

Provisional

**For participants only**

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**International Law Commission**  
**Seventy-fourth session (second part)**

**Provisional summary record of the 3652nd meeting**

Held at the Palais des Nations, Geneva, on Wednesday, 2 August 2023, at 10 a.m.

**Contents**

Tribute to the memory of João Clemente Baena Soares and Nugroho Wisnumurti, former members of the Commission

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 (continued)*

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***Present:***

*Chair:* Ms. Galvão Teles

*Members:* Mr. Akande  
Mr. Argüello Gómez  
Mr. Asada  
Mr. Aurescu  
Mr. Fathalla  
Mr. Fife  
Mr. Forteau  
Mr. Galindo  
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

***Secretariat:***

Mr. Llewellyn Secretary to the Commission

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

**Tribute to the memory of João Clemente Baena Soares and Nugroho Wisnumurti, former members of the Commission**

**The Chair** said it was with deep sadness that she wished to announce the death of João Clemente Baena Soares, former member of the Commission, who had been a distinguished Brazilian diplomat renowned for his contributions to peace, human rights and global diplomacy. Among his various postings and achievements, Mr. Baena Soares had served as Secretary-General of the Organization of American States (OAS) between 1984 and 1994, the only Brazilian to have held that office. He had been elected to the Commission in 1997 and had served until 2006, including as Chair from 1998 to 2000. On behalf of the Commission and its secretariat, she wished to extend her heartfelt condolences to Mr. Baena Soares's family.

**Mr. Galindo** said that he had been deeply saddened by the news of the passing of João Clemente Baena Soares. Mr. Baena Soares had entered the diplomatic service of Brazil in 1953 and had held positions in several countries; he had also served as Secretary-General for Foreign Affairs of Brazil, the highest diplomatic position in the Brazilian Ministry of Foreign Affairs. During his tenure as Secretary-General of OAS, he had proven himself to be a man of peace and a skilled negotiator at a complex historical moment for the region. He had also been a talented facilitator of peaceful solutions to political crises in Central America in the 1980s and in Haiti in the early 1990s. Perhaps one of his main achievements had been to consolidate the role of OAS in electoral observation missions. His role in the adoption of the 1985 Protocol of Cartagena de Indias had helped to shape OAS in its modern form.

Mr. Baena Soares had also been a member, and President, of the Inter-American Juridical Committee. In addressing students in the Committee's Course on International Law, he had stressed that while academic research was always necessary, the importance of practice must not be forgotten. He had spoken of the barrier that prevented international law from receiving due recognition as a driver of peace, namely the disparities of power in the international community, and, *inter alia*, had sought to ensure that international law prevailed in the organization of a peaceful and democratic society. Above all, he had championed the concept of integral development established in the OAS Charter. His life was proof that all actors in the international community stood to gain by bringing practice and theory together.

**Mr. Vázquez-Bermúdez** said that Joao Clemente Baena Soares had left an important legacy in the field of multilateralism, particularly through his contribution to strengthening the role of OAS in the promotion of democracy and the prevention and resolution of crises and conflicts in the region. Mr. Baena Soares's extensive experience had helped to shape his considerable contribution, as a member of the Commission, to the progressive development and codification of international law.

He also wished to pay tribute to the memory of Nugroho Wisnumurti, another former member of the Commission, whose recent passing had been noted at the Commission's 3641st meeting. Mr. Wisnumurti had been a prominent diplomat of Indonesia, which he had served in the international arena as Permanent Representative to the United Nations, and had left his mark in the form of the so-called "Wisnumurti Guidelines" on the selection of candidates for United Nations Secretary-General. As an active member of the Commission, Mr. Wisnumurti had contributed to its substantive work in a thoughtful and constructive manner.

*At the invitation of the Chair, the members of the Commission observed a minute of silence.*

**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*  
(*continued*) (A/CN.4/L.979 and A/CN.4/L.979/Add.1)

**The Chair** invited the Commission to resume its consideration of chapter VII of its draft report, as contained in document A/CN.4/L.979/Add.1, starting with paragraph 2, of which the *chapeau* had already been adopted.

*Subsidiary means for the determination of rules of international law*

*General commentary*

**Ms. Ridings** suggested that all 10 paragraphs of the general commentary should be deleted. The Commission should develop the topic further, given its complexity, before introducing a general commentary to the draft conclusions. That approach would also be more efficient than adopting the general commentary at an early stage and then having to revise it. In addition, some parts of the general commentary, in particular those touching on sources and “precedent”, might prejudice certain points that the Commission had not yet discussed or developed. It also seemed to prejudge any potential outcomes of the Commission’s work on nomenclature and the meaning of draft conclusions. She was not suggesting that the general commentary should be discarded, but that it should be held in abeyance so that it could be considered at a later time.

**Mr. Fife** said that it would be preferable to engage in substantive consideration of subsidiary means before adopting a general commentary.

**Ms. Okowa** said that the paragraphs should not be deleted. It was her understanding that the purpose of a general commentary was to signal to the Member States the direction of the topic and the main issues that would be considered.

**The Chair** said that the Commission did not have an established practice on whether a general commentary should be included at the early stages of a topic’s consideration.

**Mr. Mingashang** said that the paragraphs should be retained and their content discussed. They could be revisited at a later stage as the topic was developed further.

**Ms. Mangklatanakul** said that there were a number of questions that the Commission needed to discuss, such as sources of international law and subsidiary means. The general commentary as drafted by the Special Rapporteur prejudged the Commission’s work on such questions and should therefore be deleted.

**Mr. Paparinskis** said that, of the four sets of draft conclusions mentioned in paragraph (7), three, namely those on general principles of law, identification and legal consequences of peremptory norms of general international law (*jus cogens*) and subsequent agreements and subsequent practice in relation to the interpretation of treaties, were not accompanied by a general commentary, while the fourth, identification of customary international law, was accompanied by a very short general commentary. In the case at hand, it might be preferable to include a general commentary that was more concise than the one drafted by the Special Rapporteur. More broadly, the general commentary covered questions that had not yet been addressed by the Commission or the Drafting Committee, such as the function of subsidiary means. The Commission could perhaps decide to defer consideration of the general commentary until the commentaries to draft conclusions 1 to 3 had been adopted. However, he was not opposed to the consideration of the general commentary at the current stage, particularly paragraphs (1), (4), (7) and (8).

**Mr. Savadogo** said that, as the text could be revisited at a later stage, it would not be appropriate to discard it from the outset, particularly since it reflected the in-depth discussions that had taken place in the Commission.

**Mr. Fathalla** said it was his understanding that part of the purpose of adopting a general commentary was to inform the General Assembly of the views expressed in the Commission’s discussions, including differences of opinion. He wondered whether there were any criteria for deciding not to adopt a general commentary in a particular case.

**The Chair** said it was important to bear in mind that there was no requirement for a general commentary. The Commission could decide whether and when to include one on a case-by-case basis.

**Mr. Akande** said that the general commentary should be retained and that the Commission should consider it paragraph by paragraph.

**Mr. Forteau** said that the general commentary should be introductory in nature and should take as neutral a position as possible so as not to prejudge the Commission's future discussions. It was not intended to be a summary of the debate and should not cover substantive issues.

**Mr. Sall** said that the Commission should consider the text of the general commentary before deciding whether it should be retained or deleted.

**Mr. Mavroyiannis** said he agreed with Mr. Akande that the general commentary should not be rejected out of hand. As Ms. Okowa had noted, the general commentary provided useful information to States on how the Special Rapporteur saw the state of play and the future direction of the topic, although it should remain neutral insofar as possible. The text could be revisited at a later stage.

**The Chair** said that the general commentary was intended to reflect the position of the Commission as a whole, not just that of the Special Rapporteur. In accordance with the usual practice, it might be taken up once more at the end of the first-reading stage, but would not be discussed at every session.

**Mr. Oyarzábal** said that it would be preferable to focus on the paragraphs of the draft general commentary that reflected the Commission's decisions on the format of the work to be undertaken. Controversial issues should be avoided. The Special Rapporteur should also be invited to specify which paragraphs of the general commentary could most usefully be taken up at the current stage.

**Mr. Ruda Santolaria** said it appeared that, at the current early stage of the topic's consideration, most members would prefer to have a more concise general commentary. He proposed, therefore, that the Commission should begin to consider the commentaries to the individual draft conclusions at the current meeting and that the Special Rapporteur should prepare a revised, shortened version of the general commentary for consideration at a subsequent meeting. A lengthier, more detailed version could be presented when the full set of draft conclusions and commentaries was ready for adoption on first reading.

**Mr. Galindo** said that, since members' views did not appear to diverge significantly regarding the utility of the general commentary, he was not in favour of postponing the discussion of a text that the Special Rapporteur had carefully drafted for analysis by the Commission. He agreed, however, that it would be advisable to condense and simplify the content of the general commentary.

**Ms. Oral** said that Ms. Ridings's concern, if she had understood correctly, was that some of the arguments set forth in the general commentary might prejudge future discussions and conclusions. For that reason, it would be more efficient to consider the text at a later stage. Since the discussion appeared to be evolving into a debate on the approach to commentaries in general, the Commission should perhaps review its methods of work and the purpose and nature of general commentaries at some future date. She had no strong opinion concerning the best way forward with regard to the general commentary under discussion. She would not object to a paragraph-by-paragraph consideration, although she sensed that some members still had reservations.

**Mr. Vázquez-Bermúdez** said he agreed that the question was not whether a general commentary should be included but whether it should be discussed and adopted at such an early stage of the topic's consideration. The general commentary was certainly useful and should be considered on its merits, but deferring its consideration would allow the Commission to retain flexibility and avoid prejudgement. The decision on whether to prepare a more concise version should be left to the discretion of the Special Rapporteur.

**Ms. Okowa** said that, despite the discretion accorded to the Special Rapporteur, the commentaries must reflect the views of the entire Commission. Without a careful paragraph-

by-paragraph consideration, the Commission could not form a collective view on the relevance of the text proposed and the weight that should be given to specific details, nor could it reach a decision on whether certain parts of the general commentary should be condensed or deleted.

**Mr. Asada** said that, since the general commentary must reflect the collective view and there were clearly differences of opinion, he agreed that either the Commission should proceed to consider the current text paragraph by paragraph or the Special Rapporteur should be asked to prepare a shortened version. He would prefer the latter option.

**Mr. Ouazzani Chahdi** said that there was a distinction to be drawn between a general commentary and an introduction to the draft conclusions. The text under discussion would serve better as an introduction. If it was to reflect the collective position of the Commission, it should perhaps be considered after the rest of the set of draft conclusions and commentaries had been discussed. In any case, he was in favour of retaining the current text.

**Mr. Huang**, supported by **Mr. Nesi**, proposed that the Commission should defer its consideration of the general commentary and should proceed to consider the commentaries to draft conclusions 1 to 3. On the basis of informal consultations, the Special Rapporteur should draft a revised version of the general commentary for presentation at a subsequent meeting.

**Mr. Akande** said that a third option would be to have a small group of members examine the text together with the Special Rapporteur. In order to revise the text to the satisfaction of all members, the Special Rapporteur needed to understand their specific objections.

**The Chair** said that the collective view appeared to be that the general commentary should be maintained but that it should be shortened. The Commission should thus defer its discussion of the general commentary until after the discussion of the commentaries to draft conclusions 1 to 3.

**Mr. Jalloh** (Special Rapporteur), thanking the members for their contributions to the rich debate, said that some members seemed to be trying to reopen issues that had been decided upon previously during the plenary debate or in the Drafting Committee. On the question of practice, general commentaries had been prepared at different stages of the Commission's consideration of previous topics. However, the Commission had in the past been criticized for failing to present commentaries until the very end of a topic's consideration. Thus, in presenting commentaries at such an early stage, he sought to avoid such criticism and respond to concerns raised by States. He had been somewhat surprised by the proposal that the entire text should be deleted; in his view, the Commission could not take such a decision without looking at each paragraph individually. In any case, like all texts considered by the Commission, the text of the general commentary was provisional in nature. He proposed, therefore, that the Commission should proceed to consider the general commentary paragraph by paragraph. Any paragraph on which it failed to reach a consensus could be left in abeyance.

**Ms. Ridings** said she wished to clarify that she had not proposed that the entire general commentary should be deleted; she had simply suggested that the paragraphs concerned should be left in abeyance. Her intention had not been to suggest that there should be no general commentary to the draft conclusions.

**Mr. Patel** said that the Commission should proceed to consider the text as proposed by the Special Rapporteur and should attempt to adopt as many paragraphs as possible. It could return to any paragraphs considered controversial at a later date.

**The Chair** said that adopting only part of the commentary was not an option. Despite the Special Rapporteur's preference, the most efficient approach would be to consider the commentaries to the draft conclusions first and then to discuss and adopt a revised version of the general commentary, amended on the basis of informal consultations.

**Mr. Forteau**, supported by **Mr. Mingashang** and **Ms. Oral**, said that the Commission should proceed to discuss and adopt the commentaries to draft conclusions 1 to

3. It was not essential for the Commission to adopt the general commentary at the current session. That discussion could be postponed until the seventy-fifth session.

**Mr. Jalloh** (Special Rapporteur) said that he had done his best to reflect all the comments received in writing, even though some had been submitted very late. Those comments had given him reason to believe that members did not have major issues with the text and that there was thus no reason for the Commission to deviate from its usual paragraph-by-paragraph approach. Any problematic paragraphs could be left in abeyance.

**Ms. Mangklatanakul** said that it was difficult for members to submit written comments on the entire document and that the discussions at plenary meetings must also be reflected. She was concerned that the general commentary lacked consistency and terminological clarity. For that reason, she agreed that the Commission should proceed to consider it on a paragraph-by-paragraph basis.

**The Chair** said she remained convinced that the most efficient way to proceed would be to postpone the discussion of the general commentary and return to it after discussing and adopting the commentaries to the individual draft conclusions, on the understanding that the structure, length and content of the general commentary would be revised. The members would have a better sense of the adjustments that might be appropriate after discussing the individual draft conclusions.

*The meeting was suspended at 11.25 a.m. and resumed at 11.55 a.m.*

**Mr. Jalloh** (Special Rapporteur), noting that informal consultations had been held during the suspension of the meeting, said that, for each paragraph of the general commentary, he would make proposals that reflected the comments and suggestions made by members.

**The Chair** invited the Commission to proceed with the adoption of the general commentary paragraph by paragraph.

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraph (2)*

**Mr. Forteau** said that the first sentence of paragraph (2), which stated that the draft conclusions were intended to “contribute to greater clarity on the law relating to the sources of international law”, could be construed as implying that subsidiary means were sources of international law. He therefore proposed that the sentence should be amended to read: “The present draft conclusions seek to contribute to greater clarity on the use of subsidiary means, including their relationship with the sources of international law.”

**Mr. Jalloh** (Special Rapporteur) said that, in response to Mr. Forteau’s concerns regarding the ambiguity of the first sentence, he wished to propose that the sentence should be amended to read: “The present draft conclusions seek to contribute greater clarity on the law generally relating to the sources of international law in two principal ways.”

**Mr. Paparinskis**, supported by **Ms. Mangklatanakul**, said that he shared Mr. Forteau’s concerns about the first sentence, which the Special Rapporteur’s suggestion did not meet. His own proposal would be to replace the phrase “law relating to the sources of international law” with the phrase “subsidiary means for the determination of international law”. He could also support Mr. Forteau’s alternative proposal in that regard.

He wished to make a number of proposals in relation to the second sentence. First, in the phrase “they aim to identify and elucidate the traditional and contemporary roles of subsidiary means”, the words “identify and” should be deleted, because “identify” was a technical term that had given rise to much discussion. Secondly, in the same phrase, the words “traditional and” should be deleted, since the main thrust of the Special Rapporteur’s argument was that the Commission was engaged in a modern study of subsidiary means. Thirdly, the words “roles of” should be deleted, because the functions of subsidiary means had not yet been addressed by the Commission. His fourth proposal, which concerned the phrase “consistent with the letter and spirit of Article 38, paragraph 1, of the Statute of the

International Court of Justice”, was to delete the words “the letter and spirit of”, which struck him as an unusual turn of phrase in the context of an international legal argument. Fifthly, in the same part of the sentence, the words “in the wider context of the ‘sources’ of international law” should be deleted, since they seemed to place subsidiary means on the same level as sources of international law.

In addition, he had doubts about the content of footnote 1, in particular whether the first sentence of the footnote should define in passing one of the great jurisprudential queries of modern law, namely the question of the character of sources, and whether the statement in the second sentence that the sources of international law were those set out in Article 38 (1) (a)–(c) was consistent with the Special Rapporteur’s argument, set out later in the commentaries, that Article 38 did not in fact accurately reflect all the sources of international law.

**Mr. Vázquez-Bermúdez** said that he shared the concerns expressed by Mr. Forteau and Mr. Paparinskis about the first sentence of the paragraph and would gladly support either of their proposed amendments. He also supported the further proposals made by Mr. Paparinskis with regard to the second sentence.

**Mr. Forteau** said that he supported the proposals made by Mr. Paparinskis with regard to the second sentence. He was also in favour of simplifying the text by merging paragraphs (2) and (3) together and omitting all references to the idea that there were two aims to the draft conclusions, since in fact they had only one aim, which was to clarify the manner in which subsidiary means for the determination of rules of international law were used.

**Mr. Galindo** said that while he was of the view that the distinction between “formal” and “material” sources was rather artificial, footnote 1 provided a definition that concerned only “formal” sources of international law. Clarification of that fact was necessary; otherwise, the footnote could imply that the Commission understood the term “sources” to refer only to formal sources of international law.

**Mr. Oyarzábal** said he agreed that there was a need to simplify the paragraph. For that reason, he supported the proposals made by Mr. Forteau and Mr. Paparinskis.

**Mr. Fife** said that his concerns about paragraph (2) were mostly taken care of by Mr. Forteau’s proposal regarding the first sentence and the Special Rapporteur’s proposal to delete the word “to” in the phrase “contribute to greater clarity”, as well as the proposals made by Mr. Paparinskis regarding the second sentence. He also wished to propose, for reasons that were different from but overlapped with the concerns expressed by Mr. Galindo, the deletion of footnote 1 and its premature and potentially prejudicial attempt to define the term “sources”. The use of terms would be dealt with in a more concrete way in the commentaries to the individual draft conclusions. Mr. Forteau’s proposal to merge paragraphs (2) and (3) was also a worthwhile one, as it was not clear that the dichotomy proposed between the aim described in paragraph (2) and the aim described in paragraph (3) was valid.

**Ms. Okowa** said she had understood that the Special Rapporteur’s intention in paragraph (2) was to make explicit that the current topic would be the last of the Commission’s endeavours in relation to the sources of international law. The draft conclusions must be read together with the Commission’s previous outputs in relation to sources, since subsidiary means could not be understood outside the context of the sources of international law. One way to simplify the text would be to amend it to read:

“The present draft conclusions on subsidiary means seek to contribute greater clarity on the law generally relating to the sources of international law in two principal ways. First, they aim to elucidate the historical and current uses of subsidiary means for the determination of rules of international law, within the broad framework of Article 38, paragraph 1, of the Statute of the International Court of Justice.”

**Mr. Akande** said that the concerns of some members with regard to the first sentence were rooted in their impression that the use of the term “sources” in that context might be read as suggesting that subsidiary means were sources. Mr. Forteau’s proposal met that



concern by making it explicit that subsidiary means were not a source of international law but had a relationship with those sources.

He supported the proposals made by Mr. Paparinskis regarding the second sentence, except that he would prefer to retain the words “roles of”. While it was true that the Commission had not yet discussed the functions of subsidiary means, it had repeatedly stated that it would do so.

Regarding the proposal to merge paragraphs (2) and (3), in his view, the two aims described in those paragraphs were different; however, the first sentence of paragraph (3) could be incorporated into paragraph (2), at the end of the paragraph. Such an amendment would result in a clearer text.

**Mr. Fife** said that Ms. Okowa had raised a valid point about the need to situate the Commission’s work on subsidiary means in the context of its previous work on sources of international law. That was the role played by paragraph (4) of the general commentary, which explained that Article 38 (1) of the Statute of the International Court of Justice provided the overarching framework for those endeavours. To address Ms. Okowa’s concerns, appropriate references to the Commission’s previous outputs could be included in a footnote. However, her proposed text did not address his concerns about the need for conceptual clarity and the added value that the Commission could provide in that regard going forward. He agreed with Mr. Akande that the words “roles of” should be retained.

**Mr. Mingashang** said that paragraphs (2) and (3) indeed addressed two completely different aims, namely the elucidation of roles and methodology, respectively. In the interests of clarity, those two aims should continue to be dealt with in separate paragraphs.

**Mr. Fathalla** said that he supported Mr. Akande’s proposal to move the first sentence of paragraph (3) to the end of paragraph (2).

**Mr. Jalloh** (Special Rapporteur) said that, while paragraph (2) might be conceptually linked to subsequent paragraphs of the general commentary, it would be helpful if members could make proposals only in respect of the paragraph currently under consideration. It seemed that members were in agreement that the overriding aim of the draft conclusions was to clarify how subsidiary means could be used to determine rules of international law. While he had taken due note of the different proposals put forward, he wished to recall that the purpose of paragraph (2) was simply to introduce key concepts and ideas, which could then be fleshed out in subsequent paragraphs. He appreciated the helpful proposal made by Ms. Okowa, who had rightly pointed out that the draft conclusions should be read in conjunction with the Commission’s previous outputs on sources of international law.

Mindful of the points raised by members, he wished to propose, building on Mr. Forteau’s initial proposal, that the first sentence of the paragraph should read: “The present draft conclusions seek to contribute greater clarity on the use of subsidiary means and their relationship to the sources of international law in two principal ways.” In the second sentence, his preference would be to retain the words “identify and elucidate the traditional and contemporary roles of subsidiary means”, as that language reflected the discussions held in the Drafting Committee about the origin and objectives of Article 38 of the Statute of the International Court of Justice and about how the role of subsidiary means had evolved over time. Regarding the objections raised in respect of the word “identify”, he wished to recall that, in the Drafting Committee, he had accepted certain compromise solutions on the understanding that certain points would be expanded upon in the commentary. Footnote 1 was not intended to spark a debate about the distinction between “formal” and “material” sources, which he too considered to be artificial; it simply addressed a point that he did not think warranted inclusion in the body of the text. He could accept the deletion of footnote 1 with the exception of the reference to his first report on the topic, which should be retained.

**Ms. Mangklatanakul** said that, since the Commission had not yet reached a consensus on whether the list of subsidiary means in Article 38 (1) (d) of the Statute of the International Court of Justice was exhaustive, paragraph (2) should avoid giving the impression that additional subsidiary means existed. It should not convey anything other than what had been agreed upon in the Drafting Committee and at plenary meetings, namely that the purpose of subsidiary means was only to determine rules of international law.

**Mr. Oyarzábal** said that, for the sake of expediency, paragraphs (2) and (3) should be kept separate. In his view, paragraph (2) could be shortened to read: “The present draft conclusions seek to contribute to greater clarity on the use of subsidiary means for the determination of rules of international law, consistent with Article 38 of the Statute of the International Court of Justice.”

**Mr. Jalloh** (Special Rapporteur) said that, although Ms. Mangklatanakul was of the view that judicial decisions and teachings were the only subsidiary means for determining rules of international law, the Commission had already established that subsidiary means other than those specifically mentioned in Article 38 (1) (d) existed, as reflected in draft conclusion 2 (c). The difference of opinion among members concerned what exactly those other subsidiary means were. Paragraph (2) should not give the impression that the question of whether additional subsidiary means existed had not been settled.

**Ms. Okowa** said that Mr. Oyarzábal’s proposal was problematic, as the language “consistent with Article 38 of the Statute” and the deletion of the second sentence of the paragraph could have the effect of reopening the debate on whether the list of subsidiary means in Article 38 (1) (d) of the Statute was exhaustive.

**Mr. Akande** said that the first sentence of the paragraph as reformulated by the Special Rapporteur helpfully clarified that subsidiary means were not sources of international law. In his view, simplifying the second sentence would more plainly convey the idea that the draft conclusions sought to shed light on the roles of subsidiary means in determining rules of international law. For example, the language “identify and elucidate the traditional and contemporary roles of subsidiary means” could be revised to read “identify and elucidate the roles of subsidiary means” and, to avoid repetition, the words “in the wider context of the ‘sources’ of international law” could be deleted from the end of the sentence.

**Mr. Forteau** said that draft conclusion 2 (c) stated that subsidiary means also included any other means generally used to assist in determining rules of international law. “Generally used” were the operative words in that paragraph, given that the only points on which there was currently a consensus were that there might be other subsidiary means, provided that they were “generally used”, and that, at future sessions, the Commission should determine which means fell into that category. Therefore, no position had yet been taken on what those other means were.

He was in favour of deleting footnote 1, including the reference to paragraph 160 of the Special Rapporteur’s first report on the topic, as it did not correspond to what was said in the remainder of the footnote and could cause a great deal of confusion about the relationship between subsidiary means and sources of international law.

**Mr. Vázquez-Bermúdez** said that the first sentence of the paragraph, as reformulated by the Special Rapporteur on the basis of Mr. Forteau’s initial proposal, seemed to enjoy broad support. He had no objection to the words “identify and elucidate” in the phrase “identify and elucidate the traditional and contemporary roles of subsidiary means”, but, like Mr. Akande, he considered that the words “traditional and contemporary” were superfluous and could be deleted. He also supported the deletion of the words “the letter and spirit of” and the language “in the wider context of the ‘sources’ of international law” from the second sentence of the paragraph, and the deletion of footnote 1.

**Mr. Jalloh** (Special Rapporteur) said that he disagreed with Mr. Forteau’s interpretation of draft conclusion 2 (c). The category of “any other means” had already been determined to exist and its existence was not up for debate. Members had already suggested that the work of expert bodies and the resolutions of certain international organizations could be included in that category.

The revised first sentence of the paragraph would therefore read: “The present draft conclusions seek to contribute greater clarity on the use of subsidiary means and their relationship to the sources of international law in two principal ways.” The second sentence could be further amended to read: “First, they aim to identify and elucidate the roles of subsidiary means for the determination of rules of international law, consistent with the letter and spirit of Article 38, paragraph 1, of the Statute of the International Court of Justice.” Footnote 1 should be deleted, as the relationship between subsidiary means and the sources

of international law was already explained in the first sentence. Footnote 2, which would then become footnote 1, should follow directly after “the Statute of the International Court of Justice”.

**Mr. Vázquez-Bermúdez** said that he wondered whether the Special Rapporteur might consider deleting the language “the letter and spirit of” from the second sentence, as it struck him as interpretative in character and its inclusion might give rise to unforeseen consequences.

**Mr. Jalloh** (Special Rapporteur) said that he preferred to retain the language in question.

**The Chair** said she took it that the Commission wished to adopt paragraph (2) of the general commentary as reformulated by the Special Rapporteur.

*Paragraph (2), as amended, was adopted.*

*Paragraph (3)*

**Mr. Jalloh** (Special Rapporteur) said that the first sentence of the paragraph should be retained as it stood. The second sentence should be divided into three sentences, which would read: “Such determination relates to two main aspects. Firstly, in some cases, the question is whether subsidiary means can be used to identify an applicable rule of international law, whether derived from a treaty, international custom or a general principle of law. Secondly, in other cases, it may be determined – using the subsidiary means – that a certain rule exists, but debate could remain about its content and scope.” In the penultimate sentence, the phrase “which raises many questions as to the legal value and implications thereof” should be deleted. In the last sentence, the words “States, international organizations and other relevant actors” should be replaced with “practitioners and scholars”.

**Mr. Oyarzábal**, speaking on a point of order, said that it would be useful if the Special Rapporteur’s reformulated text could be circulated to members in writing ahead of the Commission’s next meeting.

*The meeting rose at 1.05 p.m.*