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International Law Commission

Seventy-fifth session (second part)

Provisional summary record of the 3700th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 31 July 2024, at 3 p.m.

Contents

Present:

Chair:	Mr. Vázquez-Bermúdez
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Ms. Oral
	Ms. Orosan
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Zagaynov

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-fifth session (*continued*)

Chapter VIII. Non-legally binding international agreements (*continued*) (A/CN.4/L.994)

The Chair invited the Commission to resume its consideration of chapter VIII of its draft report (A/CN.4/L.994), on the topic "Non-legally binding international agreements".

Paragraph 24 (*continued*)

Mr. Forteau (Special Rapporteur) said that paragraph 24 should be reworded to read: "It was emphasized that there would be a need to indicate that the title of the topic was without prejudice to the terminological choices that some States made to guide their practice."

Paragraph 24, as amended, was adopted.

Paragraph 25

Paragraph 25 was adopted.

(ii) "Non-legally binding"

Paragraph 26

Ms. Okowa said that the article "a" should be inserted before the phrase "political nature" and the verb "ruled" should be changed to "governed".

Mr. Akande said that, to avoid the confusing repetition of the phrase "non-legally binding" in the formulation "non-legally binding international agreements had such non-legally binding nature", that part of the paragraph should be reworded to read "agreements within the scope of the topic were of a non-legally binding nature".

Mr. Forteau (Special Rapporteur) said that he welcomed the changes proposed to the English text, which would bring it into line with the French text.

Paragraph 26 was adopted with those amendments.

Paragraph 27

Mr. Grossman Guiloff said that, in the second sentence of the Spanish text, the phrase "*adverbio 'jurídicamente'*" should be changed to "*expresión 'jurídicamente no vinculante'*" to bring the text into line with the English and French versions.

Ms. Galvão Teles said that the last sentence would more accurately reflect the proposal that it was meant to describe if it read "Another proposal was made to refer to just 'non-binding agreements', which could help to avoid the impression that such agreements were legally binding".

Mr. Forteau (Special Rapporteur) said that he supported Ms. Galvão Teles's proposal but that the words "to simply refer to" should perhaps be used instead of "to refer to just".

The Chair said he took it that the Commission wished to adopt paragraph 27 as amended by Ms. Galvão Teles, with the modification proposed by the Special Rapporteur.

Paragraph 27 was adopted as amended and with the proposed change to the Spanish text.

Paragraph 28

Mr. Akande said that the first sentence would be clearer if it was rephrased to read: "The view was expressed that the Special Rapporteur should clarify the use of expressions that suggest that international law applies to non-legally binding international agreements, as they could be read as being in tension with the aim of the Commission not to transform non-legally binding agreements into legally binding agreements."

Mr. Paparinskis said that the first sentence appeared to reflect a point that he had made during the plenary debate on the topic. The meaning of the sentence could perhaps be better expressed through the use of the word "the promise" rather than "the fact".

Mr. Jalloh said that, as he had also made a similar point during the plenary debate, the phrase "A view was expressed" should perhaps be changed to "Some members expressed the view".

Mr. Fife said that he supported the proposal made by Mr. Akande. However, the word "understanding" would be preferable to "aim", which was too weak, or "promise".

Mr. Forteau (Special Rapporteur) said that, in Mr. Akande's proposal, the word "applies" should be changed to "could apply" and "the aim of the Commission not to transform" should be changed to "the understanding that the Commission's work would not transform".

The Chair said he took it that the Commission wished to adopt the paragraph as amended by Mr. Akande, with the modifications proposed by the Special Rapporteur and Mr. Jalloh.

Paragraph 28, as amended, was adopted.

(iii) International agreements within the scope of the topic

Paragraph 29

Mr. Paparinskis said that paragraph 29 set out the view that agreements involving international organizations should be included within the scope of the topic, but the first sentence of paragraph 32 set out a narrower view that agreements entered into by international organizations should be excluded. He would therefore propose that the first sentence of paragraph 32 should be added to the end of paragraph 29, with the words "On the other hand" inserted at the beginning of that sentence.

Mr. Oyarzábal said that paragraph 29 should reflect the general agreement reached by the Commission, which was that non-legally binding agreements between international organizations did fall within the scope of the topic. If the first sentence of paragraph 32 was moved to paragraph 29, it would have to be modified substantially and say the opposite of what it currently said. The wording could read: "There was general support for non-legally binding agreements entered into by international organizations to be included in the scope of the topic."

Mr. Forteau (Special Rapporteur) said that, to accurately reflect what had been said in the plenary debate, paragraph 29 should begin with the words "Members generally agreed that", instead of "Several members agreed that", and the first sentence of paragraph 32 should be moved to the end of paragraph 29, with the words "It was stated that" replaced with "A view was expressed that".

Paragraph 29, as amended by the Special Rapporteur, was adopted.

Paragraph 30

Mr. Savadogo said that, in the last sentence of the French text, the phrase "*le Rapporteur spécial pense qu'il faille exclure*" should be replaced with "*le Rapporteur spécial propose d'exclure*".

Paragraph 30 was adopted with that amendment to the French text.

Paragraph 31

Ms. Galvão Teles said that the paragraph was unclear and could perhaps be deleted.

Mr. Savadogo said that, in the first sentence, the word "name" in the English text and "*nom*" in the French text should be replaced with "title" and "*intitulé*", respectively. He had no objections to the text on matters of substance.

Ms. Mangklatanakul said that the paragraph was useful in that it noted that the Special Rapporteur's study should not be limited on the basis of the titles given to documents. To make that point clear, a phrase such as "in the preparation of the Special Rapporteur's report" should be included in the first sentence.

Mr. Galindo said that he was uncertain whether the views referred to in the paragraph were intended to reflect those that he had expressed during the plenary debate. If they were, he wished to note that his comments regarding the name of a document had related to the analysis of whether an instrument was binding or non-binding rather than to the scope of the topic.

Mr. Akande said that the first sentence should be deleted, as it seemed not to relate to the section of the chapter – on international agreements within the scope of the topic – in which paragraph 31 was located. As he understood the paragraph, it dealt with the question of whether or not an agreement contained what the Special Rapporteur had termed "a normative component" in his first report on the topic (A/CN.4/772). If that was the case, the words "political or moral" should be replaced with "normative" in the second sentence.

Mr. Paparinskis said that, like Mr. Akande, he had understood the paragraph to relate to the Special Rapporteur's discussion of the role of a "normative component" in paragraph 100 of his first report, and the last sentence to relate to one member's view that some agreements relating to operational measures would be excluded from the scope of the Commission's work if the scope was determined only on the basis of the presence of a normative component. The last sentence should perhaps be reformulated to make that clear.

Mr. Asada said that, as he read the paragraph, the second and third sentences were intended to create a contrast, but that contrast was obscured by the words "and were not intended to create legal rights and obligations", which appeared at the end of the second sentence. Those words should therefore be deleted.

Mr. Sall said that, like Ms. Mangklatanakul, he found the first sentence to make an important point. However, the sentence perhaps did not belong in paragraph 31. He would propose that it should be placed at the end of paragraph 30.

Mr. Jalloh said that the paragraph was important and should be retained. However, it did contain unclear elements, including the reference to political or moral commitments, that could perhaps be reformulated or deleted.

Mr. Fife said he agreed with Mr. Sall that the first sentence was important and should be retained. He had some reservations with respect to the phrase "It was suggested that" in the second sentence, which gave the impression that the view described in the sentence was widely held in the Commission.

Ms. Mangklatanakul said that, while members had different views on the issue, she felt strongly that it was important to make clear that political and moral commitments would be discussed and considered by the Commission.

Mr. Oyarzábal, supported by **Mr. Akande**, said that the current discussion showed that the paragraph was problematic. As the chapter was meant to be a summary, not every view needed to be included on every issue. Furthermore, it was important to ensure that views were expressed in a way that would be clear to the Sixth Committee, to which the Commission's report was addressed.

Mr. Forteau (Special Rapporteur) said that, while there could be disagreement on the substantive issues set out in the paragraph, its meaning was perfectly clear. He understood that some members found the expression "political or moral commitments" problematic, but that expression had been used during the plenary debate. At the beginning of the second sentence, the words "It was suggested that" should be replaced with "The view was expressed that".

Paragraph 31, as amended by the Special Rapporteur, was adopted.

Paragraph 32

Mr. Oyarzábal said that, as he recalled, members in favour of excluding resolutions of international organizations from the scope of the topic had outnumbered those in favour of including them. However, the wording of the paragraph seemed to imply the opposite. The reference to "several members" in what had originally been the second sentence should therefore be changed to "some members". The following sentence should then indicate that most members opposed the inclusion of resolutions of international organizations within the scope of the topic.

Mr. Grossman Guiloff, supported by **Mr. Jalloh**, said that the reference, in the last sentence, to the exclusion of "treaties and agreements with non-State actors" from the scope of the topic was problematic because international organizations were non-State actors. As noted in paragraph 29, members had generally agreed that the topic should cover agreements between States and international organizations and between international organizations.

Mr. Fife said that he shared the concerns raised by Mr. Oyarzábal. In addition, he did not recall that the exclusion of agreements with non-State actors from the scope of the topic had, as indicated in the last sentence of the paragraph, been welcomed during the plenary debate.

Mr. Asada said that the phrase "On the other hand" should be deleted from the second sentence, as the first sentence of the paragraph had been moved to paragraph 29. It was his understanding that the Special Rapporteur's intention had been to exclude three items: unilateral acts of States, non-binding provisions in treaties, and agreements with non-State actors. If that was the case, the "and" that appeared before "non-binding provisions" in the last sentence should be deleted.

Mr. Jalloh said that, in his view, it was important for the Commission to first examine agreements concluded by States with non-State actors, especially armed insurgent groups, before deciding whether to exclude them from the scope of the topic. No decision should be made in that regard without such prior consideration.

Ms. Okowa said that she had been among the members who had supported expanding the scope of the topic to include agreements with non-State actors. There seemed to be an inconsistency between the last sentence of paragraph 32 and paragraph 38, which addressed agreements concluded between States and private parties, including agreements concluded between States and rebel groups in conflict situations.

Mr. Mavroyiannis said that, from a methodological perspective, it was problematic that at least five categories of documents were addressed in paragraph 32.

Mr. Jalloh said that a sentence such as "A view was expressed that the scope of the topic should not at this stage exclude agreements between States and non-State actors in the context of rebel or insurrectional movements" should be added to the paragraph.

Mr. Akande said that the reference to agreements with non-State actors should be deleted from paragraph 32; the matter should be dealt with solely in paragraph 38.

Mr. Fife said that he fully supported the deletion of the reference to non-State actors from paragraph 32. The wording "was welcomed" could then be retained because there had been general agreement about the two remaining elements.

Mr. Forteau (Special Rapporteur) said that the first sentence of the paragraph should be deleted, since it had been moved to paragraph 29; the words "On the other hand" should be deleted from the beginning of the second sentence; the word "several" in the second sentence should be replaced with "some"; the word "Some" at the beginning of the third sentence should be replaced with "However, several"; and the words "and agreements with non-State actors" should be deleted from the last sentence.

Paragraph 32, as amended by the Special Rapporteur, was adopted.

Paragraph 33

Mr. Ouazzani Chahdi said that, in the French text, the words "*elles étaient*" should be replaced with "*il s'agit*".

Paragraph 33 was adopted with that amendment to the French text.

Paragraphs 34 and 35

Paragraphs 34 and 35 were adopted.

Paragraph 36

Mr. Galindo, supported by **Mr. Ruda Santolaria**, said that the words "or other territorial units of States" should be inserted after the reference to "federated States".

Mr. Jalloh said that he supported the proposal made by Mr. Galindo. The word "such" should be inserted before "non-legally binding international agreements" in the second sentence to make a connection between the first and second sentences. He also wished to propose that the first sentence of paragraph 37 should be moved to paragraph 36.

Mr. Forteau (Special Rapporteur) said that he agreed with Mr. Galindo's proposal to add "or other territorial units of States". The word "such" could not be inserted in the second sentence as proposed by Mr. Jalloh because that sentence referred to the general category of non-legally binding international agreements and stated that, of that category, a large portion was concluded at the sub-State level. Paragraph 37 should be left intact because it addressed a different issue – inter-institutional agreements as seen from the perspective of domestic law and in relation to international law – and the three sentences of the paragraph were connected.

Paragraph 36, as amended by Mr. Galindo, was adopted.

Paragraph 37

Mr. Oyarzábal said that it was unclear under what law the legally binding obligations referred to at the end of the first sentence were created.

Mr. Galindo said that he understood "other States" to be a reference to domestic law. The sentence could be made clearer if the terminology used within it was harmonized.

Mr. Forteau (Special Rapporteur) said that the reference to "other States" should be replaced with the phrase "some domestic systems".

Paragraph 37, as amended, was adopted.

Paragraph 38

Mr. Lee said that, while he agreed with the main thrust of the paragraph, he had reservations about the term "private parties" in the first sentence. He therefore proposed that it should be replaced with "non-State entities" or "non-State parties".

Mr. Fife said he agreed that the term "private parties" was not appropriate and that the idea would be better encapsulated by the more neutral term "non-State actors".

Mr. Jalloh said he agreed that the term "private parties" should be replaced with something along the lines of "non-State entities". He did not understand what was meant by the first part of the second sentence, which read "At the same time, it was noted that some of those examples required clarification". During the debate, a number of members had simply expressed the wish that the Commission should have the possibility of looking into such agreements. He would therefore propose deleting the phrase in question.

Mr. Paparinskis said that he would support the use of the term "non-State actors". However, he had reservations about the second sentence, which included among the "non-State actors" *de facto* governments and even insurrectional movements that became the new government of a State. He was not convinced that such entities should be considered "non-State actors", particularly in contexts where several governments were purporting to represent the State. Perhaps the Special Rapporteur could suggest an alternative formulation that did not involve using an umbrella term to describe such actors. He would propose deleting the words "concluded between States and private parties, for example agreements" from the first sentence, thus avoiding the question of whether the entities cited were non-State actors.

Ms. Okowa said that the wording proposed by Mr. Paparinskis would suggest that the only examples available to the Commission were agreements concluded in conflict situations, which would exclude many other categories of agreement, such as agreements concluded with a *de facto* government such as the Taliban in Afghanistan in a situation that was not a conflict situation. She agreed that the term "private parties" did not provide an accurate description, but neither did "non-State groups".

Mr. Jalloh said he agreed that *de facto* governments could not be described as non-State actors and therefore perhaps the solution would simply be to delete the words "*de facto* governments" from the first sentence. The second sentence could then read: "At the same time, even if agreements between non-State actors and States were excluded from the scope of the topic, such an assessment should be made following the Commission's study of the matter."

Mr. Fife said that the promotion of the objectives of international law sometimes required the conclusion of non-legally binding agreements with States that were not recognized as such. To his mind, the notion of "non-State actors" implicitly included the notion of recognition. He would therefore be reluctant to limit the scope of the concept to conflict situations or insurgency.

Mr. Forteau (Special Rapporteur) said that the second sentence of the paragraph had been based on Mr. Fife's statement in the plenary debate. If a broader interpretation was adopted in the first sentence, the second sentence would no longer be necessary. The first sentence could read: "Some members stated that the Commission could consider agreements concluded between States and non-State actors, for example agreements concluded in conflict situations between States and rebel or insurrectional movements, or non-State armed groups." If that change was made, the second sentence would be deleted.

Mr. Oyarzábal said that, in order to avoid the reference to "non-State actors", he would propose amending the first sentence to read: "Some members stated that the Commission could consider agreements concluded in conflict situations between States and rebels or insurrectional movements, *de facto* governments, or non-State armed groups." In the second sentence, everything that came after the word "clarification" could be deleted.

Mr. Jalloh said that the Special Rapporteur's proposed solution could work for the first sentence, but he would rather reformulate the second sentence than delete it entirely, as that would result in the loss of a substantive element regarding the Commission's future course of action.

Mr. Grossman Guiloff said that the Commission was not drafting the paragraph from scratch, but rather endeavouring to reflect what had been said on the matter during the plenary debate. Therefore, even if members disagreed with some points, the Commission should be careful not to delete views actually expressed during the debate. The reference to *de facto* governments should be retained if it had been mentioned during the debate.

Mr. Paparinskis said that he could go along with the Special Rapporteur's proposal, although he understood that the deletion of the reference to *de facto* governments would come at a cost. As a compromise solution, a more cumbersome but more descriptively precise formulation for the first sentence might be to replace "private parties" with "actors other than States and international organizations".

The Chair suggested that paragraph 38 should be left in abeyance to allow interested members to reach an agreement.

Paragraph 38 was left in abeyance.

(c) Identification of questions to be examined

(i) Criteria for distinguishing treaties from non-legally binding agreements

Paragraph 39

Mr. Grossman Guiloff proposed replacing the words "Some members" with "Several members" in the first sentence.

Paragraph 39, as amended, was adopted.

Paragraph 40

Mr. Galindo said that the third sentence was intended to reflect something he had said during the plenary debate, but was somewhat confusing as drafted. He therefore proposed amending that sentence to read: "It was noted that there were situations in which an agreement expressly stated that it was non-binding but, at the same time, contained several linguistic markers that led one to conclude that it was, in fact, a binding agreement."

Paragraph 40, as amended, was adopted.

Paragraph 41

Mr. Fathalla said that, in order to reflect what he had said during the plenary debate, the words "including the need for ratification" could be added after "final clauses" so as to distinguish between treaties and non-binding agreements.

Ms. Mangklatanakul said it had been agreed that both objective and subjective criteria were used to determine the intentions of the parties. In her statement she had stressed some of the elements that must be taken into account, especially the criteria set out in the definition of the term "treaty" in article 2 (1) (*a*) of the Vienna Convention on the Law of Treaties. She therefore proposed adding a sentence at the end of the paragraph to reflect what she had said in the debate: "Based on the definition of the term 'treaty' under article 2 (1) (*a*) of the 1969 Vienna Convention on the Law of Treaties, a view was also expressed that determining whether the parties to an agreement were subjects of international law and whether the governing law of an agreement was international law were additional criteria that would be of practical use and should be studied."

Paragraph 41, as amended, was adopted.

Paragraph 42

Ms. Okowa said that the meaning of the phrase "treating those agreements as *quasi*-sources of international law" in the second sentence was not clear to her. Was the intention to exclude non-binding agreements from the techniques and processes of lawmaking?

Mr. Forteau (Special Rapporteur) said that, as the French version of that phrase was clearer, the English version should be aligned with it. Translated literally, the phrase would read "equating those agreements with sources of international law".

Paragraph 42, as amended, was adopted.

Paragraph 43

Paragraph 43 was adopted.

Paragraph 44

Mr. Grossman Guiloff said that his was the other view referenced in the second sentence. To accurately reflect what he had said in the debate, the sentence should be amended to read: "According to another view, while the Commission should study possible presumptions on the subject, the general presumption should be that, in the absence of clear proof to the contrary, an international agreement that had not indicated that it was or was meant to be legally binding should be presumed to be non-binding."

Paragraph 44, as amended, was adopted.

Paragraph 45

Ms. Galvão Teles said that she would prefer to make the second sentence more neutral by replacing the phrase "Some members considered that it was too ambitious for the Commission to determine" with "Some members considered that it was not for the Commission to determine".

Mr. Oyarzábal, referring to the last sentence, said that, as he recalled, several members had in fact said that judicial bodies should not have the power to recategorize agreements. The words "A view was expressed" should therefore be qualified by something along the lines of "by several members".

Mr. Forteau (Special Rapporteur) said that the phrase "by some members" would be most appropriate.

Paragraph 45, as amended, was adopted.

(ii) Regime of non-legally binding international agreements

Paragraph 46

Mr. Oyarzábal, referring to the first sentence, said it was his understanding that there had been general agreement that non-legally binding international agreements were not, as such, governed by the law of treaties. The sentence should therefore begin with "The members generally agreed with the conclusion". The words "at all" should be added at the end of the second sentence, after "international law".

Paragraph 46, as amended, was adopted.

Paragraph 47

Mr. Jalloh said that, in order to better reflect the strong general agreement among the members during the debate, the second sentence should begin with "It was agreed that" rather than "It was expressed that".

Mr. Forteau (Special Rapporteur) said that the matter was somewhat more complicated than that, as some members had argued that a non-legally binding agreement that conflicted with a peremptory norm of general international law would not be void, since its non-legally binding nature meant that the regime of nullity would not apply. A possible solution might be simply to delete the words "It was expressed that" from the beginning of the second sentence.

Paragraph 47, as amended, was adopted.

Paragraph 48

Ms. Okowa said that, in the second sentence, the word "other" should be inserted before "rules of international law", since good faith was itself a rule of international law. The words "at odds" should be replaced with "inconsistent".

Mr. Grossman Guiloff said that the phrase "It was highlighted" at the beginning of the first sentence should be qualified to indicate that the point in question had been highlighted by some members rather than an individual member.

Mr. Jalloh said that he supported Ms. Okowa's proposal to use the words "inconsistent with" rather than "at odds with".

Mr. Forteau (Special Rapporteur) said that he agreed with the proposals to begin the first sentence with the words "Some members highlighted that" and to replace the words "at odds with" in the second sentence. However, he was hesitant to introduce the word "other" before "rules of international law" in the second sentence, as the principle of good faith was mentioned again in that sentence and the word "other" might therefore appear contradictory.

Paragraph 48, as amended, was adopted.

Paragraph 49

Ms. Okowa said that, as estoppel was already mentioned in paragraph 48, the word "expressly" or "explicitly" could perhaps be added after "Some members" in the first sentence. In the third sentence, the word "worth" should be replaced with "worthy of".

Paragraph 49, as amended, was adopted.

Paragraph 50

Mr. Oyarzábal said that, in order to more accurately reflect the discussion, the words "exchanged views as to" in the first sentence should be replaced with "addressed".

Paragraph 50, as amended, was adopted.

Paragraph 51

Ms. Galvão Teles said that the first and second sentences appeared to contradict each other. As the key point made during the debate was clearly expressed in the first sentence, perhaps the second sentence could simply be deleted.

Paragraph 51, as amended, was adopted.

(iii) (Potential) legal effects of non-legally binding international agreements

Paragraph 52

Mr. Oyarzábal said that, in order to reflect what had been said during the debate, perhaps a sentence could be added at the end of the paragraph, to read: "It was suggested that the term 'legal implications' was preferable to the term 'effects'."

Mr. Nguyen proposed adding the word "legal" before "effects" in the first sentence.

Mr. Lee said that he agreed with Mr. Oyarzábal's recollection of the point made during the debate. In paragraph 78, it was stated that the Special Rapporteur had highlighted suggestions by some members for alternatives, such as "implications" or "consequences". It would therefore be appropriate to include that point also in paragraph 52. Perhaps a new sentence could be added between the third and fourth sentences, to read: "It was suggested that an alternative expression such as 'legal implications' or 'consequences' be used instead of '(potential) legal effects'."

Mr. Forteau (Special Rapporteur) said he agreed that the point made in paragraph 78 could be repeated in paragraph 52. A new sentence could be inserted at the end of the paragraph and should read: "Some members suggested the use of alternative terms such as 'implications' or 'consequences'."

Paragraph 52, as amended, was adopted.

Paragraph 53

Ms. Okowa said that it might be useful to add wording to the last sentence to clarify what "possible evidence" was being referred to in the phrase "It was also stated that non-legally binding international agreements could be considered 'international instruments' as possible evidence".

Mr. Jalloh, referring to the second sentence, in which it was stated that the "other acts" mentioned in paragraph (2) of the commentary to conclusion 12 of the conclusions on identification of customary international law "were forms of evidence of the constitutive elements of a rule of customary international law", said that the wording "were forms of evidence" seemed more categorical than the approach that had been taken in the commentary. He would prefer to soften that language by replacing "were" with "may be".

Ms. Galvão Teles said that she concurred with Ms. Okowa that some clarification of what was meant by the reference to "possible evidence" was needed, in particular since paragraph (3) of the commentary to draft conclusion 7 of the draft conclusions on general principles of law referred more generally to "international instruments" rather than specifically to non-legally binding international agreements.

The Chair said that, to allay the concerns of Ms. Okowa and Ms. Galvão Teles, he would suggest that, in addition to the proposal made by Mr. Jalloh, the words "of recognition of general principles of law" should be added after "possible evidence".

Paragraph 53 was adopted with those amendments.

Paragraph 54

Mr. Fife said that he found it difficult to follow the logic of the first sentence, in particular its second part, in which it was stated that non-legally binding international agreements could serve as the basis for the definition of a rule of customary international law or the formulation of a provision in a treaty. He wondered whether the wording "and serve as the basis for the definition of a rule of customary international law" should be replaced with "including a rule of customary international law" and whether "formulation" should be replaced with "interpretation".

Mr. Forteau (Special Rapporteur) said that, during the debate, the point had been made that non-legally binding agreements could be used in developing customary law or in drafting a new rule. The words "serve as the basis for" were therefore appropriate and reflected the debate. He clarified that the first and second parts of the sentence concerned different elements.

Mr. Fife said that he wondered whether the sentence might be better split into two sentences to avoid confusion.

Mr. Jalloh said that he agreed with Mr. Fife. He, too, had concerns about the first sentence, in particular regarding the use of the term "definition", which did not seem correct in the context. He wondered whether it should be replaced with "development".

Mr. Ouazzani Chahdi pointed out that the issue seemed to be of a purely linguistic nature, since the sentence in the French text was quite clear.

Mr. Forteau (Special Rapporteur) said he recalled that the term used during the debate had been "definition" and that its meaning had been somewhat ambiguous, for which reason he was reluctant to replace it with "development". To address Mr. Fife's concerns and make the distinction between the two parts of the sentence clearer, he proposed amending the wording "and serve as the basis" to read "or could serve as the basis".

Paragraph 54, as amended, was adopted.

Paragraph 55

Mr. Asada said that he struggled to understand the first sentence, which currently read: "Some members expressed reservations with respect to the potential effect of non-legally binding international agreements as forms of subsequent agreements in the interpretation of treaties, as assimilating them to a source of international law or considering them as subsequent agreements should be avoided." The first part of the sentence seemed to contradict conclusion 10 (1) of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, in which it was stated that such agreements "may, but need not, be legally binding", while the meaning of the second part, about assimilating those agreements to a source of international law, was difficult to grasp.

Ms. Mangklatanakul said that reference should be made to the reasons why some members had expressed reservations about the potential legal effects of non-legally binding agreements. She would propose that the second sentence should be replaced with three new sentences, which would read: "The view was also expressed that non-legally binding international agreements do not and cannot create legally binding obligations and non-adherence to them does not incur State responsibility. Therefore, the suggestion that non-legally binding international agreements may have potential legally binding obligations could affect their use by States. Therefore, caution should be exercised in addressing the issue of potential legal effects of non-legally binding international agreements."

Mr. Jalloh said he agreed with Mr. Asada that the second part of the first sentence was difficult to follow and with Ms. Mangklatanakul that an explanation of the reasoning behind the views being expressed was needed. He wondered whether the second sentence could be amended to read: "The view was expressed that non-legally binding international agreements do not create legal obligations." That sentence could then be followed by the last two sentences of Ms. Mangklatanakul's proposal.

Mr. Galindo said he agreed that the first sentence was difficult to understand and should be simplified. While he welcomed Ms. Mangklatanakul's proposal to replace the

second sentence, he considered that less was more. In the phrase "undesired legal obligations" the word "undesired" could simply be replaced with "unintended".

Ms. Mangklatanakul said that, notwithstanding Mr. Galindo's suggestion, her main concern, namely that the reason why States chose to enter non-legally binding agreements was precisely to avoid any legal effects, was not sufficiently addressed. She wondered whether wording could be inserted to explain that States used non-legally binding agreements in the belief that no legal obligations were created.

Mr. Forteau (Special Rapporteur) said that, to improve clarity, the first part of the first sentence could be reformulated to read "Some members expressed reservations about considering non-legally binding international agreements as a form of subsequent agreement in the interpretation of treaties". The second part of that sentence could then be left unchanged. To allay Ms. Mangklatanakul's concerns, he proposed amending the second sentence to read: "The view was expressed that giving non-legally binding international agreements potential legal effects could affect their use by States by creating legal obligations that it was not the intention of States to create."

Mr. Oyarzábal said that he wondered whether an additional sentence should also be included to reflect comments he had made during the debate. He had emphasized the need to seek the views of States in the Sixth Committee on whether non-legally binding international agreements could produce legal effects and, if so, what those effects might be.

Mr. Forteau (Special Rapporteur) said that, while he could agree to Mr. Oyarzábal's proposal, wording to that effect was already contained in paragraph 62, in the section on the future programme of work, which was where he believed the issue would be better addressed.

Mr. Jalloh said that he supported the Special Rapporteur's proposal for the second sentence, which seemed to address Ms. Mangklatanakul's concern and reflect the debate without overcomplicating the issue.

Paragraph 55, as amended by the Special Rapporteur, was adopted.

Paragraph 56

Paragraph 56 was adopted.

Paragraph 57

Mr. Fife, referring to a point he had made during the debate, said that he wished to propose the insertion of a sentence at the end of the paragraph, to read: "Yet another view was that the notion of soft law was not particularly useful in this context, as non-legally binding international agreements were not necessarily soft."

Paragraph 57, as amended, was adopted.

(d) Form of the final outcome of the work

Paragraphs 58 and 59

Mr. Grossman Guiloff said that, to better reflect what some members had said during the debate, the second sentence of paragraph 58 should be amended to read: "Several members were of the view that the output should instead be draft guidelines to stress the non-binding nature of the proposed topic, considering *inter alia* that 'conclusions' are the output used by the Commission in its work on customary law, general principles and subsidiary means."

Ms. Galvão Teles, expressing support for Mr. Grossman Guiloff's proposal, said that the third sentence, which concerned best practices, model clauses or other recommendations, would be better placed at the start of paragraph 59, which dealt with the same issue.

Mr. Jalloh said that he wished to voice his support for both of those proposals.

Mr. Oyarzábal said that he wondered whether the third and fourth sentences of paragraph 58 could be combined to remove the wording "In that regard, comparison was drawn between". The sentence would therefore read: "It was also suggested that States could

benefit from best practices, model clauses or other recommendations in addition to draft guidelines, as was done in the Commission's work on the topics 'Reservations to treaties' and 'Provisional application of treaties'."

Mr. Akande, agreeing with Mr. Grossman Guiloff's proposal, said that he would suggest only a slight change to reflect the fact that "non-binding nature" referred not to the topic but to the agreements dealt with under the topic. He likewise agreed with the suggestion by Ms. Galvão Teles to move the third sentence to paragraph 59. To address Mr. Oyarzábal's point, he wondered whether wording could be inserted to state that reference had been made in that regard to the Commission's work.

Mr. Forteau (Special Rapporteur), noting that agreement on the substance seemed to be emerging, said that he would be grateful if members could provide their proposals in writing.

The Chair said he took it that the Commission wished to leave paragraphs 58 and 59 in abeyance, pending the preparation of a revised proposal by the Special Rapporteur.

Paragraphs 58 and 59 were left in abeyance.

Paragraph 60

Mr. Fife said it might be useful to state that the Commission could provide non-exhaustive examples of the different types of non-legally binding international agreements for illustrative purposes. The first sentence should therefore be amended to read: "Some members stated that, as part of the study of the existing practice of non-legally binding international agreements, the Commission could sketch a possible typology or provide examples of categories of agreements for illustrative purposes."

Paragraph 60, as amended, was adopted.

(e) Future programme of work

Paragraph 61

Mr. Jalloh, referring to the second sentence, said that he questioned whether the programme of work proposed by the Special Rapporteur should be described as "detailed". In fact, he had commented that the programme of work was somewhat general in nature, since it did not contain specific details of the work to be done. He did not recall that the programme of work had been characterized as "achievable"; describing it that way might put the Commission in a difficult position if things did not go to plan. The words "was considered achievable" at the end of the second sentence should therefore be replaced with "was generally supported".

Paragraph 61, as amended, was adopted.

Paragraphs 62 and 63

Paragraphs 62 and 63 were adopted.

3. Concluding remarks of the Special Rapporteur

Paragraph 64

Paragraph 64 was adopted.

Paragraph 65

Ms. Okowa said that the words "criteria to distinguish" in the first sentence should be replaced with "criteria for distinguishing". In the last sentence, it was unclear what was meant by "possible presumptions".

Mr. Forteau (Special Rapporteur) said that "presumptions", which he had mentioned in his first report and in his summing-up, referred to presumptions such as whether an international agreement should or should not be presumed to be legally binding. To improve

clarity, the words “regarding the bindingness or non-bindingness of agreements” could be inserted after “possible presumptions”.

Paragraph 65, as amended, was adopted.

Paragraph 66

Ms. Okowa said that she would welcome clarification on what was meant by the references to “an inductive rather than a deductive approach” and to “robust academic discipline”.

Mr. Forteau (Special Rapporteur) said that, in both cases, the formulation reflected the exact words that had been used by him, in the first example, and by Ms. Mangklatanakul, in the second. The paragraph should therefore be left unchanged.

Paragraph 66 was adopted.

Paragraph 67

Paragraph 67 was adopted.

Paragraph 68

Mr. Oyarzábal said that he could not recollect any reference in the Special Rapporteur’s concluding remarks to the need for the Commission’s work not to be “overly prescriptive”. The word “overly” should be deleted.

Mr. Forteau (Special Rapporteur) said that, in fact, he had used the word “*trop*” in his concluding remarks. The word “overly” should therefore be replaced with “too”.

Paragraph 68, as amended, was adopted.

Paragraphs 69 to 71

Paragraphs 69 to 71 were adopted.

Paragraph 72

Ms. Okowa said that she wondered whether “sense” was the correct term to use in the third sentence, as part of the phrase “the term ‘arrangements’ had an administrative or operational sense in some legal systems”.

Mr. Forteau (Special Rapporteur) said that the word “sense” should be replaced with “meaning”.

Paragraph 72, as amended, was adopted.

Paragraph 73

Paragraph 73 was adopted.

The meeting rose at 6.05 p.m.