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International Law Commission

Seventy-fourth session (second part)

Provisional summary record of the 3650th meeting

Held at the Palais des Nations, Geneva, on Friday, 28 July 2023, at 10 a.m.

Contents

Present:

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

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

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

The Chair said that, although the Commission had begun at the preceding meeting to consider chapter VI of its draft report, which concerned the topic "Prevention and repression of piracy and armed robbery at sea", for technical reasons it had been decided that the Commission should suspend its consideration of that chapter and begin its consideration of chapter VII. The secretariat had informed members of that change via email.

Mr. Patel said that he would like to hear more about the technical reasons that had prompted the Bureau's decision to suspend the consideration of chapter VI at the last minute. Such an unexpected change in schedule was inconvenient, as members might not necessarily be ready to consider an entirely different chapter of the draft report at such short notice. He was also concerned that the Commission was rushing through its work without taking the time to study the text properly or to engage in high-quality debate. He urged the Bureau to adhere to the Commission's rules of procedure, as failing to do so undermined its credibility and that of the Commission as a whole.

The Chair said that the consideration of the Commission's draft report was a challenging exercise that required a balance to be struck between high-quality debate and efficient time management. The different chapters of the draft report had already been available for some time. Any members who felt that the Commission was rushing through its work should, naturally, voice their concerns. The Commission had already shown flexibility on a few occasions by revisiting paragraphs that members had believed to have been adopted too quickly.

The Commission's programme of work had always allowed a certain degree of flexibility to enable the most efficient use to be made of the time available. The decision to suspend the consideration of chapter VI, which had been taken in consultation with the Special Rapporteur, had been prompted by the complexity of the discussion and the difficulty of recording and keeping track of the amendments that were being proposed, simultaneously, in English and French. The suspension would give the Bureau time to devise a more user-friendly procedure for considering and adopting that chapter. Members had been informed of the change of topic as promptly as possible.

Ms. Oral said that the Chair was to be commended for her excellent management of the discussions on the Commission's draft report thus far, which were by no means straightforward on account of the many comments and proposals being made. Nonetheless, all members had been given the opportunity to be heard. She rejected the notion that the Commission was rushing through its work. Members were, of course, free to raise any legitimate concerns that they might have about the conduct of proceedings, provided that they did so in a respectful manner. She trusted that the Bureau would not have decided to suspend the consideration of chapter VI if doing so had not been absolutely necessary.

Mr. Cissé, speaking as Special Rapporteur for the topic "Prevention and repression of piracy and armed robbery at sea", said that he had been duly consulted about and had accepted the decision to suspend the consideration of chapter VI for technical reasons, as doing so would enable him to prepare an improved text that reflected all the comments made by members. The Commission had taken that course of action numerous times in the past to allow informal consultations to take place.

Draft report of the Commission on the work of its seventy-fourth session (*continued*)

Chapter VII. Subsidiary means for the determination of rules of international law (A/CN.4/L.979 and A/CN.4/L.979/Add.1)

The Chair invited the Commission to consider chapter VII of the draft report, as contained in document A/CN.4/L.979. The Commission had already provisionally adopted draft conclusions 1 to 3, which were set out, along with the related commentaries, in the addendum to chapter VII (A/CN.4/L.979/Add.1). The summary of the debate contained in document A/CN.4/L.979 therefore focused mainly on draft conclusions 4 and 5, which had

been provisionally adopted by the Drafting Committee during the second part of the seventy-fourth session.

Mr. Jalloh (Special Rapporteur) said that, as the Drafting Committee had completed its work on draft conclusions 1 to 3 just before the end of the first part of the seventy-fourth session, he had been able to start drafting the accompanying commentaries during the intersessional period. The Commission had not considered draft conclusions 4 and 5, as provisionally adopted by the Drafting Committee, until the second part of the session, meaning that work on the related commentaries had not yet begun. The commentaries in question were expected to be available in 2024.

He was grateful to Mr. Forteau for having shared with him, ahead of time, some drafting suggestions aimed at clarifying the text and helping readers who might not be familiar with the work of the Commission to follow the information presented in the chapter. He invited other members to do likewise.

The Chair said that, when proposing amendments, members should be mindful of the fact that the sections containing the introduction and summary of the plenary debate on the topic had been prepared by the secretariat on the basis of the Special Rapporteur's introduction of his first report and the ensuing debate, and were intended to provide factual information.

A. Introduction

Paragraph 1

Mr. Jalloh (Special Rapporteur) proposed, for the sake of consistency, that the date "(2023)" should be inserted after the words "seventy-fourth session" and that "(2024)" should be inserted after the words "seventy-fifth session".

Ms. Okowa said that she found the exact timeline for the preparation by the secretariat of the two memorandums requested by the Commission to be unclear. The Special Rapporteur should perhaps reformulate the second sentence of the paragraph to clarify at which session those requests had been made and at which session the secretariat was expected to deliver the memorandums in question.

The Chair said that such memorandums were normally prepared for the session following the session at which they had been requested. The second sentence was factually accurate, given that, at its seventy-third session, the Commission had requested the secretariat to prepare two memorandums: one in time for its seventy-fourth session and a second in time for its seventy-fifth session.

Mr. Forteau proposed, for the sake of clarity, that the words "to be submitted" should be added before "for the seventy-fourth session" and "for the seventy-fifth session" in the second sentence.

Paragraph 1, as amended, was adopted.

Paragraph 2

Paragraph 2 was adopted.

B. Consideration of the topic at the present session

Paragraph 3

Paragraph 3 was adopted.

Paragraph 4

Mr. Forteau proposed that the words "of international law" should be inserted after "the nature and function of sources" in the second sentence of the paragraph.

Mr. Zagaynov suggested that, in the third sentence, the phrase "and additional subsidiary means" should be revised to read "and possible additional subsidiary means". It

was important to reflect the fact that there was still some uncertainty over what constituted additional subsidiary means.

Ms. Mangklatanakul proposed that the phrase "and its status under customary international law" should be deleted from the end of the second sentence.

Mr. Jalloh (Special Rapporteur) said that the phrase in question should be retained, as the status of Article 38 (1) (*d*) of the Statute of the International Court of Justice had been very much a part of the consideration of the topic at the Commission's seventy-fourth session.

The Chair said she took it that the Commission wished to adopt the paragraph as amended by Mr. Forteau and Mr. Zagaynov.

It was so decided.

Paragraph 4, as amended, was adopted.

Paragraph 5

Ms. Ridings said that, while she understood that it was standard practice to reproduce the text of non-agreed draft outputs in a footnote in the annual report, she wondered whether it was necessary to do so in the case at hand, since three of the five draft conclusions had already been provisionally adopted by the Commission. To her mind, footnote 3 was superfluous and could be deleted.

Mr. Forteau said that footnote 3 could be deleted from paragraph 5 if the text of draft conclusions 4 and 5 was retained in footnote 4 or, if paragraph 6 was subsequently amended, reproduced in a new footnote.

Mr. Jalloh (Special Rapporteur) said that the standard practice of reproducing the text of both agreed and non-agreed draft outputs in a footnote was intended to be helpful to readers and should be followed until such time as the Commission decided to update its working methods. Footnote 3 should therefore be retained.

Paragraph 5 was adopted.

Paragraphs 6 and 7

Mr. Jalloh said that the language "The Commission, at its … meeting, on … 2023, adopted the commentaries to draft conclusions 1 to 3, as provisionally adopted at the current session (see sect. C.2 below)", which was essentially the language of paragraph 7, should be placed after the first sentence of paragraph 6. The current second sentence of paragraph 6 should then become the new first sentence of paragraph 7, followed by a second sentence that read: "The commentaries to these two draft conclusions are expected to be adopted during the next session (see *infra* paras. 42–48 for the summary of the debate on these two draft conclusions)." The secretariat would insert the appropriate meeting numbers in paragraph 6.

Mr. Forteau said that, in the French version of footnote 4, the word "*également*" was still missing from the second sentence of draft conclusion 5, which should read "*une attention particulière devrait également être portée*".

Paragraphs 6 and 7, as amended, were adopted.

1. Introduction by the Special Rapporteur of the first report

Paragraph 8

Ms. Okowa said that, firstly, the statement at the end of the second sentence to the effect that subsidiary means had been included in Article 38 of the Statute of the International Court of Justice a century previously was factually inaccurate and should be corrected. Either a reference to the Statute of the Permanent Court of International Justice should be inserted or the exact number of years since the adoption of the Statute of the International Court of Justice should be specified.

Secondly, she failed to see the logical connection between the two parts of the fourth sentence. While it was true that Article 38 of the Statute of the International Court of Justice

was “an applicable law provision directed at the judges of the Court”, that was not the reason for its recognition as an authoritative statement of the sources of international law. The sentence should be reworded to read: “Although Article 38 of the Statute of the International Court of Justice, which was the basis of the topic, was an applicable law provision directed at judges, it is now also recognized by States, practitioners and scholars as the most authoritative statement of sources of international law.”

Lastly, a footnote could usefully be inserted after the mention of “customary international law” near the beginning of the last sentence to support the assertion that Article 38 was considered a settled part of customary international law.

Mr. Patel said that he wondered whether it would be more appropriate to refer to “Article 38 (1) (*d*)” instead of simply “Article 38” throughout the paragraph. The language “directed at the judges of the Court” struck him as slightly awkward and in need of improvement. It would indeed be useful to include a footnote after the reference to “customary international law” in the last sentence. He questioned the choice of the word “guidance” in the last sentence. He failed to understand why the Commission would need to provide guidance on subsidiary means when, as just mentioned, Article 38 (1) (*d*) of the Statute of the International Court of Justice was considered a settled part of customary international law and the Commission was in fact producing conclusions, not guidance, on subsidiary means for the determination of rules of international law.

Mr. Reinisch, speaking on a point of order, said that his colleagues’ comments would have been valuable if the Commission had been dealing with the commentary, which expressed what the Commission wished to state as a body. However, paragraph 8 contained an account of the introductory statement made by the Special Rapporteur in relation to his first report on subsidiary means for the determination of rules of international law (A/CN.4/760). Unless the Commission considered that paragraph 8 did not accurately reflect that introduction, it should give due deference to the wording of the paragraph as it was drafted.

Mr. Fathalla, also speaking on a point of order, said that he agreed with Mr. Reinisch. Responsibility for the introductory statement lay with the Special Rapporteur. The Commission could not therefore make changes to the account of what the Special Rapporteur had said.

The Chair said that the section entitled “Introduction by the Special Rapporteur of the first report”, contained in paragraphs 8 to 25, was based on the statement he had made to introduce the report. If there were mistakes or sentences that did not make sense, members could certainly make proposals. However, they could not do so in relation to mere differences of opinion or disagreements with the way in which points had been made. It was not the Commission’s practice to negotiate a text that reflected the Special Rapporteur’s introductory statement. Questions could be raised, however, in the discussion on the summary of the debate and whether it adequately captured the positions expressed.

Mr. Jalloh (Special Rapporteur) said that, if there were obvious errors, he would be grateful to colleagues for drawing the Commission’s attention to them. He wished to continue along the lines suggested by the Chair, as that did indeed reflect the Commission’s practice. Similarly, the practice with respect to the summary of the debate would be to retain the text as it stood, especially given the current time constraints.

In the light of the comments made, he proposed that, in the second sentence of paragraph 8, the words “a century after their inclusion in Article 38” should be replaced with the words “long after their inclusion in Article 38”.

Paragraph 8, as amended, was adopted.

Paragraph 9

Mr. Patel said that he wondered whether the 24 delegations in the Sixth Committee that had supported the consideration of the topic “Subsidiary means for the determination of rules of international law” should be mentioned by name, as there was some sensitivity among States when it came to having their views duly reflected.

Mr. Jalloh (Special Rapporteur) said that, while he agreed on the importance of taking the views of States into account, it was not the Commission's practice to list all the delegations that had said they were in favour of considering the topic. However, chapter II of his first report, which contained a summary of the 2021 and 2022 debates in the General Assembly, expressly mentioned the States that had expressed support for the Commission's decision to consider the topic, in addition to those that had seemed cautious about that decision.

Paragraph 9 was adopted with minor drafting changes.

Paragraphs 10 to 14

Paragraphs 10 to 14 were adopted.

Paragraph 15

Mr. Forteau proposed that the words "of the Commission" should be inserted after the words "in all the official languages" at the end of the last sentence.

Paragraph 15, as amended, was adopted.

Paragraphs 16 to 25

Paragraphs 16 to 25 were adopted.

2. Summary of the debate

(a) General comments

Paragraph 26

Ms. Ridings said that, in the last sentence, the word "broadly" should be deleted from the phrase "They broadly agreed with the Special Rapporteur that subsidiary means were not sources of international law", as no one had disagreed with him on that point, and the word "broadly" could suggest that there had been disagreement.

Paragraph 26, as amended, was adopted.

Paragraph 27

Ms. Ridings said that the second sentence should be amended to take account of the extensive discussion of the functions of subsidiary means, to read: "As such, it was important for the Commission to elaborate the functions of subsidiary means and to define what 'determination' of rules meant." The Special Rapporteur had indicated that the functions of subsidiary means would be dealt with in future draft conclusions.

Paragraph 27, as amended, was adopted.

Paragraph 28

Mr. Paparinskis, referring to the first sentence concerning the terminology used to describe the functions of subsidiary means, proposed that the phrase "in French and Spanish" should be revised either in positive terms to read "in Arabic, Chinese, French, Russian and Spanish" or in negative terms to read "in authentic languages other than English".

Mr. Ouazzani Chahdi said that he supported Mr. Paparinskis' proposal: the words "in French and Spanish" should be replaced with "in all the official languages"; alternatively, all the official languages could be listed.

Mr. Fife recalled that Arabic had been added as an official language in the 1970s and thus was not an authentic language of the Statute. He supported the proposal to refer to all the official languages other than English, as that would cover all those that were relevant without emphasizing any difference between the authentic and the other languages in terms of treaty law.

Mr. Forteau said that the proposals did not correspond to the meaning of the paragraph. The general thrust of the paragraph was that some languages – French and

Spanish, and perhaps others – expressly referred to the auxiliary function of subsidiary means, contrary to the English term "subsidiary", which did not necessarily imply "auxiliary". It was therefore necessary to determine whether the Arabic, Chinese and Russian versions expressly referred to the auxiliary function of subsidiary means. If so, they should be mentioned; if not, they should not be included.

Mr. Zagaynov said that, like the French and Spanish versions, the Russian text expressly referred to the auxiliary function of subsidiary means.

Mr. Ouazzani Chahdi said that the same was true of the Arabic text and that a language group had met to resolve issues relating to the Arabic translation of terms such as "teachings" [*doctrine*] and "means" [*moyens*], which had been poorly translated in the Arabic version of the Statute. Although the translation of the Statute into Arabic could not be modified, the terms could be explained in a manner that would be helpful to judges. He would therefore welcome the inclusion of a reference to the Arabic language in the paragraph.

Mr. Huang said that, in Chinese, the same word was used for "subsidiary" and "auxiliary".

Mr. Jalloh (Special Rapporteur) said that the discussion of terminology had centred on the French and Spanish versions; the paragraph under consideration contained a summary of that discussion. He agreed with the proposal to replace "in French and Spanish" with "in all the official languages".

Mr. Oyarzábal said that he was not in favour of drawing distinctions between the different official languages, let alone between English and the other languages. As there were in fact differences in the interpretation of "subsidiary" in the various languages, however, he agreed with Mr. Forteau on the need to include the word "expressly" before the phrase "referred to its auxiliary function" if that was what was intended. He supported the Special Rapporteur's proposal.

Mr. Forteau said that, as the paragraph was part of a summary of the discussion, it was necessary to retain the text as it stood, except that the word "expressly" should be added before "referred to". The beginning of the first sentence would thus read: "With respect to the terminology, some members expressed the view that it would be important to recall that the term used in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice in French and Spanish expressly referred to the auxiliary function of such materials".

Mr. Fife said that the Commission would revert to the discussion of the meaning of the term "subsidiary" in greater detail in relation to draft conclusion 1. He would prefer to avoid creating the impression that there was a contradiction between the English and the other versions. The Commission had determined that the original meaning of the term "subsidiary" in English was "auxiliary" or "ancillary". There was ample evidence that the various language versions could be reconciled, in keeping with the Vienna Convention on the Law of Treaties, without creating a conflict. The added value of regarding the various language versions as being equally authentic was obvious, especially since the French and Spanish versions focused explicitly on the auxiliary function. That was not true of the English word "subsidiary", which could have several possible meanings.

Mr. Grossman Guiloff said that he supported Mr. Forteau's proposal, for the reasons set forth by Mr. Oyarzábal and Mr. Fife.

Paragraph 28, as amended, was adopted.

Paragraph 29

Mr. Patel, recalling Ms. Ridings's earlier comments, proposed that, in the first sentence, the qualifier "broad" should be deleted.

Paragraph 29, as amended, was adopted.

Paragraph 30

Mr. Forteau, noting that a number of members had been somewhat cautious in their acceptance of the existence of other forms of subsidiary means, proposed that, in the first

sentence, the term "*dans l'ensemble*" [broadly] should be inserted before "*convenus*" [agreed], especially since that formula was used subsequently in paragraph 33.

Mr. Paparinskis said he supported that suggestion, which was in line with Ms. Ridings's earlier proposal. In the final sentence, it was unclear whether members had cautioned against two propositions, or solely against the first proposition – the undue expansion of the category of subsidiary means – with the second half of the sentence expressing the approach that they would prefer to take. If the latter was the intended meaning, for clarity, the word "or" should be replaced with "preferring rather to consider".

Ms. Mangklatanakul recalled that the possible existence of other categories of subsidiary means had been debated extensively in the Drafting Committee and that, irrespective of their position on whether other categories did or did not exist, the members had agreed that the substance of the debate should be reflected in the report with a view to the Commission's returning to the subject at a future date. To better reflect the deliberations, she proposed that the start of the first sentence should be amended to read "Some members were of the view that".

The Chair reminded the members that the section of the report under discussion reflected the debate in plenary meetings only, not the debate in the Drafting Committee.

Ms. Mangklatanakul, thanking the Chair for her clarification, said that, as the paragraph reflected only the plenary debate, an amendment along the lines she had suggested was all the more important in order to avoid prejudging what should or should not be considered subsidiary means.

Mr. Forteau said that, to reflect the caution demonstrated by some members, it would be sufficient to add the word "broadly" or "generally" before "agreed" at the start of the first sentence and to insert the word "necessarily" before "exhaustive" at the end of the sentence.

Mr. Oyarzábal said that Ms. Mangklatanakul had made a valid point and suggested that a more accurate formulation for the start of the first sentence might be "There was support for the view that".

Mr. Fife said that, since religious law was not a subject that had been discussed extensively during the plenary debate, in contrast to unilateral acts, he was concerned that the fourth sentence could imply that the two subjects had been accorded equal attention. He suggested, therefore, that the phrase "as well as religious law" should be deleted.

Mr. Fathalla said that his recollection was that Ms. Okowa had been the only member of the Commission to have referred to religious law during the plenary debate. He wondered whether it was the Commission's usual practice to reflect every point raised, even if by one member only.

Mr. Jalloh (Special Rapporteur) said that issues highlighted by one member were generally reflected briefly but should not be accorded detailed attention. Since the relevance of religious law had not been debated heavily, a simple mention that the issue had been raised was sufficient.

Ms. Oral said she doubted that every comment or proposal regarding possible forms of subsidiary means that had been raised during the plenary debate was captured in the report. If that was indeed the case, she would understand the inclusion of the reference to religious law. If not, she would be in favour of deleting the reference.

Mr. Ouazzani Chahdi said that members often made observations or proposals that were not reflected in summaries of the debate. Only in the case of the Sixth Committee was it perhaps correct to state that all the issues raised were reflected in the summary, including those mentioned by only one delegation. With regard to the text under discussion, he believed that Ms. Okowa had in fact referred to sharia, not religious law. In any case, he was firmly in favour of the phrase's deletion.

Mr. Patel said that he had also mentioned the importance of religious law during the debate and would prefer for the reference to be retained.

Mr. Jalloh (Special Rapporteur) said that, rather than addressing each specific point directly, he wished to propose four minor adjustments that should resolve all the concerns

raised and allow paragraph 30 to be adopted by consensus. The first sentence should begin with the words “Members generally agreed that” and the word “necessarily” should be inserted before the word “exhaustive” at the end of the sentence. In the middle of the fourth sentence, the phrase “as well as religious law” should be deleted. Lastly, in the final sentence, after the first comma, the word “or” should be replaced with “suggesting instead”.

Paragraph 30, as amended, was adopted.

Paragraph 31

Paragraph 31 was adopted.

Paragraph 32

Mr. Fathalla proposed that, in the final sentence, the words “and decisions” should be inserted after the word “resolutions”, the words “and bodies” should be inserted after “organizations” and the words “with a case-by-case analysis” should be deleted.

Paragraph 32, as amended, was adopted.

(i) Scope and outcome of the topic

Paragraph 33

Mr. Forteau said that, in the first sentence, the meaning of the word “additional” in the phrase “additional subsidiary means” was unclear. He therefore wished to propose that the last part of the sentence should be amended to read “*les moyens auxiliaires de détermination des règles du droit international autres que les décisions judiciaires et la doctrine*” [subsidiary means for the determination of rules of international law other than judicial decisions and teachings].

He also wished to propose the addition of a new sentence at the end of the paragraph, which would read: “*Certains membres ont toutefois exprimé des doutes quant à l’utilisation des résolutions des organisations internationales en tant que moyens auxiliaires, car elles relèvent plutôt du processus de formation du droit internationale*” [Some members, however, expressed doubts about the use of resolutions of international organizations as subsidiary means because they pertain rather to the process of formation of international law].

Mr. Fathalla said that the reference at the end of the third sentence of the paragraph to the “binding nature” of unilateral acts was unclear. Unilateral acts were of course not binding on all States, so it should be clarified on whom such acts were binding.

Mr. Patel said that the phrase “Frequently mentioned were certain resolutions and decisions of international organizations” in the final sentence of the paragraph was unclear and should be reworded.

Mr. Forteau said that the phrase “unilateral acts should not be considered as subsidiary means, as they would have a binding nature” in the third sentence should be amended to read “unilateral acts of States should not be considered as subsidiary means insofar as they have a binding nature”.

Mr. Zagaynov said that he supported the insertion of the additional sentence proposed by Mr. Forteau.

Mr. Jalloh (Special Rapporteur) said it was clear that “additional subsidiary means” meant subsidiary means other than those listed in Article 38 (1) (*d*) of the Statute of the International Court of Justice, namely judicial decisions and teachings. Moreover, the phrase “Additional subsidiary means for the determination of rules of international law” was the title of chapter IX of his first report (A/CN.4/760). For the sake of coherence, it would be best to retain the text as proposed.

In response to the concerns raised by some members about the use of the word “binding” in relation to unilateral acts, he wished to propose that, in the phrase in question, “unilateral acts” should be amended to read “unilateral acts of States capable of creating binding legal obligations”. That amendment would obviate the need to reword the final clause

of the sentence, namely the part that read “as they would have a binding nature”, which would be retained.

Lastly, he was not opposed to Mr. Forteau’s proposal to insert a new sentence at the end of the paragraph. He proposed, however, that it should read: “Some members, however, expressed doubts as to the use of resolutions from international organizations as subsidiary means.”

Mr. Fife said that the additional sentence proposed by Mr. Forteau should be adopted in full. The final part of the proposed sentence, which the Special Rapporteur had not taken up, helpfully clarified that the doubts expressed by some members had their basis in the fact that the resolutions of international organizations played a role in the process of formation of international law and raised the question of whether such resolutions in fact had a different role from that of subsidiary means in the context of the determination of rules of international law.

Mr. Forteau said that the clarification provided in the final part of his proposed new sentence was particularly important in the light of the fact that paragraph 62 of the report raised the possibility that the resolutions of international organizations could have a “dual function” as subsidiary means and elements in the process of formation of international law.

Mr. Grossman Guiloff said it was important to make clear that while the resolutions of international organizations could play a role in the formation of international law, such resolutions *per se* were not a source of international law.

The Chair proposed that the Commission should suspend its consideration of paragraph 33 to allow the Special Rapporteur time to prepare a revised version of the text in the light of the suggestions made by members.

It was so decided.

Paragraph 33 was left in abeyance.

Paragraphs 34 and 35

Paragraphs 34 and 35 were adopted.

Paragraph 36

Mr. Savadogo proposed that, in the fifth sentence of the paragraph, the words “of international law” should be inserted after the word “fragmentation”.

Paragraph 36, as amended, was adopted with a minor drafting change to the French text.

Paragraph 37

Paragraph 37 was adopted.

Paragraph 38

Mr. Patel proposed that, in the final sentence of the paragraph, the words “and appreciation” should be inserted after the phrase “Several members expressed support”.

Paragraph 38, as amended, was adopted.

(ii) Methodology

Paragraphs 39 and 40

Paragraphs 39 and 40 were adopted.

(b) Draft conclusions 1 to 3

Paragraph 41

Paragraph 41 was adopted.

(c) Draft conclusion 4

Paragraph 42

Mr. Jalloh (Special Rapporteur) said that, for the sake of clarity, the subject of draft conclusion 4 should be clearly indicated in the first sentence of the paragraph. To that end, he proposed that the phrase "which concerns decisions of courts and tribunals" should be inserted after the first clause of the first sentence, which read "With respect to draft conclusion 4". He also wished to propose, again for the sake of clarity, the addition of a footnote after the word "tribunals"; the new footnote would read: "See *supra* footnote 3 for the initial proposal of the Special Rapporteur and footnote 4 for the text provisionally adopted by the Drafting Committee after the plenary debate."

Paragraph 42, as amended and with the addition of a footnote, was adopted.

Paragraph 43

Ms. Okowa said that, in the first sentence of the paragraph, the term "*stare decisis*" in the phrase "no formal system of *stare decisis* existed in international law" should be translated into English. With that change, the phrase would read "no formal system of judicial precedent existed in international law".

Mr. Fife said that he was concerned about the use of the word "formal" in that phrase, since it implied that there might be some type of system of precedent in international law. The word should be deleted.

Mr. Akande said that it was not clear whether the draft conclusions referred to in paragraph 43 were the draft conclusions as provisionally adopted or the draft conclusions as proposed by the Special Rapporteur in his first report. It would be helpful to clarify the reference by clearly indicating that the draft conclusions being referred to were those that had been proposed by the Special Rapporteur in the first report.

The Chair said that the paragraph summarized the plenary debate, in which the Commission had been discussing the draft conclusions as proposed by the Special Rapporteur in his report.

Mr. Mingashang said that the Latin terms and phrases used in the Commission's work were also used in the legal texts of many countries and were broadly understood. Unless there was a compelling reason to replace the term "*stare decisis*", he was in favour of retaining it.

Ms. Okowa said that while she agreed that the term "*stare decisis*" was used in the legal texts of some jurisdictions, the term simply meant "judicial precedent". It was preferable to use an equivalent English term that was easily understood by persons who were unfamiliar with Latin. While Latin terms and phrases were suitable for academic writings, the Commission's work should be accessible to a wide audience.

Mr. Reinisch said that it was unclear whether the term "legal precedent" meant the same thing as the doctrine of *stare decisis*. "Legal precedent" could refer to the practice of looking to previous legal decisions that were not necessarily binding but had a legally persuasive character. "*Stare decisis*", however, much like the concept of "*quieta non movere*", was a doctrine according to which there should be no deviation from previous decisions. The term had a very precise meaning that was understood in many languages. He therefore had doubts about whether it should be replaced with another term.

Mr. Forteau, supported by **Ms. Okowa**, said that the French text of the paragraph was much clearer than the English text on the point under discussion. It stated that "*il n'existait en droit international aucune règle du précédent (*stare decisis*)*". The English version should be aligned with the French.

Mr. Patel said that there was not a single occurrence of the term "*stare decisis*" in the case law of the International Court of Justice from 2001 to 2010. The word "precedent", however, was used.

Mr. Jalloh (Special Rapporteur), responding to the point raised by Mr. Akande, said that paragraph 43 should be read in the light of paragraph 41, which indicated that draft conclusions 1 to 3 had been provisionally adopted with commentaries. The headings of section 2 (c) and (d), namely "Draft conclusion 4" and "Draft conclusion 5", respectively, made it clear that the paragraphs that came under those subsections addressed those two draft conclusions, which had remained pending.

Mr. Ouazzani Chahdi said that, on page 48 of its recent report on jurisprudence and precedents in international law, the Institute of International Law stated that "*Dans les systèmes de common law, le concept de 'précédent' est synonyme de '*stare decisis*'*" [in common-law systems, the concept of "precedent" is synonymous with "*stare decisis*"].

The Chair said that if the first sentence of the English text of paragraph 43 was aligned with the corresponding sentence in the French text, omitting the word "formal", which would also have to be removed from the French text, the sentence would read: "While it was agreed that no system of judicial precedent (*stare decisis*) existed in international law, there was nonetheless value in consistency and predictability."

Mr. Akande said that it was important, for the sake of clarity, to insert the word "binding" before "judicial precedent". However, even with that amendment, the sentence was not accurate. It was not true that there was no *stare decisis* or rule of precedent in international law; in fact, there were some systems of international law, such as the law of international criminal tribunals and the World Trade Organization, that did follow the rule of precedent.

Mr. Forteau, supported by **Mr. Fife**, said that it was difficult to sum up the Commission's plenary debate on the subject of *stare decisis* in a single sentence, given that diverse views had been expressed in that regard. He shared Mr. Akande's concern about the first sentence, which was not entirely accurate in relation to certain areas of international law, such as the law of international administrative tribunals. He therefore wished to suggest that the word "general" should be inserted before the words "international law".

Ms. Okowa said that there was precedent in international law; it was not, however, formal or binding. That was why the word "formal" had been proposed by the Special Rapporteur in his initial formulation. In her view, "formal" and "binding" were synonyms. She would prefer to amend the first clause of the sentence to read "While it was agreed that, in general, there was no formal or binding system of precedent in international law".

Mr. Nesi said that, in some contexts, the use of Latin terms made the text easier to understand. The term "*stare decisis*" was understood by all. He was therefore in favour of retaining the sentence as originally proposed, albeit with the omission of the word "formal".

The Chair said that the Commission would resume its consideration of paragraph 43 at its next meeting.

Chapter VIII. Sea-level rise in relation to international law (A/CN.4/L.980)

The Chair said that she wished to acknowledge the presence at the meeting of members of the Permanent Mission of the Marshall Islands to the United Nations Office and other international organizations in Geneva, including the Deputy Permanent Representative.

Mr. Aurescu, speaking as Co-Chair of the Study Group on sea-level rise in relation to international law, introduced the report of the Study Group on its consideration of the topic at the current session and on its future work (A/CN.4/L.980). The report had been adopted by the Study Group on a paragraph-by-paragraph basis between 3 and 5 July 2023.

In accordance with the agreed programme of work, the focus of the Study Group's work in 2023 had been issues related to the law of the sea. The Co-Chairs had prepared an additional paper (A/CN.4/761) as a follow-up to the first issues paper issued in 2020 (A/CN.4/740). The additional paper addressed specific issues that had been proposed for consideration by members of the Study Group in 2021 and by Member States in 2021 and 2022. It was complemented by a selected bibliography (A/CN.4/761/Add.1) and was intended to be read in conjunction with the first issues paper.

The Study Group's work had begun with seven meetings held during the first part of the session, between 26 April and 4 May 2023. There had been a substantive exchange of

views on the additional paper, with a focus on the preliminary observations outlined by the Co-Chairs in respect of each principle, issue or concept addressed and any other matters related to the subtopics under consideration.

The second phase of the topic's consideration had taken place at the start of the second part of the session, in five meetings held from 3 to 5 July 2023. At those meetings, the Study Group had considered the draft interim report, which reflected the Group's rich debate on the additional paper. It had been adopted after amendments had been incorporated to reflect the comments and proposals received and after the Group had given further consideration to its future work.

In 2024, the Study Group would revert to the subtopics of statehood and the protection of persons affected by sea-level rise. In 2025, it would seek to finalize a substantive report on the topic as a whole by consolidating the results of the work undertaken.

The Chair said that the Commission would adopt chapter VIII of its draft report at a subsequent meeting. At the current juncture, she took it that the Commission wished to take note of the report of the Study Group.

It was so decided.

The meeting rose at 1.10 p.m.