Provisional

For participants only

12 October 2023

Original: English

International Law Commission

Seventy-fourth session (second part)

Provisional summary record of the 3655th meeting

Held at the Palais des Nations, Geneva, on Thursday, 3 August 2023, at 3 p.m.

Contents

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*)

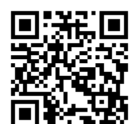
Chapter VIII. Sea-level rise in relation to international law

Chapter III. Specific issues on which comments would be of particular interest to the Commission

Chapter IX. Succession of States in respect of State responsibility

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

Please recycle



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 3.05 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 consideration of the portion of chapter VII of its draft report contained in document A/CN.4/L.979/Add.1. She recalled that a version of the text showing the changes proposed by the Special Rapporteur to reflect members' earlier comments had been circulated informally, in English only.

Commentary to draft conclusion 2 (Categories of subsidiary means for the determination of rules of international law)

Paragraph (1)

Mr. Jalloh (Special Rapporteur) said that, in the second sentence, the word "eminent" should be deleted.

Mr. Forteau, supported by **Mr. Savadogo**, questioned the use of the term "*chapeau*"; in French, at least, it should be changed to "*phrase introductive*" [introductory phrase].

Mr. Ouazzani Chahdi suggested that, in the first sentence, the words "or species" should be deleted.

Mr. Paparinskis suggested that the penultimate sentence of the paragraph should be deleted. It did not sit well with the statement earlier in paragraph (1) to the effect that the first two subparagraphs of draft conclusion 2 built on Article 38 of the Statute of the International Court of Justice; moreover, the Commission had focused almost exclusively on the practice of the Court, rather than other authorities. He was not convinced that referring to what actually occurred in practice at the international, regional and national levels represented a fair summary of the intellectual exercise in which the Commission had engaged so far.

Ms. Mangklatanakul suggested that the following sentence should be added between the existing fourth and fifth sentences of paragraph (1): "The Commission decided to include a specific provision for future consideration when it is conclusive that there exist subsidiary means other than the two categories referred to in subparagraphs (a) and (b)." In discussions within the Drafting Committee, it had been agreed as a compromise to include the third category of subsidiary means covered by subparagraph (c), but some members continued to question whether such a category existed. Mr. Forteau had asserted that, in draft conclusion 9 of its draft conclusions on peremptory norms of customary international law (*jus cogens*), the Commission had acknowledged the existence of other categories of subsidiary means, including the work of expert bodies; in her view, however, those provisions related to determining the peremptory character of norms of customary international law, not their existence, much less the existence of rules of international law more broadly. Further discussion of what could constitute subsidiary means would be needed once the Special Rapporteur submitted his second report.

Mr. Jalloh (Special Rapporteur) said that he would be happy to discuss the issue as part of the Commission's future work; however, for the present, he felt it wiser not to reopen the substance of the debate. The inclusion of subparagraph (c) in draft conclusion 2 represented the result of a compromise reached within the Drafting Committee; it had deliberately been couched in general terms, and no mention was made of specific types of legal material that some members had suggested as potential subsidiary means, such as the work of expert bodies or resolutions of international organizations. If further clarification was needed, he suggested adding the following sentence in place of that suggested by Ms. Mangklatanakul: "The view was expressed that this category should be kept non-specific pending future consideration of this precise point by the Commission."

Mr. Oyarzábal suggested replacing the opening phrase of the fourth sentence of the paragraph with the following text: "The third category aims at encompassing other subsidiary means that may be used extensively…" In his view, the last two sentences of the paragraph as drafted should be deleted. The penultimate sentence could give rise to confusion.

Ms. Mangklatanakul, emphasizing that clarity was needed within the Commission if a clear text was to be transmitted to the Sixth Committee of the General Assembly and to the general public, said that views diverged on whether a third category of subsidiary means existed at all and, if it did, what means it might include. At such an early stage of its work on the topic, the Commission had insufficient evidence to decide conclusively. The commentary being presented to States in the Sixth Committee should accurately reflect how far the Commission's work had progressed. The addition proposed by the Special Rapporteur did not satisfy her concern.

Ms. Okowa said that Ms. Mangklatanakul was effectively reopening the debate that had taken place in the Drafting Committee, where it had not been possible to reach agreement on certain key points of substance. A third category of subsidiary means had been included in draft conclusion 2 as a compromise; the Special Rapporteur had said that the issue would be considered further. To reflect that point, she suggested that the following sentence should be inserted after the additional text proposed by the Special Rapporteur: "In its future works, the Commission will explore the ambit of the third category in some detail."

Mr. Paparinskis said that one solution might be to insert a sentence drawing on the statement he had delivered as Chair of the Drafting Committee, to the effect that the provision was best understood in the light of future work to be undertaken on the question of additional subsidiary means, taking into account the comments of States.

The Chair, speaking as a member of the Commission, said that such a solution would reflect the divergent views held on the matter but might be best reserved for the section of the commentary dealing specifically with subparagraph (c) of draft conclusion 2. In the paragraph under consideration, which was more general, she suggested that the fourth sentence could be replaced with neutral wording such as: "The third category of subsidiary means reflects the fact that there may be other subsidiary means used generally in practice to assist in the determination of rules of international law."

Mr. Forteau suggested the following alternative wording: "The third category addresses the fact that there are other means used in practice to assist in the determination of rules of international law."

The Chair said she took it that the Commission agreed to adopt paragraph (1) with the deletion of the words "or species" from the first sentence and "eminent" from the second, the deletion of the penultimate sentence, and the fourth sentence altered to read: "The third category addresses the fact that there are other means used in practice to assist in the determination of rules of international law."

Mr. Jalloh (Special Rapporteur) said that he would prefer to retain the wording "used extensively in practice" from the sentence as originally drafted.

The Chair suggested that the wording "used generally in practice" might be acceptable.

Mr. Jalloh (Special Rapporteur) agreed to that suggestion.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Lee said that the fourth sentence of paragraph (2) could be more smoothly worded.

The Chair suggested that it might simply be deleted.

With that amendment, paragraph (2) was adopted.

Paragraph (3)

Mr. Galindo sought clarification regarding the implications of the phrase "State and international practice" in the fourth sentence. Was the intention to make a distinction between State practice and international practice?

Mr. Patel, supported by **Mr. Fathalla**, suggested that the phrase referred to by Mr. Galindo should be changed to "the practice of States, international organizations and other entities", as "international practice" alone was a weak term. Even with that amendment, a footnote would be required to indicate that the sentence reflected a particular view. In the penultimate sentence, he suggested deleting the word "explicitly".

Mr. Forteau said that the words "and important" should be deleted from the third sentence in order to avoid any suggestion of a hierarchy among subsidiary means.

Mr. Lee said that, by adopting draft conclusion 2 (c), the Commission had agreed on the existence of a third category of subsidiary means; however, the nature thereof remained to be determined. References to an "important catch all category" and "a more open-ended category" might prejudge the outcome of the Commission's work. He suggested that the words "and important catch all" should be deleted.

Mr. Nesi said that the expression "catch all" added little to the text. If the third category of subsidiary means did exist, the Commission would establish its nature in due course.

Mr. Oyarzábal said that, as paragraphs (1) and (3) of the commentary to draft conclusion 2 appeared very similar, paragraph (3) could be deleted.

Mr. Ouazzani Chahdi sought clarification regarding the use of the word "statutory" in the second sentence, as it seemed incongruous.

The Chair, noting that a number of disparate amendments had been proposed, suggested that retaining the paragraph but deleting the words "statutory" from the second sentence, "and important catch all" from the third, "State and international" from the fourth and "explicitly" from the fifth would satisfy most concerns.

Mr. Patel said that deleting "State and international" from the fourth sentence and simply referring to subsidiary means that had emerged "in practice" would convey little meaning; however, he could accept that amendment.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Jalloh (Special Rapporteur) proposed to insert the word "formal" before "definitions" in the second sentence of the paragraph and the words "the broader term" after "settled on" in the final sentence.

Mr. Patel said that the paragraph went too far in stating categorically that no definition of the term "judicial decisions" could be found in the Statute, documents or jurisprudence of the International Court of Justice, when in fact the Court had clarified what a judicial decision was in, for example, the case on the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America*). The second sentence should therefore be deleted.

Mr. Jalloh (Special Rapporteur) said that the intention had been to explain that there had been no formal examination of the term "judicial decisions"; he would thus prefer to retain the sentence. He would welcome the pertinent information from the *Gulf of Maine* case, to add that as a reference.

Ms. Mangklatanakul said that she saw no need for an extensive definition of "judicial decisions"; she agreed that the second sentence should be deleted.

Ms. Okowa said that the concern expressed by Mr. Forteau might be met by replacing the word "Neither" at the beginning of the second sentence with the words "It is not immediately apparent from an examination of" and inserting the words "that they" before "contain".

Mr. Akande said that the wording proposed by the Special Rapporteur was simply a statement of fact; it would be helpful if the members who had expressed concerns would explain why they thought that it was incorrect.

Mr. Mingashang proposed to simplify the second sentence, replacing it with "There is no established definition of 'judicial decisions' in international law", followed by the references to the Charter and the other instruments mentioned.

Mr. Forteau said that the concern expressed by some members seemed to have arisen from the reference to "the jurisprudence", as it might indeed be possible to deduce a definition of "judicial decisions" from the jurisprudence. He proposed that the word "formal" should be replaced with "explicit".

Ms. Mangklatanakul said that the whole paragraph was problematic, as the definition of "decisions of courts and tribunals" was not addressed in the draft conclusions.

The Chair said she took it that, in addition to the changes proposed by the Special Rapporteur, the Commission wished to replace the word "formal" with "explicit"; to replace the word "Neither" at the beginning of the second sentence with the words "It is not immediately apparent from an examination of"; and, also in the second sentence, to insert the words "that they" before "contain".

Paragraph (5), as amended, was adopted.

Mr. Patel asked that it be noted in the record of the meeting that he did not agree with the amendments.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were deleted.

Paragraph (8)

Mr. Jalloh (Special Rapporteur) said that he proposed, in the first sentence, to delete the introductory clause and the words "should be taken to"; in the second sentence, to replace "in the normal course" with "normally"; in the third sentence, to delete the words "*in limine litis*"; in the fourth sentence, to delete the reference to the *LaGrand* case; and to replace the last sentence with the sixth and seventh sentences of paragraph (9), from "Similarly" to "conciliation commissions".

Mr. Paparinskis said that, in the fourth sentence, footnote 44 should be deleted to avoid any suggestion that only binding provisional measures were decisions for the purpose at hand. He also proposed replacing the words "International Court of Justice" with "international courts and tribunals", because the same argument would apply with equal force to provisional orders issued by, for example, the International Tribunal for the Law of the Sea and the regional human rights courts.

Mr. Forteau said that, with the inclusion of the new fifth and sixth sentences, the proposed mention of human rights treaty bodies and conciliation commissions was problematic, as those bodies could not adopt binding decisions. He therefore proposed that the words "understood in a broad sense" should be inserted before the word "includes" in the fifth sentence.

Mr. Oyarzábal, supported by **Mr. Galindo**, said that he did not understand why, given that it had been decided in the Drafting Committee that draft conclusion 2 (a) would address "decisions of courts and tribunals", the paragraph included a reference to decisions taken by other bodies, persons or institutions that might have jurisdictional authority or not. There had been no discussion in the Drafting Committee meetings of including mention of the decisions of such bodies, persons or institutions in the commentary.

Mr. Patel said that, as the meaning and scope of the term "judicial decisions" had been raised in paragraph (5), and as paragraphs (6) and (7), which had explored that meaning and scope, had now been deleted, it was not possible to use the words "in the view of the Commission" in paragraph (8). They should be deleted.

Mr. Fathalla said that, in the proposed fifth sentence, the "decisions" referred not only to binding decisions, as Mr. Forteau had said, but also to, for example, advisory opinions. Furthermore, the Human Rights Committee considered individual complaints and was considered to be a semi-judicial body. He therefore did not agree that the mention of the treaty bodies should be omitted.

Mr. Fife said that the reference in the first sentence to "a body of people" meant that the approach to the notion of decisions of courts and tribunals was too broad. At the beginning of the proposed fifth sentence, the word "Similarly" should be deleted because there was no analogy between the work of the International Court of Justice and the wording of the following sentences. Like Mr. Oyarzábal, he questioned whether the proposed fifth and sixth sentences had their place in the section of the commentary on "decisions of courts and tribunals". Lastly, he agreed with Mr. Forteau's proposal to add precision by including the words "understood in a broad sense" in the fifth sentence.

Ms. Mangklatanakul said that, while the explanation of "decision" given in the paragraph might be correct, it was misleading, as the term that should be explained was "judicial decisions", and a "body of people" could not adopt judicial decisions. She proposed that paragraphs (8) and (9) should be merged. Alternatively, the part of the sentence from "or a body of people" onward and the final sentence should be deleted.

Ms. Okowa said that some clarity might be added, in the first sentence, by replacing the words "body of people" with "body of persons" and the words "as part of deciding or bringing to an end" with "as part of a process of adjudication or review with a view to bringing to an end". She also proposed to move the final sentence and place it after the first sentence.

Mr. Vázquez-Bermúdez said that more discussion was needed on the bodies that were covered by the third category of subsidiary means: for example, the Inter-American Court of Human Rights produced advisory opinions and judicial decisions, but the Inter-American Commission on Human Rights could issue only recommendations, and yet they were included in the same category.

The Chair said that there seemed to be agreement that, in addition to the changes proposed by the Special Rapporteur in the informal document circulated in the meeting room, the Commission wished to delete footnote 44 and replace the words "International Court of Justice" with "international courts and tribunals". Further discussion was needed on the proposed inclusion of the fifth and sixth sentences. She therefore suggested that paragraph (8) should be left in abeyance.

Mr. Jalloh (Special Rapporteur) said that the fifth and sixth sentences had been added to reflect the preference expressed by some members for a clearer explanation of "decisions". The points concerned were not controversial and had been addressed in the Commission's previous work on customary international law.

Paragraph (8) was left in abeyance.

Paragraph (9)

Mr. Jalloh (Special Rapporteur) proposed that the first sentence should be deleted; in the second sentence, the words "As a starting point," should be replaced by "The term"; in the third sentence, the words "The term" should be replaced by "It"; at the end of the fourth sentence, the words "as well as investment tribunals" should be added; in the fifth sentence, the words "human rights" in the term "regional human rights courts" should be deleted; and the last three sentences, starting from "Similarly", should be deleted.

Mr. Ruda Santolaria said that, as some points that had yet to be agreed upon in relation to paragraph (8) also came up in paragraph (9), paragraph (9) should also be left in abeyance.

Paragraph (9) was left in abeyance.

Paragraph (10)

Mr. Jalloh (Special Rapporteur) proposed that, in the first sentence, the words “although this point will be elaborated in later conclusions” should be inserted after “For reasons of clarity”; and, in the final sentence, the words “This pattern” should be replaced with “The reference to national law” and the word “extensive” before “practice” should be deleted.

Mr. Galindo suggested that, in the third sentence, the words “they are also indications” should be replaced with “they can also be indications” and the words “can be” before “a basis” should be deleted.

Mr. Forteau said that the final sentence should be deleted altogether, as the *Barcelona Traction, Light and Power Company, Limited* judgment referred to in footnote 49 concerned domestic law, without any reference to decisions of national courts in identifying or determining law. It was thus unrelated to the content of the paragraph.

Mr. Paparinskis said that, while there might be disagreement on why domestic law was introduced in the *Barcelona Traction* case – as a general principle of law or as a reference by the rule of international law itself to partially determine its content – it was not as a subsidiary means; he could not immediately think of any other case that could be cited in the footnote in its place where the Court would have relied on a judgment of a domestic court as a subsidiary means. If the Special Rapporteur could identify an appropriate case, the sentence might be retained; otherwise it should be deleted.

Mr. Fife said that he supported all the proposed amendments and also proposed to delete the fifth sentence, “National court decisions are relevant as a form of proof of State judicial practice”, which was tautological and without relevance.

Mr. Patel said that the reference in the second sentence to “hybrid courts” was misleading, as such courts did not operate on the basis of national law. It should therefore be deleted. In the third sentence, the words “in passing” were colloquial and should be deleted. He also agreed with Mr. Forteau that the reference to the *Barcelona Traction* case should be removed from footnote 49.

Mr. Vázquez-Bermúdez said that, if the third sentence was retained, the words “or to determine the existence of a principle common to the national legal systems”, as referred to in the Committee’s work on general principles of law, should be added to specify an additional role of national court decisions.

Mr. Akande said he agreed with Mr. Forteau that the final sentence should be deleted. As to the “hybrid courts” mentioned by Mr. Patel, some of them did work on the basis described. That could be clarified by inserting the words “but not all” after “some”.

The Chair said that there seemed to be agreement that, in addition to the changes proposed by the Special Rapporteur in the informal document circulated in the meeting room, in the second sentence, the words “but not all” should be inserted after “some”; in the third sentence, the words “in passing” should be deleted, “they are also indications” should be replaced with “they can also be indications”, the words “can be” before “a basis” should be deleted, and the words “or to determine the existence of a principle common to the national legal systems” should be inserted after “*opinio juris*”; and the final sentence and footnote 49 should be deleted.

Paragraph (10) was adopted with those amendments.

Paragraph (11)

Paragraph (11) was adopted.

Paragraph (12)

Ms. Ridings said it appeared that the wording from the third sentence onward was an attempt to read the minds of the judges; as such, it was not necessary and should be deleted.

Mr. Patel said that, for the same reasons as he had given in respect of “decisions” in paragraph (5), the whole paragraph should be deleted.

Mr. Fife said that the mention, in the fourth sentence, that teachings were more frequently cited in the separate opinions of judges, gave the impression that teachings were also cited in majority opinions, which was not the case. He therefore agreed with Ms. Ridings that the text of the paragraph from the third sentence onward should be deleted.

Ms. Okowa said that the third and fourth sentences should be retained because they served to explain to readers that it was because the International Court of Justice had not defined the term "teachings" that the Commission was undertaking an examination of the ordinary meaning of the term. However, the third sentence should be reformulated to read "Neither the International Court of Justice nor the Permanent Court of International Justice have defined teachings as a category in their practice", and the clause "who more frequently cite teachings in their separate opinions" should be deleted from the fourth sentence to take account of Mr. Fife's concerns.

Mr. Akande said that he supported Ms. Okowa's proposal for the third sentence. The first clause of the fourth sentence should also be deleted, as the assertion that the term "teachings" had not been explicitly defined in the individual opinions of judges was difficult to verify.

Mr. Sall said that, as the Court could have decided to define the term "teachings" if it had so wished, it was important to indicate in the paragraph that it had never done so. That could be done by simply stating "Nor has the Court defined 'teachings'."

Mr. Fathalla said that he supported Ms. Okowa's proposal to delete the second clause of the fourth sentence in order to allay Mr. Fife's concerns.

Mr. Jalloh (Special Rapporteur) said that the third sentence should be reformulated to read "Neither the Court nor the Permanent Court of International Justice have defined teachings as a category in their practice"; the fourth sentence should be deleted in its entirety; and the final sentence should read simply "It would therefore seem useful to briefly examine the ordinary meaning of the term", with the remainder of that sentence deleted.

Paragraph (12) was adopted with those amendments.

Paragraphs (13) and (14)

Mr. Jalloh (Special Rapporteur) said that, in the first sentence, the words "and as will be explained further in conclusion 5" should be inserted, between commas, before the words "the Commission decided" and, in the second sentence, the words "Be that as it may" should be deleted.

Mr. Galindo, supported by **Mr. Vázquez-Bermúdez**, **Ms. Ridings** and **Mr. Savadogo**, said that the sentence referring to the dictionary meaning of the noun "teaching" should be deleted in its entirety, as the definition given would be quite artificial when translated into the other official languages.

Ms. Ridings said that an additional reason for deleting that sentence was that, through its focus on the definition of "teachings", the sentence placed an emphasis on academics and overlooked the writings of practitioners, which seemed to reflect a biased approach.

Mr. Oyarzábal said that the meaning of the phrase "derived from the Court's practice and in customary international law", which followed the term "subsidiary means" in the first sentence, was unclear and should be deleted. It was his understanding that the subsidiary means were set out in the Statute of the Court.

Mr. Patel said that, in the fourth sentence, the word "elitist" should be replaced with the phrase "a remnant of the continued legacy of the colonial period", as that formulation more accurately reflected the intended meaning of the sentence.

Mr. Forteau said that the first sentence added no value to the paragraph and should be deleted. If it was retained, the Arabic, Chinese and Russian equivalents of the English, French and Spanish terms given would have to be added.

Ms. Okowa said that paragraph (13) in its entirety seemed unnecessary and should be deleted.

Mr. Jalloh (Special Rapporteur) said that, as both paragraphs (13) and (14) would also be relevant to draft conclusion 5, he proposed that they should be deleted from the commentary to draft conclusion 2, on the understanding that he would reintroduce them the following year in connection with draft article 5, pending its adoption by the Commission.

Mr. Akande said that, since the term "teachings" was used in draft conclusion 2, the Commission should provide some explanation in the commentary to that draft conclusion of why it had decided not to follow the wording of the Statute. Paragraph (13) could simply be reformulated to read as follows:

> In the present draft conclusions, the Commission decided to use the term "teachings" to describe the second well-established category of subsidiary means. The Commission debated the possibility of using the "most highly qualified publicists" reference contained in Article 38, paragraph 1 (*d*). Views were expressed that such formulations referred to a historically and geographically charged notion that could be considered elitist and a remnant of the continued legacy of the colonial period. It was also felt that it focused too heavily on the status of the individual as an author as opposed to the scientific quality of the individual's work, which ought to be the primary consideration. However, the view was also expressed that the formulation "the teachings of the most highly qualified publicists of the various nations", which mirrors the exact phrase used in Article 38, paragraph 1 (*d*), of the Statute of the Court, was preferable to the succinct formulation "teachings".

Mr. Jalloh (Special Rapporteur) said he agreed that it would be preferable to provide such an explanation in the commentary to draft article 2. The relationship between paragraphs (13) and (14) would also have to be considered.

The Chair said she took it that the Commission wished to leave paragraphs (13) and (14) in abeyance pending the preparation of a revised proposal by the Special Rapporteur.

It was so decided.

Paragraph (15)

Mr. Forteau said that the first sentence should be deleted because the French and Spanish equivalents of the term "teachings" – and perhaps the Arabic, Chinese and Russian equivalents as well – did not have the plain meaning given in the sentence.

Paragraph (15), as amended, was adopted.

Paragraph (16)

Mr. Jalloh (Special Rapporteur) said that the first two sentences should be deleted and, at the beginning of the third sentence, the word "Teachings" should be replaced with the phrase "The term 'teachings'".

Paragraph (16), as amended, was adopted.

Paragraph (17)

Mr. Jalloh (Special Rapporteur) said that the following sentence should be inserted at the beginning of the paragraph: "As in the case of subparagraph (a), which addresses decisions of courts and tribunals and is further elaborated upon in draft conclusion 4, the nature of and the need for representativeness of teachings in terms of the various legal systems and regions of the world will be elaborated upon in future draft conclusions, starting with draft conclusion 5." In addition, the words "That draft conclusion makes clear that" should be inserted at the beginning of the following sentence; the sentence that read "The phrase 'coinciding views' was used during the drafting of this provision" should be deleted; and the phrase "or better yet State-created" should be deleted from the sentence beginning with the words "Texts produced".

Mr. Galindo said that, in the sentence beginning with the word "However", the word "correct" should be replaced with a formulation such as "the most plausible", as it was unusual to describe views regarding legal interpretations as being "correct".

Mr. Jalloh (Special Rapporteur) said that he would prefer to replace “correct” with “accurate”.

Mr. Akande said it was not clear that the Commission had reached agreement as to whether texts produced by State-empowered bodies such as the Commission were separate from teachings. The phrase “should be considered separate” should therefore be replaced with “may be considered separate” in the sentence beginning “Texts produced”.

Mr. Forteau said that a footnote would be needed at the end of the first sentence proposed by the Special Rapporteur to remind readers that draft conclusions 4 and 5 would be adopted the following year.

The Chair said that the Special Rapporteur would provide the secretariat with the text of that footnote.

On that understanding, paragraph (17), as amended, was adopted.

Paragraph (18)

Mr. Jalloh (Special Rapporteur) said that the words “Turning now to” and “which” should be deleted from the first sentence.

Ms. Mangklatanakul said that the following sentence, which was drawn from the statement made by the Chair of the Drafting Committee when introducing the Committee’s report on the topic at hand, should be inserted after the first sentence: “The provision is best understood in light of future work to be undertaken on the question of additional subsidiary means, taking into account the comments of States” (A/CN.4/SR.3635). In addition, in the penultimate sentence, the word “would” should be changed to “may”.

Mr. Forteau said that he supported Ms. Mangklatanakul’s proposal except with respect to the reference to the comments of States, which should not be included. The Commission was an independent expert body, and it should avoid giving the impression that it would necessarily follow whatever States might recommend.

Mr. Oyarzábal said that the Commission’s previous discussions had not resulted in a clear delineation between the first and third categories of subsidiary means. The paragraph should therefore not refer to various means that could possibly be included in the third category, much less suggest that they were key candidates for inclusion. The Commission should either refrain from mentioning any means that could potentially fall within the third category or list a variety of means that could potentially be included.

Mr. Paparinskis said that, in the statement he had made as Chair of the Drafting Committee when introducing the Committee’s report on the topic, he had noted that there had already been support in the plenary debate for the inclusion of works of expert bodies, including the human rights treaty bodies. On that basis, the reference to “the works of expert bodies and resolutions/decisions of international organizations” in the second sentence could perhaps be replaced with a reference to “the works of expert bodies, including the human rights treaty bodies”.

The Chair said she took it that the Commission wished to leave paragraph (18) in abeyance pending the preparation of a revised proposal by the Special Rapporteur.

It was so decided.

Paragraph (19)

Mr. Jalloh (Special Rapporteur) said that the second sentence should be reformulated to read “Regarding the illustrative list of additional subsidiary means, express mention was made of the works of expert bodies and the resolutions or decisions of international organizations”, and the last two sentences of the paragraph should be reformulated to read: “Express mention was made of the need to have separate and additional draft conclusions addressing the works of expert bodies especially those created by States and certain resolutions/decisions of international organizations which found broad support for inclusion. The categories mentioned would also accord with the prior work of the Commission on several topics completed since 2018.”

Mr. Patel said that the portion of the third sentence that read “After a thorough deliberation, taking into account the various positions” was unnecessary, as all the Commission’s decisions were taken under such circumstances.

Mr. Paparinskis said that the references to resolutions or decisions of international organizations should perhaps be deleted, as there had been no mention of such resolutions or decisions in his statement as Chair of the Drafting Committee.

Mr. Jalloh (Special Rapporteur) said that he would prefer to retain the portions of paragraph (19) that Mr. Patel and Mr. Paparinskis wished to delete because they reflected the discussions that the Commission had had and the views expressed by certain Commission members, including on matters such as whether the work of expert bodies should be a separate category or what role unilateral acts played. The statement made by the Chair of the Drafting Committee was not inaccurate, but it did not reflect all the views expressed by members.

The Chair said she took it that the Commission wished to leave paragraph (19) in abeyance, pending the preparation of a revised proposal by the Special Rapporteur.

It was so decided.

Paragraph (20)

Mr. Patel said that the paragraph was highly controversial. First, not all current members of the Commission had worked on the various projects mentioned in the paragraph. Second, the works of expert bodies had already been examined. A large number of developing States did not have expert bodies on international law, let alone on the procedural aspects of international law.

Ms. Ridings said that the paragraph should be considered in relation to draft conclusion 5 at a later stage in the project.

Mr. Forteau said that he agreed with the proposal to set the paragraph aside for the current session. The inclusion of a reference to conclusions 11 and 13 of the Commission’s conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, which did not concern subsidiary means, created much confusion.

Mr. Jalloh (Special Rapporteur) said that the Commission should consider retaining paragraph (20). He had served as Chair of the Drafting Committee in 2018, when the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties had been adopted on second reading. He recalled that the pronouncements of expert bodies had been discussed in that context. Side events involving the treaty bodies had even been held. As explored in his first report as Special Rapporteur, considerable support could be found in the literature and in practice for the argument that the works of expert bodies could serve as subsidiary means. That view had been supported by a considerable number of members of the Commission. In accordance with the Commission’s usual practice, he had included the reference in question to establish a link with one of its previous projects.

The Chair said she took it that the Commission wished to leave paragraph (20) in abeyance pending the preparation of a new text.

It was so decided.

Paragraph (21)

Mr. Oyarzábal said that parts of the paragraph were difficult to understand. He therefore proposed that the first four sentences, the word “Specifically” at the beginning of the fifth sentence and the last sentence should be deleted.

Mr. Galindo said that, contrary to his understanding of the argument advanced in the penultimate sentence, it might in fact be possible that regional practice could give rise to a specific type of subsidiary means that were applicable within a single region. He proposed either that the sentence should be deleted or that, at the beginning, the words “One view was expressed that” should be inserted.

Mr. Patel said that the paragraph was rather verbose. It was difficult in particular to accept the statement made in the penultimate sentence. The judgment of the International Court of Justice in the *Haya de la Torre Case*, for example, had been rendered with Latin American States in mind and had never gained acceptance in other parts of the world. Other texts that had not been interpreted uniformly in all regions included the judgment of the Permanent Court of International Justice in *The Case of the S.S. "Lotus"* and the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Mr. Sall said that, while he agreed that the last sentence could be deleted, it was important to retain the explanation of the word "generally".

Ms. Okowa said that the first sentence accurately captured the content of the debate in the plenary. While subsequent sentences might benefit from some redrafting, she would not support the deletion of the paragraph as a whole, which would substantially limit the scope of the project. As part of any redrafting, it would be useful to clarify to which regions the term "regional practice" referred.

The Chair, speaking as a member of the Commission, said that the purpose of the paragraph was to explain the decision to use the word "generally". The Drafting Committee had decided to include that word as a compromise in order to secure acceptance of the third category. She understood the words "other means generally used" in the draft conclusion as a reference not to means that were used in many regions but to means that were used frequently.

Mr. Paparinskis said that he too supported the text proposed by the Special Rapporteur. The fifth sentence was based on a sentence included in the first statement that he had made on the topic in his capacity as Chair of the Drafting Committee. That said, the word "Specifically" could be dropped. He shared some of Mr. Galindo's concerns. In that connection, he proposed that the words "or in a particular regional setting" should be inserted after "specific court or tribunal" in the penultimate sentence.

The Chair said she took it that the Commission wished to leave paragraph (21) in abeyance pending the preparation of a new text.

It was so decided.

Paragraph (22)

Mr. Jalloh (Special Rapporteur) said that the opening clause of the second sentence should read "This may raise the question of the function of the traditional and additional subsidiary means".

Mr. Oyarzábal proposed deleting the words "though not *per se* a functions provision" in the last sentence.

Mr. Savadogo said that, in the same sentence, it was unclear to what the expression "At this stage" referred.

The Chair said that the words in question could be deleted.

Paragraph (22), as amended, was adopted with a minor editorial correction.

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

Chapter VIII of the draft report, as a whole, was adopted with a minor editorial change.

Chapter III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.975)

Ms. Mangklatanakul asked why the Commission was not seeking to elicit comments from States in connection with the topic "Succession of States in respect of State responsibility".

The Chair said that the Commission was currently carrying out an internal process to consider the way forward for the topic "Succession of States in respect of State

responsibility”. Chapter IX of the draft report set out the recommendations of the Working Group established for that purpose, of which the plenary Commission had already taken note. Only once that process had been completed would it be appropriate to seek to elicit comments from States in connection with the topic.

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

Chapter IX. Succession of States in respect of State responsibility (A/CN.4/L.986)

Mr. Mavroyiannis said that, in paragraph 11, it should be clarified that, while the Working Group on succession of States in respect of State responsibility had recommended that the Commission should not proceed with the appointment of a new special rapporteur, that recommendation was without prejudice to any decision that might be taken at the Commission’s seventy-fifth session.

The Chair said that the paragraph in question reproduced the wording of the oral report of the Chair of the Working Group, of which the Commission had already taken note, without discussion, earlier at the current session.

Ms. Mangklatanakul said that the recommendations contained in the oral report of the Chair of the Working Group were not decisions of the Commission. If the merit of further work on the topic was to be discussed in the context of a working group, it should be emphasized in the text that further deliberations would take place in the Commission before any decision was taken. Moreover, the Working Group should have full authority to explore substantive issues. In her view, there was indeed merit in further work on the topic. Many of the new members of the Commission, including Mr. Lee and Mr. Patel, could offer their expertise and insight in that regard. The Commission should refrain from prejudging the question of whether to appoint a new special rapporteur.

The Chair said that no comments had been made in the plenary when the Commission had taken note of the oral report of the Working Group. The only decision that the plenary Commission was taking in relation to the topic would be set out in paragraph 16 of the text, which, once completed by the secretariat, would state that the Commission had decided to appoint Mr. Reinisch as Chair of the Working Group to be re-established at the seventy-fifth session. The Working Group had held extensive discussions, and consultations had taken place. At the following session, the re-established Working Group would consider the available options.

Ms. Oral said that it was not the time to discuss the oral report of the Working Group, of which the Commission had already taken note. Paragraphs 11 and 12 of the text did not prejudge any future decision relating to work on the topic.

Ms. Mangklatanakul said that the question of future work on the topic raised important issues, particularly at the beginning of the new quinquennium. She proposed that the words “and to report to the Commission for further deliberation and decision” should be added at the end of paragraph 16.

Mr. Patel said that, as noted in its oral report, the Working Group had agreed that it would carry out work during the intersessional period. That work would serve as the basis for a decision to be taken at the Commission’s seventy-fifth session. However, no such work was mentioned in the text. During the discussions in the Working Group, some members had recommended that he should serve as Chair of the Working Group, and he had indicated that he was prepared to serve in that capacity. However, no candidate had been named in the oral report of the Working Group, and a different decision was now being taken. Although his nomination as Chair had been put forward and supported, and no member had objected to it, the oral report had not included it because the secretariat had advised that specific names were not normally mentioned at that stage. When Mr. Reinisch had presented the oral report, he had been specifically referred to as the Chair of the Working Group. In that connection, he would appreciate further explanation and transparency on the part of the Bureau. Moreover, it was unclear who would carry out the intersessional work.

The Chair said that the text was based on the oral report of the Working Group. During the meeting at which the Commission had taken note of the oral report of the Working Group, no issues had been raised by members. In accordance with paragraph 13, the Chair of

the Working Group would prepare a working paper during the intersessional period, in close collaboration with interested members of the Working Group. Unless the Commission took the decision to appoint a chair, no intersessional work could take place. She agreed to supplement paragraph 16 with the language proposed by Ms. Mangklatanakul.

Following consultations between the members of the Bureau and their respective regional groups, the Bureau was recommending that Mr. Reinisch should be appointed as Chair of the Working Group to be re-established at the seventy-fifth session. She had not been informed of any objections raised during that process.

Mr. Ruda Santolaria said that the text in no way prejudged the manner in which the Commission would address the topic in the future. As stated in paragraph 12, it had been recommended that the Working Group should be re-established at the Commission's seventy-fifth session, with the current open-ended composition, with a view to undertaking further reflection on the way forward for the topic, taking into account the views expressed, and the options identified, in the Working Group at the current session. Paragraph 13 outlined the intersessional work that would take place.

Mr. Patel asked whether Mr. Reinisch would be chairing the next working group during the seventy-fifth session.

The Chair said that, as stated in the text, and in accordance with the agreement reached in the Working Group to re-establish the Working Group at the next session, Mr. Reinisch would chair the Working Group to be re-established at the Commission's seventy-fifth session. At that session, the Commission would decide whether to establish a new working group, with a new chair, in order to carry out substantive work on the topic.

Chapter IX of the draft report, as a whole, as amended, was adopted, subject to the completion of paragraph 16 by the secretariat.

The meeting rose at 6.10 p.m.