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Held at the Palais des Nations, Geneva, on Friday, 30 May 2025, at 10.35 a.m.

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Present:

Chair: Mr. Paparinskis

Members: Mr. Akande
Mr. Argüello Gómez
Mr. Asada
Mr. Cissé
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. Mingashang
Mr. Nesi
Mr. Nguyen
Ms. Okowa
Ms. Oral
Ms. Orosan
Mr. Ouazzani Chahdi
Mr. Patel
Mr. Ruda Santolaria
Mr. Sall
Mr. Savadogo
Mr. Vázquez-Bermúdez

Secretariat:

Mr. Pronto Secretary to the Commission

The meeting was called to order at 10.35 a.m.

Tribute to the memory of Nabil Elaraby, former member of the Commission

The Chair said that he wished to recall the sad news of the death, in August 2024, of Mr. Nabil Elaraby of Egypt, who had been a member of the Commission from 1994 to 2001.

At the invitation of the Chair, the members of the Commission observed a minute of silence.

Subsidiary means for the determination of rules of international law (agenda item 8) (*continued*) (A/CN.4/781 and A/CN.4/781/Add.1)

Report of the Drafting Committee (A/CN.4/L.1019)

Mr. Nesi (Second Vice-Chair), introducing the report of the Drafting Committee on the topic “Subsidiary means for the determination of rules of international law” (A/CN.4/L.1019) on behalf of the Chair of the Drafting Committee, said that the report contained the texts and titles of the draft conclusions provisionally adopted by the Committee on first reading.

The Drafting Committee had devoted five meetings to the topic, from 19 to 23 May, for the consideration of five new draft conclusions, as originally proposed by the Special Rapporteur in his third report (A/CN.4/781), together with a number of reformulations that had been proposed by the Special Rapporteur in response to suggestions made during the debates in plenary meetings and in the Committee. The Commission had also transmitted draft conclusions 1 to 8, which had been provisionally adopted at the seventy-fourth and seventy-fifth sessions, back to the Drafting Committee solely for the purposes of finalizing the first reading. Based on the proposal of the Special Rapporteur in his third report, and with slight adjustments taking into account the plenary debate, the Committee had decided to adopt five parts and had reordered the draft conclusions.

Part One, entitled “Introduction”, contained draft conclusion 1, entitled “Scope”, which had been provisionally adopted by the Commission at the seventy-fourth session.

Part Two, entitled “General provisions”, contained three draft conclusions: draft conclusion 2, entitled “Categories of subsidiary means for the determination of rules of international law”; draft conclusion 3, entitled “Nature and function of subsidiary means”; and draft conclusion 4, entitled “General criteria for the assessment of subsidiary means for the determination of rules of international law”. Draft conclusions 2 and 4 had also been provisionally adopted at the seventy-fourth session. Draft conclusion 3 had been provisionally adopted by the Commission at the seventy-fifth session as draft conclusion 6. It had been decided by the Drafting Committee, based on the Special Rapporteur’s proposal in his third report, which had taken into account the views expressed in the Sixth Committee, that since the draft conclusion concerned the nature and function of subsidiary means, it would be better located in the “General provisions” part.

Part Three, entitled “Decisions of courts and tribunals”, contained three draft conclusions: draft conclusion 5, entitled “Decisions of courts and tribunals”; draft conclusion 6, entitled “Absence of legally binding precedent in international law”; and draft conclusion 7, entitled “Weight of decisions of courts and tribunals”. Those draft conclusions corresponded, respectively, to draft conclusion 4, provisionally adopted at the seventy-fourth session, and draft conclusions 7 and 8, provisionally adopted at the seventy-fifth session. The new layout in Part Three had been intended to group the draft conclusions concerning decisions of courts and tribunals, consistent with the Special Rapporteur’s proposal in his third report.

Part Four, entitled “Teachings”, contained draft conclusion 8, which bore the same title, and draft conclusion 9, entitled “Weight of teachings”. Draft conclusion 8 had been provisionally adopted at the seventy-fourth session as draft conclusion 5. Draft conclusion 9, adopted at the current session, referred to the criteria to be considered when determining the weight to be given to teachings. In keeping with the content of draft conclusion 7, “Weight of decisions of courts and tribunals”, and draft conclusion 11, “Weight of the works of expert bodies”, which provided a set of specific criteria for each type of subsidiary means, the

Drafting Committee had been of the view that each draft conclusion concerning a category of subsidiary means should be accompanied by a draft conclusion indicating the criteria for determining weight, to build on the general criteria for such assessment set out in draft conclusion 4. The criteria in draft conclusion 9 referred back to the general criteria previously adopted by the Commission.

In line with the Special Rapporteur's revised proposal, the Drafting Committee had considered explicitly including other factors, such as the character and normative value of the teachings or the extent to which the teachings remained relevant in the light of subsequent developments. Another alternative considered by the Committee had been to refer to teachings that assessed, reflected or examined existing law. However, it had been concluded that such text was too restrictive and did not create appropriate criteria to evaluate teachings. Furthermore, reference to the consideration of subsequent developments could potentially hinder the use of older but nonetheless authoritative teachings. It had been emphasized that older teachings could still be relevant for assessing current or future developments. The inclusion of the phrase "as appropriate", in addition to the reference to the general criteria contained in draft conclusion 4, was sufficient to cover the key elements of the criteria, including quality and representativeness. It also conveyed the idea that not all of the criteria would necessarily be relevant when evaluating the weight of a teaching.

The title of draft conclusion 9, "Weight of teachings", followed the same format used in draft conclusions 7, 11 and 13.

Part Five, entitled "Other means generally used to assist in determining rules of international law", contained draft conclusions 10, 11, 12 and 13, all of which had been discussed and adopted by the Drafting Committee at the current session.

Draft conclusion 10, entitled "Expert bodies", provided that: "The works of bodies consisting of experts serving in their personal capacity may serve as a subsidiary means for the determination of the existence and content of rules of international law." The draft conclusion had been adopted by the Drafting Committee based on revisions made by the Special Rapporteur to draft conclusions 9 and 10 originally proposed in his third report to reflect the plenary debate.

The main question confronting the Committee regarding draft conclusion 10 had been whether to distinguish between the works of public and private bodies, as initially proposed by the Special Rapporteur in his third report. Members had considered that distinguishing between bodies on the basis of their public or private character could be difficult in practice and that a separation in terms of the weight to be attributed to their work could be more relevant. Accordingly, it had been decided that the work of both types of entities should be addressed together in a single draft conclusion and the differences should be explained in the commentary, with a focus on the scientific rigour of the works produced rather than the public or private character of the entity that produced them. It had been noted that, in the Commission's work on subsequent agreements and subsequent practice in relation to the interpretation of treaties, it might have been justified to have a separate draft conclusion dealing with expert treaty bodies to the extent that their mandate concerned the interpretation and application of a given convention, following the rules of the Vienna Convention on the Law of Treaties, but that there was no such justification in the case of the current topic for treating them separately.

As to the specific terminology used in the draft conclusion, the term "works" had been deemed preferable to "outputs", which was used in other projects to refer to the work of the Commission, and "pronouncements", which was used in other projects to refer to the work of expert treaty bodies when interpreting the instrument over which they had a mandate. The term "works" had been considered to be broader, permitting coverage also of texts prepared by academic institutions and various other materials. "Works" had also been preferred to "outputs" in the French version.

The Drafting Committee had been of the view that the term "bodies" was more appropriate than "groups," which had a particular connotation in the context of the United Nations, and would include the works of bodies such as the Commission and other entities within the United Nations system. However, the Committee had also envisaged the draft conclusion as being expansive enough to also include the works of entities such as the

International Committee of the Red Cross, the Institute of International Law, the International Law Association, human rights treaty bodies and notable academic institutions, as well as the Commission itself.

The phrase “experts serving in their personal capacity” had been intended to capture the fact that one of the key criteria for considering the weight of those subsidiary means was not whether the work was prepared by a private individual, or groups of individuals of an organ of experts at an international organization, but rather the quality of the work produced by expert entities. The phrase had also been chosen to distinguish the work of entities comprised of experts acting in their personal capacity from that of entities where the work was produced by State representatives acting in their official capacity. Thus, consistent with the Special Rapporteur’s third report, the draft conclusion excluded works that were the product of the exercise of State functions and State official authorization, such as those of the United Nations Commission on International Trade Law (UNCITRAL). The phrase “may serve as a subsidiary means” had been included to distinguish the works of expert bodies from “teachings”, as explicitly referred to in Article 38 (1) (d) of the Statute of the International Court of Justice. That point would be addressed in the commentary to the draft conclusion.

The title of draft conclusion 10 was “Expert bodies”. The intention behind the provision was to emphasize the quality of the works and the qualifications of the entities that prepared them.

Draft conclusion 11, concerning specific criteria for assessing the weight of the works of expert bodies in addition to the general criteria established in draft conclusion 4, set out five such specific criteria in subparagraphs (a) to (e). The provision had been proposed by the Special Rapporteur to the Drafting Committee based on revisions that took account of comments from members in the plenary and the Committee. The question of the weight of the works of expert bodies had initially been addressed in each of the second paragraphs of the draft conclusions on private and public expert groups, namely draft conclusions 9 and 10, as originally proposed by the Special Rapporteur in his third report. Although he had also suggested in his third report that the Commission should consider having separate conclusions on the weight for each of the categories of subsidiary means to make the final outcome more user-friendly, the Drafting Committee had been of the view that it would be preferable to consolidate those elements into a stand-alone provision and also to consider a separate draft conclusion on the weight of the works of expert bodies. Such an approach was consistent with the structure adopted in relation to the decisions of courts and tribunals, which were addressed through separate draft conclusions dealing respectively with their identification and their weight (draft conclusions 5 and 7).

The provision was comprised of a *chapeau* and five subparagraphs. The formulation of the *chapeau* followed that of draft conclusion 7, except that the Drafting Committee had decided not to include the phrase “*inter alia*” in order to take account of the concerns States had raised about the use of “*inter alia*” in draft conclusion 7, as it was intended to complement draft conclusion 4, which already contained that qualifier. The same considerations applied to the current provision.

The Drafting Committee had engaged in extensive discussion on the formulation and content of the provision, particularly regarding the criteria to be listed and the implications of each criterion. There had been agreement that the list should be specific to the works of expert bodies and be complementary to the criteria listed in draft conclusion 4. It should be recalled that the commentary to draft conclusion 4, formerly draft conclusion 3, had considered the possibility of elaborating additional criteria for the assessment of subsidiary means for each category of materials, as the Commission had done in 2024 with draft conclusion 7, formerly draft conclusion 8, concerning the specific criteria to determine the weight to be given to decisions of courts and tribunals.

Subparagraph (a) of the draft conclusion addressed the character and normative value of the works produced by the expert body concerned. While the Drafting Committee had initially considered the formulation “the nature of the works produced by the expert body concerned”, an express reference to the “character and normative value” of the works had been preferred, as the term “character” would more directly address the works being

produced rather than the expert body that produced them, and the term “normative value” would be useful in drawing a distinction between the different works produced by such bodies, for example general comments or decisions on individual cases by human rights treaty bodies. With regard to the works of the Commission, such as draft articles and draft conclusions, members had noted that the various outputs could fit into different categories depending on whether their content constituted codification or progressive development and on other factors, such as whether they formed the basis of subsequent treaties, in which case they could serve as *travaux préparatoires*.

Subparagraph (b) dealt with the methodology used by an expert body in producing its works on a particular issue. The Drafting Committee had initially considered the formulation “the care and objectivity with which it produces its works on a particular issue”. While that formulation was intended to capture the diligence and neutrality of the expert body, it had been observed that such phrasing could be perceived as introducing subjective value judgments and could prove difficult to assess in a principled manner. Alternative suggestions had been made, including references to the “procedures, techniques or processes followed”, the “sources relied upon” or the “thoroughness of the work”. Ultimately, the Committee had agreed on the term “methodology”, which had been regarded as appropriately neutral and objective and sufficiently flexible to encompass a range of factors relevant to the reliability of the output. In addition, “methodology” would help maintain a focus on the thoroughness of the methods without requiring a subjective evaluation, thus creating a more objective and workable standard. Other nuanced considerations would be explained in the commentary. It had also been noted that such a formulation introduced a distinct analytical dimension that was not already covered by the general criteria set out in draft conclusion 4.

Subparagraph (c) related to the extent to which the works remained relevant, taking into account subsequent developments. It had been inspired by subparagraph (c) of draft conclusion 7. The Drafting Committee had originally considered the Special Rapporteur’s revised formulation “the context in which the works are produced, taking into account present developments”. “Context” had been specifically set aside, given the already existing definition contained in article 31 of the Vienna Convention on the Law of Treaties. “Circumstances” had been another alternative considered but had been set aside, as it had been considered to be too restrictive to encapsulate the Special Rapporteur’s intention. The current subparagraph, as in the case of its equivalent text in draft conclusion 7, was intended to take into consideration the evolution of international law and how it could affect the weight of existing materials. It provided for consideration of the extent to which the works remained pertinent from a historical perspective, specifically considering, for example, that works from the 1920s had been created under circumstances and in the context of an international law system that did not reflect contemporary times. As in the case of draft conclusion 7, subsequent developments were not limited to the emergence of the same type of materials at a later stage, but included other changes in international law more broadly, including decolonization, globalization and other factors.

Subparagraph (d) concerned the extent to which the body was comprised of experts with competence in international law. The Drafting Committee had considered other alternative formulations presented by the Special Rapporteur, such as referring to “whether the body is comprised of independent experts” and “whether it consists of experts with competence in international law”, and the addition of “and the procedure of their appointment”, as attempts to distinguish the criterion from the one contained in draft conclusion 4 (c). However, the notion of independence had been considered to be encompassed by the phrase “in their personal capacity” in draft conclusion 10 and had been deleted. It had been understood that the notion of independence under the current draft conclusion would be better addressed in the commentary. The Committee had agreed on the use of the formulation “the extent to which”, rather than “whether”, to capture a discussion in the Committee concerning the possibility of expert bodies in which not all members had specific expertise in international law, as in the case of human rights treaty bodies. The preference for the expression “comprised of” rather than “consists of” had also been considered to contribute to the clarity and flexibility of the provision, while also providing for a critical look to be taken at the extent to which the body was comprised of experts in international law, as there were expert bodies for which legal expertise could be desirable but not required. The term “consists of” had been considered too broad in that regard.

Lastly, subparagraph (e) envisaged the process and basis of selection of the experts. The Drafting Committee had first considered a proposal for the phrase “the method of appointment of the experts”, but members had considered that the expression alluded more to a technical distinction between private and public institutions than to the legitimacy and authority of the body in question and the scrutiny in the selection of the experts, which was the focus of the draft conclusion. Some members had proposed referencing the body’s mandate, but it had been decided to exclude such a reference to avoid duplication with draft conclusion 4 (f). The Committee had chosen the formulation “process and basis” as a means of both adequately referring to the idea of legitimacy and capturing, in a flexible manner, the distinction between private and public institutions. Additionally, the Committee had decided to use the term “selection” rather than “appointment”, as it had been considered a broader and more neutral term capable of encompassing not only actual appointments but also elections and other forms of designation by which experts were selected, depending on the nature of the body concerned.

A proposal had been made to include an additional subparagraph (f) addressing “the extent to which the works seek to state existing law”, drawing on the Commission’s work on identification of customary international law, as referred to in the commentary to conclusion 14 of the conclusions on that topic. It had been argued that such an element was not fully captured by the existing criteria and would add an important consideration for the assessment of weight. However, some members had felt that such a criterion might be misplaced in the text of the draft conclusion, considering that not all expert bodies attempted to state existing law. While the Drafting Committee had recognized the relevance of the point, it had agreed that such a consideration would be more appropriately addressed in the commentary.

The title of draft conclusion 11, “Weight of the works of expert bodies”, tracked the formulation of the titles of other provisions on “weight”, namely draft conclusions 7 and 9.

Draft conclusion 12, entitled “Resolutions and other texts produced by international organizations or at intergovernmental conferences”, provided that such resolutions and texts could be used as subsidiary means for the determination of the existence and content of rules of international law. The study of resolutions as subsidiary means for determining rules of international law had already been foreshadowed in the commentary to the draft conclusions adopted at the Commission’s seventy-fourth session (A/78/10).

As in the plenary debate, there had been different views in the Drafting Committee. Some members had considered that resolutions of international organizations were documents resulting from the work of States and would be better categorized as part of the process of the formation of law rather than its determination or application, and had argued that there was not enough practice to support the proposition that they could also serve as subsidiary means. It had also been noted that the consideration of the circumstances under which they could be used as subsidiary means raised questions as to the extent to which they could be considered equivalent to other subsidiary means, such as teachings. While doctrine in the traditional sense was meant to clarify the law, resolutions acted more as elements of law creation. Other members had been of the view that resolutions, like judicial decisions, were capable of performing dual functions without undermining their value in the law formation process. Furthermore, including resolutions as subsidiary means could help ensure greater inclusivity, as reliance solely on teachings and judicial decisions tended to privilege Western perspectives, and resolutions allowed for broader regional representation of the views of States. Given the debates, the Committee had decided to adopt a provision on resolutions and other texts produced by international organizations or at intergovernmental conferences in recognition of the fact that, in certain circumstances, they could also serve as subsidiary means within the scope of “any other means” in draft conclusion 2 (c).

The phrase “may be used as subsidiary means” differed from the formulation of draft conclusions 5 and 8, which stated that judicial decisions and teachings, respectively, “are” subsidiary means for the determination of rules of international law. As in the case of draft conclusion 10 addressing the works of expert bodies, the formulation in the current draft conclusion was intended to acknowledge that the materials envisaged therein were among the “other means” referred to in draft conclusion 2 (c) and were not part of the subsidiary means expressly mentioned in Article 38 1 (d) of the Statute.

The Drafting Committee had considered whether to include a specific paragraph indicating that the main role of those materials could be to serve as evidence of the constitutive elements of sources such as customary international law rules and general principles of law. However, it had been noted that such uses were already covered in other works of the Commission concerning the sources of international law and that the current draft conclusion should be focused on how resolutions could serve as subsidiary means for the determination of rules of international law. Attention had been specifically drawn to the fact that the Commission, in its previous work on peremptory norms, had established that materials could serve different functions in the context of international law. It had also been noted that such primary use of those materials could be covered by draft conclusion 3 (2), which indicated that “[t]he use of materials as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes”.

The Drafting Committee had considered other possible formulations, such as referring only to “other texts” of international organizations more broadly. However, it had been of the view that such a phrase would be too broad and could dilute the particularities of resolutions which, even if not binding as a general rule, were the result of an intergovernmental process and the expression of the collective will of member States, and, accordingly, differed in nature from a report of an international organization. Another suggestion had been to refer to the “acts of international organizations”, as used in the articles on the responsibility of international organizations adopted by the Commission in 2011. A “without prejudice” clause had also been considered but ultimately had been deemed unnecessary. The Committee had settled on “other texts” in addition to resolutions, including memorandums prepared by the secretariat of an international organization, such as those prepared by the secretariat of the Commission at the Commission’s request, or interpretative guides prepared by such organizations, which could serve as useful subsidiary means for the determination of rules of international law. That would be further elaborated upon in the commentary.

The draft conclusion was not restricted to the products of international organizations, but also included text and materials resulting from intergovernmental conferences, which, in certain circumstances that ought to be assessed on a case-by-case basis, could also serve as subsidiary means for the determination of the existence and content of rules of international law.

The title of draft conclusion 12 was “Resolutions and other texts produced by international organizations or at intergovernmental conferences”.

Draft conclusion 13 concerned the criteria for determining the weight of resolutions and other texts produced by international organizations or at intergovernmental conferences. As in the case of draft conclusions 7 and 11, which provided criteria for determining the weight of their respective materials, draft conclusion 13 was intended to accompany draft conclusion 12 by providing the criteria for assessing the weight of a resolution or text produced by an international organization or at an intergovernmental conference, in addition to the general criteria contained in draft conclusion 4. The text followed the *chapeau* of other draft conclusions dedicated to evaluating the weight of specific subsidiary means.

The Drafting Committee had faced the challenge of ascertaining criteria that could cover a wide variety of materials, including resolutions, final acts, reports, memorandums, studies and other forms of works. Some of the options considered had included taking into consideration the text and legal basis of the resolution and the rationale for its adoption. The circumstances of adoption of resolutions or other texts had also been considered to be relevant for the determination of the weight to be attached to them. However, it had been noted that the most important elements were the quality of the reasoning and the expertise of the persons involved, and other criteria that were already contained in draft conclusion 4.

It had been the view of the Drafting Committee that the general criteria contained in draft conclusion 4 were well suited as elements to address the question of the weight of resolutions and the other materials in question. The provision thus provided a cross reference to the general criteria set out in draft conclusion 4. Nevertheless, the qualifier “as appropriate” had also been included, in recognition of the fact that not all the criteria listed would be specifically applicable to all types of materials. In addition, draft conclusion 13 added one

element specific to the materials envisaged therein, namely “the circumstances surrounding their production”, which had been considered as wide enough to encompass adoption in the case of resolutions, but also the “production” of other types of documents, such as statements and studies. The aim of that addition was to provide for consideration of the circumstances when the resolution or other relevant text was produced, and whether those circumstances precluded the material in question from being authoritative in the current circumstance. It had been noted that some texts were not adopted but taken note of or issued on the occasion of a particular event and that, accordingly, the term “production” was to be preferred to “adoption”, so as to capture alternative scenarios and be more inclusive of the works produced by international organizations and intergovernmental conferences. For example, it had been mentioned that the memorandums or other documents produced by regional codification bodies such as the Inter-American Juridical Committee, the African Union Commission on International Law and the Committee of Legal Advisers on Public International Law might not necessarily be formally adopted by States but, in the case of the Committee of Legal Advisers, were only taken note of by the Council of Europe. Similarly, memorandums and other texts produced for the Commission by its secretariat were not adopted but could still carry some weight.

The commentary would also note that the statements of States before and after the adoption of resolutions would also be relevant elements to take into consideration when assessing the nature and weight of the resolutions in question. In addition, the commentary would address some of the specific materials to be considered under that category, not as an exhaustive list, but as a guide to facilitate interpretation of the draft conclusion. Other circumstances could include whether the resolution had been negotiated over an extended period of time.

The title of draft conclusion 13 was “Weight of resolutions and other texts produced by international organizations or at intergovernmental conferences”.

It should be noted that the Special Rapporteur had withdrawn his revised proposals originally presented in his third report for draft conclusion 12, concerning coherence in decisions of courts and tribunals, and draft conclusion 13, concerning the relationship between subsidiary means and supplementary means of interpretation. Both issues had been addressed in his third report based on the workplan for the topic and the statements made in the Commission and the Sixth Committee. As in the plenary debate, there had been different views as to whether such proposals for draft conclusions were within the scope of the topic at hand. Nonetheless, the Drafting Committee had been of the view that some aspects of those proposals, such as the issue of conflicting decisions and possible interaction between subsidiary means and supplementary means of interpretation, could be addressed in the appropriate sections of the commentary.

He recommended that the Commission should take note of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Drafting Committee on first reading. In accordance with the Commission’s established practice, the Special Rapporteur would submit commentaries to the draft conclusions, which would be considered by the Commission at its seventy-seventh session. He would like to thank the Special Rapporteur once more for his excellent work on the topic.

The Chair said that, since the Commission would not be in a position to adopt the draft conclusions contained in the report of the Drafting Committee until the following session, the Chair of the Drafting Committee had recommended that the Commission should simply take note of the draft conclusions provisionally adopted by the Committee on first reading (A/CN.4/L.1019). He took it that the Commission wished to do so.

It was so decided.

Mr. Forteau said that, as he had not been a member of the Drafting Committee for the topic of subsidiary means, he wished to place on record his position on the Committee’s report.

He wished to make three observations. First, the report indicated that the draft conclusions had been adopted by the Drafting Committee in original English, French and Spanish. However, he had found several drafting problems in the French version of the newly

adopted draft conclusions, for example the grammatical structure of draft conclusion 13, and he trusted that the Commission would be able to resolve such linguistic problems by the following session.

Second, with regard to substantive issues, he did not understand why the word “normative” was used in draft conclusion 11 (a). Draft conclusion 3 stated that subsidiary means were not a source of international law. Therefore, it was inconsistent to refer, in draft conclusion 11, to the normative value of the works of expert bodies as subsidiary means. By definition, subsidiary means had no normative value.

Third, he did not agree with draft conclusions 12 and 13, in particular the reference to resolutions produced by international organizations or at intergovernmental conferences, and reserved his position as to whether the Commission should adopt them at its next session. Those draft conclusions posed three problems, in his view. First, draft conclusion 2 and the title of Part Five indicated that the Commission only took into account materials that were generally used as subsidiary means. However, the Special Rapporteur’s third report and the debates at the current session had not provided sufficient elements of practice and case law to suggest that resolutions were generally used as subsidiary means. Second, to say that resolutions could serve as subsidiary means risked undermining their role and authority, if they were regarded merely as subsidiary means rather than as important elements of international practice that contributed to the formation of law. The message conveyed by draft conclusions 12 and 13 seemed problematic at a time when multilateralism was under threat. Third, the two draft conclusions did not explain in which cases a resolution could be used to establish customary law or to interpret a treaty and in which cases it served as a subsidiary means. Consequently, they gave rise to confusion. That was all the more regrettable given that the topic under consideration concerned all branches of international law, and there was a need for legal certainty with regard to the use of sources of international law, on the one hand, and the use of subsidiary means, on the other.

Mr. Jalloh (Special Rapporteur) said that he wished to thank Mr. Forteau for his explanation of position. It was highly regrettable that Mr. Forteau had not been able to join the Drafting Committee for the topic of subsidiary means. As pointed out in the statement introducing the Drafting Committee’s report, the Committee had carefully addressed each argument made in the plenary debate both in favour of and against the various proposals of the Special Rapporteur concerning all the draft conclusions contained in his third report. Those considerations had included the views of Mr. Forteau and other members of the Commission who had not been able to join the Drafting Committee. In the end, the Committee had adopted all the draft conclusions by consensus after careful legal analysis of the practice and law, including draft conclusion 12 on resolutions and other texts produced by international organizations or at intergovernmental conferences. For that reason, while noting Mr. Forteau’s personal views on the matter, he looked forward to working with him at the seventy-seventh session to enable him to join the Commission’s broad consensus, in particular on draft conclusion 12. The commentaries that he had prepared for all the draft conclusions provided examples of practice on the use of non-binding resolutions as subsidiary means for the determination of rules of international law.

Draft report of the Commission on the work of its seventy-sixth session (*continued*)

Chapter III. Specific issues on which comments would be of particular interest to the Commission (*continued*) (A/CN.4/L.1007)

The Chair invited the Commission to resume its consideration of chapter III of its draft report (A/CN.4/L.1007).

Paragraph 3 (*continued*)

The Chair said that in paragraph 3, which had been left in abeyance at the previous meeting, it had been proposed that the phrase “relevant international organizations” should be replaced with “competent international organizations” and that the expression “case law” should be replaced with “decisions of national courts and tribunals”. A second sentence would be added to the paragraph, to read: “The Commission would also appreciate receiving from States information concerning legislation and practice related to the use of uncrewed

vessels and aircraft in the context of prevention and repression of piracy and armed robbery at sea.”

Paragraph 3, as amended, was adopted.

Chapter III as a whole, as amended, was adopted.

Chapter VII. Subsidiary means for the determination of rules of international law (continued) (A/CN.4/L.1010)

The Chair invited the Commission to resume its consideration of chapter VII of the draft report (A/CN.4/L.1010), beginning with paragraph 6. A revised version of the outstanding paragraphs of the chapter had been circulated informally by the Special Rapporteur.

Paragraph 6 (continued)

Mr. Jalloh (Special Rapporteur) proposed that a new third sentence should be inserted in the paragraph, which would read: “The report, consistent with the workplan for the topic, also addressed the question of the risk of conflicting decisions of international courts and tribunals and the possible link between the supplementary means of interpretation under the law of treaties and the subsidiary means of determining rules of international law, the study of which had been requested by some members and some States in the Sixth Committee.” In the following sentence, he proposed that the beginning of the clause starting with “and the proposed draft conclusions” should be amended to read “and proposed five draft conclusions on, respectively, the work of private and public expert bodies, the issues of their weight, non-binding resolutions of international organizations”.

Ms. Mangklatanakul, supported by **Mr. Fife**, said that the Special Rapporteur’s proposed addition concerning the study of the possible link between supplementary means of interpretation and subsidiary means might not accurately reflect the position of States in the Sixth Committee. In order to be certain, it would be necessary to review the statements made in the Sixth Committee, which would be a time-consuming exercise. She believed strongly that the Commission should not make a comparison between subsidiary means and supplementary means and would therefore be in favour of retaining paragraph 6 as originally drafted.

Mr. Jalloh (Special Rapporteur) said that paragraph 6 summarized the content of his third report, which had formed the basis for the subsequent debates in the Commission. He was, of course, open to textual proposals, but it was important that the substance of the report should not be lost.

Mr. Forteau, supported by **Mr. Grossman Guiloff**, said that, as the point about the request for a study was also made in paragraph 22, it did not need to be included in paragraph 6. Perhaps paragraph 6, as amended by the Special Rapporteur, could be adopted if that specific phrase – “the study of which had been requested by some members and some States in the Sixth Committee” – was deleted.

Mr. Jalloh (Special Rapporteur) said that a compromise solution might be to reformulate that phrase to read “the study of which the Commission had indicated it would undertake”.

Mr. Forteau said that the Special Rapporteur was proposing to include “non-binding resolutions of international organizations” in the list of the five proposed draft conclusions in the last sentence. However, as the relevant section of the Special Rapporteur’s report and the relevant draft conclusion were on “resolutions” in general, the words “non-binding” should perhaps be deleted.

Mr. Jalloh (Special Rapporteur) said that in his report he had distinguished between non-binding and other resolutions, but he would be willing to delete the words “non-binding” in paragraph 6.

Paragraph 6, as amended, was adopted.

Paragraph 7

Mr. Jalloh (Special Rapporteur) proposed adding the word “sole” before “purpose” near the end of the last sentence.

Paragraph 7, as amended, was adopted.

Paragraph 8

Mr. Jalloh (Special Rapporteur) proposed amending the end of the last sentence to read “owing to the unavailability of time for the translation and consideration of the commentaries which had been prepared by the Special Rapporteur, as a consequence of the reduced length of the present session”.

Mr. Lee said that the sentence used the same standard language that already appeared in other chapters of the report. In the interests of consistency, if there were no compelling reasons for deviating from that language, the sentence should be maintained as originally drafted.

The Chair recalled that, in similar paragraphs of other chapters, the word “translation” had been added at the request of Mr. Forteau.

Mr. Jalloh (Special Rapporteur) said that, as the situation described in chapter VII was factually different from those described in the other chapters, in that he had already submitted the commentaries, he wished to reflect what had actually happened.

Ms. Oral said that she agreed with the position expressed by Mr. Lee, as many of the changes proposed by the Special Rapporteur did not seem essential.

Paragraph 8 was left in abeyance.

1. *Introduction by the Special Rapporteur of the third report*

Paragraph 9

Mr. Jalloh (Special Rapporteur) proposed that the second sentence should be amended to read: “He noted with appreciation the substantially increased number of delegations that had referred to the topic in the Sixth Committee in 2024.” The third and fourth sentences should be combined into one, and the words “some aspects of” should be inserted before “draft conclusions 5 to 8” in the final sentence.

Paragraph 9, as amended, was adopted.

Paragraph 10

Mr. Jalloh (Special Rapporteur) said that, at the end of the first sentence, the words “existing text in the draft conclusions” should be replaced with “one draft conclusion”. In the second sentence, the word “Concerning” should be replaced with “For” and the words “to attach” with “of”. At the end of the fifth sentence, “draft conclusion 4” should be replaced with “draft conclusions 4 and 8, which addressed decisions of courts and tribunals and their weight, respectively”. In the final sentence, the words “the draft conclusions on” should be deleted.

Paragraph 10, as amended, was adopted.

Paragraph 11

Mr. Jalloh (Special Rapporteur) proposed inserting the word “some” before “delegations” in the first sentence. The end of the second sentence should be amended to read “by deleting the language providing the criteria as being additional to the factors in draft conclusion 3”.

Paragraph 11, as amended, was adopted with minor drafting changes.

Paragraph 12

Mr. Jalloh (Special Rapporteur) said that the two sentences should be combined into one, and the words “in his third report” should be added after “The Special Rapporteur”.

Paragraph 12, as amended, was adopted.

Paragraph 13

Mr. Jalloh (Special Rapporteur) said that, in the first sentence, the word “clarified” should be replaced with “explained”. The references to the Harvard Law Research Institute, the African Association of International Law and the Chinese Society of International Law should be deleted from the second sentence.

Paragraph 13, as amended, was adopted with a minor editorial change.

Paragraph 14

Mr. Jalloh (Special Rapporteur) said that, in the first sentence, the words “that an ‘expert body’ was” should be replaced with “that ‘expert body’ concerned”. In the second sentence, he proposed adding the word “final” before “outputs” and adding the phrase “as opposed to the preparatory work” after “outputs”. He also proposed adding a new sentence at the end, to read: “Most of their preparatory reports could, however, be considered teachings.”

Paragraph 14, as amended, was adopted.

Paragraph 15

Mr. Jalloh (Special Rapporteur) said that he wished to propose a new sentence for insertion at the beginning of the paragraph. It would read: “Examples of such expert bodies included codification bodies such as the Commission and the expert treaty bodies created by States to monitor implementation of certain human rights treaties.” In the second sentence, he proposed replacing the word “recognized” with “distinguished”.

Paragraph 15, as amended, was adopted.

Paragraph 16

Mr. Jalloh (Special Rapporteur) said that, in the second sentence, he proposed deleting the word “crystallization” and replacing it with the words “collection of State practice contributing to the formation”. The third and fourth sentences should be combined into one. An additional phrase should be added to the end of the last sentence, which would read “and ultimately underlined that the rigour and reception of States of the work, including in the General Assembly, were decisive considerations”.

Paragraph 16, as amended, was adopted with minor drafting changes.

Paragraph 17

Mr. Jalloh (Special Rapporteur) said that his proposed new wording of paragraph 17 would read:

The Special Rapporteur noted that there was wide recognition of the work of human rights treaty bodies, which performed a range of functions entrusted to them by States, including adopting general comments, issuing views and adjudicating disputes. Their outputs varied, but in some cases shared formal and procedural qualities with judicial decisions when engaging in resolving complaints brought by individuals against States alleging human rights violations. To describe the various types of outputs, the Special Rapporteur supported retaining the term “pronouncements”, as previously used by the Commission in its conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, noting the use of a wide range of such materials by States and courts in interpreting and applying international law and underlining the need not to introduce new language which could create uncertainty for States and other users of the Commission’s work.

Paragraph 17, as amended, was adopted.

Paragraph 18

Mr. Jalloh (Special Rapporteur) proposed adding a new sentence to the beginning of the paragraph, which would read: “There were also certain specialized bodies in specialized fields of international law whose work carried weight.” He also proposed inserting the phrase “which has been described as having a hybrid character” after “International Committee of the Red Cross” in the second sentence.

Paragraph 18, as amended, was adopted.

Paragraph 19

Mr. Jalloh (Special Rapporteur) proposed adding the phrase “of State practice or *opinio juris* and also of general principles of law formed in the international legal system” to the end of the second sentence. In the last sentence, the words “in a dual manner, in some cases” should be added after “noted that resolutions functioned”.

Paragraph 19, as amended, was adopted with minor drafting changes.

Paragraph 20

Mr. Jalloh (Special Rapporteur) proposed deleting the word “legally” before “distinguishing between”.

Paragraph 20, as amended, was adopted with minor drafting changes.

Paragraph 21

Mr. Jalloh (Special Rapporteur) proposed adding the phrase “on which he had requested Commission guidance and also taken into account the views of States” near the beginning of the first sentence, after “the question of fragmentation”.

Paragraph 21, as amended, was adopted.

Paragraph 22

Mr. Jalloh (Special Rapporteur) proposed amending the first part of the first sentence to read “The Special Rapporteur examined the issue in his third report, in response to a request for further study by States and observers in the Sixth Committee, leading to his proposed inclusion of draft conclusion 13 addressing the relationship between subsidiary means”. The rest of the sentence would remain the same.

Paragraph 22, as amended, was adopted with a minor editorial change.

Paragraph 23

Mr. Jalloh (Special Rapporteur) said that, in the first sentence, the words “the divergence of” should be replaced with “differing”. In the last sentence, he wished to insert the phrase “noting that the item had not been included in his initial syllabus for the topic” after “The Special Rapporteur”.

Paragraph 23, as amended, was adopted.

Paragraph 24

Mr. Jalloh (Special Rapporteur) proposed deleting the words “and called for suggestions thereon” at the end of the first sentence.

Paragraph 24, as amended, was adopted.

Paragraph 25

Mr. Jalloh (Special Rapporteur) proposed inserting the phrase “which had been adhered to up to the present session” after “the future programme of work”.

Paragraph 25, as amended, was adopted.

2. *Summary of the debate*

(a) *General comments*

Paragraph 26

Mr. Jalloh (Special Rapporteur) said that, in order to factually reflect an important element of the debate at the current session, paragraph 26 should be amended to read:

During the plenary debate, members thanked the Special Rapporteur for his rich third report and the analysis and proposals contained in it. They welcomed the interest shown by States in the topic and reiterated that subsidiary means, as referred to in Article 38, paragraph (1) (d), of the Statute of the International Court of Justice, served as aids in the determination of the existence and content of rules of international law.

Mr. Forteau, referring to the Special Rapporteur's proposed deletion of the phrase "were not sources of international law and stressed the importance of not confusing the two", said that if that point had been made in the discussion, it should be retained in paragraph 26 unless the Special Rapporteur had moved it elsewhere in the text.

Ms. Jalloh (Special Rapporteur) said that his intention had simply been to avoid the use of the word "confusing", as there were already other references to confusion in the text. The Commission had already made it clear, in draft conclusion 3 as provisionally adopted by the Drafting Committee on first reading, that subsidiary means were not a source of international law. In paragraph 26, he had wished to take a positive approach by specifying what the Commission considered subsidiary means to be rather than what it considered them not to be.

Mr. Fife said that the focus should be on providing clear and helpful guidance to users. The point highlighted by Mr. Forteau was one of the key arguments in the Commission's work on the topic and should therefore be made clearly.

Mr. Akande said that the other changes proposed by the Special Rapporteur – up to "International Court of Justice" – could be accepted, and just the last phrase retained as originally drafted.

Paragraph 26, as amended, was adopted.

Paragraph 27

Paragraph 27 was adopted.

Paragraph 28

Mr. Grossman Guiloff proposed adding a new sentence to the end of the paragraph, to read: "Other members expressed concern that departing from the technical meaning of 'context', as codified in article 31 of the Vienna Convention on the Law of Treaties, would have serious implications for norms such as the prohibition of discrimination, the threat or use of force and terrorism, to mention just a few." The sentence was meant to reflect something he had said in the debate in response to the idea expressed in the third sentence, which referred to the historical, political and ideological contexts in which legal writings were produced.

Mr. Lee said that, at the end of the last sentence, the meaning of the word "imperial" before "perspectives" in that context was not clear to him and he was not convinced it was the most appropriate descriptor. He therefore proposed deleting the words "or imperial".

Mr. Akande said that he had no objection to the substance of Mr. Grossman Guiloff's proposed new sentence, but wondered whether paragraph 28 was the appropriate place for it, as that paragraph had to do with the Commission's treatment of teachings, whereas the new sentence appeared to concern treaty interpretation.

Mr. Grossman Guiloff said that he would not object to moving his sentence to another paragraph, but he had proposed it for inclusion in paragraph 28 precisely because it was related to the issue raised in that paragraph.

Mr. Jalloh (Special Rapporteur) said that he did not object to the deletion proposed by Mr. Lee but would like to discuss with Mr. Grossman Guiloff the placement of his proposed new sentence.

Paragraph 28 was left in abeyance.

Paragraph 29

Mr. Jalloh (Special Rapporteur) proposed deleting the first sentence, which read: “Several members highlighted the need to streamline and rationalize the reports, removing redundant or inconsistent elements.” At the beginning of the second sentence, the words “It was emphasized” should be replaced with “Several members emphasized”. In the third sentence, “some members” should be replaced with “most members”, “his report” with “the report” and “risked straying from” with “might distract from”. In his view, a number of points regarding his report had been repeated throughout the chapter and seemed to overemphasize the views of just one or two members. It was one thing for the Commission members to be critical of each other’s work during the plenary debates, but quite another to include those criticisms in the report to the General Assembly, particularly as, in the absence of any commentaries, it would provide the only basis for the Sixth Committee to understand what had happened at the current session.

Mr. Akande, referring to the Special Rapporteur’s proposal to replace “some members” with “most members” in the original third sentence, said that, in his view, it would be preferable not to use a qualifier and simply to say “While members appreciated”.

Mr. Fife said that he shared Mr. Akande’s view. As for the Special Rapporteur’s proposal to delete the first sentence, he had been among the members who had highlighted the need to streamline and rationalize the reports and he believed that the lengthy debate on that point should be reflected, particularly as it had been raised by more than one or two members, contrary to what the Special Rapporteur had suggested. Perhaps a compromise solution would be to delete only the words “removing redundant or inconsistent elements”.

Ms. Mangklatanakul said that she supported Mr. Fife’s and Mr. Akande’s proposals.

Mr. Jalloh (Special Rapporteur) said that he could accept Mr. Akande’s proposal. As for Mr. Fife’s proposal, it was his understanding that the comments on the need to streamline and rationalize the reports were attributable to Mr. Fife and not to “several members”. If the sentence was retained, it should perhaps be reformulated to read: “The view was expressed that there was a need to streamline and rationalize the reports.”

Mr. Fife said that he would be willing to accept that amendment, but wished to stress that he had been far from alone in expressing that view, although the exact wording quoted was his.

Paragraph 29, as amended, was adopted.

Paragraph 30

Mr. Jalloh (Special Rapporteur) proposed deleting the first sentence of the paragraph.

Mr. Forteau said that the first sentence reflected a point that he had made in the plenary debate and he would therefore like to see it retained. However, for the sake of accuracy, the sentence should be redrafted to state that the “practice and case law in the field”, rather than “the study of the topic”, were marked by ambiguities and conceptual overlap.

Mr. Jalloh (Special Rapporteur) said that the point had been made in the debate that there was extensive practice, but it was not necessarily marked by ambiguity and a lack of clarity. The extent of the practice in that area was clear from the memorandums on the topic prepared by the secretariat.

Mr. Forteau said that, while the Special Rapporteur might disagree with the position he had taken in the plenary debate, that was no reason to exclude the view from the Commission's report.

Mr. Jalloh (Special Rapporteur) said that he would be willing to retain the sentence, as amended by Mr. Forteau, provided that the beginning was amended to read "The view was expressed".

Paragraph 30, as amended, was adopted.

Paragraph 31

Mr. Jalloh (Special Rapporteur) proposed adding the words "of the International Court of Justice" after "Statute" in the first sentence and deleting the last sentence.

Ms. Mangklatanakul proposed amending the second sentence to read: "A number of members cautioned against expanding Article 38 (1) (d) into a catch-all provision which included new forms of subsidiary means, as it risked introducing conceptual ambiguity and practical confusion." The next sentence would then start with "It would be more appropriate".

Ms. Okowa said that Ms. Mangklatanakul's proposal to replace "It was further suggested that" with "A number of members cautioned" would give the impression that more members had made that point than had actually been the case. She would therefore prefer to keep the original formulation.

Mr. Forteau said that he supported Ms. Mangklatanakul's proposal but would prefer to use "Some members" rather than "A number of members". He would also be in favour of retaining the last sentence.

Mr. Lee said that he had originally raised the point addressed in the second sentence, but he would be amenable to Ms. Mangklatanakul's proposal, with the reference to "Some members".

Ms. Mangklatanakul said that the reason she had proposed amending the second sentence was to provide an explanation of why the Commission should not treat Article 38 (1) (d) as a catch-all provision.

Mr. Forteau said that there was no question as to the accuracy of the statement, as the point had been made in the plenary debate by at least three members.

Mr. Jalloh (Special Rapporteur) said that he had no objection to reflecting the substance of Ms. Mangklatanakul's proposal, but was concerned about giving it too much weight.

Paragraph 31 was left in abeyance.

Paragraph 32

Mr. Jalloh (Special Rapporteur) proposed replacing the word "adequate" with "useful" in the first sentence.

Mr. Lee proposed deleting the words "as authoritative" after "emerged over time" in the second sentence.

Paragraph 32, as amended, was adopted.

Paragraph 33

Mr. Jalloh (Special Rapporteur) proposed adding the words "and teachings" after "judicial decisions" and replacing the word "obscure" with "muddle" in the first sentence. In the second sentence, he wished to replace the words "that it be clarified" with "to clarify".

Mr. Akande said that he would be in favour of retaining the word "obscure" rather than "muddle".

Paragraph 33, as amended, was adopted with a minor drafting change.

Paragraph 34

Mr. Jalloh (Special Rapporteur) proposed deleting the first sentence and beginning the next sentence with the words “Regarding draft conclusion 5, support was expressed”.

Paragraph 34, as amended, was adopted.

Paragraph 35

Mr. Jalloh (Special Rapporteur) said that he wished to propose the insertion of a new first sentence, to read: “Concerning draft conclusion 6, support was expressed for the Special Rapporteur’s proposal to reposition draft conclusion 6 earlier in the text, following draft conclusion 2.” The words “It was also observed” could then be added to the following sentence. The last sentence should be deleted.

Paragraph 35, as amended, was adopted with a minor drafting change.

Paragraph 36

Mr. Jalloh (Special Rapporteur) said that he would like to replace the word “was” with “served as” before “a complement to” in the first sentence. In the third sentence, the word “providing” should be replaced with “or”, the words “to be given to each type” should be deleted, and the words “subsidiary means” should be replaced with “teachings”.

Paragraph 36, as amended, was adopted.

Paragraph 37

Mr. Jalloh (Special Rapporteur) said that, in the first sentence, the words “Some members expressed support” should be replaced with “Members generally supported”, “effort to revise the” should be replaced with “proposed”, “organizing them into parts and” should be added before “the repositioning”, and “structured” should be added before “text”. He wished to propose the insertion of a new second sentence, to read: “It was suggested that private expert groups might be more appropriately reflected under the category of teachings, in recognition of their scholarly contributions.” What would become the third sentence should be reworded to read: “Some members noted that placing them under ‘Other means generally used to determine rules of international law’ in Part IV could inadvertently obscure their academic character.” The beginning of the penultimate sentence should be amended to read “The view was expressed that” and, towards the end of the sentence, the word “moved” should be replaced with “on private expert groups, relocated”.

Mr. Forteau said that, in his view, it would be inaccurate to say in the first sentence that “members generally supported” the Special Rapporteur’s proposed structure of the draft conclusions. In his own case, for example, he had had no time to address the *toiletage* of the texts adopted on first reading. He had stated clearly that his silence on that point should not be considered acquiescence. He would therefore propose saying simply that “Members supported”.

Paragraph 37, as amended, was adopted.

Paragraph 38

Mr. Jalloh (Special Rapporteur) proposed replacing the phrase “however, a preference for guidelines was also noted” with “and consistent with the practice of the Commission on topics relating to Article 38 of the Statute of the International Court of Justice”.

Paragraph 38, as amended, was adopted.

(b) *Draft conclusion 9 (Outputs of private expert groups)*

Paragraph 39

Mr. Jalloh (Special Rapporteur) said that, in the first sentence, he wished to delete the word “some” before “members”. He also proposed deleting the second sentence and amending the beginning of the third sentence to read “Members also raised”.

Paragraph 39, as amended, was adopted with a minor drafting change.

Paragraph 40

Mr. Jalloh (Special Rapporteur) said that, in the first sentence, he proposed deleting the word “clear” before “operational value” and replacing the word “risked” with “could lead to”. The second and third sentences should be reformulated to read: “It was proposed to merge draft conclusions 9 and 10, or to subsume them under the category of ‘teachings’ in draft conclusion 5. Other members, who saw the merits in recognizing works of public expert groups as subsidiary means, suggested merging only draft conclusion 9 with draft conclusion 5 on ‘teachings’, while retaining draft conclusion 10 as a separate provision.”

Ms. Mangklatanakul proposed replacing the full stop at the end of the first sentence with a comma and adding the phrase “and to be dealt with preferably through commentary rather than as a stand-alone draft conclusion”.

Mr. Jalloh (Special Rapporteur) said that it might be preferable to add that point as a new second sentence, to read: “The view was expressed that the issue should be dealt with preferably in the commentary rather than in a stand-alone draft conclusion.”

Paragraph 40, as amended, was adopted.

The meeting rose at 1.05 p.m.