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International Law Commission
Seventy-fourth session (second part)

Provisional summary record of the 3643rd meeting
Held at the Palais des Nations, Geneva, on Monday, 24 July 2023, at 3 p.m.

Contents

* Reissued for technical reasons on 24 October 2023.

Present:

Chair:	Ms. Galvão Teles
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Tsend
	Mr. Vázquez-Bermúdez
	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-fourth session

Chapter IV. General principles of law (A/CN.4/L.976 and A/CN.4/L.976/Add.1)

The Chair invited the Commission to commence the adoption of the draft report paragraph by paragraph, starting with the portion of chapter IV contained in document A/CN.4/L.976.

A. Introduction

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

B. Consideration of the topic at the present session

Paragraph 6

Paragraph 6 was adopted.

Paragraphs 7 to 10

Paragraphs 7 to 10 were adopted, subject to their completion by the secretariat.

C. Text of the draft conclusions on general principles of law adopted by the Commission on first reading

1. Text of the draft conclusions

Paragraph 11

The Chair recalled that the text of the draft conclusions themselves had already been adopted; only the introductory sentence of paragraph 11 remained to be adopted.

Mr. Forteau, drawing attention to several minor editorial amendments required to the French version of the draft conclusions, requested the secretariat to ensure that the text of the draft conclusions was reproduced accurately in section C.2 of the chapter, where it appeared with the accompanying commentaries.

Paragraph 11 was adopted with minor editorial amendments to the French version of the text.

2. Text of the draft conclusions and commentaries thereto

The Chair, inviting the Commission to consider the portion of its draft report contained in document A/CN.4/L.976/Add.1, said that the commentaries to draft conclusions 1, 2 and 4 and 3, 5 and 7 had been adopted at the seventy-second and seventy-third sessions, respectively; they were now presented for formal adoption on first reading.

Mr. Forteau said that it would be useful for the Special Rapporteur to explain, for each draft conclusion, whether any substantive changes had been made to the text of the commentary adopted by the Commission at previous sessions. The commentary to draft conclusion 7, in particular, appeared different in relation to the mention of *travaux préparatoires*, which were not quoted any more.

Mr. Vázquez-Bermúdez (Special Rapporteur) explained that no changes had been made to the commentaries to draft conclusions 1 to 5, but that the commentary to draft conclusion 7 had been adopted at the seventy-third session on the understanding that it would be revisited. Some elements of it were therefore new, reflecting the Commission's discussions. The commentaries to draft conclusions 6 and 8 to 11 were entirely new text.

Paragraph 1

The introductory sentence of paragraph 1 was adopted.

Commentary to draft conclusion 1 (Scope)

The commentary to draft conclusion 1 was adopted.

Commentary to draft conclusion 2 (Recognition)

The commentary to draft conclusion 2 was adopted.

Commentary to draft conclusion 3 (Categories of general principles of law)

The commentary to draft conclusion 3 was adopted.

Commentary to draft conclusion 4 (Identification of general principles of law derived from national legal systems)

The commentary to draft conclusion 4 was adopted, subject to the completion of paragraph (4) by the secretariat.

Commentary to draft conclusion 5 (Determination of the existence of a principle common to the various legal systems of the world)

The commentary to draft conclusion 5 was adopted.

Commentary to draft conclusion 6 (Determination of transposition to the international legal system)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraphs (4) and (5)

Mr. Patel, referring to footnote 17, expressed the view that the International Court of Justice had not been nearly as categorical in its rejection of the "principle of the just and equitable share" in the *North Sea Continental Shelf* cases as the wording of the footnote implied.

Mr. Forteau suggested that, in order to address that concern, the relevant section of footnote 17 could be rephrased to the effect that the International Court of Justice had expressed doubts on the subject.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the words "the International Court of Justice rejected" could be altered to "the International Court of Justice appears not to have accepted". During discussions of the Court's decision, some members of the Commission had expressed the view that certain principles might apply only in particular contexts; that would be clear from the records of the Commission's work.

Mr. Akande said that he considered the original formulation of footnote 17 to reflect the Court's judgment accurately; however, he could also accept the alternative wording suggested by the Special Rapporteur.

Mr. Fife said that, while the Court might have phrased its judgment diplomatically, without using the specific word "rejected", there could be no doubt about its position on the matter. The Commission must ensure that its commentary was similarly clear.

Mr. Patel said that, in paragraph 19 of its judgment, the Court had referred to the "doctrine" of just and equitable share; he therefore questioned the reference in footnote 17 to the "principle".

Mr. Akande emphasized that paragraph 17 of the Court's judgment, in which the phrase "principle of the just and equitable share" appeared, must be read in conjunction with

paragraphs 19 and 20, which set out the view of the Court on the matter. The footnote as drafted was clear in that respect.

Ms. Oral said that she agreed with Mr. Akande and with the Special Rapporteur's suggestion.

Mr. Jalloh echoed concerns regarding the use of the word "rejected", not least because it was also used in the first sentence of footnote 17; he would therefore be in favour of using a phrase such as "appears to have expressed doubts about".

Mr. Forteau expressed support for the point made by Mr. Patel. The Court had not rejected the notion of just and equitable share as a general principle of law but as a "doctrine". He suggested that altering the phrase "pointing out that it was" to "pointing out that this doctrine was" in footnote 17 would clarify the issue.

Mr. Asada said that a distinction must be drawn between the term "principle" invoked by Germany and the term "doctrine" referred to by the Court in paragraph 19 of its judgment; however, as the Court had in any case rejected the principle, he considered footnote 17 accurate as originally drafted.

Mr. Vázquez-Bermúdez (Special Rapporteur) proposed that, in order to allay the concerns of some members of the Commission, in footnote 17, the word "rejected" should be replaced with the words "did not support" in both the first and second sentences. Also in the second sentence, "pointing out that it was" should be replaced with "pointing out that this doctrine was".

Paragraph (4) was adopted, with those amendments to footnote 17.

Mr. Forteau said that there appeared to be a contradiction between the argument presented in paragraphs (4) and (5) of the commentary to draft conclusion 6, supported by the cases cited in footnote 17, to the effect that the right of access to courts, while a general principle of law, was not applicable in the international setting because it contravened the principle of consent to jurisdiction, on the one hand, and, on the other, the finding of the European Court of Human Rights in *Golder v. the United Kingdom*, referenced in footnote 37, that the principle whereby a civil claim must be capable of being submitted to a judge ranked as one of the universally recognized fundamental principles of law.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the cases cited in footnote 17 were intended to illustrate the fact that, in order to be transposed into the international legal system, a general principle of law must be compatible with that system and capable of being applied within the framework thereof, when the conditions for its application existed. In some cases, tribunals had considered that there might, *prima facie*, be an incompatibility but had gone on to find that there was none. A distinction must be drawn between domestic and international forums. The key thing was that international courts and tribunals could only apply those elements of general principles of law derived from national legal systems that were capable of being applied in the international setting.

Mr. Reinisch said that he saw no contradiction between paragraph (5) of the commentary to draft conclusion 6 and the discussion of the *Golder* case in footnote 37, as there was no assertion that the right of access to courts applicable *in foro domestico* would be required at the international level, where the principle of consent to jurisdiction was paramount; however, the issue might be clarified by making reference to relevant jurisprudence of the International Court of Justice in paragraph (5) and drawing a contrast with the findings of the European Court of Human Rights in *Golder*.

Mr. Forteau suggested that the problem might be resolved by adding the words "to international courts and tribunals" after the word "transposed" in the second sentence of paragraph (5); the French version, as amended, would read "*transposé aux juridictions internationales*".

With that amendment, paragraph (5) was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Mr. Vázquez-Bermúdez (Special Rapporteur) proposed that, in the penultimate sentence, the phrase "if a principle common to the various legal systems of the world does not contravene fundamental principles of international law and the conditions for its application exist at the international level" should be replaced with "if a principle common to the various legal systems of the world is suitable to be applied within the framework of the international legal system, when conditions for that application exist".

Mr. Zagaynov said that he had substantive problems with the paragraph in general. As currently drafted, the paragraph implied that, for a general principle of law to exist, it was sufficient that it was transposable but not necessarily that it had been transposed. The notion of "implicit" recognition was problematic. In paragraph (2) of the commentary to draft conclusion 6, it was stated that transposition did not occur in an automatic fashion. According to the commentary to draft conclusion 2, to determine whether a general principle of law existed, it was necessary to examine all the available evidence showing that its recognition had taken place. The distinction between transposability and transposition had been discussed in the Drafting Committee. In his view, it was obvious that transposability alone was insufficient to support the existence of a general principle of law. His preference would be to replace the words "may be transposed" in the second sentence with "is transposed" and to delete the third and fourth sentences.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, when preparing draft conclusion 6 and the commentary thereto, the aim had been to maintain a certain degree of flexibility with regard to the process of transposition. That said, he could accept Mr. Zagaynov's proposed amendment to the second sentence.

Mr. Reinisch said that, in the Special Rapporteur's proposal for the penultimate sentence, the comma before the word "when" should be replaced with the conjunction "and", to make it clear that the clause beginning with the word "if" and the clause beginning with the word "when" set out separate conditions.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the two clauses referred to by Mr. Reinisch should be read together: a principle was suitable for application when conditions for that application existed. Such a reading reflected the wish expressed by Commission members for an approach that was flexible and not excessively prescriptive. The comma before the word "when" should therefore be retained.

Mr. Fife said that the beginning of the second sentence of paragraph (7) should be reworded to read "Therefore, recognition requires that", and the words "is required", which appeared at the end of that sentence, should be deleted.

Mr. Forteau said that the paragraph was difficult to understand and, with the proposed changes, appeared to be contradictory, as the second sentence now required recognition that a principle "is transposed" while the penultimate sentence referred to recognition that a principle "may be transposed".

Mr. Akande said that, as he understood the paragraph, the first sentence was intended as a general statement about general principles of law, with the second sentence then focusing on a particular type of general principle of law. However, the meaning of the paragraph could perhaps be made clearer by deleting the second sentence in its entirety and rewording the third sentence so that it would read: "In the context of a principle common to the various legal systems of the world, recognition is implicit when the compatibility test is fulfilled."

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the simplest solution would perhaps be to replace the words "may be transposed" with the words "is transposed" in the penultimate sentence.

Mr. Jalloh said that he supported the change proposed by the Special Rapporteur, as the phrases used in the second and penultimate sentences should be aligned. He would be in favour of retaining the second sentence.

Mr. Forteau said that he supported Mr. Akande's proposal. However, if the decision was made to retain the second sentence and use the wording "is transposed" in the penultimate sentence, the word "generally" should be inserted between the words "it can"

and “be inferred” in that sentence. Otherwise, the statement made in the sentence would be too categorical.

Mr. Zagaynov said that he was concerned that the use of the word “implicit” in relation to recognition in the third sentence could be interpreted as suggesting that explicit forms of recognition also existed, which would contradict the last sentence of the paragraph. The words “recognition is implicit” should therefore be replaced with a formulation such as “recognition can be assumed”. In addition, the last clause of the penultimate sentence, which read “it can be inferred that the community of nations has recognized that it may be transposed”, raised a number of questions as to how the transposition actually occurred once the possibility of transposition had been recognized.

The Chair said she took it that the Commission wished to leave paragraph (7) in abeyance pending the preparation of a revised proposal.

It was so decided.

Commentary to draft conclusion 7 (Identification of general principles of law formed within the international legal system)

Mr. Forteau said that the version of the commentary before the Commission was much more developed and precise than the version provisionally adopted at the previous session. However, it was regrettable that the accompanying footnotes did not include any references to doctrine. At the previous session, the Special Rapporteur had noted that few references to the literature had been included because teachings on the subject varied widely, and that the opinions expressed in the literature regarding the existence of the second category of general principles of law were far from uniform and could prove controversial (A/CN.4/SR.3611). In his view, that lack of agreement in teachings should somehow be reflected in the commentary to the draft conclusion. Many scholars, including Alain Pellet and Dominique Carreau, could be cited in support of the view that there existed only one category of general principles of law. The lack of references to teachings in the commentary was particularly concerning in the light of the fact that footnote 7, which was associated with paragraph (2) of the commentary to draft conclusion 3, included references only to teachings supportive of the possible existence of two categories of general principles of law. In his view, the treatment of teachings in the commentaries remained unbalanced.

Mr. Grossman Guiloff said that the diversity of views among members of the Commission regarding the possible existence of a second category of general principles of law was described in paragraphs (11) to (13) of the commentary.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that footnote 10, which was associated with paragraph (3) of the commentary to draft conclusion 3, included references to works of scholarship in which the possible existence of a second category of general principles of law appeared to find support. To address Mr. Forteau’s concern, a new sentence could be added to provide references to teachings reflective of the opposite view, namely that there existed only one category. That said, the teachings mentioned in footnote 10 were by no means the only examples that could be cited. In that connection, reference could be made to the works of scholars such as Dionisio Anzilotti, the Secretary-General of the Advisory Committee of Jurists, which had drafted the Statute of the Permanent Court of International Justice; Paul Reuter, a renowned scholar and former member of the Commission; and modern-day scholars such as Patrick Dumberry, Rumiana Yotova and Malgosia Fitzmaurice. He would prepare new text to address Mr. Forteau’s concern.

The Chair said she took it that the Commission wished to entrust the Special Rapporteur with the preparation of new text, the placement of which would be determined at a later stage.

It was so decided.

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Forteau said that a footnote was needed with references to cases where international courts had used the types of evidence referred to in the last sentence of paragraph (3) when identifying general principles of law formed within the international legal system. Such a demonstration of how evidence was used in practice was especially important in light of the view expressed during the Commission's debates that general principles of law should not become a means for circumventing the will of States through the mere invocation of a resolution adopted by an international organization – one of the forms of evidence listed in the paragraph.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that paragraph (3) proposed a methodology to ensure that the analysis took into account all available evidence of the recognition of the principle in question by the community of nations, and provided a non-exhaustive list of the types of evidence to be considered.

Mr. Forteau said that examples of cases where courts had applied that methodology were needed. The Commission should demonstrate that the methodology that it was proposing was indeed followed in practice.

Mr. Grossman Guiloff said that the proposed footnote should contain references not only to case law, but also to treaties that set out the various principles referred to in footnote 19.

Mr. Jalloh said that no change was needed to paragraph (3) because the focus of that paragraph, like that of paragraph (4), was on methodology. Footnote 19 provided examples of the types of principles being discussed, and those principles were reflected in the examples of evidence given in paragraph (3), such as international instruments and resolutions.

Mr. Akande said that, as discussions of case law relevant to paragraph (3) were included in later paragraphs, Mr. Forteau's concern could perhaps be addressed by indicating in paragraph (3) that the methodology that it described was demonstrated in those later paragraphs.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the following sentence could be added to the end of paragraph (3): "Paragraphs (6) to (10) refer to decisions of courts and tribunals that illustrate aspects of this methodology".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted with minor editorial changes.

Paragraph (5)

Mr. Paparinskis said that the words "the case law", at the end of the paragraph, should be replaced with "decisions of courts and tribunals", in line with the wording of draft conclusion 8 and elsewhere in the commentaries.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Forteau said that the use of the word "intrinsic" in the first sentence was not appropriate, as it suggested that the principle of *uti possidetis*, and thus colonialism, was intrinsic to international law. It should be replaced with the word "specific" ["*propre*" in French].

Mr. Patel said that the principle of *uti possidetis* did not pertain to one specific system of international law. He wondered whether the wording suggested by Mr. Forteau would be compatible with the judgment of the International Court of Justice in *Frontier Dispute (Burkina Faso/Republic of Mali)*.

Mr. Jalloh said that the word "intrinsic" should be retained, as it was consistent with the wording used in the first sentence of paragraph (2) and the first sentence of paragraph (5)

of the commentary to draft conclusion 7. He did not consider that it implied that colonialism was a good thing.

Mr. Grossman Guiloff said it did seem that the word "intrinsic" was used frequently in the commentary; he wondered whether it might be possible to say in the paragraph under discussion simply that *uti possidetis* was another general principle recognized by the international community.

Mr. Ruda Santolaria said he agreed that the word "intrinsic" should be retained, as the text was intended to give examples of principles intrinsic to the international legal system.

Mr. Forteau said he was sceptical of the idea that *uti possidetis* was intrinsic to international law. Rather, it was the product of the historical situation of colonization followed by decolonization; it was not part of the essence of the structure of the international legal system. The word "intrinsic" was too strong in relation to *uti possidetis* and its use would lead only to confusion. As explained in the judgment of the International Court of Justice, the principle was not inherent to one specific system of international law. In fact, he was not persuaded that *uti possidetis* was a general principle of international law, but that was not the subject of the current discussion.

Mr. Nesi said that, as he had explained in a book he had written some 30 years previously, *uti possidetis* was indeed a general principle of international law and an intrinsic principle of the international legal system. It was not a justification of the colonial process but, as the International Court of Justice had noted in its judgment, was logically connected with the phenomenon of the obtaining of independence, whenever it occurred. He, like others, was of the view that it went beyond the idea of colonialism.

Mr. Patel said that he supported Mr. Forteau's suggestion. In the judgment quoted in the paragraph under consideration, the International Court of Justice had noted that the principle had first been invoked and applied in Spanish America. Thus it was justified to replace "intrinsic" with "specific".

Mr. Grossman Guiloff said that the inclusion of the quotation from the Court's judgment was problematic, as it specifically noted that the principle of *uti possidetis* was not a special rule which pertained solely to one specific system of international law. It was thus not logical to say that the principle was intrinsic to the international legal system: the quotation indicated that it was not.

Mr. Akande said that, while he understood Mr. Forteau's argument, the second sentence of the paragraph demonstrated that the principle was intrinsic to the process of obtaining independence. Any replacement of "intrinsic" with "specific" would introduce other complications.

Mr. Ouazzani Chahdi suggested that, as it was proving problematic, the word "intrinsic" should simply be replaced with "inherent".

Mr. Ruda Santolaria said that the word "intrinsic" was used in the draft conclusion itself and so should be retained for purposes of consistency. The quotation from the Court's judgment indicated that application of the principle was not restricted to Latin America; rather, it was a general principle, applicable anywhere that independence was achieved.

Mr. Forteau said that the current formulation of the commentaries was problematic insofar as it suggested that the principle of *uti possidetis* applied beyond situations of decolonization, for instance in cases of unilateral succession of States or the dispute between Israel and Palestine regarding the borders of Palestine. In that regard, it would be entering dangerous waters to describe *uti possidetis* as a principle intrinsic to the international legal system.

Mr. Patel, noting that paragraph (7) referred to "the new African States", said that, in 1964, those States had indicated clearly that the principle of *uti possidetis* was present in the Charter of the Organization of African Unity only in an implicit sense. He therefore agreed that the word "intrinsic" should be deleted, to avoid raising more questions in relation to paragraph (7).

Mr. Jalloh said he did not agree that the use of the word "intrinsic" represented a risk, and he would be opposed to its deletion.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the quotation from the judgment of the International Court of Justice was clear and the principle of *uti possidetis* could not be seen as a justification of colonization; rather, it was a way to avoid endangering the existence of new States. The Court had stated that the principle was not a special rule which pertained solely to one specific system of international law, but pertained wherever it occurred. While he would take account of all the members' comments, it seemed that the majority was in favour of retaining the word "intrinsic".

The Chair said it seemed from the discussion that the doubt concerned the pertinence of the example given, rather than the use of the word "intrinsic"; most members who had expressed an opinion seemed to agree with the example given. Nevertheless, the concerns expressed by Mr. Forteau and supported by others would be noted.

Mr. Grossman Guiloff said that, according to the wording of the quotation, the principle applied only when linked to independence. On that understanding, he had no objection to supporting the majority opinion.

Mr. Tsend said that the word "intrinsic" implied something coming from within, as was true of the example given in paragraph (6), where it stemmed from the nature of international law. However, a statement that all the general principles of international law were intrinsic to the international legal system could give rise to concerns like those raised by Mr. Forteau.

The Chair, recalling that the Commission had decided at its seventy-third session that the draft conclusion would concern general principles that were intrinsic to the international legal system, and that the Special Rapporteur had been asked to provide examples in illustration of that, said that the example chosen was relevant to cases of independence in the context of decolonization. As there was as yet no agreement on the text, she took it that the Commission wished to leave paragraph (6) in abeyance.

It was so decided.

The meeting rose at 6.05 p.m.