that might otherwise remain invisible. We acknowledge this involves additional steps, and resource-constrained law users may view such demands skeptically. Yet such additional steps are necessary if we are serious about confronting the diversity deficit in the use of teachings.

Another challenge emerges from pluralism's dialectical nature: it offers not answers but productive tensions between competing frameworks. Judges accustomed to consulting teachings to "uncover" the *lex lata* may find this disappointing. Indeed, this frustration appears palpable in the joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal, in the *Arrest Warrant* case, who observed that the large literature (on universal jurisdiction) the Court consulted contained "vigorous exchanges of views suggesting profound differences of opinion," with no straightforward answers.[135] But this is precisely pluralism's epistemic and dialectical function: this multiplicity of perspectives requires a fundamental shift in expectations, from relying on teachings to "find" definitive answers to using them as repositories of other ways of thinking about, and determining, the applicable law.

Critics might counter that pluralism "ultimately ends in immobilization, since if everything is complex and variable . . . how can one say anything?"[136] If pluralism demands demonstrating engagement with multiple viewpoints, judges might simply avoid teachings

[133] Cesare P.R. Romano, Symposium: The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems, *Deciphering the Grammar of the International Jurisprudential Dialogue*, 41 N.Y.U. J. INT'L L. & POL. 755, 772 (2008); Emanuel Adler & Michael Faubert, *Epistemic Communities of Practice*, *in* CONCEPTUALIZING INTERNATIONAL PRACTICES (Alena Drieschova, Christian Bueger & Ted Hopf eds., 2022).

[134] *See* Ingrid Brunk & Monica Hakimi, *Statement by the Editors-in-Chief of the* American Journal of International Law, 119 AJIL 379 (2025) (noting that the *Journal* endeavors "to promote the study and practice of international law through broad, open, critical, and vigorous debate").

[135] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ Rep. 3, 75, para. 44 (Feb. 14) (joint sep. op., Higgins, Kooijmans & Buergenthal, JJ.).

[136] Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 885 (1988); Alan Freeman, *The Politics of Truth: On Sugarman's "Legality, Ideology and the State,"* 11 AM. B. FOUND. RES. J. 829, 840 (1986).

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(or, at least, explicitly citing them) entirely. Or they may retreat to a more formalistic use of teachings, thereby replicating the very problems—tokenism and superficial diversity—that pluralism seeks to address.

These challenges are real, but they apply equally to all approaches to teachings—what distinguishes pluralism is how it addresses them. The starting point for substantive engagement with teachings does not require a descent into relativism but rather intellectual honesty about the lack of diversity that has shaped "the production and reception of international legal doctrine,"[137] and a genuine commitment to change that. Robert Cover's observation that "a legal interpretation cannot be valid if no one is prepared to live by it"[138] reminds us that pluralism does not seek diversity for its own sake (e.g., seeking out fringe views), but rather aims to produce legal determinations that achieve epistemic justice through broader inclusion.[139] The transformative power lies not in achieving perfect representation but in creating an interpretative space that allows for a disruption of the legalist assumptions that make judges unconsciously privilege familiar legal knowledge.

Achieving this disruption requires a "sensible" approach, one that balances pluralism's promise with practical realities.[140] Thus, while the invocation of pluralism may range from combative to cooperative,[141] we advocate a conciliatory, sensible pluralist engagement with teachings, one carried out through the established "grammar of international law."[142] The need for such a pragmatic approach was also recognized by the feminist judgment rewriters who found that working within formal judicial constraints "sometimes requir[es] compromise" between aspiration and "the reality of its daily application."[143]

V. Conclusion

This Essay examined the ILC's historic acknowledgment that the use of teachings in legal determination suffers from a systemic diversity deficit, and its subsequent invocation of "representativeness" as the remedy. We have argued that this concept admits of varying interpretations. It may be understood narrowly, in a political register, to require citations from various nations and demographic groups. Or it may be understood broadly, in a pluralist register, to demand genuine engagement with different ways of knowing and reasoning about law. Our contention is that the latter interpretation better serves the underlying purpose of addressing the diversity deficit, and we have advanced three interconnected arguments to support that reading.

Both pluralism and representativeness remain complex, overlapping concepts susceptible to formalistic application. Yet pluralism provides, we argue, a more direct pathway to surfacing the assumptions embedded within legalism. It has the capacity to disrupt epistemic boundaries and "denaturalize" assumptions, mediate between law and lived experience, and

[137] 2025 ILC Report, *supra* note 1, para. 312.
[138] Cover, *supra* note 28, at 44.
[139] Miranda Fricker, Epistemic Injustice: Power and the Ethics of Knowing 4 (2011).
[140] To echo the words of the special rapporteur. First Report on Subsidiary Means, *supra* note 2, para. 330.
[141] Geoffrey Swenson, *Legal Pluralism in Theory and Practice*, 20 Int'l Stud. Rev. 438 (2018).
[142] Koskenniemi, *supra* note 28, at 615.
[143] Feminist Judgments in International Law, *supra* note 114, at vii, 3.

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challenge sociological conditioning, and may thus enable, as well as encourage, judges to recognize how their theoretical frameworks shape their thinking about legal determination.

With the ILC's second reading of its draft conclusions envisaged for 2027,[144] it is hoped that this Essay could offer some reflections to assist members of the ILC, states, and other stakeholders in further developing their observations on the subject. In terms of operationalizing the insights developed here, we strongly propose applying a broader, purposive interpretation to the language of "representativeness" in the ILC's draft conclusions and, ideally, including an express reference to pluralism in the draft conclusions or the associated commentaries.

This purposive approach would reconfigure "representativeness" from a potentially surface-level exercise in promoting diversity into genuine epistemological engagement. By enabling judges to access diverse ways of knowing law, teachings could fulfill their original function—serving as subsidiary means for the determination of rules of law—while also progressively remedying international law's legitimacy deficit by strengthening epistemic diversity, and justice, in a plural world.

[144] Third Report on Subsidiary Means, *supra* note 29, para. 431.

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