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International Law Commission

Seventy-fourth session (second part)

Provisional summary record of the 3656th meeting

Held at the Palais des Nations, Geneva, on Friday, 4 August 2023, at 10 a.m.

Contents

Present:

Chair:	Ms. Galvão Teles
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	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 10.15 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)

Ms. Mangklatanakul, speaking on a point of order, said that the Commission had already spent a disproportionate amount of time considering chapter VII of the draft report, leaving very little time for the adoption of the remaining chapters. To ensure that the Commission was able to maintain the high standard of quality required of its work, she wished to propose that the Commission should suspend its consideration of the commentary to draft conclusion 3 and instead adopt a summary of the debate in that regard. The Commission could then consider a revised commentary to draft conclusion 3 at its seventy-fifth session.

The Chair said that the Commission should have enough time to adopt all pending chapters of the draft report, including chapter VII, by the end of the session. It could not suspend consideration of the commentary to draft conclusion 3 because the secretariat would not have sufficient time to prepare a summary of the debate. She invited the Commission to resume its consideration of chapter VII of the draft report, as contained in document A/CN.4/L.979/Add.1, beginning with paragraph (1) of the commentary to draft conclusion 3.

Commentary to draft conclusion 3 (General criteria for the assessment of subsidiary means for the determination of rules of international law)

Paragraph (1)

Paragraph (1) was adopted.

Chapeau of draft conclusion 3

Paragraph (2)

Mr. Paparinskis said that he wished to propose a number of minor amendments that would sharpen the argument set out in paragraph (2). In the second sentence, the words “or ‘authority’” should be deleted. “Authority” was a technical term that was commonly used in relation to the law of treaties; its use was not appropriate in the context of the commentary and its removal would not affect the thrust of the argument. In the third sentence, the term “legal systems”, which was usually employed in relation to domestic law, should be replaced with the term “fields of international law”. Lastly, the final sentence should be deleted because it pertained to an empirical element, namely the internal workings of courts and tribunals, and did not strengthen the argument made in the paragraph.

Mr. Jalloh (Special Rapporteur) said that he could agree to all the amendments proposed by Mr. Paparinskis except the proposal to delete the final sentence.

The Chair said she took it that the Commission wished to amend paragraph (2) as proposed by Mr. Paparinskis but to retain the final sentence of the paragraph in accordance with the preference expressed by the Special Rapporteur.

Paragraph (2) was adopted on that understanding.

Paragraph (3)

Mr. Jalloh (Special Rapporteur) proposed that, in the last sentence, the words “in the Commission” should be deleted after the words “The view was nonetheless expressed”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

*Subparagraph (*a*) – their degree of representativeness*

Paragraph (5)

Mr. Oyarzábal proposed that, after the first sentence, a new sentence should be added, which would read: "This criterion entails that in assessing subsidiary means recourse shall be had to the decisions of courts and tribunals, teachings and any other subsidiary means from various regions or legal systems." Footnote 58 should be deleted. The existing second, third and fourth sentences should be combined and amended to read: "This criterion should be applied flexibly if the rules of international law under consideration are bilateral or regional in nature, then the focus would instead be on the content and degree of specialization of the subsidiary means used to aid in the determination of the rules in question: an example of a flexible application of the criteria identified in draft conclusion 3."

Mr. Akande said that, in the new second sentence proposed by Mr. Oyarzábal, the words "*inter alia*" should be inserted after the words "shall be had". The proposed new sentence helpfully focused on the element of universality, which provided a contrast to the subsequent point about applying the criterion of representativeness in a flexible manner.

Mr. Forteau said that it would be better to insert the words "*inter alia*" after the word "entails".

Mr. Fife, supported by **Mr. Forteau**, said that the third sentence proposed by Mr. Oyarzábal should be divided into several shorter sentences. A full stop should be inserted after the words "bilateral or regional in nature", and the following word "then" should be replaced with the words "In such cases". A full stop should be placed after the word "question", and the words "This is" should be inserted before the words "an example".

Ms. Ridings said that, in the new second sentence, the word "shall" should be replaced with the word "should" to reflect the language used in draft conclusion 3.

Paragraph (5), as amended, was adopted.

*Subparagraph (*b*) – the quality of the reasoning*

Paragraph (6)

Mr. Paparinskis said that he strongly supported paragraph (6), which was almost fully based on the statement he had delivered on the topic of subsidiary means for the determination of rules of international law in his capacity as Chair of the Drafting Committee at the Commission's 3635th meeting (A/CN.4/SR.3635). He wished to propose, however, that the adjective "inherently" in the phrase "the criterion is inherently subjective" should be deleted. That word had not featured in his statement.

Mr. Forteau, supported by **Mr. Vázquez-Bermúdez**, said that in the final sentence, which currently read "On the other hand, it might be less relevant when scrutinizing certain subsidiary means, such as the resolutions or decisions adopted by the General Assembly of the United Nations", the term "certain subsidiary means" should be replaced with "certain other means". In addition, the words "to the extent that they are used as subsidiary means" should be inserted at the end of the sentence.

Ms. Mangklatanakul said that the Commission was not in a position to "scrutinize" the resolutions and decisions of the General Assembly. She proposed that the word "scrutinizing" should be replaced with the word "examining".

Mr. Jalloh (Special Rapporteur) said that the reasoning behind the proposal made by Mr. Paparinskis was unclear. His work on the commentaries to the draft conclusions was informed but not bound by the statement made by the Chair of the Drafting Committee. Mr. Forteau's proposal was likely to give rise to much debate among members and he would prefer to avoid reopening the discussion on such a heavily debated point at the current stage. He supported Ms. Mangklatanakul's proposal, however.

Mr. Forteau said that the Commission had decided to refer to resolutions and decisions using neutral language. His proposed amendment was intended to ensure that the text reflected that decision.

Mr. Jalloh (Special Rapporteur) said that it was not clear to him that Mr. Forteau's proposal truly reflected a neutral position. It might, in fact, contradict the views expressed by other Commission members on the question of resolutions and decisions. Perhaps, in the spirit of compromise, he could agree to delete the word "subsidiary" from the phrase "certain subsidiary means", leaving the rest of the text unchanged.

Mr. Fife, referring to the amendment proposed by Mr. Paparinskis, said that all experts shared an understanding of what constituted quality. While he agreed that there were different views on how to achieve quality, and therefore did not object to the use of the adjective "subjective" *per se*, to state that the quality of reasoning was "inherently" subjective was detrimental to the idea of legal process and academic excellence. He fully supported Mr. Forteau's proposal with regard to the final sentence, since it accurately reflected the variety of views expressed by members and would not prejudge the outcome of the Commission's future discussions on the topic.

Mr. Paparinskis said that, in his statement on the topic as Chair of the Drafting Committee, he had used the term "certain materials", rather than "certain subsidiary means". Perhaps that term would be sufficiently neutral for those colleagues who had voiced concerns and sufficiently inclusive for the Special Rapporteur.

Mr. Fathalla said that he could not support Mr. Forteau's proposed insertion of new language at the end of the final sentence because the first part of the last sentence already addressed the latter's concerns. He was, however, supportive of Mr. Paparinskis' compromise proposal to use the term "certain materials" instead of "certain subsidiary means".

Mr. Nesi said that he supported the deletion of the word "inherently" for the reasons already expressed by other members. He was willing to go along with the proposal to use "certain materials" instead of "certain subsidiary means", although his strong preference was for Mr. Forteau's proposed amendments.

Mr. Jalloh (Special Rapporteur) said that he was willing to support the proposal made by Mr. Paparinskis to use the term "certain materials". However, if that term was used, he would prefer for the clause "such as the resolutions or decisions adopted by the General Assembly of the United Nations" to be deleted.

With regard to the deletion of the word "inherently", assessments of the quality of reasoning always harboured a strong subjective element; it was for that reason that two courts could interpret the same rule in different ways. Whether or not the word "inherently" was used in the text would not change that basic point, for which reason he would not persist in objecting to its deletion.

The Chair said she took it that the Commission agreed to delete the word "inherently" and to replace the term "certain subsidiary means" with the term "certain materials", as proposed by Mr. Paparinskis, and to delete the last clause of the final sentence, as proposed by the Special Rapporteur.

Paragraph (6) was adopted with those amendments.

*Subparagraph (*c*) – the expertise of those involved*

Paragraph (7)

Mr. Jalloh (Special Rapporteur) proposed that the word "exclusively" should be inserted between the words "rather than focusing" and "on the renown or academic titles of the particular author or actors" in the second sentence.

Mr. Paparinskis said that the word "occupational" in the term "occupational background" in the second sentence should be deleted. He had not used that word in his statement on the topic as Chair of the Drafting Committee, and "background" without a qualifying adjective was a broader concept that was more appropriate in the context of the commentary.

Ms. Mangklatanakul said that the second sentence of the paragraph should be deleted. While the Commission had previously noted that it was not very satisfied with the

expression “the most highly qualified publicists”, as used in Article 38 (1) (*d*) of the Statute of the International Court of Justice, the reference to the “occupational background” of those involved was even more subjective. The occupation of a given expert was irrelevant to the assessment of his or her level of expertise.

Mr. Mingashang said that the text of paragraph (7) accurately reflected the Commission’s debate on the issue in question.

Mr. Forteau said that he supported the text as proposed.

Mr. Jalloh (Special Rapporteur) proposed that the term “the occupational background and the qualifications” should be amended to read “the occupation, background and qualifications”.

Mr. Oyarzábal said that the paragraph was unclear, in particular the statement that the occupational background and qualifications of those involved “should demonstrate expertise on the subject matter in a number of ways”. The paragraph would benefit from redrafting.

Ms. Ridings said that the Special Rapporteur’s proposal to use the term “occupation” instead of “occupational background” created more problems than it solved. Experience could be obtained in different ways and a person’s occupation was not necessarily an indicator of his or her experience. Her preference would be to refer simply to “background”.

Mr. Sall said that the phrase “*qui devaient démontrer la compétence des intéressés en la matière de diverses manières*” [which should demonstrate expertise on the subject matter in a number of ways] in the second sentence should be replaced with the phrase “*la compétence des intéressés en la matière devrait être apprécié de diverses manières*” [expertise on the subject matter should be assessed in a number of ways]. The reference in the final sentence to the Commission’s previous work was superfluous, since footnote 60 contained a reference to the commentary to conclusion 14 of the conclusions on identification of customary international law.

Mr. Akande said that any reference to “occupational” or “occupation” could create confusion about which occupations were or were not relevant. The text should refer simply to “background”.

Ms. Okowa suggested that the phrase “the occupational background and the qualifications” should be amended to read “the relevant expertise, educational background and qualifications”.

The Chair pointed out that reference was made to “expertise” later in the same sentence.

Mr. Vázquez-Bermúdez said that he agreed with the proposals to delete the word “occupational” and to replace “which should demonstrate” with “should be assessed”.

Ms. Mangklatanakul said that, for the reasons she had already stated, she supported the proposal made by Mr. Paparinskis.

Mr. Jalloh (Special Rapporteur) said that the Commission could resolve the issue by simply deleting the word “occupational” from the expression “occupational background” in the first sentence.

The Chair said that the content and placement of footnote 59 should also be checked.

Mr. Fife said that footnote 60 would be more reader-friendly if it was prefaced by the words “The Commission has previously noted that”.

Paragraph (7), as amended, was adopted.

*Subparagraph (*d*) – the level of agreement among those involved*

Paragraph (8)

Mr. Jalloh (Special Rapporteur) proposed that paragraph (8) should be split into two parts, with the second part becoming paragraph (10) and a new paragraph (9) inserted

between the two parts. Paragraph (8) would end after the fourth sentence and the new paragraph (9) would read:

> "The level of agreement may reflect in the coinciding views of individual scholars, which is not a requirement that there be scholarly consensus, assuming that were even possible. However, where there appears to be a general trend evident from a review of a diverse and representative body of scholarly works, such trend would likely be a reliable indication, on balance, that those views are more likely to be correct. This is particularly the case where the general views follow objective individual assessments by the authors concerned."

The new paragraph (10) would begin with what had originally been the fifth sentence of paragraph (8), starting with the words "The Commission mentioned". The paragraphs of the commentary would be renumbered accordingly.

Paragraph (8), as amended, and new paragraph (9) were adopted.

New paragraph (10)

Mr. Asada said that, to his mind, the two types of subsidiary means addressed in the paragraph – teachings of publicists and resolutions of international organizations – should be dealt with in separate paragraphs. Accordingly, the new paragraph (10) should end after footnote 62. The sentence immediately after footnote 62, "The level of unanimity behind a judicial decision may influence its weight", was confusing and should be deleted. However, if the Special Rapporteur wished to retain it, the phrase "level of unanimity", which was paradoxical, should be replaced with "level of agreement". The next sentence, starting with "When it comes to other subsidiary means", should begin a new paragraph; the word "possible" should be inserted between "other" and "subsidiary" in that phrase to reflect the fact that resolutions of international organizations had not yet been confirmed to be subsidiary means. The last two sentences of the paragraph should be deleted, as they related more to the criterion of "the reception by States and other entities".

Mr. Galindo said that footnotes 62 and 63 should be deleted, given the complexities involved in referring to scholarly works. While the Commission had discussed the significance of agreement or disagreement between parties representing different geographical regions, it had not discussed that issue in relation to parties representing different cultures. For that reason, the words "or cultures" just before footnote 63 should be deleted, as should footnote 63 itself.

Mr. Fife said that the sentence between footnotes 61 and 62, "Judges of the International Court of Justice seem to consider this relevant to how much weight they give to the teachings of publicists", should be deleted, as its meaning was unclear. While he had no objection to the following sentence, which referred to the "level of unanimity" behind a judicial decision, it did seem to be stating the obvious.

Mr. Forteau said he agreed with Mr. Fife that the sentence between footnotes 61 and 62 should be deleted because it was impossible to know with certainty how much weight, if any, the judges of the International Court of Justice gave to teachings. If the sentence "When it comes to other subsidiary means, resolutions from international organizations are usually adopted with States either voting for or against or abstaining from voting" was to be retained, it would need to be carefully reformulated in line with the language already adopted by the Commission. The insertion of the word "legal" between "or" and "cultures" just before footnote 63 could perhaps allay the concerns raised by Mr. Galindo.

Mr. Sall proposed that the words "level of unanimity" [*niveau d'unanimité*] should be replaced with "level of support" [*niveau d'adhésion*].

Mr. Ruda Santolaria said he agreed that the phrase "level of unanimity" was problematic. Either "level of agreement" or "level of support" would be a better alternative. He shared the concerns raised by Mr. Galindo about the reference to "cultures" and supported Mr. Forteau's proposed solution.

Mr. Mingashang said that, as an alternative to Mr. Forteau's proposal, the word "cultures" could be replaced with "legal systems" [*systèmes juridiques*].

The Chair said she took it that the Commission wished to suspend the consideration of the new paragraph (10) to enable the Special Rapporteur to reflect on the proposals made and further refine the text. 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.

New paragraph (10) was left in abeyance.

Subparagraph (e) *– the reception by States and other entities*

Paragraph (9)

Mr. Paparinskis proposed, for the sake of simplicity, that the final sentence of the paragraph, "A similar logic applies here", should be deleted to avoid prejudging the outcome of the discussion on whether the Commission's outputs themselves could be considered subsidiary means.

Mr. Jalloh (Special Rapporteur) said that he wished to build on Mr. Asada's proposal to delete the last two sentences of the new paragraph (10), which had originally been the last two sentences of paragraph (8), by suggesting that the second of those two sentences should be incorporated into paragraph (9), which, conceptually, was a better fit. The exact placement of the sentence could be determined in due course. He had no objection to the amendment proposed by Mr. Paparinskis.

The Chair said she took it that the Commission wished to leave paragraph (9) in abeyance to allow the Special Rapporteur to produce a revised text.

Paragraph (9) was left in abeyance.

Subparagraph (f) *– where applicable, mandate conferred on the body*

Paragraph (10)

Mr. Ouazzani Chahdi proposed that the word "Commission" should be replaced with "International Law Commission" each time it appeared in the paragraph.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Mr. Jalloh (Special Rapporteur) proposed that the beginning of the first sentence, up to the colon, should be amended to read: "This criterion is useful in assessing whether particular regard should be had to decisions of a particular court and, if so, whether to give it greater weight".

Ms. Ridings proposed, for the sake of precision, that the words "international economic law" at the end of the first sentence should be replaced with "international trade law" and that the language "the criterion in question is not necessarily meant to apply" in the second sentence should be amended to read "the criterion in question is also not meant to apply".

Mr. Asada said that it would perhaps be worthwhile to include a reference, in a footnote to be inserted in the first sentence, to the 2007 judgment of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, in which the Court had disagreed with the view taken by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in its 1999 judgment in the *Tadić* case because the Tribunal had not been called upon, nor was it in general called upon, to rule on questions of State responsibility, since its jurisdiction was criminal and extended over persons only. That case illustrated how the Court could decide not to give weight to the decision of a specialized tribunal in view of the latter's jurisdiction and mandate.

Ms. Mangklatanakul said that, while she did not have any specific amendments to propose, it was worth recalling that the criterion to be used to assess the weight of subsidiary means was "the mandate conferred on the body" where applicable, not the body itself. As it

currently stood, paragraph (11) seemed to give greater weight to the type of body concerned than to its actual mandate.

Mr. Paparinskis said that, while he agreed with the substance of Mr. Asada's proposal, in his view, the reference to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* should be placed in paragraph (12) and not necessarily in a footnote. He would leave it to the Special Rapporteur to decide where that reference should be inserted.

Mr. Fife, expressing support for the proposals made by Mr. Asada and Mr. Paparinskis, said that, in the first sentence of the paragraph, the language "it is a specialist tribunal with special competence on those questions" should be amended to read "it is a specialist tribunal with particular competence on a specific question".

Ms. Okowa said that, before she could support the inclusion of a footnote as proposed by Mr. Asada, she would like to know whether there was a necessary deference, in the Court's judgment, to the decision of the Tribunal on a particular point, or whether the Court had taken the view that the two bodies were dealing with separate questions. While the correctness of the proposition in paragraph (11) was not in doubt, she wondered whether that case was the best example for supporting the argument.

Mr. Akande said that he too had doubts over whether *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* was the best example to cite in support of the point being made in paragraph (11), not least because questions had been raised about the correctness of the Court's finding in that case.

Mr. Forteau said that the Commission, in its 2001 articles on responsibility of States for internationally wrongful acts, had interpreted the 1999 appellate judgment in the *Tadić* case differently from the Court. The Court's 2007 judgment was problematic in that it criticized the International Tribunal for the Former Yugoslavia while at the same time relying on the Tribunal's findings of fact. To include a reference to that case would only cause confusion.

Mr. Jalloh (Special Rapporteur) said that he agreed with Ms. Okowa, Mr. Akande and Mr. Forteau that including a reference to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* could be problematic, for two reasons. The first concerned the way in which the Court's position had been received in academic circles and the second was that the Commission was not in a position to arbitrate between the Court and the Tribunal. In fact, the understanding ultimately reached by the two bodies was that the decisions of tribunals with specialized competence would be given weight when such tribunals ruled on matters relating to that competence. Conversely, specialist tribunals would normally give weight to the decisions of a general court when the latter pronounced on matters of general international law. A discussion on the criterion "where applicable, the mandate conferred on the body" would take place at the Commission's seventy-fifth session.

He could support the first amendment proposed by Ms. Ridings but not the second. He preferred to retain the language "the criterion in question is not necessarily meant to apply to the works of purely private expert bodies" because there could well be instances where the mandate of a private expert body might be relevant in assessing the weight of a subsidiary means of determining rules of law. He did not object to Mr. Fife's proposed amendment in principle, although he was concerned that the language "on a specific question" might be too restrictive.

Mr. Fife said that he preferred the wording "it is a specialist tribunal with particular competence on specific questions" or "on a specific question" because the words "those questions" did not refer to anything in the text.

Mr. Jalloh (Special Rapporteur) said that it was unclear whether "specific questions" referred solely to questions that were directly related to the particular competence of a specialist tribunal or whether that phrase might also refer to broader questions. Including language that was open to interpretation could have substantive implications.

Ms. Okowa said that, in practice, specialist tribunals with a particular competence rarely ruled on questions related solely to that competence without also ruling on general questions of international law. In her view, the language "specific questions" was too narrow and failed to convey that reality.

Mr. Fife said that "on those questions" in the original text needed to be either explained or deleted.

The Chair said she took it that the Commission wished to accept Mr. Fife's proposals to replace "special competence" with "particular competence" and to delete "on those questions", as well as Ms. Ridings's proposal to replace the words "international economic law" with "international trade law".

Paragraph (11) was adopted with those amendments.

Paragraph (12)

Mr. Jalloh (Special Rapporteur) proposed that the fifth sentence should be amended to read: "Particular regard may be given to subsidiary means that fall squarely within such a mandate than one that falls outside it."

Mr. Galindo said that the seventh sentence, which referred to the United Nations Commission on International Trade Law (UNCITRAL), was misleading, in particular the word "also" in the phrase "also has a special mandate in relation to matters of private international law". The sentence should be deleted.

Mr. Forteau said that he too was in favour of deleting the seventh sentence. Footnote 71, which contained a quotation from the 2010 judgment of the International Court of Justice in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, stated in the penultimate sentence that the Court had taken into account the practice of various international courts, tribunals and commissions in relation to issues of compensation. However, the Court had done so not in its 2010 judgment but in its 2012 judgment on compensation. A reference to the 2012 judgment should therefore be added.

Mr. Paparinskis, expressing support for the proposals put forward by Mr. Galindo and Mr. Forteau, said that the third to last sentence, which began with the words "In the *Committee*", should be deleted, as it did not support the Special Rapporteur's argument regarding bodies with specialized mandates. To his mind, the penultimate sentence too should be deleted, as it could be read as casting aspersions on the independence and integrity of those bodies. The beginning of the last sentence should be amended to read "The work of such bodies."

He agreed with the points made by members in relation to the proposal to insert a reference to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. However, the commentary to the draft conclusions referred descriptively to methodological aspects of the Court's reasoning, of which the *Genocide* case was an illustrative example. He thus proposed that the third to last sentence, which he had proposed for deletion, should be replaced with the language: "Conversely, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the Court gave careful consideration to the ICTY Appeals Chamber's reasoning but found itself unable to subscribe to its view on issues of general international law which did not lie within the specific purview of its jurisdiction." The accompanying footnote should refer to paragraph 403 of the 2007 judgment. His proposed language neutrally described what the Court had done without implying any view on the substantive points of the case. To his mind, it would be remiss of the Commission not to refer to such an emblematic case.

Mr. Akande proposed that, in the eighth sentence, the words "narrower and" should be deleted so that the text read "Other institutions may have a more specialized mandate". The word "narrow" in the final clause of the ninth sentence should also be deleted. He was uncertain about Mr. Paparinskis' proposal, as the language "which did not lie within the specific purview of its jurisdiction" could be read as being the Commission's interpretation of the Tribunal's mandate. The words "in its view" could be inserted between "which" and "did" to make it clear that it was the International Court of Justice that had taken that view.

Mr. Forteau said that he shared the concerns raised by Mr. Akande.

Ms. Mangklatanakul proposed that the sixth, seventh, eighth and eleventh sentences should be deleted, as they seemed to suggest conditions for deciding how much weight should be given to the decisions of the bodies to which they referred.

Mr. Oyarzábal said that the reference to UNCITRAL in the seventh sentence should be retained, since its work played an important role in the progressive development of international trade law and was connected to both public international law and private international law. In that sentence, the words "in relation to matters of private international law" should be replaced with the words "in preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law". That language reflected the mandate of UNCITRAL.

Mr. Asada said that, notwithstanding the differing views thereon, the judgment of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* was relevant and a reference to it should be included.

Mr. Fife said that it could be helpful to place the references to *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* in a footnote, with the footnote marker placed immediately after the reference to *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. The footnote could begin with the words "Conversely, see", followed by the references to the two cases.

Mr. Mingashang said that it might be preferable to split paragraph (12) into multiple paragraphs to separate out the various ideas being presented.

Ms. Okowa said that, in the penultimate sentence, the phrase "Whatever the case" should be replaced with "In any case". The question of whether a body with a specialized mandate should take precedence over other bodies was too complex to be resolved quickly and should be discussed in full at a later date.

Paragraph (12) was left in abeyance.

The Chair said that, at its next meeting, the Commission would resume its consideration of the paragraphs of chapter VII that had been left in abeyance.

Chapter X. Other decisions and conclusions of the Commission (A/CN.4/L.981)

The Chair invited the Commission to begin its consideration of chapter X of its draft report (A/CN.4/L.981).

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted, subject to their completion by the secretariat.

New paragraph 3

The Chair said that a new paragraph 3 should be inserted to reflect the decision to include the topic "Non-legally binding international agreements" on the Commission's programme of work and to appoint Mr. Forteau as Special Rapporteur for the topic.

Mr. Patel said that, in the syllabus for the new topic, which was contained in annex I to the Commission's report on the work of its seventy-third session (A/77/10), paragraph 28 stated that a "preliminary examination of the topic could also lead, if necessary, to the use of a study group, provided that its work is fully transparent". Therefore, there was a need for a study group for the preliminary consideration of the topic. He wished to propose that the mandate for such a group should include a review of existing State practice in relation to the topic, the recommended criteria for identifying State practice, the format of the potential final product, the definition of the scope of the topic and the direction of the work thereon. The group should aim to achieve concrete outcomes in accordance with the mandate of the Commission and within a reasonable time. While the study group could work under the guidance of the Chair, without the need for the appointment of a Special Rapporteur, the

Commission was free to consider the possibility of replacing the group by appointing a Special Rapporteur as the work on the topic progressed, as appropriate. After the presentation of the group's final report, the Commission could consider whether and how to pursue further the development of the topic, or parts thereof, within the Commission itself or in other forums.

In his view, the study group should consist of a chair, a co-chair and as many members as necessary to ensure the fair and equitable representation of all geographical regions, in particular Asia, which remained excluded from all current Special Rapporteur appointments, study groups and working groups. He did not agree to the appointment of a Special Rapporteur for the new topic; therefore, there was no consensus within the Commission with regard to that decision.

Mr. Ouazzani Chahdi said that it would be helpful to know how many topics the Commission would be discussing at its seventy-fifth session.

The Chair said that the Bureau would ensure that the number of topics on the agenda for the seventy-fifth session was manageable, taking into account the positions that had been expressed in the Sixth Committee.

Mr. Oyarzábal said that he supported the topic's inclusion in the programme of work, given its importance to States. While it was also important to ensure that all regions were duly represented among Special Rapporteurs, geographical representation was not the only consideration that should be taken into account when selecting topics.

The Chair said that the Commission was sensitive to the needs and views of States. While geographical representation was desirable, the main consideration was the merit of a given topic and the degree of States' interest in it.

Mr. Patel said that, while the Commission's four criteria for the selection of new topics were well defined, there were no rules governing the transfer of a topic from the long-term programme of work to the current programme of work. Thus, whenever there was scope for the Commission to exercise discretion, the possibility of arbitrariness arose. The issue of equitable geographical representation needed to be addressed, given that, since the Commission's creation in 1948, 32 of the 66 Special Rapporteur appointments had gone to members from Western European and other States.

It was unclear why the proposal to create a study group for the topic had not been taken up. The decision to appoint a Special Rapporteur for the topic should not be taken immediately; rather, it should be discussed further by the Commission. The possibility of appointing co-rapporteurs could also be considered.

The Chair said that the appointment of Mr. Forteau as Special Rapporteur for the topic had been the subject of extensive consultations, during which all of the regional groups had expressed their agreement.

Mr. Ruda Santolaria said that the topic was of particular practical use to States. Topics were included in the current and long-term programmes of work after careful consideration and broad consultation and in accordance with the Commission's established criteria, in particular the quality of the proposal for the topic's development. Decisions on how to approach the work on each topic were taken in accordance with the nature of the topic. As recently as 2021, the Commission had completed its consideration of one of the topics on its programme of work under the guidance of a Special Rapporteur from the Asian region, former Commission member Shinya Murase.

Mr. Fife said that since the Commission's inception, there had been a structural imbalance for historical reasons. The current members had shown their commitment to balance and representativeness in their work on the topic "Subsidiary means for the determination of rules of international law". The Sixth Committee now had an expectation that the Commission would take up the topic of non-legally binding international agreements; if it did not do so, it would face questions from the General Assembly.

Mr. Galindo recalled that the Inter-American Juridical Committee had considered the topic of binding and non-binding agreements and had appointed a Special Rapporteur to lead the study. The system had worked very well; the Special Rapporteur had provided invaluable

information and the final product had been of high quality. Thus, while conscious that the Commission's practices and methods of work differed from those of the Committee, he was in favour of appointing a Special Rapporteur, specifically Mr. Forteau, for the topic.

Mr. Mingashang said that the issues raised during the discussion were complex and that, in the short time remaining during the current session, it would not be possible to find a solution to any structural imbalance that might persist within the Commission. The issues raised should be placed on the agenda for discussion at the seventy-fifth session. As to the more immediate question, all members appeared to be in favour of Mr. Forteau's appointment as Special Rapporteur.

The Chair said that the decision to transfer the topic "Non-legally binding international agreements" to the Commission's current programme of work had been taken only after extensive consultations that had revealed clear support not only for the topic's inclusion but also for the appointment of Mr. Forteau as Special Rapporteur. The Commission was aware that the issues raised by Mr. Patel deserved serious consideration and had already embarked on a review and revitalization of its procedures and methods of work during the current session.

Mr. Patel said that, while he did not oppose the inclusion of the topic *per se* or the appointment of Mr. Forteau as Special Rapporteur, the Commission must acknowledge that there had been a degree of arbitrariness in its decision. Why had that topic been transferred to its current programme of work when there were other topics of more pressing concern and greater universal significance for the international legal community? The use of non-legally binding international agreements might be advanced in some regions, but not all, and the argument that they constituted a pressing concern was therefore weak. Furthermore, when topics that were not universally significant were selected for consideration, examples of State practice would lack diversity; for example, if the Commission were to consider international law in relation to space technology, advanced nations would be able to contribute practice but less developed nations would not.

The criteria that guided the transfer of topics from the long-term programme of work to the current programme of work required clarification and should be discussed at the start of the Commission's seventy-fifth session. The Commission's decision to commence work on a topic was influenced mainly by the status of the consideration of other topics and by requests from the General Assembly. In some instances, the placing of a topic on the agenda had also been preceded by preliminary work undertaken by a working group established for that purpose. For example, while the issue of the right of asylum had been raised by the Commission as early as its first session, the Commission had not taken it up again until 1960, in response to General Assembly resolution 1400 (XIV). Subsequently, in 1977, the Commission had decided that the topic had lost contemporary relevance and did not require active consideration. Thus, contemporary relevance was always important and must be assessed on the basis of needs expressed by States, not in regional organizations but in international organizations such as the United Nations.

With regard to the topic of non-legally binding international agreements, the Commission should consider establishing a working group or study group, which could be co-chaired by Mr. Forteau and another member from an underrepresented region. Alternatively, as the Commission had shown at the current session that it was open to setting new precedents, it could consider the possibility of appointing a co-rapporteur from an underrepresented region. Such an approach would mark progress towards the reform of the Commission as an institution.

The Chair reiterated that all regional groups had communicated their agreement to the topic's consideration and the appointment of a Special Rapporteur. The Asia-Pacific States had been the first to express their full support. The concerns raised had been well noted and would be discussed in depth at a future date.

Mr. Patel said that, as he had clearly indicated, there was no consensus among the Asia-Pacific States in favour of the topic's consideration. He wished to emphasize that the decision was not based on consensus and that he did not join the consensus. Furthermore, why could a study group not be formed to consider the topic so that members from other regions could be included? There was a lack of fairness in both approach and method.

The Chair said that a decision to include the topic of non-legally binding international agreements in the current programme of work and to appoint Mr. Forteau as Special Rapporteur had been taken after extensive consultations and the points that Mr. Patel was now raising had not been raised at that time. She took it that the Commission wished to adopt the new paragraph 3 reflecting that decision.

New paragraph 3 was adopted.

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

Paragraph 5

The Chair said that, at the end of the paragraph, two new sentences should be added, which would read: "The Chair of the Planning Group presented an oral report on the work of the Planning Group at the current session to the Commission, at its 3648th meeting, on 27 July 2023. The Commission took note of the oral report."

Paragraph 5, as amended, was adopted.

Paragraphs 6 to 30

Paragraphs 6 to 30 were adopted.

Mr. Huang said that he had chosen to make his statement after the adoption of paragraph 30, concerning honoraria, as he had wished to avoid triggering a long debate. Nonetheless, he wished to invite his colleagues, and especially the new members of the Commission, to reflect seriously on the issue of honoraria as they embarked on a new quinquennium of work. The Commission had first expressed its dissatisfaction with and objection to General Assembly resolution 56/272 of 27 March 2002 in its 2002 annual report. That resolution had reduced the Commission members' honoraria from US$ 3,000 per member plus US$ 2,500 per Special Rapporteur to a purely symbolic amount, without prior consultation and in a manner inconsistent with usual United Nations practice and the principle of fairness. The reduction had especially affected Special Rapporteurs, particularly those from developing countries, as it compromised their ability to conduct the requisite research. The Commission had brought its position to the attention of Member States and, at the same time, out of concern about the administrative cost of disbursing symbolic amounts, had decided not to collect the sums to which members were entitled. Although the Commission had continued to voice the same concerns year after year, the General Assembly had not responded substantively until 2022, when it had agreed to the establishment of a trust fund to receive voluntary contributions to fund assistance for Special Rapporteurs and the Chairs of the Commission's study groups.

That agreement, which had been the result of sustained efforts over two decades, was an important achievement. He therefore questioned whether the Commission should continue reiterating its dissatisfaction with the resolution 21 years after its adoption. The current financial situation of the United Nations almost certainly precluded any change in the amount of honoraria in the foreseeable future and no other United Nations body continued to raise the issue in the way that the Commission had done. Furthermore, since it was to be hoped that the establishment of the trust fund would resolve the issue of funding for Special Rapporteurs, would it not be better for the Commission to turn its focus to the fund's management and fundraising? It was an honour to serve on the Commission, but that honour did not have to be matched by honoraria. Moreover, the Commission's statute stipulated only that its members should be paid travel expenses and should receive a special allowance. He suggested, therefore, that, as a friendly gesture to Member States, the Commission should no longer repeat its claim for honoraria in its annual report. Some members had already expressed support for his suggestion but, since others had requested time to consider, he proposed that the debate on the issue should be postponed until 2025.

Paragraphs 31 to 67

Paragraphs 31 to 67 were adopted.

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

Chapter I. Introduction (A/CN.4/L.973)

The Chair invited the Commission to begin its consideration of chapter I of its draft report (A/CN.4/L.973).

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

The Chair pointed out that the word "then" should be inserted between the names of the two Chairs to clarify that they had served successively, not simultaneously.

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 11

Mr. Patel said that he wished to emphasize the importance of inclusivity in the work of the Commission and the fact that, at the seventy-fourth session, members from Asian countries and newly elected members had been excluded, while powers, roles and responsibilities had been concentrated in five members who had already served in the preceding quinquennium. The allocation for the quinquennium 2023–2027 offered a good case study of how a particular group of countries or group of members were excluded. The Commission had 34 members, of whom 9 were from Africa, 8 from Asia, 3 from Eastern Europe, 6 from Latin America and 8 from Western European or other States. Of those, 18 were new members, including 6 from Africa, 6 from Asia, 1 from Eastern Europe, 2 from Latin America and 3 from Western European or other States. With regard to the distribution of responsibilities by region, the two Chairs for the seventy-fourth session were both nationals of Western European countries; of the six Special Rapporteurs, two were African, two were Latin American and two were from Western European States; one Chair of a working group and one Chair of an open-ended working group were from Western European States; and the Co-Chairs of the Study Group on sea-level rise in relation to international law were nationals of countries of Eastern Europe and of Western European or other States.

Asian representation in internal decision-making or policymaking bodies was thus entirely lacking – except within the Bureau, where the unwritten one-region-one-member rule guaranteed equal representation for all regions – despite the fact that, in February 2023, the Asian members of the Commission had been invited to a meeting convened for the sole purpose of discussing how to increase the representation of Asian nations. Five members of the Commission, including two from Western Europe, one from Latin America and two from Africa, would be in charge of most of the substantive topics on the Commission's programme of work for the next quinquennium and half of the new members had been entirely excluded from substantive roles and responsibilities. The whole process of excluding Asia from a potential role as Chair of the Working Group on succession of States in respect of State responsibility, despite the nomination and support of a candidate by the Group of Asian States, could be seen as a deliberate strategy of excluding members who came from Asian countries. Similarly, 50 per cent of the new members were completely excluded from any substantive roles and responsibilities.

An examination of the nationalities of all previous Special Rapporteurs, of which there had been 67, revealed that 32 (48 per cent) had been from Western European or other States, 11 (17 per cent) had been Latin American, 9 (14 per cent) had been African, 9 (14 per cent) had been Eastern European and only 5 (7 per cent) had been Asian. The 67 Special Rapporteurs had represented 40 different nationalities, including 15 nationalities of Western European and other States, 8 African, 8 Latin American and 9 Eastern European nationalities, but only 3 Asian nationalities. Among the Chairs of the Working Group on the long-term programme of work, since the 1990s three had been from Western European or other States, two had been from Latin American States, one had been from an African State and one had been from an Asian State. Even in that regard, geographical distribution had been far from equitable. Although the Commission had emphasized the need for equitable representation

on several occasions, there appeared to be only a limited intention to actually achieve such representation.

The lack of equitable representation had several implications. Firstly, the credibility of the outputs and functioning of the Commission continued to suffer from the lack of Asian representation. Secondly, since, for the current quinquennium, five members of the Commission had more than one substantive responsibility, the efficiency and quality of its work were likely to suffer and had actually suffered during the current session, ultimately affecting the high standards of quality work expected of the Commission. Since none of the new members had been given the opportunity to assume substantive duties in their first year, during which the programme for almost the entire quinquennium had been set, there was an inclusivity deficit.

Regional diversification had been a long-standing tradition in the Commission. It had been reiterated over the decades, most prominently in chapter VII of the Commission's report on the work of its forty-eighth session, published in the 1996 *Yearbook of the International Law Commission*, in which the Commission had stated that: "In practice special rapporteurships tend to be distributed among members from different regions. This system, provided that it is applied with some flexibility, has many advantages, in particular in that it helps to ensure that different approaches and different legal cultures are brought to bear in the formulation of reports and proposals." The importance of regional diversification in the designation of Special Rapporteurs and the attendant advantages had been further emphasized on the occasion of the Commission's seventieth anniversary, yet the current Commission appeared to take a different view with regard to the members from Asian countries. The Commission must give its reasons for diverging in a deliberate way from its long-standing tradition of promoting regional diversification.

What could and should be done to address the imbalance? Firstly, all current Special Rapporteurs should have co-rapporteurs from unrepresented regions, starting with Asia. Secondly, all working groups should have co-chairs from unrepresented groups, starting with Asia and the group of new members. Thirdly, any long-term decisions should be predicated on affirmative action in favour of unrepresented regions or new members, as appropriate. Since there were no approved rules and methods for the Commission's internal functioning, decisions should be taken by the plenary Commission rather than by the Bureau, whose capacities were impeded by a conflict of interests. The Commission had set a new precedent at the seventy-fourth session by having two Chairs, serving consecutively, in order to promote gender diversity. That precedent could be applied in future to promote progress towards the long-standing goal of equitable regional representation, provided that the Commission was genuinely concerned about attaining it. If the call for diversity, equitable representation and inclusivity was not heeded, Member States and the Commission would continue to suffer through the current quinquennium.

Since there had been no debate on the issue he had raised, despite its sensitive nature and the need for urgent attention, he called for a written copy of his statement to be circulated to all members of the Commission and to be appended to the Commission's 2023 report. Alternatively, the statement could be posted on the Commission's website, together with translations into other official languages of the United Nations. A summary was insufficient, as it would exclude vital facts and figures and become no more than another routine reminder.

The Chair, speaking as a member of the Commission, said she regretted that Mr. Patel had felt the need to make such a statement. The Commission took note of his concerns, although they did not reflect her views; at the seventy-fourth session, the Commission had had an inclusive Bureau and had implemented new procedures for the first time, including briefings for new members.

Paragraphs 4 to 11 were adopted.

Paragraphs 12 and 13

Paragraphs 12 and 13 were adopted.

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

Chapter II. Summary of the work of the Commission at its seventy-fourth session (A/CN.4/L.974)

The Chair invited the Commission to begin its consideration of chapter II of its draft report (A/CN.4/L.974).

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

The Chair said that the paragraph would be amended to reflect the decision to include the topic "Non-legally binding international agreements" in the Commission's programme of work and to appoint Mr. Forteau as Special Rapporteur.

Paragraph 7 was adopted on that understanding.

Paragraphs 8 to 11

Paragraphs 8 to 11 were adopted.

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

The meeting rose at 1.20 p.m.