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International Law Commission

Seventy-fourth session (second part)

Provisional summary record of the 3651st meeting

Held at the Palais des Nations, Geneva, on Monday, 31 July 2023, at 3 p.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. Galindo
	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 3.15 p.m.

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

Chapter VI. Prevention and repression of piracy and armed robbery at sea (A/CN.4/L.978 and A/CN.4/L.978/Add.1) (*continued*)

The Chair invited the Commission to resume its consideration of chapter VI (C) (2) of the draft report, as contained in document A/CN.4/L.978/Add.1, beginning with the commentary to draft article 1. She noted that, earlier that day, the Special Rapporteur had circulated an informal document to members with proposed revisions to the text contained in document A/CN.4/L.978/Add.1 and the footnotes thereto and had subsequently met informally with a group of members to discuss a series of potential further amendments, which Ms. Ridings would present to the plenary on behalf of the Special Rapporteur and those members.

Commentary to draft article 1 (Scope)

The Chair said that, in the informal document circulated to members, the Special Rapporteur proposed that the text of the commentary to draft article 1, as contained in document A/CN.4/L.978/Add.1, should be replaced in its entirety with the following:

(1) Draft article 1 defines the scope of the present draft articles, indicating that they apply to piracy and armed robbery at sea. The provision should be read together with draft articles 2 and 3 which define these two crimes and serve to delimit the scope of the topic.

(2) The present draft articles are broader in scope than the 1982 United Nations Convention on the Law of the Sea (UNCLOS). While UNCLOS only refers specifically to piracy, the present draft articles also include "armed robbery at sea", a crime that is not as such referred to in UNCLOS. For the purposes of the draft articles and commentary, reference to piracy means maritime piracy.

(3) The aim of the work on the present topic is to examine two crimes at sea, piracy and armed robbery at sea. The topic of piracy will be addressed principally within the framework of UNCLOS, taking into account existing applicable international law, regional approaches, extensive state practice, and legislative and judicial practice under national legal systems, especially for armed robbery at sea that is not addressed under UNCLOS. The framework of regional and subregional organizations involved in combating maritime piracy and armed robbery at sea will provide useful illustrations of the implementation of international law in this area.

(4) The present draft articles apply to the "prevention" and "repression" of piracy and armed robbery at sea. "Prevention" is the act of stopping something from happening or arising, while "repression" is the act of subduing or suppressing something that has arisen. The United Nations Security Council has highlighted the need to establish legal frameworks for the prevention and repression of piracy and armed robbery at sea in the Gulf of Guinea, and for the repression of piracy in Somalia.

(5) The term "repression" is used in article 100 of the 1982 UNCLOS which requires all States to "cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State". This provision is identical to article 14 of the 1958 Convention on the High Seas, which in turn was based on article 38 of the Commission's 1956 draft articles concerning the law of the sea, with commentaries. "Repression" is broader than the term "punishment", for example as used in the draft articles on prevention and punishment of crimes against humanity, adopted by the Commission at its seventy-first session. The obligation to take measures to prevent and punish is a more specific aspect of the wider concept of "repression".

Ms. Ridings said that a new sentence should be added to the end of paragraph (2), reading as follows: "The work on the present topic is not to duplicate existing frameworks and academic studies, but instead aims to clarify and build upon them as well as to identify new issues of common concern."

The commentary to draft article 1, as amended, was adopted.

Commentary to draft article 2 (Definition of piracy)

The Chair said that, in the informal document circulated to members, the Special Rapporteur proposed that the text of the commentary to draft article 2, as contained in document A/CN.4/L.978/Add.1, should be replaced in its entirety with the following:

Subparagraph (1)

(1) Draft article 2 (1) sets out a definition of acts of piracy for the purpose of the present draft articles. The definition in paragraph 1 is based on article 101 of the 1982 United Nations Convention on the Law of the Sea, article 15 of the 1958 Convention on the High Seas and article 39 of the draft articles concerning the law of the sea, adopted by the Commission at its eighth session, in 1956. It is regarded as reflecting customary international law and has been reproduced in several regional legal instruments.

(2) The essential elements of piracy under UNCLOS are that it comprises any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed on the high seas or a place outside the jurisdiction of any State, against another ship or aircraft, or against persons or property on board such ship or aircraft. It can be distinguished from air piracy, which involves the unlawful seizure of an aircraft from on board the aircraft, or from another aircraft.

(3) The Commission felt that the integrity of the definition of piracy contained in article 101 of the United Nations Convention on the Law of the Sea should be preserved. This is in line with the objective of the topic which is not to seek to alter any of the rules set forth in existing treaties, including UNCLOS.

(4) The Commission acknowledged that there were certain elements of the definition of piracy contained in article 101 of UNCLOS which posed questions of interpretation and application, especially in view of the evolving nature of modern piracy. The Commission found it advisable to explain in the commentaries certain terms in article 101, which are set out below.

"*any illegal act of violence or detention, or any act of depredation*"

(5) Drawing on its earlier work in 1956, the Commission has adopted a definition of illegal acts of violence where the intention to rob (*animus furandi*) is not required. The Commission also considered that the term "violence" included intimidation as well as violence of different kinds including physical and psychological violence. Material acts which constitute piracy result from any "illegal act of violence" exercised against persons on board a ship or aircraft, the deprivation of liberty of persons on board, or acts of depredation against property. "Depredation" implies the looting of property on board a ship or aircraft, accompanied by destruction.

"*committed for private ends*"

(6) It was recognized that the expression "committed for private ends" in subparagraph 1 (a) primarily refers to the pursuit of profit or private gain, most often including ransom demands and theft of property on board private ships or ships belonging to a State. This could also include acts against a State ship for private ends. It was further recognized that the pursuit of private ends can coexist with political or ideological objectives, sometimes making it difficult to distinguish between piracy committed for purely private ends and maritime crimes other than piracy, which can be committed for political or other ends. There is an ongoing debate as to whether "private ends" can be assimilated to ideological or political ends. Some scholars have contended that any maritime violence lacking public authority can be regarded as violence "for private ends".

"*on the high seas*"

(7) The definition of piracy specifies that it is committed "on the high seas" or "in a place outside the jurisdiction of any State". The regime applicable to piracy under international law is an exception to the exclusive jurisdiction of the flag State which applies on the high seas. This regime does not apply to acts committed within the territorial jurisdiction of a State. The Commission decided to retain this geographical limitation of piracy as set out in UNCLOS and to provide a definition of "armed robbery at sea" to cover other geographical areas of the sea where acts which can be assimilated to piracy may occur.

"*against another ship or aircraft*"

(8) The definition of piracy in UNCLOS is based on acts committed by the crew or the passengers of a private ship or aircraft against another ship or aircraft. The requirement for piracy to involve acts of violence by one ship directed toward another ship is based on the historical antecedents of the provision. When illegal or violent conduct on the high seas involves only one ship, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) is likely to be implicated for its parties. Regarding aircraft, it is important to note that the Convention on International Civil Aviation (done at Chicago on 7 December 1944) declares that an "aircraft used in military, customs and police services shall be deemed to be a State aircraft". As a result, according to article 2, paragraph 1 (a), of the present draft articles, which repeats article 101 (a) of UNCLOS, piracy entails acts against "private aircraft", not "State aircraft".

(9) The Commission noted that according to the legislative practice of some States, "piracy" is also considered to include piratical acts against offshore oil platforms. Such State practice is, however, at best *lex ferenda* as a matter of international law as oil platforms do not qualify as either a "ship or aircraft" or as "property beyond the jurisdiction of any State". Furthermore, the arbitral tribunal in *The Arctic Sunrise* award on the merits concluded that the conduct in question was not piracy because "[t]he *Prirazlomnaya* is not a ship. It is an offshore ice-resistant fixed platform."

(10) The legal instruments referred to in paragraph (1) of the present commentary have recognized, on the basis of the debates that took place in the Commission in 1954, that piracy can be committed by an aircraft against a ship. In reality, modern piracy is no longer committed using only ships and aircraft. The use of drones, UAV (unmanned aerial vehicles) or MAV (maritime autonomous vehicles) in the commission of acts of piracy or armed robbery at sea is a new phenomenon. So too is the use of other devices for carrying out cyberattacks at sea. It is recognized that such actions are within the scope of the definition of piracy in draft article 2 (1).

(11) For example, arming a vessel intended for piracy, or leasing a vessel in the knowledge that it will be used for the same purpose, constitutes an act of complicity. It should also be noted that preparatory acts, assistance given to pirates or an unsuccessful attempt to commit an act of piracy are punishable under national laws.

(12) Acts of piracy under the definition in subparagraph 1 of the present draft articles involve acts from a private ship or aircraft. However, article 102 of UNCLOS specifically provides that "acts of piracy … committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft".

(13) The definition of piracy in subparagraph 1 is limited to acts involving two ships, two aircraft or a ship and an aircraft. It does not extend to situations of unlawful violence or detention or acts of depredation by the crew or the passengers of a ship or aircraft against that same ship or aircraft.

(14) Piracy may also be conducted from land against ships, but the Commission decided to avoid specifically referring to "land" as the place where preparations are made to commit acts of piracy. Some members considered that acts of piracy could also be committed from offshore platforms.

(15) The Commission gave consideration to whether to include a definition of "ship" to assist in clarifying the definition in draft article 2 (1). Although the International Maritime Organization has defined "vessels and aircraft" in some of the Conventions concluded under its auspices, UNCLOS does not define "ship" or "vessel". The Commission did not consider it productive to include a definition of ship in the present draft articles.

"*any act of inciting or of intentionally facilitating*" *such an act*

(16) The definition of piracy includes conduct that is ancillary to piracy, such as incitement, financing or intentional facilitation of piracy. The United Nations Security Council has seen the need to address this element of acts of piracy in its resolutions concerning the situation in Somalia and the Gulf of Guinea. In its resolution 1976 (2011) on Somalia, the Council emphasized the importance of all States criminalizing under their domestic law "incitement, facilitation, conspiracy and attempts to commit acts of piracy". In its subsequent resolution 2020 (2011), the Council inserted text to cover not only pirates apprehended off the coast of Somalia, but also "their facilitators and financiers ashore". A similar approach was adopted most recently by the Security Council with regard to the Gulf of Guinea. Consistent with the approach of the Council, the Commission considered that the expression "any act of inciting or of intentionally facilitating" a piratical act is sufficiently broad to include, in particular, the financing of acts of piracy. The act of preparation, attempt to commit and complicity in acts of piracy constitute unlawful acts and are punishable by national laws.

Subparagraph (2)

(17) Paragraph (1) of draft article 2 refers to acts of piracy committed "on the high seas". Nevertheless article 58 (2) of UNCLOS, regarding the rights and obligations of States in the exclusive economic zone, provides: "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part." It follows that article 101 of UNCLOS and related provisions of UNCLOS regarding piracy apply to the exclusive economic zone. This is confirmed by the arbitral tribunal in *The "Enrica Lexie" Incident* which observed that article 58 (2) of UNCLOS "extends specific rights and duties of States as regards the repression of piracy to the exclusive economic zone".

(18) The Commission considered whether an explicit reference should be made to the exclusive economic zone but decided to include a reference to the provisions of article 58, paragraph 2, of UNCLOS to indicate that piracy can also be committed in the exclusive economic zone. The subparagraph was drafted in a neutral manner so as not to prejudice the position of non-parties to UNCLOS.

(19) The separation between the two paragraphs recognizes that the exclusive economic zone and the high seas are two distinct maritime spaces in which different rights and obligations apply.

National legislative practices

(20) The Commission noted that the evolution of States' legislative practice has given rise to a variety of definitions of piracy. It examined whether a definition of piracy based on definitions in national law might supplement the definition under international law. It considered, however, that any such definition risked encompassing all kinds of illegal acts at sea not defined in article 101 (a) and (b) of UNCLOS. Such an expansion would undermine the integrity of the definition of piracy under UNCLOS.

Subsequent developments

(21) The Commission recognized that the current definition of piracy may not encapsulate technological developments in maritime security which may lead to subsequent efforts by the international community to update it. It nonetheless considered it unnecessary to introduce a "without prejudice" clause to accommodate possible further developments.

Ms. Ridings, referring to the text proposed by the Special Rapporteur in the informal document, said that the last sentence of paragraph (2) should be deleted. In paragraph (7), a footnote with the text "This extends to the exclusive economic zone; see paragraph 2 of this draft article" should be inserted at the end of the second sentence and, in the last sentence, the words "areas of the sea" should be replaced with "areas at sea". The phrase "*lex ferenda*" should be replaced with "*de lege ferenda*" in the second sentence of paragraph (9) and, in the citation to *The Arctic Sunrise Arbitration (Netherlands v. Russia)* contained in one of the footnotes to that paragraph, the year "2010" should be changed to "2019". The following language should be inserted at the end of the second sentence of paragraph (10): "as they were understood when the definition of piracy was developed". The text of paragraph (11) in its entirety – except for the words "For example", which should be deleted – should be moved to the end of paragraph (16), and the text of the footnote to paragraph (11) should be incorporated into the last footnote to paragraph (16). Paragraph (11) would thus be deleted. The following sentence should be added to the end of paragraph (13): "A view was expressed that piracy should not always be considered as involving two ships, but may involve action by a crew on a ship against that ship." In the second sentence of paragraph (14), the word "committed" should be replaced with "conducted". The sentence appearing at the end of paragraph (16) and beginning with the words "The act of preparation" should be deleted. The word "subparagraph" should be replaced with "paragraph" in the second sentence of paragraph (18). A sentence should be added to the end of paragraph (20), reading: "Nevertheless the Commission noted that national anti-piracy laws may help shed light on State practice, and common elements should be examined to promote harmonization of national laws."

In addition, a footnote referring to paragraph 62 of the decision of the International Court of Justice in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* should be inserted at the end of the first sentence of paragraph (18). She would provide the secretariat with the appropriate text.

Mr. Patel said that a resolution recently adopted by India should be mentioned in the footnote to paragraph (16) that contained references to national laws. He would provide the secretariat with the appropriate citation.

The commentary to draft article 2, as amended, was adopted on that understanding and with minor editorial changes.

Commentary to draft article 3 (Definition of armed robbery at sea)

The Chair said that, in the informal document circulated to members, the Special Rapporteur proposed that the text of the commentary to draft article 3, as contained in document A/CN.4/L.978/Add.1, should be replaced in its entirety with the following:

> (1) Draft article 3 concerns the definition of armed robbery at sea. The definition is drawn from the one adopted by the Assembly of the International Maritime Organization (IMO) in its Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships. Subparagraphs (a) and (b) of draft article 3 correspond to subparagraphs 1 and 2 respectively of paragraph 2.2 of the Code.
>
> (2) There is no substantive difference between piracy and armed robbery at sea as far as the conduct itself is concerned. The main difference between piracy and armed robbery at sea is the location of the act: the high seas and exclusive economic zone on one hand, and waters subject to the jurisdiction of the coastal State on the other. This has consequences for the applicable jurisdiction in respect of the two crimes. In the case of piracy, it is acknowledged that universal jurisdiction applies such that any State has the right (but not the obligation) to prosecute the crime of piracy committed on the high seas. With respect to armed robbery at sea, the coastal State has the exclusive competence to exercise prescriptive and enforcement jurisdiction over such acts.
>
> (3) The difference between the definition in draft article 3 and the IMO Assembly's definition is that, in the chapeau of the draft article, the Commission used the term "armed robbery at sea", instead of "armed robbery against ships", as in the IMO Assembly's definition. Recent Security Council resolutions on maritime piracy

in the Gulf of Guinea in particular have used the phrase "armed robbery at sea", instead of "armed robbery against ships". In view of the practice of the Security Council, and to avoid unduly restricting the definition, the Commission considered that it was unnecessary to replicate the IMO definition verbatim.

(4) Unlike piracy, to which universal jurisdiction applies, the IMO Resolution A.1025 (26) states that armed robbery is punishable under the coastal State's jurisdiction, as examined in some national legislation and regional conventions as described above. In addition, it has to be noted that armed robbery at sea does not necessarily involve two ships.

(5) "Armed robbery at sea" applies within a State's internal waters, archipelagic waters and territorial sea. Although a number of acts of armed robbery at sea occur in straits used in international navigation, such straits may include areas that are within the maritime zones of a coastal State as well as high seas. For example, the Strait of Korea/Tsushima includes areas of high seas. It was therefore considered not necessary, and indeed confusing, to include a specific reference to straits used for international navigation within the definition.

Ms. Ridings, referring to the text proposed by the Special Rapporteur in the informal document, said that, in the first sentence of paragraph (2), the words "no substantive difference" should be replaced with "not necessarily any substantive difference" and, in the penultimate sentence, the phrase "but not the obligation" and the brackets surrounding it should be deleted. In the second sentence of paragraph (3), the words "Recent Security Council resolutions" should be replaced with "A recent Security Council resolution". In addition, references to a Security Council resolution and statement should be included in a footnote to paragraph (3). She would provide the secretariat with the relevant text.

The commentary to draft article 3, as amended, was adopted on that understanding and with minor editorial changes.

Chapter VI of the draft report, as a whole, as amended, was adopted.

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) (*continued*)

The Chair invited the Commission to resume its consideration of chapter VII (B) (2) of the draft report, as contained in document A/CN.4/L.979, continuing with paragraph 43.

2. Summary of the debate (*continued*)

(c) Draft conclusion 4 (*continued*)

Paragraph 43 (*continued*)

Mr. Jalloh (Special Rapporteur) said that, while it could be considered that there was no formal system of *stare decisis* in general international law, the same could not be said of certain sub-fields of international law. The first clause of the first sentence of paragraph 43 should therefore be reformulated to read "While it was agreed that, in general, no system of judicial precedent existed in general international law". In the second sentence, the words "proposed by the Special Rapporteur" should be added after the words "draft conclusions 1 to 3" and the words "the proposed" should be inserted before "draft conclusions 4 and 5".

Mr. Forteau said that, because of the use of the phrase "in general" in the Special Rapporteur's proposal, there was no need to also replace "international law" with "general international law".

Paragraph 43, as amended, was adopted.

Paragraph 44

Mr. Forteau said that, in the first sentence, the word "other" should be inserted before "international courts and tribunals".

Paragraph 44, as amended, was adopted.

Paragraph 45

Paragraph 45 was adopted.

(d) Draft conclusion 5

Paragraph 46

Mr. Jalloh (Special Rapporteur) said that the clause "which concerns teachings" should be inserted after the reference to "draft conclusion 5" in the first sentence. A footnote similar to the one that the Commission had agreed to add to paragraph 42, with respect to draft conclusion 4, should be inserted, with respect to draft conclusion 5, in paragraph 46.

Paragraph 46, as amended, was adopted.

Paragraph 47

Mr. Savadogo proposed that, to improve the drafting of the first sentence in the French text, the words "*la force convaincante*" and "*l'éminence*", should be replaced with "*la force de conviction*" and "*la notoriété*", respectively.

Mr. Sall said that "*la force persuasive*" was another alternative to "*la force convaincante*".

The Chair, speaking as a member of the Commission, said that "*la force persuasive*" was the best option.

Mr. Galindo said that there seemed to be a contradiction between the first and last sentences. While it followed from the first that not all writers were of equal eminence, the word "peers", which was used in the last sentence, referred to a group of equals. It might therefore be preferable to replace that word with "other authors" or "other writers".

Mr. Jalloh (Special Rapporteur) said that, in a scholarly setting, the word "peers" was used to refer to other writers, regardless of any differences in status among them.

Paragraph 47 was adopted, subject to those drafting changes to the French text.

Paragraph 48

Mr. Forteau proposed that, for greater clarity, the first sentence should be reformulated to read: "It was noted that the lack of diversity in the use of teachings should be addressed."

Mr. Patel said that, during the debate, the view had been expressed that the use of teachings could contribute to mitigating – rather than "addressing" – the lack of diversity. The reference to the individual and joint separate opinions of judges in the last sentence should be expanded to include their separate, including dissenting, opinions. In addition, ethnic, cultural, linguistic and religious diversity should be mentioned alongside gender diversity, at least in the commentary, to better reflect the views expressed in the debate.

Mr. Zagaynov said that representativeness was presented rather differently in the paragraph under consideration and paragraph 37. In the former, reference was made to "representativeness, including gender diversity". The latter, by contrast, included a reference to representativeness understood as covering "several aspects, including considerations of regional distribution, legal traditions and gender". To harmonize the text, he proposed that, in the paragraph under consideration, the words "including gender diversity" should be replaced with "including considerations of regional distribution, legal traditions and gender".

Mr. Asada said that it should be mentioned in the paragraph that, while the Commission had generally agreed on the importance of diversity, it had also discussed the difficulties associated with fully achieving diversity in practice.

Mr. Oyarzábal said that he would be in favour of deleting the second sentence, which seemed out of place. Moreover, linguistic diversity should be mentioned alongside gender diversity, just as it was in the version of draft conclusion 5 provisionally adopted by the Drafting Committee.

The Chair, speaking as a member of the Commission, said that, as currently drafted, the paragraph did not do justice to the richness of the debate that had taken place. Members had raised issues relating to various aspects of representativeness, including gender and linguistic diversity.

Mr. Jalloh (Special Rapporteur) said that the paragraph under consideration formed part of the summary of the debate, which had been prepared by the secretariat to capture the views expressed, in the plenary, on each of the draft conclusions proposed in his first report. Although the draft conclusions were interconnected, the commentaries to draft conclusions 4 and 5 had not yet been drafted. The Drafting Committee had decided that it would address many of the specific points made in the plenary, including Mr. Patel's point about diversity, in the context of its work on those two draft conclusions. He saw merit in Mr. Zagaynov's proposal. To ensure that racial diversity was also covered, the words "gender diversity" in the second sentence could be replaced with "considerations of regional distribution, legal traditions, gender and racial diversity". In line with Mr. Forteau's proposal, the first sentence could be amended to read: "It was noted that the lack of diversity in teachings used should be addressed."

The Chair said that the individual and joint opinions of judges of international courts and tribunals were sometimes discussed as a possible category of teachings. The word "dissenting" was more often associated with the judicial functions of such courts and tribunals.

Mr. Oyarzábal said that the issues addressed in the third sentence, namely the "status of the work of certain bodies" and the "possible value of other materials", seemed distinct from those addressed in the first and second sentences.

The Chair said that the third sentence did indeed address distinct issues. The paragraph might be clearer if it was split into two. The problem was that, as the commentary to draft conclusion 5 had not yet been drafted, the Commission was trying to reflect a wide range of different issues in the summary of the debate.

Mr. Jalloh (Special Rapporteur) said that it was impossible to reflect the full breadth of the debate, including the point made by Mr. Asada, in such a short summary. The Commission had discussed not only the status of bodies such as the International Committee of the Red Cross but also the possibility that their works could constitute teachings. He agreed with the Chair's suggestion that the paragraph should be split into two.

Mr. Grossman Guiloff said that he too supported the suggestion to split the paragraph into two. He wondered whether it could be made clear that the list of forms of representativeness was non-exhaustive.

The Chair said that the sentence already contained the word "including". The Drafting Committee had decided that the words "*inter alia*" should be added to draft conclusion 5 to further emphasize the non-exhaustive nature of the list.

Mr. Jalloh (Special Rapporteur) said that the Drafting Committee's decision to add the words "*inter alia*" to draft conclusion 5 should not be reflected in the paragraph under consideration, which formed part of the summary of the plenary debate. That decision could be addressed in the commentary.

The Chair said she took it that the Commission wished to amend the first sentence in the manner proposed by Mr. Forteau, as amended orally by the Special Rapporteur; to amend the second sentence in the manner proposed by Mr. Zagaynov, as amended orally by the Special Rapporteur; and to split the paragraph into two, such that the third sentence formed a separate paragraph.

Paragraph 48, as amended, was adopted.

(e) Future programme of work

Paragraph 49

Paragraph 49 was adopted.

3. Concluding remarks of the Special Rapporteur

Paragraph 50

Mr. Ouazzani Chahdi said that, in the third sentence, it seemed unnecessary to specify that the consensus in the Commission had been "general". In addition, the drafting of that sentence in the French text could be improved by replacing "*un consensus … s'était fait jour, dans le cadre de ce qui s'était révélé un débat*" with " *un consensus … s'était dégagé, dans le cadre d'un débat*".

Mr. Forteau said that, as the word "consensus" already implied a general agreement, it would be preferable to use the words "general agreement" or simply "consensus".

The Chair said that the words "in what had proved to be a rich and intellectually stimulating debate" at the end of that sentence seemed superfluous.

Mr. Jalloh (Special Rapporteur) said that, with regard to the third sentence, he would not object to the proposal to delete the word "general". However, he would prefer to retain the words "in what had proved to be a rich and intellectually stimulating debate", which reflected his assessment of the debate in his capacity as Special Rapporteur.

Mr. Patel said that the word "general" should also be deleted in the fifth sentence, in which the phrase "general consensus" was used for a second time.

Mr. Grossman said that he would understand "consensus" to imply a greater degree of agreement than "general consensus" or "a consensus in general", either of which would suggest that some issues might not have been agreed upon by all concerned.

The Chair, while acknowledging that in certain areas consensus had not been reached, said that the paragraph in question referred to specific issues on which it had.

Mr. Sall said that using "consensus" alone was preferable; however, if a qualifier was felt necessary, the words "broad consensus" should be unequivocal.

The Chair said she took it that the Commission agreed to delete the word "general" both times it occurred.

Paragraph 50, as amended, was adopted.

Paragraph 51

Mr. Asada, pointing out that the wording "general consensus" was also used twice in paragraph 51, suggested that the word "general" should be deleted on both occasions, for the sake of consistency.

The Chair expressed the view that a distinction was being drawn between instances where the entire Commission had been in agreement and cases where there had been broad, but not universal, support for a particular position. It might be that alternative wording would clarify matters.

Mr. Vázquez-Bermúdez said that the deletion of "general" in some cases need not imply that it should not be used elsewhere. As Mr. Grossman had explained, the notion of "general consensus" might be appropriate in some circumstances, as it introduced a degree of flexibility, rather than suggesting an absolute consensus; however, wording such as "general support" might be clearer. The paragraph under discussion was part of the summary of the Special Rapporteur's concluding remarks, the aim of which was to convey the overall sense of the discussion.

Mr. Jalloh (Special Rapporteur) said that the non-exhaustive nature of the list of sources of international law given in Article 38 of the Statute of the International Court of Justice had not been called into question during the Commission's debate and was widely supported in the literature; it would therefore be appropriate to change "general consensus" to "consensus" in the first sentence of paragraph 51, in line with the apparently emerging practice of using "consensus" alone to indicate agreement by all concerned. In the second sentence of the paragraph, however, the words "general consensus" referred to a point on which diverging views had been expressed – not as to whether additional subsidiary means

existed but what they might be – so it would be better to retain that wording or an equivalent, if the Commission felt that "general consensus" was an infelicitous collocation.

Mr. Asada said that the wording "general consensus" presented a conceptual difficulty. The term "consensus" implied that there was no objection to taking a particular decision. Instead of "general consensus", wording such as "general agreement" should be used.

The Chair said that the wording "general consensus" had been used in previous texts adopted by the Commission, though she acknowledged that the term "consensus" could have specific procedural and legal meanings.

Mr. Forteau said that, in the second sentence, the qualified nature of the agreement should be clearly indicated, as some members of the Commission had questioned whether additional subsidiary means existed.

The Chair, speaking as a member of the Commission, echoed that view.

Mr. Zagaynov, expressing support for the amendments proposed, suggested that, in the first sentence of paragraph 51, the reference should be specifically to Article 38 (1) (*d*) of the Court's Statute, rather than simply Article 38.

The Chair said that she understood it was the Special Rapporteur's intention to refer to Article 38 as a whole.

Mr. Akande said that, like Mr. Zagaynov, he had understood the reference in the first sentence of paragraph 51 to be to Article 38 (1) (*d*); however, as the paragraph summarized the views of the Special Rapporteur, he would not insist on rewording it, though he would raise the issue again when the Commission came to discuss the corresponding parts of the commentaries to the draft conclusions.

Mr. Jalloh (Special Rapporteur) said that the Commission had not established a consistent practice in that regard; consideration might be given to the issue in due course. His preference would be to delete the word "general" in the first sentence of paragraph 51 and retain it in the second sentence.

The Chair said that the issue of whether to standardize use of the term could be considered in the context of the Commission's methods of work; for the present, however, she took it that the Commission agreed to adopt paragraph 51 with the Special Rapporteur's preferred amendments.

Paragraph 51, as amended, was adopted.

Paragraph 52

Mr. Oyarzábal suggested that, in the second sentence, the words "It was also noted that" should be changed to "He also noted that".

Mr. Jalloh (Special Rapporteur), expressing support for that suggestion, further suggested that the first sentence might be rephrased to indicate that there had been "consensus", in the sense of the term as used elsewhere in the text already adopted, on the form that the output of the Commission's work should take.

The Chair said that it might be preferable not to seek to standardize usage of the term in the course of the present discussion, given the time constraints.

Mr. Jalloh (Special Rapporteur) said that, while his preference would be to use the term "consensus" in that particular instance, he would not insist, in the interests of advancing the Commission's adoption of its report.

Paragraph 52, as amended, was adopted.

Paragraph 53

Mr. Forteau suggested that, in the first sentence, the words "regarding the use of subsidiary means" ("*d'utilisation des moyens auxiliaries*") should be inserted after the word "methodology".

With that amendment, paragraph 53 was adopted.

Paragraphs 54 and 55

Paragraphs 54 and 55 were adopted.

Paragraph 56

Paragraph 56 was adopted with a minor editorial correction.

Paragraphs 57 to 59

Paragraphs 57 to 59 were adopted.

Paragraph 60

Mr. Forteau suggested that, in the first sentence, the words "by some courts and tribunals" should be inserted between "over-reliance" and "on materials".

Mr. Jalloh (Special Rapporteur) welcomed that suggestion.

Paragraph 60, as amended, was adopted.

Paragraph 61

Mr. Patel said that, as there had been some discussion within the Commission as to whether any formal system of precedent (*stare decisis*) existed in international law, the wording of the second sentence of paragraph 61 should be amended to qualify the statement that there was no such formal system.

Mr. Jalloh (Special Rapporteur) suggested amending the second sentence to begin: "The Special Rapporteur noted that members broadly agreed that there existed no formal system of precedent (*stare decisis*) in general international law …"

Paragraph 61, as amended, was adopted.

Paragraph 62

Mr. Forteau suggested that the words "of States" should be added after "unilateral acts" in both the first and seventh sentences of paragraph 62.

Mr. Jalloh said that his preference would be to alter the words "unilateral acts" to "unilateral acts of States capable of creating binding legal obligations" the first time it occurred.

Paragraph 62, as amended, was adopted.

Paragraph 63

Mr. Patel said that, in the second sentence, the words "and tribunals" should be added after "the proliferation of international courts".

Paragraph 63, as amended, was adopted, with a minor editorial correction.

Paragraphs 64 and 65

Paragraphs 64 and 65 were adopted.

Paragraph 66

Ms. Okowa said that, in the final sentence of the paragraph, the term "case law", which was usually associated with contentious cases, should, given the context of "international courts, tribunals and other bodies", be replaced with the term "jurisprudence".

Mr. Jalloh (Special Rapporteur) said that Ms. Okowa had correctly interpreted his intention, which was to survey the decisions of not only courts and tribunals, but also of other bodies. He therefore proposed that the words "decisions of courts and tribunals" should be used, as they had a broader sense and would be preferable to "jurisprudence".

Paragraph 66, as amended, was adopted.

Paragraph 33

The Chair, noting that the adoption of paragraph 33 had been held in abeyance from the Commission's previous meeting, said that the Special Rapporteur would present the proposed new text of the paragraph, amended to take into account the proposals made by other members during and after the discussion at the previous meeting.

Mr. Jalloh (Special Rapporteur) said that several members had submitted proposed changes. Taking those into account, in the second sentence, the words "for determination other than those" should be inserted after the words "additional subsidiary means". In the third sentence, the words "of States capable of creating binding legal obligations" should be inserted after "unilateral acts", and the final clause, "as they would have a binding nature", should be deleted. In the fifth sentence, after the words "decisions of international organizations", the words "and bodies" should be inserted. In order to fully reflect the debate, a final sentence should also be added at the end of the paragraph, to read: "Some members, however, expressed a contrary view [or 'doubts'] as to the use of resolutions of international organizations as a form of subsidiary means."

Mr. Forteau said that, for clarity, the Special Rapporteur's proposal for the second sentence should be amended to read "for the determination of rules of international law other than those". In the proposed final sentence, there should be some explanation of the reason why some members did not agree that resolutions could be subsidiary means. He therefore proposed the wording: "*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 d'interprétation ou de formation du droit international*." [Some members, however, expressed doubts about the use of resolutions of international organizations as subsidiary means because they pertain rather to the process of interpretation or formation of international law.]

Ms. Okowa said that, as there were only two judicial decisions that had confirmed the existence of unilateral acts of States capable of creating binding legal obligations, it would be less cumbersome and clearer to insert a footnote quoting those references. The footnote could then be cross-referenced subsequently in the text when unilateral acts were mentioned.

The Chair said that the chapter currently being discussed was a summary of the debates in the Commission and contained very few footnotes, none of which referred to case law. She suggested that Ms. Okowa's proposal to include the references could be taken up when discussing the commentary to the relevant draft conclusion.

Mr. Forteau said that, in the proposed change to the third sentence, the word "binding" was unnecessary, as legal obligations were necessarily binding.

The Chair said that the term "binding legal obligations" also occurred in the amendment that the Commission had just approved to paragraph 62.

Mr. Jalloh (Special Rapporteur) said that he did not object to the proposal to omit the word "binding" before "legal obligations", and to aligning the wording of paragraph 62 with it. **W**hile the wording proposed by Mr. Forteau for an additional sentence at the end of the paragraph indicated that it expressed a minority view, and so he had no objections to it, he was under the impression that, in the Commission's debates, the reference had been to the resolutions of international organizations being linked to the formation of customary international law, rather than of international law. It had also been mentioned during the debates that the resolutions of international organizations, like national court decisions, might, in some circumstances, play a dual, non-exclusive, function, which could mean that resolutions might be read as subsidiary means. He therefore proposed the following wording: "Some members expressed doubts regarding the use of resolutions of international organizations as subsidiary means because they fall under the process of formation of international law."

Mr. Forteau, supported by **Mr. Vázquez-Bermúdez** and **Mr. Fife**, said that, since the wording he had proposed in French seemed to have found acceptance, it could be left to the secretariat and the translation services to provide the wording in the other languages.

Mr. Jalloh, noting that other members, in particular Mr. Akande and Mr. Asada, had expressed a different opinion on unilateral acts which should also be reflected in the text, proposed the insertion of “including unilateral acts” at the end of the fourth sentence, after “warranted further consideration by the Commission”.

The Chair said she took it that the Commission agreed: in the second sentence, to insert “for the determination of rules of international law other than those” after the words “additional subsidiary means”; in the third sentence, to insert “of States capable of creating legal obligations” after “unilateral acts”, and to delete the final clause, “as they would have a binding nature”; at the end of the fourth sentence, to insert “including unilateral acts” after “warranted further consideration by the Commission”; in the fifth sentence, to insert the words “and bodies” after the words “decisions of international organizations”, and to add a new final sentence: “Some members, however, expressed doubts about the use of resolutions of international organizations as subsidiary means because they pertain rather to the process of interpretation or formation of international law.”

Paragraph 33, as amended, was adopted.

The meeting rose at 6 p.m.