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International Law Commission
Seventy-fourth session (second part)

Provisional summary record of the 3654th meeting
Held at the Palais des Nations, Geneva, on Thursday, 3 August 2023, at 10 a.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
	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 10.05 a.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 of its draft report, as contained in document A/CN.4/L.979/Add.1, continuing its discussion of paragraph (6) of the general commentary to the draft conclusions, which had been left in abeyance.

Paragraph (6) (*continued*)

Mr. Jalloh (Special Rapporteur) said that he wished to propose some changes to paragraph (6) based on comments and suggestions received from members. He had endeavoured to accommodate and balance the various views expressed. The new text would read:

> "With respect to the second aim, which concerns a consistent methodological approach, Article 38 is the applicable law provision of the Statute of the International Court of Justice. However, its significance stems not only from its inclusion in the Statute of the principal judicial organ of the United Nations and the only universal court with general jurisdiction, but also from the broader acceptance and reliance on Article 38 by States and tribunals, as well as legal scholars, as an authoritative statement of the sources of international law under customary international law. There is no suggestion from the practice of States and international organizations or established literature that Article 38 is an exhaustive enumeration of the sources of international law or the subsidiary means for the determination of rules of international law. Thus, in addition to judicial decisions and teachings, which may be thought of as the traditional subsidiary means, the present draft conclusions will also address additional subsidiary means prevalent in the practice of States and international organizations, which will be elaborated in later draft conclusions. The view was, however, expressed that the list of subsidiary means found in Article 38, paragraph 1 (*d*), can be read broadly to address contemporary developments."

In response to the suggestion that references to authoritative academic texts should be incorporated to support the propositions contained in the paragraph, he was also proposing the addition of two footnotes, one referencing Article 92 of the Charter of the United Nations, establishing the International Court of Justice as the principal judicial organ of the United Nations, and the other referencing, in *The Statute of the International Court of Justice: A Commentary*, the chapter by Alain Pellet in which it was noted that one of the main criticisms of Article 38 was its incompleteness.

Ms. Mangklatanakul suggested that, in the second sentence, the phrase "and the only universal court with general jurisdiction" should be deleted because the International Court of Justice was not the only court with general jurisdiction. Additionally, in the penultimate sentence, the phrase "address additional subsidiary means" should be replaced with "explore whether additional subsidiary means exist", as the current wording misleadingly implied that the existence of additional forms of subsidiary means had already been established.

Mr. Forteau recalled that the existence of subsidiary means other than judicial decisions and teachings had been recognized by the Commission in draft conclusion 9 (2) of its 2022 draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*). The text proposed by the Special Rapporteur was thus wholly acceptable as currently formulated.

Mr. Sall said that, while the revised text was well balanced, he wished to propose two small adjustments to the second sentence. Firstly, after the words "the Statute of the principal judicial organ of the United Nations", the words "which is an integral part of the Charter of the United Nations" should be added. Secondly, the phrase "and the only universal court with general jurisdiction" should be replaced with "in its capacity as the only universal court", to

reflect the fact that, as Ms. Mangklatanakul had noted, the Court's universality was more important than the generality of its jurisdiction.

Mr. Asada, recalling that the reference to the first aim originally contained in paragraph (4) of the general commentary had been deleted, said that the phrase at the start of paragraph (6), which read "With respect to the second aim", was therefore confusing and should also be deleted.

Ms. Okowa said that the revised text was factually correct and an accurate reflection of the discussions. However, the phrase "under customary international law" at the end of the second sentence was redundant and should be deleted.

Mr. Vázquez-Bermúdez said that he did not support the addition of footnotes referring to a single author to support propositions set forth in the body of the text. However eminent the author might be, such a reference could give the impression that the Commission had been unable to identify additional authors and that the proposition was thus insufficiently supported. He was in favour of adopting the paragraph, as amended, but without the proposed footnote.

Mr. Fife, supported by **Mr. Ruda Santolaria**, said that he too was in favour of incorporating a reference to the fact that the Statute of the International Court of Justice was an integral part of the Charter of the United Nations, as stipulated in Article 92 thereof, given the importance of that provision for understanding the normative value of Article 38 of the Statute. However, like Mr. Vázquez-Bermúdez, he believed that the footnote referring to the work of a single author should be omitted. Although he was an enthusiastic user of the work in question, there was no need to cite it in that context. Moreover, if supporting references were to be provided, more than one would need to be included.

The Chair said she took it that the Commission wished to adopt paragraph (6) as amended by the Special Rapporteur, subject to the addition of a reference to the Statute as being an integral part of the Charter of the United Nations and the omission of the proposed footnote referring to an academic source.

Paragraph (6), as amended, was adopted on that understanding.

The Chair invited the Commission to begin its consideration of the commentaries to the individual draft conclusions.

Commentary to draft conclusion 1 (Scope)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Jalloh (Special Rapporteur) proposed that, in the third sentence, the words "that would provide" should be replaced with "that would have provided" and that the last two sentences should be amended to read: "The Commission settled on the formulation that the draft conclusions concern "the use of" subsidiary means, which term was seen as less imperative than the term "are to be used". In addition, the formulation employed was preferred because it was more neutral."

Mr. Forteau proposed the deletion of the words "to describe" in the first sentence and the word "confusingly" in the fourth sentence.

Mr. Paparinskis said that, as the Statute did not strike him as confusing, he too was in favour of the deletion of "confusingly". In the fifth sentence, to clarify the empirical point regarding what happened in practice and the normative point regarding what the Court was required to do, the words "in practice" should be placed after "judges" and the phrase "when they deem it necessary" should be replaced with "when it is necessary". The latter amendment would remove any suggestion that there was an element of judgment involved in referring to subsidiary means.

Mr. Nguyen said that, in the fifth sentence, the Commission should refer specifically to Article 38, paragraph 1 (*d*), of the Statute, as it was the only paragraph that dealt with subsidiary means.

Ms. Okowa proposed that, in the fourth sentence, the words "does direct" should be changed to "directs" and the phrase "but it also – confusingly – indicates" should be amended to read "but at the same time indicates".

Ms. Oral, supported by **Mr. Ruda Santolaria**, said that, as she too had concerns about the use of the word "confusingly", she was in favour of Ms. Okowa's proposal.

Mr. Fife said that he too agreed with that proposal. Additionally, in the fourth sentence, he saw no need to refer to the International Court of Justice by its full title; a reference to "the Court" would suffice. Like Mr. Paparinskis, he was uncomfortable with the fifth sentence as currently formulated, not least because his impression was that judges seldom referred to teachings as subsidiary means and, empirically, the practice referred to was thus debatable. To simplify the paragraph, he proposed that the fourth sentence should be adjusted to indicate that judges "may" rather than "are to" use subsidiary means for the determination of the rules of international law and that the rest of the paragraph should be deleted.

Mr. Jalloh (Special Rapporteur) said that he could accept the amendments proposed for the first and fourth sentences. In the fifth sentence, the intention was to compare the provision of the Statute with what happened in practice. While he understood that referring to teachings as subsidiary means might be rare, the fact that the Court frequently referred to judicial decisions, including its own decisions, was sufficient to support the proposition. He would add "paragraph 1 (*d*)" to the reference to Article 38 but otherwise would prefer to retain the text of the last three sentences as he had proposed.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Jalloh (Special Rapporteur) proposed that the second sentence should be amended to read: "First, while the reference to 'subsidiary means for the determination of rules of international law' is derived from Article 38, paragraph 1 (*d*), of the Statute of the Court, it is not identical to the wording in that provision which speaks of the determination of 'rules of law'". He also proposed the addition of the word "However" at the start of the third sentence.

Mr. Galindo said that the statement, in the third sentence, that the term "subsidiary means for the determination of rules of international law" should, for all intents and purposes, be deemed equivalent to the term "subsidiary means for the determination of rules of law" was difficult to understand, given that it was followed, in the fourth sentence, by a statement indicating that there were exceptions to that equivalence. He therefore proposed that the third sentence should be deleted and that the start of the fourth sentence should be adjusted to read "However, the broader term 'rules of law' contained in the Statute".

Mr. Forteau said that he agreed with Mr. Galindo's proposed amendment. He also wished to propose the deletion of footnote 17, since the explanation it provided was unnecessary and could prove problematic.

Mr. Paparinskis, supported by **Mr. Vázquez-Bermúdez** and **Mr. Fife**, said that a new sentence should be inserted at the end of the paragraph to reflect the view expressed in the Drafting Committee that there could be situations in which rules that were not rules of international law could provide assistance in the determination of rules of international law, in the context of the determination of general principles or customary international law, or when a rule of international law itself made reference to a rule of domestic law, as had been recognized in paragraph (7) of the commentary to article 3 of the 2001 articles on responsibility of States for internationally wrongful acts. The proposed new sentence was based on language he had used in the statement that he had made on the topic in his capacity as Chair of the Drafting Committee. It would read: "At the same time, the reference to 'rules of international law' should be understood as not being an *a priori* exclusion of other rules of law that could provide assistance in the determination of rules of international law."

Mr. Ruda Santolaria said that he supported the addition proposed by Mr. Paparinskis and the deletion proposed by Mr. Forteau.

Mr. Jalloh (Special Rapporteur) said that he could not support the amendment proposed by Mr. Galindo, which would significantly change the structure of the paragraph and concerned an issue on which no concerns had been raised in the plenary debate or in the Drafting Committee. He was, however, willing to support the addition of the new sentence proposed by Mr. Paparinskis and the deletion of footnote 17 as proposed by Mr. Forteau.

Mr. Fife said he agreed that there appeared to be a logical inconsistency between the third and fourth sentences. The phrases "will be frequently used" and "will often, although not always, be substituted" were not particularly helpful to the reader.

Mr. Jalloh (Special Rapporteur) said that the third and fourth sentences were intended to state that in some instances in the context of the draft conclusions, the term "rules of law" might be used to designate "rules of international law". "Rules of law" was the term used in Article 38 of the Statute of the International Court of Justice; nowhere in the Statute did the term "rules of international law" appear.

Mr. Akande said that, while he understood the Special Rapporteur's reasoning with regard to the third and fourth sentences, he wished to propose that the two sentences should be merged and amended to read: "The term 'subsidiary means for the determination of rules of international law' will be frequently used in this topic and the commentaries but the broader term 'rules of law' contained in the Statute will sometimes be substituted with the term 'rules of international law'."

The Chair said she took it that the Commission agreed to adopt the paragraph with the amendment to the third and fourth sentences proposed by Mr. Akande, the addition of the new sentence proposed by Mr. Paparinskis and the deletion of footnote 17.

Paragraph (3) was adopted with those amendments.

Paragraph (4)

Mr. Jalloh (Special Rapporteur) proposed that the first and second sentences of paragraph (4) should be amended to read:

> "Second, an analysis of the ordinary meaning of the term 'subsidiary' under Article 38, paragraph 1 (*d*), of the Statute, in the various authentic language versions, indicates that they are auxiliary in character. The term as expressed in English was derived from the Latin '*subsidiarius*', which refers to something that provides assistance, that is 'subordinate', 'supplementary' or 'secondary'; 'something which provides additional support or assistance; an auxiliary, an aid'."

A new footnote would be inserted, the indicator for which would appear after the word "versions". It would read:

> "See, in this regard, article 33, Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331. Furthermore, pursuant to Article 111 of the Charter of the United Nations, the Chinese, French, Russian, English, and Spanish texts are equally authentic. In accordance with Article 92 of the Charter, the annexed Statute of the Court forms an integral part of the Charter. The Charter has therefore been authenticated in the above five languages. Pursuant to resolution 3190 (XXVIII) of the General Assembly on 18 December 1973, Arabic was included among the official and the working languages of the General Assembly and its Main Committees."

Footnote 18, which referred to the definition of "subsidiary" in the third edition of the *Oxford English Dictionary*, would be retained. Footnote 20, which contained a reference to Schwarzenberger's *International Law as Applied by International Courts and Tribunals*, would be deleted.

Mr. Ouazzani Chahdi said that it was unnecessary to use the adjective "authentic" in relation to the various language versions and that the proposed new footnote was superfluous.

Mr. Fife said he was pleased that the Special Rapporteur had taken due account of the suggestions he had submitted in writing and had made a number of improvements to the paragraph. However, he would have preferred a more elaborate explanation of the relationship between the various language versions.

Ms. Ridings said that the final two sentences of the paragraph should be deleted, since they suggested that there were "principal" means for the determination of rules of law but failed to adequately address that claim by clarifying what such "principal" means were. The claim was particularly unclear because footnote 20, containing a reference to Schwarzenberger's *International Law as Applied by International Courts and Tribunals*, had been deleted, although she had not verified the passage of that work to which the footnote referred. If the sentences were retained, further explanation should be provided in a footnote, which could read: "In other words, rules of international law may be determined through direct reference to the particular rule."

Mr. Forteau said that it was unusual for the paragraph to begin with a lengthy examination of the English term "subsidiary", which was less clear than the equivalent terms in the other language versions. Moreover, paragraphs (4) and (5) addressed the same issue, namely the ordinary sense of the term "subsidiary" and the corresponding terms in the other languages. He therefore wished to propose that paragraph (4) should be reduced to the first sentence only and that the remainder of the paragraph should become a new paragraph (5), with subsequent paragraphs renumbered accordingly. At the beginning of the current paragraph (5), which would become paragraph (6), the words "Third, and more substantively" should be deleted.

Mr. Oyarzábal said that he supported the amendment proposed by Ms. Ridings and had submitted a similar proposal in writing.

Mr. Akande said that retaining the final two sentences of paragraph (4) without an explanatory footnote left them open to all kinds of interpretation by the reader. Since it would be difficult for the Commission to agree on a satisfactory explanation of what "principal means" were at the current stage, he supported Ms. Ridings's proposal to delete those two sentences. He also supported Mr. Forteau's proposed division of paragraph (4) into two paragraphs.

Mr. Jalloh (Special Rapporteur) said that it was not his intention to prioritize English over the other languages by placing the examination of the English term "subsidiary" before the examination of the corresponding terms in other languages. The point he was trying to make in paragraph (4) was that, in the English language, the term "subsidiary" had certain connotations and the dictionary definition of the word had changed over the years. The corresponding terms in other languages, such as "*moyens auxiliaires*" in French, had no connotation of subsidiarity and were thus clearer. In his view, that point was clearly reflected in paragraphs (4) and (5).

He was open to the proposal made by various colleagues with regard to the final two sentences of paragraph (4). The citation of Schwarzenberger's *International Law as Applied by International Courts and Tribunals* referred to a passage that concerned the sources of international law as set out in Article 38 (1) (*a*)–(*c*), which were sometimes referred to as "formal" sources or, in some works, as "primary" sources, with subsidiary means being "secondary" sources. Nonetheless, since the concerns raised by the members would be met by the omission of the final two sentences, he was willing to agree to their deletion.

He did not agree, however, with Mr. Forteau's proposal to split paragraph (4) into two paragraphs, the motivation for which was unclear. Such a change would only make the text more difficult to follow. His preference was to retain the original structure of paragraph (4).

Mr. Forteau said that his concern about paragraph (4) was that it appeared to give priority to the examination of the English term, which was the most complicated. His proposed restructuring would put the treatment of the various language versions on an equal footing.

Mr. Fife said that he fully supported the deletion of the final two sentences of the paragraph and the restructuring of the paragraph as proposed by Mr. Forteau. The first sentence of paragraph (4) was essential because it sent the message that the various authentic

language versions were not in contradiction with each other. In the second sentence, however, the reference to the Latin word "*subsidiarius*" was confusing, since it was immediately followed by the accepted meaning of "subsidiary" in English. The phrase "which refers to something that provides assistance", after the word "*subsidiarius*", should therefore be amended to read "and refers to something that provides assistance". Since the early twentieth century, dictionary definitions of "subsidiary" had fully allowed for its interpretation as a synonym of "auxiliary". It was important to reflect that fact.

Mr. Fathalla said that he supported Mr. Forteau's proposed restructuring of the text, which provided greater clarity and did not affect the substance of the paragraph.

Ms. Mangklatanakul said that paragraphs (4) and (5), as currently proposed, would not be helpful to users of the draft conclusions and should be deleted.

Mr. Vázquez-Bermúdez said that paragraphs (4) and (5) were important and should be retained. He agreed with the proposals made by Mr. Forteau and Mr. Fife.

Mr. Ruda Santolaria said that he supported the amendments proposed by Mr. Forteau and Ms. Ridings.

The Chair, summing up the proposed amendments, said she took it that the Commission agreed to amend the first two sentences as proposed by the Special Rapporteur, to further amend the second sentence as proposed by Mr. Fife, to delete the final two sentences as proposed by Ms. Ridings and to restructure the paragraph as proposed by Mr. Forteau, moving the entirety of the paragraph with the exception of the first sentence to a new paragraph (5).

Paragraph (4), as amended, and the proposed new paragraph (5) were adopted on that understanding.

The Chair said that the subsequent paragraphs of the commentary would be renumbered accordingly at a later stage. For the moment, the Commission would proceed with the adoption of the commentary based on the original numbering as contained in document A/CN.4/L.979/Add.1.

Paragraph (5)

Mr. Jalloh (Special Rapporteur) proposed that the paragraph should be amended to read:

> "Third, and more substantively, the Commission's study of the French (*moyens auxiliaires*), Spanish (*medios auxiliares*) and other equally authentic language versions of Article 38, paragraph 1 (*d*), found that they more precisely underline the ancillary or auxiliary nature of the subsidiary means. The other authentic language versions, which set forth a relatively narrower understanding of the term subsidiary than the broader ordinary understanding which became associated with the English term, further confirm that both judicial decisions and teachings differ in their nature and are subordinate to the formal sources of law, expressly enumerated in Article 38, paragraph 1 (*a*) to (*c*), of the Statute: treaties, international custom and general principles of law. In other words, judicial decisions and teachings are subsidiary simply because they are not sources of law that may apply in and of themselves. Rather, they are used to assist or to aid in determining whether or not rules of international law exist and, if so, the content of such rules. This is not to suggest that the subsidiary means are not important. On the contrary, they remain so, albeit only as secondary means for the identification and determination of rules of international law."
>
> A new footnote would be inserted at the end of the first sentence. It would read:
>
> "The same understanding is reflected in Chinese and Russian. The Arabic version of the Charter and of the annexed Statute is not covered by Article 111 of the Charter, and there exist different translations. The Arabic-speaking members of the Commission therefore engaged a useful linguistic exchange in a meeting with the United Nations translators and interpreters, leading to an assessment that the better translation of 'subsidiary means' would be: اجي اطي الكوسطائل."

Mr. Forteau said that first sentence should be amended to read: "The French (*moyens auxiliaires*), Spanish (*medios auxiliares*) and other equally authentic language versions of Article 38, paragraph 1 (*d*), more precisely underline the ancillary or auxiliary nature of the subsidiary means." That those terms more precisely underlined the ancillary or auxiliary nature of subsidiary means was a statement of fact.

Mr. Galindo proposed that the term "international custom" should be replaced with the term "customary international law".

The Chair said that the term "international custom" was taken from Article 38 (1) (*b*) of the Statute.

Mr. Fife said that the phrase "which set forth a relatively narrower understanding of the term subsidiary than the broader ordinary understanding which became associated with the English term", proposed by the Special Rapporteur as an amendment to the second sentence of the paragraph, should instead read "which set forth a relatively narrower understanding of the term subsidiary than a broader understanding which also became associated with the English term". He had found no evidence to indicate that more recent understandings of the term had trumped or replaced other possible understandings.

Mr. Oyarzábal said that the final two sentences of paragraph (5) were linked to the final two sentences of paragraph (4). Since those sentences had been deleted, the final two sentences of paragraph (5) should be deleted as well. If the sentences were retained, the word "secondary" in the phrase "only as secondary means" should be deleted.

Mr. Paparinskis said that the term "international custom" could be placed in quotation marks in order to indicate that it was a term that had been taken from Article 38 (1) (*b*). He wished to propose that the phrase "and are subordinate to" in the second sentence should be deleted, since it reflected a point similar to that made in Schwarzenberger's *International Law as Applied by International Courts and Tribunals*, the reference to which had been deleted.

Mr. Jalloh (Special Rapporteur) said that he could not support Mr. Forteau's proposed amendment to the first sentence, since the current wording more clearly highlighted the contrast between the Commission's findings regarding the understanding of the English term "subsidiary" and its findings regarding the understandings of the equivalent terms in the other authentic language versions. He supported Mr. Fife's proposed amendment to the second sentence, however, and could agree to the proposal made by Mr. Paparinskis to place "international custom" in quotation marks. He would prefer to retain the final two sentences of the paragraph, since the Commission had made a similar point in the commentary to the conclusions on identification of customary international law. He was not sure that he had understood Mr. Oyarzábal's concern about the word "secondary".

Mr. Oyarzábal said that the use of the word "secondary" in the expression "secondary means" raised the question of what might constitute "primary means". The lack of clarity around the distinction between so-called "primary" and "secondary" means had been the reason for the deletion of the final two sentences of paragraph (4).

Mr. Sall said that the final two sentences of paragraph (5) could not be deleted because they explained an idea expressed in the preceding sentence.

Mr. Fife said that the third sentence, "In other words, judicial decisions and teachings are subsidiary simply because they are not sources of law that may apply in and of themselves", could create the impression that subsidiary means were another kind of source of law, which was contrary to the general thrust of the draft conclusions. Perhaps the final clause of the sentence could be amended to read "because they are not sources of law that may as such apply in and of themselves".

Mr. Jalloh (Special Rapporteur) said that, in the light of the explanation provided by Mr. Oyarzábal, perhaps the word "secondary" in the final sentence could be replaced with the word "auxiliary". He did not think, however, that Mr. Fife's proposed amendment of the third sentence changed the sense of the text as proposed in any way and therefore wished to retain the original language.

Mr. Akande said that he wondered whether the Special Rapporteur might consider amending the first sentence along the lines proposed by Mr. Forteau. The third sentence could be usefully revised to read: "In other words, judicial decisions and teachings are subsidiary simply because they are not themselves sources of law to be applied."

Mr. Paparinskis said that he was grateful to the Special Rapporteur for having accepted some of the proposals aimed at clarifying that subsidiary means were distinct from, and not a lower-grade category of, sources of international law. He agreed with the points raised by Mr. Oyarzábal regarding the final two sentences of the paragraph and could support the amendment to the third sentence proposed by Mr. Fife or the one suggested by Mr. Akande. He maintained that the phrase "and are subordinate to" could cause confusion and should be deleted.

Mr. Forteau said that he was still in favour of amending the first sentence of the paragraph in the manner that he had proposed earlier. The Special Rapporteur should also consider merging the third and fourth sentences to read: "In other words, judicial decisions and teachings are used to assist or to aid in determining whether or not rules of international law exist and, if so, the content of such rules."

Mr. Oyarzábal proposed that the word "expressly" should be deleted from the phrase "expressly enumerated in Article 38" in the second sentence.

Ms. Mangklatanakul suggested that the consideration of paragraph (5) should be suspended to enable the Special Rapporteur to reflect on the proposals made and further refine the text.

Mr. Jalloh (Special Rapporteur) said that many of the points that had been raised about the subsidiary nature of subsidiary means were already addressed in the general commentary; dwelling on those details at the current juncture would only impede progress. He too was in favour of suspending the consideration of paragraph (5).

The Chair said she took it that the Commission wished to leave paragraph (5) in abeyance pending the preparation of a further revised text.

Paragraph (5) was left in abeyance.

Paragraph (6)

Ms. Okowa proposed that, at the end of the first sentence, the language "are even 'a subsidiary means for determining the peremptory character of norms of general international law'" should be amended to read "are equally relevant when determining the peremptory character of norms of general international law" and that, near the beginning of the second sentence, the phrase "in the work" should be revised to read "in its work".

The Chair said she understood that the Commission wished to accept only the second amendment proposed by Ms. Okowa.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Jalloh (Special Rapporteur) proposed that, in the second sentence of paragraph (7), the words "the Court explained that" should be replaced with "the Court cited its prior judgment in the *North Sea Continental Shelf* cases for the rule that" and the words "even where they overlap" should be added at the end of the sentence. In the last sentence, "and that, according to the *North Sea Continental Shelf* judgment, international law required delimitation be effected 'in accordance with equitable principles, and taking account of all the relevant circumstances'" should be added at the end.

Mr. Forteau said that he supported the proposed changes, which made the text clearer.

Mr. Asada said that he welcomed the replacement of the word "explained" with the reference to the *North Sea Continental Shelf* judgment. However, the clarity of the text would be further improved if the words "according to" in the newly inserted text at the end of the paragraph were replaced with "referring to" or "citing".

Mr. Savadogo, supported by **Mr. Vázquez-Bermúdez**, said that, in the second sentence, "multilateral treaties and customary law" were listed as the sources of law that the International Court of Justice had used to resolve the question of the law applicable in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, whereas the judgment in that case referred to "multilateral treaties" and "customary and general international law". A reference to general international law should be added to ensure alignment with the judgment of the Court cited in footnote 22.

Mr. Fife said that he did not support the proposed addition of a reference to the *North Sea Continental Shelf* judgment at the end of the paragraph, as he found it to add little value.

Mr. Forteau said that, to address the concern raised by Mr. Savadogo, the language at the end of the second sentence, "which would include both multilateral treaties and customary law, even where they overlap", should be deleted. He found Mr. Fife's proposal to be problematic, as the proposed addition at the end of the paragraph referred to the fact that the International Court of Justice had cited its own case law in *North Sea Continental Shelf*. The addition at the end of the paragraph could instead be revised to read "following what the Court indicated in the *North Sea Continental Shelf* judgment".

Mr. Asada said that he too did not wish to delete the reference to the *North Sea Continental Shelf* judgment in the final sentence and could go along with Mr. Forteau's proposal. Alternatively, the language that he had suggested previously could be revised to read "and, referring to the *North Sea Continental Shelf* judgment, that international law required delimitation be effected".

Mr. Jalloh (Special Rapporteur) said that, although he did not necessarily object to the insertion of a reference to general international law near the end of the second sentence to complement the references to multilateral treaties and customary law, he wished to point out that the purpose of the text was to highlight the two specific sources of international law drawn on by the International Court of Justice in *Military and Paramilitary Activities* and to explain that, in resolving the question of the law applicable to the case, the Court had been bound to rely on those sources by Article 38 of its Statute, as confirmed by its own case law. His concern was that the insertion of a reference to general international law would make that link less obvious.

He was grateful to Mr. Asada for his revised proposal. The addition at the end of the final sentence would therefore read "and, referring to the *North Sea Continental Shelf* judgment, that international law required delimitation be effected 'in accordance with equitable principles, and taking account of all the relevant circumstances'".

Mr. Vázquez-Bermúdez, explaining the rationale behind the proposal to insert an additional reference to general international law in the second sentence, said that, in its judgment in *Military and Paramilitary Activities*, the International Court of Justice did not refer to customary international law and general international law synonymously, but distinctly. Therefore, to refer only to customary international law in the paragraph effectively excluded general international law, which was also explicitly mentioned in the Court's judgment.

Mr. Oyarzábal said that he did not see the point of reproducing part of the Court's judgment in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* in the third sentence of the paragraph, as it made no reference to subsidiary means.

Mr. Jalloh (Special Rapporteur) said that the purpose of paragraph (7) was to show how the International Court of Justice, in applying Article 38 of its Statute to adjudicate on cases brought before it, could rely on subsidiary means in the form of prior judicial decisions. In the example cited, namely *Military and Paramilitary Activities*, the Court had stated that, in resolving the dispute, it had relied on multilateral treaties, which were covered by Article 38 (1) (*a*) of its Statute; customary international law, which was covered by Article 38 (1) (*b*); and a subsidiary means, namely its judgment in *North Sea Continental Shelf*. The Court had likewise referred back to its judgment in *North Sea Continental Shelf* in its adjudication of *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*. The changes proposed by Mr. Asada would help to clarify the complementary role that prior judicial decisions could play in settling international disputes.

Mr. Fife said that the addition of a quotation from the *North Sea Continental Shelf* judgment at the end of the paragraph would be distracting and unnecessary. He wondered whether the final sentence of the paragraph could be simplified along the lines suggested by Mr. Forteau.

Mr. Oyarzábal said that, despite the clarification provided by the Special Rapporteur, he still believed that the quotation from the judgment in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* could give the erroneous impression that "provisions of the Special Agreement" were in fact subsidiary means. Furthermore, the addition of a quotation from the judgment in *North Sea Continental Shelf* at the end of the paragraph would raise questions about the status and role of "equitable principles". Instead of quoting from judgments, the text should explicitly state that the International Court of Justice cited its own case law in settling disputes.

Ms. Oral said that paragraph (7) seemed to be making the point that, in the cases cited, the International Court of Justice had accorded subsidiary means, namely prior judicial decisions, whether issued by the Court itself or by other courts, almost the same rank that it had accorded the sources of international law listed in Article 38 of its Statute, thereby demonstrating that, in practice, it relied on both sources and subsidiary means to make its determinations. Perhaps language could be added to the paragraph to clarify that point.

The Chair said she took it that the Commission wished to retain the references to the judgment in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* and the judgment in *North Sea Continental Shelf*, insert a reference to general international law after "multilateral treaties and customary law" and accept Mr. Asada's revised amendment to the final sentence. The remainder of the text would be adopted with the changes proposed by the Special Rapporteur.

Paragraph (7) was adopted with those amendments.

Paragraph (8)

Mr. Jalloh (Special Rapporteur) proposed that, at the end of the first sentence after the block quotation, the words "including its 'material' prior decisions in the *Gulf of Maine* case" should be added. Near the beginning of the following sentence, the words "yet another example, from" should be deleted. At the end of the paragraph, a new sentence should be added, which would read: "Among those rules it found applicable to that case was the principle of the intangibility of boundaries (*uti possidetis juris*), for which the Court referred to prior judgments in *Frontier Dispute (Burkina Faso/Republic of Mali)* and *Frontier Dispute (Benin/Niger)*."

Mr. Lee said that, in the newly inserted final sentence, the words "(*uti possidetis juris*)" should be deleted and the words "inherited from colonization" should be inserted after "intangibility of boundaries", as that was the language used in the Court's prior judgments.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Mr. Jalloh (Special Rapporteur) proposed that, at the end of the fourth sentence, the language "whereas the word 'determine' as a verb can also mean to 'decide' (as will be explained in paragraph 12)" should be added. In the phrase that followed, "Under this meaning" should be revised to read "Under the first meaning".

Paragraph (9), as amended, was adopted.

Paragraph (10)

Mr. Jalloh (Special Rapporteur) proposed that the last part of the penultimate sentence should be amended to read "since the decision might have already referred to and provided an interpretation of a rule stated in a treaty, such as the principle of the sovereign equality of all States in Article 2, paragraph 1, of the Charter of the United Nations".

Mr. Paparinskis said that paragraphs (10) and (11) put forward the view that rules arising from treaties were easier to establish than rules arising from custom or general

principles. However, that was not always the case, as sometimes the existence of treaty rules was itself controversial, as in the context of accession to, termination of or conflicts between treaties. Furthermore, the three sources of international law were generally viewed as complementary rather than analytically distinct.

Mr. Savadogo proposed that the language "treaties, customary international law, or a general principle of law" at the end of the second sentence should be replaced with the terms used in Article 38 (1) of the Statute of the International Court of Justice, namely "international conventions, international custom and general principles of law".

Paragraph (10), as amended, was adopted.

Paragraph (11)

Mr. Jalloh (Special Rapporteur) proposed that the words "than in the case of treaties" should be deleted from the end of the first sentence. In the second sentence, "customary law" should be revised to read "customary international law" and the words "existence and content of the" should be added before "legal rule". In the third sentence, "instrument" should be replaced with "formal source" and the phrase "would be sufficient to form persuasive evidence" should be replaced with "provides evidence". In the final sentence, the words "would then stem" should be revised to read "would stem", and the word "general" should be inserted before "international law".

Mr. Forteau, supported by **Ms. Okowa**, **Ms. Mangklatanakul** and **Mr. Nguyen**, proposed that the words "formal source" in the first and third sentences should be replaced with "source", as customary international law and general principles of law were non-formal sources of law.

Mr. Galindo proposed that, in the newly revised third sentence, the phrase "provides evidence" should be replaced with "may provide evidence" to allow for the possibility that the decision might not provide such evidence.

Ms. Okowa proposed that, in the last sentence, the phrase "*stare decisis*" should be replaced with "doctrine of precedent (*stare decisis*)".

Mr. Nguyen proposed that, at the end of the second sentence, the word "identified" should be replaced with the word "determined".

Ms. Mangklatanakul said that she did not agree with the Special Rapporteur's proposal to add the word "general" before "international law" in the last sentence.

The Chair said that the expression "general international law" was used elsewhere in the commentary. For the sake of consistency, the same expression should be used in paragraph (11).

Mr. Jalloh (Special Rapporteur) said that, as explained previously, the qualifier "general" was used because there were specific subfields of international law, such as international criminal law, where *stare decisis* existed.

The Chair said she took it that the Commission wished to adopt paragraph (11) as amended by the Special Rapporteur, Mr. Forteau, Mr. Galindo and Ms. Okowa.

Paragraph (11) was adopted with those amendments.

Paragraph (12)

Mr. Jalloh (Special Rapporteur) proposed that, in the fourth sentence, the phrase "there is no express rule of international law on a given point" should be replaced with "a suggested rule of international law on a given point does not exist". In the sixth sentence, "This was the case, in" should be replaced with "This practice can be illustrated by", and the words "for example" should be deleted from the end of the sentence. The words "In many cases" at the beginning of the eighth sentence should be amended to read "In most cases". Lastly, a new sentence should be added at the end of the paragraph, which would read: "Indeed, for reasons of legal security, not only does the Court itself refer to its own prior decisions, it often seeks to explain a prior position that is based on previous decisions or to justify a departure from a prior decision." The new sentence should be accompanied by a

footnote containing references to and quotations from the International Court of Justice judgments in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* and *North Sea Continental Shelf*. In addition, footnote 32, which referred to the *Fisheries case*, should be supplemented with references to the judgments in *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Continental Shelf (Libyan Arab Jamahiriya/Malta)* and *North Sea Continental Shelf*.

Mr. Lee said that the language "(laying down the law)" at the end of the first sentence and the whole third sentence should be deleted. The beginning of footnote 30, which did not currently specify the cases being referred to by Hersch Lauterpacht, should be reformulated to read: "For instance, Hersch Lauterpacht observed that, in *Fisheries case* and *Reservations to the Convention on Genocide*".

Mr. Fife said that it was unclear how the *Mavrommatis Palestine Concessions* case, the *Fisheries case* and the advisory opinion on *Reservations to the Convention on Genocide*, mentioned in footnotes 31, 32 and 33, respectively, were relevant to the points being made in paragraph (12). In the *Fisheries case*, a long-standing unopposed State practice had been used to determine the existence of a rule of a more general nature.

Mr. Forteau said that, in the fourth sentence, it might be preferable to use the wording "an alleged rule" instead of "a suggested rule". He agreed with Mr. Lee that paragraph (12) should discuss only subsidiary means and should not enter into the question of the role of precedent.

Mr. Galindo said he agreed with Mr. Lee that the quoted definitions presented in paragraph (12) gave a different impression from the one that was intended. In addition, footnotes 28, 30 and 34 should be deleted. In view of the need for representativeness and multilingualism, the selection of references to scholarly works was a complex matter and such references should thus be included only where absolutely necessary.

Ms. Okowa said that the footnotes should be retained, given that the Special Rapporteur, who worked primarily in English, had already explained the challenges of providing references to sources in other languages. She hoped that the principles of representativeness and multilingualism would be applied going forward, in the second and subsequent reports of the Special Rapporteur.

In the penultimate sentence of paragraph (12), the phrase "start afresh" should be replaced with less colloquial language, such as "operate on the basis of a clean slate".

Mr. Savadogo said that, in the French-language version of the text, the definition provided in footnote 29 should be taken from a French dictionary rather than simply consisting of a translation of a definition taken from an English dictionary. He would provide the secretariat with appropriate language.

Mr. Akande said that paragraph (12) included two definitions of the word "determine", while paragraph (9) included only one. The meaning outlined in the third sentence of paragraph (12) was problematic in the context of Article 38 (1) (*d*) of the Statute, since it departed from the notion of subsidiary means as having an auxiliary function, and should thus be deleted. He wished to propose the deletion of the first three sentences of paragraph (12) and, in the fourth sentence, the replacement of the words "In this regard, for instance" with the words "In some instances". Those changes would, however, give rise to the need to make some adjustments in paragraph (9).

Mr. Paparinskis said that the language used in the fourth and fifth sentences appeared to reflect an excessively common-law framing of the international legal process, to the effect that, instead of determining rules that existed, the International Court of Justice developed legal arguments and then created solutions that subsequently became sources of law, as stated in footnote 34. That framing was not easily compatible with the overall approach that the Commission had taken so far to the character of subsidiary means. In stating that the Court determined that no rule existed and then offered an interpretation, from the perspective of international law the Commission appeared to be indicating that the Court routinely acted *ultra vires*.

The three cases cited in footnotes 31, 32 and 33 were not persuasive as illustrations of situations where the Court had created new rules. In the *Fisheries case*, the Court had found that the rule in question, while not universal, was applicable in certain cases. The *Mavrommatis Palestine Concessions* case had been based on a perfectly normal principle of international procedural law for the administration of justice. In the advisory opinion on *Reservations to the Convention on Genocide*, despite there being disagreement over what the law was, the Court had reached legal conclusions that were in line with the solution ultimately adopted in international law. The seventh and eighth sentences seemed to describe the procedures used by the principal judicial organ of the United Nations in a pejorative manner. Overall, he was concerned that the fourth to eighth sentences did not fit easily within the framework of subsidiary means that the Commission had consistently followed.

Mr. Oyarzábal said that he shared the concerns expressed by Mr. Paparinskis and Mr. Akande regarding the definitions of "determine". It would be preferable to avoid any references to dictionary definitions; otherwise, it would be necessary to add a reference to a Spanish dictionary alongside the English and French ones.

Mr. Forteau said that the meaning of "determine" and the effects of determinations made by courts and tribunals were more relevant to other draft conclusions, namely those concerning the role and effect of subsidiary means. Paragraph (12) should be removed from the commentary to draft conclusion 1 and reintroduced at a later stage, perhaps in the commentary to draft conclusion 4. Similarly, footnote 34 concerned the doctrine of precedent, which did not fall within the scope of the topic.

Mr. Vázquez-Bermúdez said that the Commission should explain its understanding of specific terms on the basis of jurisprudence and scholarship rather than dictionary definitions.

Mr. Jalloh (Special Rapporteur) said that it was not unusual for courts to consider the dictionary definitions of certain terms. He would welcome contributions from the members regarding references in languages other than English and would engage in informal consultations with a view to reaching a consensus on paragraph (12).

Paragraph (12) was left in abeyance.

Paragraph (13)

Mr. Fathalla proposed that paragraph (13) should be deleted, since discussing the translation of terminology did not add any value to the text.

Paragraph (13) was deleted.

The meeting rose at 1.05 p.m.