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International Law Commission
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Provisional summary record of the 3653rd meeting
Held at the Palais des Nations, Geneva, on Wednesday, 2 August 2023, at 3 p.m.

Contents

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 3.15 p.m.

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 (C) (2) of the draft report, as contained in document A/CN.4/L.979/Add.1.

General commentary (*continued*)

The Chair drew attention to an informal document that the Special Rapporteur had circulated showing the changes that he was proposing to the outstanding paragraphs of the general commentary.

Mr. Jalloh (Special Rapporteur) said that he was proposing various changes to paragraphs (3) to (10) in the light of informal consultations among interested members. With a view to finding a middle ground, he had sought to streamline the commentary and respond to concerns relating to a number of substantive issues, without prejudice to the possibility that those issues would be addressed at a later stage. He wished to emphasize that, at the current session, the Commission was adopting the commentaries on a provisional basis; it would subsequently have the opportunity to make further changes in the light of the comments received from States.

At the previous meeting, he had proposed a new version of paragraph (3), as set out in the informal document distributed in the meeting room. He was proposing minor changes to paragraph (4), which essentially reproduced the text of Article 38 (1) of the Statute of the International Court of Justice. To maintain a consensus, he was proposing the deletion of paragraph (5), which, in substance, had been intended to reflect the Court's actual practice. Evidence in support of the substance of the paragraph could be found in the literature and judicial decisions, including the Court's own decisions. He would return to the issues addressed in the paragraph at the following session, when his second report, which would focus on judicial decisions, would be considered by the plenary. He was proposing some changes to paragraph (6) in the light of comments received from members. Paragraph (7), which provided an explanation of the Commission's decision to follow the approach that it had taken in the context of its work on related topics, was uncontroversial. Paragraph (8) touched on an issue on which the Sixth Committee had long requested clarification, namely the normative value of the Commission's outputs. As some members had expressed concern regarding the manner in which paragraph (9) was presented, he was proposing its deletion. He nevertheless intended to return to the issues addressed in that paragraph at a later stage.

Paragraph (3) (*continued*)

Mr. Jalloh (Special Rapporteur) proposed that, as indicated in the informal document circulated in the meeting room, the second sentence should be split into three sentences, to 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." He also proposed that the words "which raises many questions as to the legal value and implications thereof" in the penultimate sentence should be deleted and that the words "States, international organizations and other relevant actors" in the last sentence should be replaced with "practitioners and scholars".

Mr. Forteau said that, while he supported the Special Rapporteur's proposals, he wished to make three points. First, the words "using the subsidiary means" in the new fourth sentence should be deleted. A rule could be determined without using subsidiary means, but they would be needed to assess its content and scope. Second, footnote 4 included several examples of draft provisions adopted by the Commission in which it was stated that subsidiary means could be used for the determination of the existence and content of rules of international law. However, the examples all concerned the use of judicial decisions. The footnote should either be simplified, such that it did not include any specific examples, or

supplemented with references to all relevant draft provisions, including those concerning the use of teachings. Third, as the uniformity of international law was not always a desirable outcome, the word "*uniformité*" [uniformity] in the last sentence should be replaced with "*cohérence*" [consistency].

Mr. Oyarzábal said that, in the first sentence, the meaning of the expression "methodological approach" was unclear. With regard to the last sentence, it was the Commission's work – and not the methodology in question – that would contribute to enhancing the uniformity, predictability and stability of international law. The new third sentence should be reformulated, as there was no question that subsidiary means could be used to identify an applicable rule of international law. The penultimate sentence should also be reformulated, as it was difficult to follow.

Mr. Sall said that, to improve the French text, the words "*premièrement*" and "*deuxièmement*" at the beginning of the new third and fourth sentences should be replaced with "*en premier lieu*" and "*en second lieu*", respectively, and the word "*méthodologie*" in the last sentence should be replaced with "*méthode*". In the new fifth sentence, the words "for instance a judicial decision" should be deleted, as it was odd to mention only one category of subsidiary means.

Mr. Fife said that, in the new third sentence, the phrase "an applicable rule of international law, whether derived from a treaty, international custom or a general principle of law" seemed to limit the potential scope of the formal sources of international law. He therefore preferred the original, non-restrictive formulation, which included the words "such as". In the last sentence, the word "methodology" worked well in English, but the cognates in other languages might not be appropriate. However, the phrase "provided that it is widely adhered to by practitioners and scholars" in the same sentence should be deleted, as it implied that the capacity of the methodology in question to contribute to enhancing the uniformity, predictability and stability of international law depended on the extent to which practitioners and scholars adhered to it.

Mr. Paparinskis said that the words "an actual source of international law" in footnote 3 raised the question of whether subsidiary means constituted a source of international law of some other kind. He therefore proposed that they should be replaced with "a source of international law". He also proposed that, for consistency with the Commission's previous practice, the words "international custom" in the new third sentence should be replaced with "customary international law". He further proposed that the words "as well as the potentially far-reaching implications of the expansion of the category of subsidiary means through the increasingly sophisticated practice of States and international organizations" in the penultimate sentence should be deleted. That issue should be addressed in relation to draft conclusion 2 (c). In the same sentence, the words "binding obligations in international law" should be replaced with "rules of international law", as subsidiary means were also relevant to the determination of rules structured as, for example, rights, powers or privileges. He supported Mr. Fife's proposal regarding the last sentence, albeit for slightly different reasons. With regard to footnote 4, the broad assertion that the Commission's draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) had found "general support among States" was, at the current stage, perhaps questionable.

Mr. Patel said that the new fourth sentence – according to which it could be determined, "using subsidiary means", that a certain rule existed – implied that subsidiary means had primacy. The beginning of the penultimate sentence seemed to exclude the possibility that subsidiary means could be used as a direct source of law, which ran counter to the practice of certain jurisdictions. The reference to the "use of any subsidiary means to elucidate the sources of binding obligations in international law" in the same sentence was misleading, as a State could not be said to be bound by an obligation to which it had not consented solely because subsidiary means had been used to elucidate that obligation. Moreover, the sentence as a whole was excessively long. With regard to the last sentence, actors other than practitioners and scholars – for example, judges – could also play a role in ensuring that the methodology in question contributed to enhancing the uniformity, predictability and stability of international law.

Mr. Galindo said he agreed with Mr. Fife that, in the new third sentence, it would be preferable to use a non-restrictive formulation, including the words "such as", to refer to the sources from which an applicable rule of international law could be derived. He agreed with Mr. Paparinskis that, in the same sentence, the expression "customary international law" should be used in preference to "international custom". The Commission had explained its preference for that expression in the context of its work on the topic "Identification of customary international law". The expressions "customary international law" and "international custom" were used inconsistently throughout the commentaries. He agreed with Mr. Forteau that the word "uniformity" should be avoided in the last sentence. That word had a complex history in the field of comparative law and was associated with colonialism.

Mr. Akande said that, if the words "provided that it is widely adhered to by practitioners and scholars" in the last sentence were to be retained, the word "courts" should be inserted before "practitioners".

Mr. Jalloh (Special Rapporteur) said it seemed that some members were less comfortable with the latest amendments proposed than they had been with the original wording of paragraph (3). It might be wise to leave the paragraph in abeyance a little longer to allow for further consolidation of the latest amendments proposed and comments made. In a number of cases, such as with regard to the amendments proposed to the second sentence of the paragraph as originally drafted, on which Mr. Fife and others had expressed concerns, the original wording might prove more acceptable. Mr. Patel had expressed the concern that subsidiary means were effectively being elevated above treaty law, but that was not the intention either of the paragraph as originally drafted or of the amendments he, the Special Rapporteur, had proposed in response to earlier comments. Part of the thrust of paragraph (3) was that subsidiary means could be used to determine the precise nature and scope of a rule the existence of which was not in dispute.

With regard to the sources of binding obligations in international law, referred to by several members, the intent of the penultimate sentence of paragraph (3) was to explain that subsidiary means, in particular judicial decisions, might specify what the obligation of a State was; that would be relevant in identifying the obligation, particularly if it stemmed from something other than a treaty, such as a unilateral act of a State. In the same sentence, the term "methodology" worked well in English, and he would favour retaining it, but how to render it in the other language versions could be discussed. In the last sentence, he understood the term "practitioners", which he was proposing to add, to refer to everything from legal advisers and counsel appearing in legal cases to judges. By including "scholars" in the same proposed amendment, he had sought to broaden the groups addressed in the paragraph. The term "uniformity", in the last sentence, was intended to suggest that approaches should be unified across sub-fields of international law, rather than to prompt a comparative legal discussion. As "coherence" had already been referenced earlier in the text, he suggested that the phrase should be limited to "the predictability and stability of international law". The reference to "international custom" was modelled on Article 38 (1) (*b*) of the Statute of the International Court of Justice, but he would happily accept the formulation "customary international law" more commonly used by the Commission in its recent work.

The Chair suggested that the Special Rapporteur should consolidate the various amendments proposed with a view to adopting the text later in the meeting.

It was so agreed.

Paragraph (4)

Mr. Jalloh (Special Rapporteur) said that, in the first sentence, his suggestion was to add the words "regarded as" between "which is" and "the most authoritative statement". In the second sentence, he proposed to change the word "mandates" to "directs that" and the words "to apply" to "shall apply".

Mr. Patel suggested that, in the first sentence, the words "first aim" should be altered to "first way", in line with the "two principal ways" referred to in paragraph (2) of the general commentary. He also expressed the view that it was incorrect to describe Article 38 of the Statute of the International Court of Justice as the most authoritative statement of sources of

international law, as its function was simply to help the Court decide disputes submitted to it. Describing it thus excluded other sources of international law. In fact, the first two sentences of the paragraph were somewhat contradictory. In the second sentence, the verb "directs" would be too harsh; he suggested changing "mandates" to "provides".

Mr. Vázquez-Bermúdez suggested that, in the first sentence, the reference should be specifically to Article 38 (1) (*a*), (*b*) and (*c*) of the Statute, not Article 38 as a whole, and that no quotation marks were needed on "community of nations" in the second sentence.

Mr. Fife, expressing support for Mr. Vázquez-Bermúdez's first proposal, suggested that the phrase "whose function is to decide in accordance with international law the disputes submitted to it by States" should be omitted, as the International Court of Justice also had an advisory role.

Mr. Paparinskis, echoing the points made by Mr. Vázquez-Bermúdez, said that Article 38 was described differently in paragraphs (4) and (6) of the general commentary. It might be sensible to align the two references, in which case he would prefer the stronger wording used in paragraph (4).

Mr. Jalloh (Special Rapporteur) said that he would not object to altering "first aim" to "first way" in the first sentence of paragraph (4), though he considered the existing wording more elegant. He hesitated to make the reference to Article 38 in the first sentence more specific, as the second sentence went on to discuss only paragraph 1 thereof; the concern of members that paragraph 2 should not be included was therefore already addressed. The authoritative nature of Article 38 as a statement of the sources of international law did not appear to be disputed in the literature; however, if some members found the wording of the first sentence too categorical, the word "most" could be deleted. While the word "source" was not explicitly used in Article 38, it was very widely consulted as a statement of the sources of international law by national courts, jurists and others. The inclusion of the words "regarded as" should allay the concerns expressed in that regard, while also addressing the point made by Mr. Paparinskis. As Article 38 contained a direct instruction to the Court, he suggested that the proposed wording "directs that the Court … shall apply" was apt; it represented a compromise based on his original proposal, which had been "mandates the Court … to apply". Article 38 (1) did not appear in the text in its entirety so as to avoid reproducing the outdated and pejorative phrase "civilized nations"; however, the quotation marks on "community of nations", which were intended to highlight the fact that the Commission had chosen to use more appropriate wording in the present draft conclusions, were not essential.

Mr. Fife reiterated his view that it would be useful to restrict the reference in the first sentence to paragraph 1 of Article 38, to avoid perpetuating the misconception he had sometimes encountered that paragraph 2 also described sources of international law. He also maintained his suggestion to delete the words "whose function is to decide in accordance with international law the disputes submitted to it by States".

Mr. Jalloh (Special Rapporteur), while acknowledging that the International Court of Justice had other functions beyond deciding disputes, said that he would prefer to retain the words that Mr. Fife had suggested deleting, as they described the key function of the Court, which was the focus of the paragraph. During negotiations to draft the Statute, the wording in question had been suggested by Chile to underline that the Court acted in accordance with international law; it did not prejudice the Court's advisory function.

Ms. Okowa suggested that Mr. Fife's concern would be satisfied by altering the words "whose function is to decide" to "whose primary function is to decide".

Mr. Asada, highlighting the fact that paragraph (4) largely reproduced the provisions of Article 38 (1) of the Statute of the International Court of Justice, sought clarification regarding the link between paragraph (4) and paragraph (2) of the general commentary, as they appeared to say slightly different things.

The Chair suggested that deleting the first part of the first sentence of paragraph (4), so that it began "Article 38 of the Statute", might help; if so, a similar amendment would be needed in paragraph (6) of the general commentary.

She took it that the Commission agreed to adopt paragraph (4) with the deletion of the words “With respect to the first aim”, the addition of “regarded as” and the deletion of “most”, in the first sentence; and, in the second sentence, the replacement of “mandates the Court, whose function is to decide in accordance with international law the disputes submitted to it by States, to apply” with “directs that the Court, whose primary function is to decide in accordance with international law the disputes submitted to it by States, shall apply”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was deleted.

Paragraph (6)

Mr. Jalloh (Special Rapporteur) said that, in the first sentence, the words “as a purely technical matter” should be altered to “which concerns a consistent methodological approach”. The first part of the third sentence should be deleted, so that the sentence would begin: “There is no suggestion from the drafters…” Later in the same sentence, the words “the provision” should be changed to “Article 38, paragraph 1 (*d*)” and the word “sources” to “subsidiary means for the determination of rules”.

Mr. Patel said that the section of the first sentence reading “Article 38 is merely the applicable law provision” was incorrectly phrased, as the function of Article 38 was very limited, applying only to the Court’s specific mandate to decide disputes, rather than to the rest of its Statute. In the second sentence, the exact meaning of the phrase “under customary international law” was unclear in the context. It could be taken to imply that Article 38 itself was a source under customary international law. In the last sentence, the adjective “classical” should perhaps be changed to “traditional”.

Mr. Galindo suggested that, after the words “by States” in the second sentence, the words “and international organizations” should be inserted, to clarify that the context included acceptance of and reliance on Article 38 by international organizations, as well as States.

Mr. Forteau said that the link between the first and second sentences of paragraph (6), on the one hand, and the third and fourth sentences, on the other, appeared unclear. The statement in the third sentence was open to debate: some did indeed view the list of subsidiary means set out in Article 38 (1) (*d*) as exhaustive. He suggested that the sentence should be deleted. In the fourth sentence, he suggested that the word “address” should be changed to “explore”.

Ms. Okowa said that, while some might view the list in Article 38 (1) (*d*) as exhaustive, it was her understanding that the third sentence of paragraph (6) was intended to reflect the intent of the drafters of the Statute, who had not considered it as such. Article 38 (1) (*d*) was not an exhaustive list of subsidiary means or intended to apply in all circumstances. Bodies other than the International Court of Justice had also applied it on an optional basis. As the question of considering additional subsidiary means had already raised some concerns, she suggested that, in the fourth sentence, the words “will also address” should be changed to “intend to address”; the outcome could then be left open, so as to take account of the reaction of States.

Mr. Vázquez-Bermúdez suggested that, in the first sentence, the word “merely” should be deleted. In the second sentence, the words “as a generally accurate statement” should be changed to “as an authoritative statement”, in line with paragraph (4) of the general commentary. He agreed with Mr. Patel that, in the fourth sentence, the term “traditional” would be preferable to “classical”; in the same sentence, he suggested changing “will also address” to “will also consider”.

Ms. Mangklatanakul said that, in the second sentence, the words “as a generally accurate statement of the sources under customary international law” should be replaced with “as an authoritative statement of international law”. She agreed with Mr. Forteau that the third sentence should be deleted. There was no need to classify subsidiary means as modern

or old-fashioned, and so the word “classical” should simply be deleted. She suggested that, in the final sentence, the words “will also address” should be replaced with “intend to explore” and then a reference added to whether those means existed or had emerged.

Mr. Paparinskis said that he agreed with Mr. Vázquez-Bermúdez’s proposals to delete the word “merely” and to replace the words “as a generally accurate statement” with “as an authoritative statement”, in order to align the paragraph with the amended wording of paragraph (4). He was sympathetic to the points made by Mr. Forteau and Ms. Mangklatanakul regarding the third sentence; either the sentence should be deleted, as they proposed, or an additional sentence should be added at the end of the general commentary to reflect the views expressed by other members. Such a sentence could read: “Several members took the view that the traditional list of subsidiary means can be read broadly so as to address contemporary developments.” In the final sentence of paragraph (6), the word “classical” should be replaced with “traditional”, the key point being that the judicial decisions and teachings should be explicitly mentioned.

Mr. Fife agreed that the word “merely” should be deleted from the first sentence. He said there was a fundamental dimension missing from the commentary concerning the significance of Article 38 of the Statute of the International Court of Justice: according to Article 92 of the Charter of the United Nations, the Court’s Statute, and thus Article 38, formed an integral part of the Charter, by which all Member States were bound. That ought to be reflected in the commentary. He supported the suggestion that the final two sentences should be reworded: the statement that the draft conclusions would also address certain additional subsidiary means was misleading in that it inferred that such additional subsidiary means existed, whereas the Commission had decided to consider whether or not they did.

Mr. Sall said that, in the final sentence of the French version, the use of the word “*outre*” at the beginning of the sentence meant that the word “*supplémentaires*” was redundant and should be deleted.

Mr. Fathalla said he agreed with Mr. Fife that the fact that the Statute of the International Court of Justice formed an integral part of the Charter of the United Nations and, as such, had been accepted by all the Member States, should be reflected in the commentary. The matter of the decisions of the treaty bodies as possible subsidiary means should also be given a place in the paragraph.

Mr. Jalloh (Special Rapporteur) said that some of the matters raised – for example, the idea of reflecting the work of expert bodies or the resolutions of international organizations – had already been discussed in the Drafting Committee. While he did not agree with that suggestion, he would endeavour to draft wording that reflected the consensus.

The Chair suggested that paragraph (6) should be left in abeyance until the Special Rapporteur had formulated new wording on the basis of the proposals made.

Paragraph (6) was left in abeyance.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Mr. Jalloh (Special Rapporteur) proposed that, as indicated in the informal document circulated in the meeting room, the words “of the Commission” should be inserted after the word “statute” in the final sentence, and the same words deleted after “general practice”.

Mr. Galindo said that the word “restatement” in the second sentence could be misleading, as it was associated with the law of the United States of America. He did not think that it should be used in the context of the codification and progressive development of international law. He proposed replacing it with the verb “to restate”. Furthermore, the final two sentences of the paragraph were unnecessary, as they only provided clarification, and so could be deleted.

Mr. Forteau said that, according to article 20 of the Commission’s statute, its commentaries should contain, among other things, a “presentation of precedents and other

relevant data"; "presentation" would be a more neutral way of expressing the same idea as "restatement".

Mr. Patel said that, in the penultimate sentence, it was inappropriate to speak of the essential "characteristic" of the draft conclusions as being to clarify the law; that was, rather, their essential "function".

Mr. Akande proposed that the word "restatement" should be replaced with "statement"; however, he could also accept Mr. Forteau's proposal to replace it with "presentation".

Mr. Jalloh (Special Rapporteur) said that the sentence could be reformulated to replace "a restatement of the rules" with "to restate the rules". Other elements in the paragraph had been drawn from the Commission's previous work on, for example, the identification and legal consequences of peremptory norms of general international law (*jus cogens*).

Mr. Akande said that it would be problematic to use the verb "restate" in the sentence; the simplest solution would be to replace "restatement" with "statement".

The Chair said she took it that the Commission wished to replace "restatement" with "statement", to insert the words "of the Commission" after the word "statute" in the final sentence, and to delete the same words after "general practice" in the same sentence.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was deleted.

Paragraph (10)

Mr. Jalloh (Special Rapporteur) proposed that, as indicated in the informal document circulated in the meeting room, the words "That said" at the beginning of the second sentence should be replaced with "Nonetheless"; and, in the final sentence, the words "such as judges, arbitrators and legal advisers" should be deleted.

Mr. Paparinskis said that, as paragraph (9) had been deleted, he was unconvinced of the usefulness of retaining paragraph (10), which seemed to consist of statements related to draft conclusions that had yet to be adopted. The second and third sentences should therefore be deleted. The question would then arise as to the usefulness of keeping the remaining, first, sentence, which had originally followed on from paragraph (9). If it was to be kept, the words "the Commission hopes" should be replaced with "the Commission's aim is". Still, he would favour the deletion of the whole paragraph, which would mean that the general commentary would end in a logical manner, with the final sentence in paragraph (8) addressing the content of the Commission's output.

Mr. Fife said he agreed with Mr. Paparinskis that it would be preferable to delete the whole paragraph but, if the first sentence was to be retained, the word "address" in "those who might be called upon to address subsidiary means" should be replaced with "use".

Mr. Akande said that the second sentence might be controversial and should be deleted. The introductory clause of the first sentence, "Taking the above into account", referred not only to the preceding paragraph, but to the whole of the general commentary; the sentence thus had value and should be retained. He agreed with the proposal to replace "the Commission hopes that" with "the Commission's aim is".

Ms. Okowa said that the introductory clause could refer to "the previous considerations" rather than "the above"; or else the clause could, as suggested, be deleted so that the sentence would begin "Given its mandate to assist States". She suggested that the word "hopes" should be replaced with "expects".

Mr. Patel said that the first sentence was inconsistent with article 1 of the Commission's statute, which did not mention "assisting" States. He proposed to replace the word "address" in the first sentence with "explore". He also noted the inconsistent use of

"draft" when mentioning the conclusions and encouraged the Special Rapporteur to ensure consistency throughout the text.

The Chair pointed out that the Commission had been given the mandate of assisting States by the General Assembly.

Mr. Fathalla said that the words "the Commission hopes that the present conclusions will serve" should be replaced with "the Commission is of the view that the present conclusions may serve".

Mr. Jalloh (Special Rapporteur) said that, while he understood those members who disagreed with the inclusion of the sentence beginning with "Nonetheless", he considered the point being made to be a substantive one. No-one had suggested that the Commission would address all subsidiary means in the context of the topic at hand; to avoid any misunderstanding, the caveat that it would not do so should thus be included.

Mr. Fife insisted that, in the first sentence, the word "address" should be replaced with "use". On a more substantive issue, he said that the reference in the second sentence to "all conceivable subsidiary means" could prejudice the Commission's subsequent discussions and so should be deleted.

Mr. Paparinskis said that the wording from "Nonetheless" to the end of the paragraph seemed to prejudge the Commission's future discussions on the parts of the report not yet adopted and future reports on the topic. He therefore associated himself with those members who had proposed that the second part of the paragraph should be deleted.

Mr. Fathalla said that he saw no harm in retaining the paragraph in its entirety.

Ms. Ridings said that she supported the proposal to delete the second and third sentences of the paragraph, both for the reasons given and because of the issues that she herself had raised concerning the general commentary at the Commission's previous plenary meeting.

Mr. Vázquez-Bermúdez said that members' concerns regarding the second sentence could perhaps be accommodated by replacing the words "do not address all conceivable subsidiary means" with "do not necessarily address all possible subsidiary means".

Mr. Forteau said that the Commission could also consider replacing the language referred to by Mr. Vázquez-Bermúdez with the formulation "do not intend to address all possible subsidiary means".

Mr. Jalloh (Special Rapporteur) said that, in the first sentence, the introductory phrase should read "Taking the above considerations into account"; the verb "hopes" should be changed to "expects"; and the phrase "will serve to" should be replaced with "may". In the second sentence, "That said" would be replaced with "Nonetheless"; and, although he would prefer to retain the formulation "the present draft conclusions do not address all conceivable subsidiary means", as it was a statement of fact, he would accept the replacement of the adjective "conceivable" with "possible". Lastly, in the final sentence, the words "such as judges, arbitrators and legal advisers" would be deleted. He would ask the secretariat to provide guidance on the use of the word "draft" before "conclusions" and introduce any necessary changes.

Paragraph (10), as amended, was adopted on that understanding.

The Chair invited the Commission to turn its attention once again to paragraph (3) of the general commentary, which had been left in abeyance.

Paragraph (3) (*continued*)

Mr. Jalloh (Special Rapporteur) said that, to address concerns raised earlier by members, he wished to propose several changes to the text of paragraph (3) as it appeared in document A/CN.4/L.979/Add.1. In the first sentence, the words "aim to" should be deleted. The second sentence should be replaced with the following three sentences:

> Such determination relates to two main aspects. Firstly, in some cases, there may be a question whether, using subsidiary means, a rule of international law can be

identified or exists to regulate a given issue based on one of the established sources of international law, such as a treaty, customary international law or a general principle of law. Secondly, in other cases, it may be determined that a certain rule exists, but debate could remain about its content and scope.

The clause "which raises many questions as to the legal value and implications thereof" should be deleted from the penultimate sentence. In the final sentence, the clause "provided that it is widely adhered to by States, international organizations and other relevant actors" should be deleted, and the word "uniformity" should be replaced with "harmony".

Changes should also be made to footnote 4. A semi-colon should be inserted after the quotation ending "determination of such rules", with the following language inserted immediately thereafter: "conclusion 14: '[t]eachings of the most qualified publicists of the various nations may serve as a subsidiary means for the determination of the rules of customary international law'." A semi-colon should be inserted after the quotation ending "determination of such principles", with the following language inserted immediately thereafter: "conclusion 9: '[t]eachings of the most qualified publicists of the various nations may serve as a subsidiary means for the determination of general principles of law'." In the language in brackets following the reference to *jus cogens*, a reference to "para. 1" should be inserted after "conclusion 9". In addition, a semi-colon should be inserted after the quotation ending "norms of general international law", with the following language inserted immediately thereafter: "conclusion 9, para. 2: '[t]he works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law'."

Mr. Patel said that he wished to know why the first sentence of paragraph (3) referred to only the content of rules of international law while the proposed sentence beginning with the word "Secondly" referred to both the content and scope of a rule.

Mr. Forteau said that, in the proposed sentence beginning with the word "Firstly", the words "or exists" should be deleted because they made the sentence ungrammatical.

Mr. Paparinskis said that, in the penultimate sentence of the paragraph, the phrase "sources of binding obligations in international law" should be replaced with "sources of rules of international law". In the second sentence of footnote 4, the reference to previous conclusions "which have already found general support among States" was perhaps inaccurate when applied to the Commission's work on *jus cogens*; therefore the clause beginning with the word "which" should be deleted, or the qualification "in relation to subsidiary means" should be inserted after "its previous conclusions".

Mr. Fife said that he supported the proposal made by Mr. Paparinskis to replace "binding obligations in international law" with "rules of international law". He would be hesitant to include a reference to "harmony" in the text because, although one hoped for harmony, he failed to see how it fitted into the structure of international law.

Ms. Okowa said that the last sentence of paragraph (3) should refer to "consistency" rather than "harmony".

Mr. Oyarzábal said that, in the proposed sentence beginning with the word "Firstly", everything that followed the words "be identified" could be deleted with no great loss of meaning. The penultimate sentence could also be simplified considerably.

Mr. Akande said that, if the Commission wished to retain the entirety of the sentence beginning with the word "Firstly", Mr. Forteau's concern could be addressed by replacing the words "or exists" with "or determined to exist" and deleting the words "to regulate a given issue".

Mr. Jalloh (Special Rapporteur) said that the words "content and scope" had been used in the proposed sentence beginning "Secondly" to contrast the cases referred to in that sentence with those addressed previously in the paragraph. He was willing to accept the proposals to replace "or exists" with "or determined to exist" and delete "to regulate a given issue" in the proposed sentence beginning "Firstly"; to change "binding obligations in international law" to "rules of international law" in the penultimate sentence; and to replace

"uniformity" with "consistency", rather than with "harmony", in the last sentence. The Commission appeared close to being able to adopt paragraph (3) with the changes to it and to footnote 4 that he had proposed, as further amended by the changes that he had just mentioned. He would therefore prefer not to open a discussion on the more extensive amendments proposed by Mr. Oyarzábal. The statement in the footnote regarding general support among States, which he would prefer to retain as drafted, was simply meant to indicate that, when the conclusions referred to had gone to States, there had been general support for them.

Mr. Akande, supported by **Mr. Paparinskis**, said that the intended meaning of the statement in the footnote regarding general support could be clarified by replacing the first part of the sentence with the following: "It should build as appropriate on its previous conclusions on subsidiary means that may be used for the determination of the existence and content of rules of international law, which have already found general support among States."

Paragraph (3), as amended, was adopted.

The meeting rose at 6.05 p.m.