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International Law Commission
Seventy-fourth session (second part)

Provisional summary record of the 3644th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 25 July 2023, at 10 a.m.

Contents

Present:

Chair:	Ms. Galvão Teles
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Cissé
	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 10.10 a.m.

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

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

The Chair invited the Commission to resume its consideration of chapter IV (C) (2) of its draft report, as contained in document A/CN.4/L.976/Add.1. She recalled that the adoption of paragraph (7) of the commentary to draft conclusion 6 had been deferred pending some redrafting and invited the Special Rapporteur to read out the proposed new text.

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

Paragraph (7)

Mr. Vázquez-Bermúdez (Special Rapporteur) proposed that paragraph (7) should read:

> "Draft conclusion 6 must be read together with draft conclusion 2, which indicates that, for a general principle of law to exist, it must be recognized by the community of nations. Therefore, recognition that a principle common to the various legal systems of the world is transposed to the international legal system is required. In this context, recognition is implicit when the compatibility test is fulfilled. In other words, if a principle common to the various legal systems of the world is suitable for application within the framework of the international legal system, when conditions for that application exist, it can be generally inferred that the community of nations has recognized that it is transposed. No formal act of transposition is required for a general principle of law to emerge."

Paragraph (7), as amended, was adopted.

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

Paragraph (6) (*continued*)

Mr. Forteau said that there was a pending issue concerning footnote 10, which pertained to draft conclusion 3, as the Special Rapporteur had agreed to add further references to the list of teachings in that footnote to reflect the divergence of views on the existence of a second category of general principles of law.

Mr. Vásquez-Bermúdez (Special Rapporteur) said it was his understanding that Mr. Forteau had wished to add references to teachings reflecting the view that general principles of law were limited to those derived from national legal systems. Subsequently, following consultations, Mr. Forteau had said that he preferred not to add such references, at least for the time being.

Mr. Forteau said that it had not been possible to provide detailed references to teachings or case law in the limited time available, the draft commentaries having been submitted to the Commission members over the weekend when the library had been closed. As an alternative, he proposed that paragraph (3) of the commentary to draft conclusion 3 should be amended to reflect what the Special Rapporteur himself had stated in 2022 at the Commission's 3611th meeting (A/CN.4/SR.3611), namely that "few references to the literature had been included, given that teachings on the subject varied widely", and that "it must be borne in mind that opinions on the existence of the second category [of general principles of law] were far from uniform and could prove controversial".

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the addition proposed by Mr. Forteau did not reflect the views of the majority of the Commission members when they had adopted draft conclusion 3 and the commentaries thereto, or his own current views.

Mr. Forteau said he was not proposing that the Commission should reopen the discussion on draft conclusion 3. He had originally made the proposal in relation to draft conclusion 7 and it was the Special Rapporteur who had proposed at the preceding meeting that it should be addressed under draft conclusion 3.

The Chair recalled that the initial proposal was to add a new footnote pertaining to draft conclusion 7. There was now an alternative proposal to include new text in relation to draft conclusion 3. Her preference would be to discuss the matter in greater detail at a later stage and to resume the consideration of paragraph (6) of the commentary to draft conclusion 7.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the phrase "in the process of obtaining independence" should be added at the end of first sentence of paragraph (6). The reference to the process of obtaining independence would thus be more prominent from the beginning even though it was already reflected in the International Court of Justice judgment quoted in the paragraph.

Mr. Forteau said that, although he would not object to the adoption of the text if that was the wish of the majority, the amended sentence did not appear to him to be in line with international law, particularly in the event that a State became independent and a border dispute arose with another State that had obtained independence from a different colonial Power, as in the case of Nigeria and the Niger. In such cases, he was not certain that *uti possidetis* applied. In *Frontier Dispute (Burkina Faso/Niger)*, Judge Yusuf had clearly explained in a separate opinion why *uti possidetis* did not apply to that case and had pointed to the need to distinguish that principle from the principle of intangibility of boundaries. The problem with the first sentence of paragraph (6) of the commentary, as amended, was that it was formulated in absolute terms, whereas *uti possidetis* did not necessarily apply to all situations of accession to independence. He continued to have serious doubts about the first sentence in particular and the entire paragraph in general.

Mr. Jalloh said that he appreciated the Special Rapporteur's efforts to find a compromise. Like Mr. Forteau, he had spent some time reviewing the literature on *uti possidetis* and Judge Yusuf's separate opinion, in particular his clarification of the distinction between that principle and the principle of respect of borders adopted by the Organization of African Unity in the 1964 Cairo resolution on border disputes among African States. To address Mr. Forteau's concern, he proposed that the phrase to be added to the end of the first sentence should be made less absolute and that it should read "in certain processes of obtaining independence". The application of *uti possidetis juris* would thus be somewhat qualified to take account of the specific context of the African States.

Mr. Lee said that he welcomed the Special Rapporteur's excellent commentaries and willingness to accommodate different views. He shared some of the reservations expressed by Mr. Forteau but did not intend to stand in the way of the Commission's adoption of the draft commentary. In that regard, he had conducted some research into teachings, which he would be glad to share with the Special Rapporteur. One example was the 2019 textbook *Droit international public* by Jean Combacau and Serge Sur, which pointed out that the principle of *uti possidetis* was not accepted by all States. As there were reservations over the normative status of the principle, the Commission might consider including references to such teachings in its commentary, which would thereby be made more balanced.

Mr. Nesi said that, in order to address all the concerns raised, he wished to propose the addition of the words "when the conditions for its application occur" after the words "international legal system" in the first sentence of paragraph (6), leaving aside the debate over the applicability of *uti possidetis* only to decolonization processes or other situations. There were certain conditions that must be met in order for that principle to apply. *Uti possidetis* was a general principle of law but was applicable only under certain circumstances, involving the creation of new States, and became relevant only after such circumstances arose. The proposals made by the Special Rapporteur and Mr. Jalloh could potentially create other problems. The phrase "when the conditions for its application occur" would constitute a more neutral solution that would not enter into the details of the applicability of the principle.

Mr. Fife said that he was concerned about the connotations of the term "intrinsic" in the context of the current discussion, even though it had been inherited as part of the language of draft conclusion 7. There was a danger that the reference to a principle as being "intrinsic to the international legal system" could be misinterpreted as meaning that such a principle would prevail over other possible norms that might apply in a particular situation. He was thus uncomfortable with the original wording and increasingly shared the views expressed by Mr. Forteau, Mr. Lee and others, while fully recognizing the contributions made by Mr. Nesi and others on the importance of the principle of *uti possidetis*. He agreed with Mr. Nesi that Mr. Jalloh's effort to adjust the language was useful but could open a Pandora's box. He suggested that Mr. Nesi's proposal should be amended to read "when the conditions for its application are satisfied". Most members would agree that the principle of *uti possidetis* was not "intrinsic" to the international legal system in the sense that it was directly applicable to all situations, including sea-level rise, for example. The cogent remarks made in the separate opinion of Judge Yusuf should be fully taken into account.

Mr. Ruda Santolaria said that he considered *uti possidetis* to be a principle intrinsic to the international legal system, as it was derived from judgments of the International Court of Justice. He welcomed the proposal to add a phrase to indicate that the principle applied when the conditions for its application were satisfied, as the Court itself had in a number of cases made assessments of whether the conditions for the principle's application had been met.

Ms. Okowa said that she wished to thank the Special Rapporteur for his excellent and extensive work on the topic. Like others, she had concerns about the use of the word "intrinsic", not least because it appeared to elevate the status of *uti possidetis* to a higher level than it deserved. Both the literature and international court decisions revealed considerable ambivalence about its exact status and role. Mr. Jalloh had referred to the Cairo resolution, in which, in the African context, the word "*uti possidetis*" was not even used as a presumption of intangibility of inherited boundaries. In fact, that was only a presumption that could be challenged by agreement or by other considerations. While *uti possidetis* might be a default rule in certain instances, it was only a presumption. Therefore, the word "intrinsic" raised the status of what in many cases was only a presumption, a default rule or an interim solution. It also ignored the very different experiences with its application in Latin America and Africa. A solution might be to delete the word "intrinsic" and add qualifiers such as those proposed by Mr. Nesi. There was a risk that the paragraph in its current form could be misleading for those who would rely on the text in the future.

Mr. Jalloh said that qualifying elements seemed already to be included in paragraphs (6) and (7) of the commentary, which stated that *uti possidetis* was a general principle "logically connected to the phenomenon of independence". However, he could accept the addition of the phrase proposed by Mr. Nesi, as modified by Mr. Fife.

Mr. Grossman Guiloff proposed that, building on the earlier suggestion from Mr. Nesi, the first sentence of paragraph (6) should be amended to read: "The principle of *uti possidetis* is another general principle that has been invoked in certain circumstances." That shortened version was an accurate reflection of the debate, although he would support the consensus view.

Mr. Paparinskis said that, since the function of paragraph (6) was not to give a description of the international law of territorial title but to provide an example to illustrate the methodology for identifying general principles of law, the first sentence of the paragraph could be deleted altogether so that the paragraph began with the reference to the case cited by way of example.

Mr. Vázquez-Bermúdez (Special Rapporteur), noting that the consensus seemed to be in favour of maintaining a degree of flexibility in the wording of the first sentence, said that the proposal put forward by Mr. Nesi, as amended by Mr. Fife – specifically, the addition of the words "when the conditions for its application are satisfied" at the end of the sentence – would probably be most effective in accommodating that flexibility.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Forteau said that, in the quotation contained in the first sentence of paragraph (7), the International Court of Justice appeared to be stating that the principle of *uti possidetis* was a customary rule, whereas most members of the Commission saw it as a general principle of international law. For that reason, he proposed that footnote 24 should include a brief indication of the relationship between customary rules and general principles of law and should draw readers' attention to draft conclusion 11, which expressly dealt with that relationship.

Mr. Patel said he too believed that the Court was referring to rules of customary international law in the quotation in question and that it was important to maintain a distinction between general principles and customary rules. He noted that, in the third sentence of paragraph (7), the positioning of the quotation marks should be adjusted slightly and the word "of" should be deleted from the phrase "formula of *uti possidetis*" in order to accurately replicate the language used by the Court. In addition, that quotation should be extended in order to include an important qualifier that was currently omitted. The full phrase would then read "they recognize and confirm an existing principle, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent".

Mr. Sall said that he was somewhat concerned about paragraph (7) in that it consisted almost entirely of text quoted from an International Court of Justice judgment rather than text drafted by the Special Rapporteur on the basis of the Commission's discussions. He had particular concerns about the Court's assertion that there had been "numerous solemn affirmations of the intangibility of the frontiers". In fact, the most important legal instruments that could be invoked in support of the stability of borders referred not to intangibility but to respect for frontiers. The term "respect" carried a somewhat different meaning. The Organization of African Unity had never stated that frontiers were intangible, and the practice of African States clearly demonstrated that frontiers could be called into question. States could, for example, agree to unite or merge, and some constitutions even recognized the possibility of dissolution and relinquishment of sovereignty. The word "intangibility" was thus too strong, even though it was drawn from a judgment of the Court.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he was in favour of the addition proposed by Mr. Forteau, although his reading of the quotation in question was different: his understanding was that the Court viewed the principle of *uti possidetis* as a pre-existing general rule that had been confirmed by States in declarations. He agreed nonetheless to the addition of a reference to draft conclusion 11 in footnote 24. With regard to Mr. Patel's observations, he would check the quotations in question and make any amendments required.

Mr. Forteau said that, in order to limit the scope of the last sentence, language drawn from the last sentence of paragraph 23 of the Court's 1986 judgment in *Frontier Dispute (Burkina Faso/Mali)* should be used, as it was narrower than the current reference to the "phenomenon of independence". The beginning of the sentence would read: "Thus, the principle of *uti possidetis*, considered as a principle of a general kind which is logically connected with decolonization, has been applied" [*Ainsi, le principe de l'*uti possidetis*, considéré comme un principe d'ordre général nécessairement lié à la décolonisation, a été appliqué*].

Mr. Nesi said that the phrase "phenomenon of independence" in the last sentence of paragraph (7) was clearly inspired by the language used in paragraph 20 of the Court's 1986 judgment, as quoted in paragraph (6) of the commentary.

Mr. Jalloh said that, given its correspondence with the Court's ruling in the 1986 *Frontier Dispute* case, he was comfortable with the current wording, although it would be closer to the Court's wording if the phrase "the phenomenon of independence" was replaced with "the phenomenon of obtaining independence". He supported Mr. Patel's suggestion that the quotation contained in the penultimate sentence of paragraph (7) should be extended.

Mr. Akande said that the focus of the discussion seemed to have turned to the question of whether or not *uti possidetis* was a general principle of law. As Mr. Paparinskis had said, it was important to bear in mind that the purpose of paragraphs (6) and (7) was

simply to provide an example of how the methodology for identifying such principles had been applied by the Court in a particular case.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, since paragraph (7) was indeed intended to provide an example of how the methodology had been applied and the last sentence was meant to summarize what was reflected in the preceding quotations, he was in favour of retaining the current wording, with the minor adjustment suggested by Mr. Jalloh.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Mr. Patel proposed that the order of paragraphs (8) and (9) should be reversed because paragraph (8) mentioned certain obligations and principles that were derived from the argument described in paragraph (9), and, as the quotation in footnote 25 clearly demonstrated, it was more natural for the description of the argument to precede the enumeration of obligations based thereon.

Mr. Sall pointed out that, since the text following the colon in paragraph (8) used the language of the *Corfu Channel* judgment of the International Court of Justice, it should be placed within quotation marks.

Mr. Vázquez-Bermúdez (Special Rapporteur) said he agreed that quotation marks should be placed around the list of obligations at the end of the paragraph. He did not, on the other hand, see any problem of logic in the current ordering of paragraphs (8) and (9): paragraph (9) explained and clarified the derivation of the obligations mentioned in paragraph (8).

The Chair, speaking as a member of the Commission, said that she also saw no problem with the current structure, whereby the commentary first described the general principles – which were, after all, the focus of the report – and then clarified the underlying argument.

Ms. Okowa, noting that the International Court of Justice had subsequently referred to the *Corfu Channel case* and the general principles mentioned in paragraph (8), and specifically to elementary considerations of humanity, in its 1986 judgment in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, suggested that the latter case should also be referred to in a footnote to the commentary.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, for the time being, for simplicity's sake, he would prefer not to refer to additional cases. However, if the Commission so wished, he could add a reference to *Military and Paramilitary Activities* to footnote 25.

Mr. Paparinskis said that he was not opposed to the inclusion of a reference to *Military and Paramilitary Activities.* More recently, the International Court of Justice had also referred to elementary considerations of humanity in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. However, in both of those cases, the Court had referred to the *Corfu Channel case* to support substantive propositions, whereas, in the report, the Commission referred to the case as an illustration of methodology. Accordingly, a reference to *Military and Paramilitary Activities* was perhaps not pertinent to the point being made in the commentary and the text should remain as drafted by the Special Rapporteur.

Mr. Vázquez-Bermúdez (Special Rapporteur) said he was persuaded that a reference to *Military and Paramilitary Activities* in the footnote would be useful because, even though it did not develop or expound on methodology, the Court's judgment in that case did refer to a general principle mentioned previously in the *Corfu Channel case.*

Mr. Savadogo pointed out that the quotation in footnote 25 reproduced exactly the text cited at the end of paragraph (8) and suggested that the repeated text should be deleted. He also wished to draw the Commission's attention to the fact that the *Corfu Channel case* had also been referred to in the separate opinion of Judge Laing in the International Tribunal for the Law of the Sea case *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea).*

The Chair, speaking as a member of the Commission, said that, despite the repeated wording, she had the impression that it was important to retain the full quotation in footnote 25. With regard to the separate opinion in *M/V "SAIGA" (No. 2)*, she agreed that a reference should be added alongside the reference to *Military and Paramilitary Activities.*

Mr. Vázquez-Bermúdez (Special Rapporteur) said he agreed with the Chair that it was best to reproduce the full quotation from the *Corfu Channel case* in footnote 25. He also agreed with Mr. Savadogo that a reference to the separate opinion in *M/V "SAIGA" (No. 2)* should be added to footnote 25, alongside a reference to *Military and Paramilitary Activities*. The footnote would be amended once the exact wording of the citations had been communicated to the secretariat.

Paragraph (8) was adopted with minor editorial corrections, subject to the amendment of footnote 25 by the secretariat.

Paragraph (9)

Mr. Akande said it should be clarified in the text of paragraph (9) that the Hague Convention that had not been applied by the Court was the Hague Convention VIII.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (12)

Paragraphs (10) to (12) were adopted.

Paragraph (13)

Mr. Zagaynov said that the current discussion had not removed his doubts about the category of general principles of law formed within the international legal system and the proposed manner in which such principles were to be determined, including in respect of the principle of *uti possidetis*. There had been discussion as to which principles were intrinsic to the international legal system and how they were to be identified. He still had questions about the relationship between general principles of law and principles of customary international law. He appreciated the fact that his position was reflected in paragraph (13), and wished to reiterate his concerns about the approach that the Commission had taken to general principles of law.

Mr. Forteau said that, at the Commission's seventy-third session, when it had provisionally adopted the commentary to draft conclusion 7, the members had agreed on the importance of provisionally adopting the commentary by the end of the previous quinquennium in the interest of obtaining further comments by States. That position had been reflected in paragraph (5) of the commentary as provisionally adopted at that session. At the Commission's 3612th meeting (A/CN.4/SR.3612), the Special Rapporteur had said that the commentary could be improved and expanded upon in the light of comments by States. The Commission had now received such comments, and a considerable number of States had expressed doubts about the concept of general principles of law formed within the international legal system. It was regrettable that paragraph (13) did not reflect those doubts.

At its seventy-third session, the Commission had extensively discussed the text of paragraph (13), which at the time had been paragraph (7), in order to ensure that the text reflected the compromise reached among members with regard to draft conclusion 7. However, one sentence that had been agreed upon at that session had disappeared from the text as currently proposed. That sentence, which had its basis in a proposal by former member Mr. Rajput, supported by some other members, in particular former member Sir Michael Wood, had read: "The view was expressed that, at the time of the drafting of the Statute of the Permanent Court of International Justice, the Advisory Committee of Jurists did not accept general principles of law formed within the international legal system, and that, during the drafting of the Statute of the International Court of Justice, the proposal for the creation of general principles of law within the international legal system was not accepted." It was not clear why that sentence had been removed.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that some States had reacted positively to the draft conclusion and its commentary, others had been open to further

consideration of the matter addressed therein and still others had expressed doubts. That range of reactions would be reflected and addressed in a future report on the topic. With regard to the omission of the sentence highlighted by Mr. Forteau, the phrase "The view was expressed" signalled that the view in question had been expressed by a single member. He did not think that the Commission should endorse the point made in the sentence, which did not accurately reflect the proceedings of the Advisory Committee of Jurists. The footnote to the first clause of the sentence, which appeared as footnote 1203 in the Commission's report on the work of its seventy-third session (A/77/10), contained a reference to the *procès-verbal* of the Advisory Committee's 15th meeting. That reference was intended to direct the reader to statements made by Lord Phillimore; however, if the reference was maintained, the Commission would also have to highlight the statements of other members of the Advisory Committee, namely Mr. Fernandes, who had explained that the Court should have the power to base its judgments, in the absence of a treaty or custom, "on those principles of international law which, before the dispute, were not rejected by the legal traditions of one of the States concerned in the dispute", and Mr. de Lapradelle, who had thought it preferable not to indicate "exactly the sources from which these principles should be derived". It would be misleading to refer only to the statements of one member of the Advisory Committee, which was a collegial body. Moreover, it could not be argued that general principles of law formed within the international legal system had not been accepted at the 1945 United Nations Conference on International Organization (San Francisco Conference); in that regard, he recalled paragraph 106 of his first report on the topic (A/CN.4/732), which referred to a proposal by the Chilean delegation to the Conference to add the phrase "and especially the principles of international law" to Article 38 (1) (*c*) of the Statute. Consequently, it would be not only inexact but also misleading to infer from such historical references that the concept of general principles of law formed within the international legal system had been rejected.

Mr. Jalloh said that he had initially supported the reintroduction of the omitted sentence, since the views expressed by members should generally be reflected in the commentaries and communicated to States. However, the omitted sentence had featured in the commentary provisionally adopted at the seventy-third session and thus had already been communicated to States, and he had been convinced by the Special Rapporteur's explanation of the reasons for its deletion from the current text. While it could be a matter of interpretation, the view expressed in the omitted sentence seemed to be contradicted by the evidence. Moreover, while it was true that some States had expressed doubts about the existence of general principles of law formed within the international legal system, according to the topical summary of the discussion in the Sixth Committee (A/CN.4/755), a number of States had voiced their support for the existence of such principles, for the Commission's methodology and for draft conclusion 7. If the doubts expressed by some States were reflected in paragraph (13), the supportive views expressed by other States would also have to be cited. He was therefore in favour of maintaining the text of paragraph (13) as proposed by the Special Rapporteur.

Mr. Fife said that, while he supported the careful balance achieved in the text of paragraph (13) and did not wish to reopen the debate on the matter of general principles of law formed within the international legal system, he was uneasy about the lack of conceptual clarity around that notion. Conceptual clarity could be achieved only if clear distinctions were maintained between different notions. However, the lines between certain categories of sources of international law, as enumerated in Article 38 (1) of the Statute of the International Court of Justice, appeared to have been blurred. Maintaining such distinctions was also important from an educational or pedagogical perspective. Moreover, he was uncomfortable with the implication that there was unanimity, whether in teachings, among the Commission members or between States, on the notion of general principles of law formed within the international legal system. The views of States carried significant weight when it came to gathering empirical evidence about the content of such a second category of general principles of law. In reality, there was still much debate among States as to the existence of that second category.

The Chair said it was clear that a number of members were of the view that paragraph (13) was particularly important and were attentive to the issues raised by Mr. Fife. She agreed, however, that the paragraph should not be opened up for redrafting at the current

stage. In addition, there remained the possibility of adding a footnote containing references to relevant teachings, as discussed earlier.

Paragraph (13) was adopted.

Commentary to draft conclusion 8 (Decisions of courts and tribunals)

Paragraph (1)

Mr. Nguyen said that the final sentence of paragraph (1), which referred to the Commission's conclusions on identification of customary international law, appeared to suggest that the decisions of courts and tribunals were sources of international law. The last clause of the sentence – "both of them being sources of international law" – should be either deleted or amended to clarify that both customary international law and general principles of law were sources of international law.

Mr. Paparinskis, supported by **Mr. Vázquez-Bermúdez** (Special Rapporteur), proposed that the last clause of the final sentence of the paragraph should be amended to read "which is also, like general principles of law, a source of international law".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Nguyen said that, in the first sentence of paragraph (2), the word "determine" should be replaced with the word "identify". "Determine" had a broader meaning, in that it referred to the operation of determining both the existence and the content of a general principle of law. As the first sentence referred only to the existence of a general principle of law, the word "identify" was more appropriate. Moreover, the word "identification" was used in paragraphs (1) and (3) of the commentary to draft conclusion 8.

Mr. Jalloh said that the commentary to draft conclusion 8 closely followed the Commission's prior work on the topic of identification of customary international law. It was not clear that the word "determine" should be replaced with the word "identify". A clear explanation regarding the usage of those two words had been provided in the commentaries to the conclusions on identification of customary international law. An effort should be made to ensure consistency with those commentaries; indeed, he had sought to do so in the commentaries to the draft conclusions on the related topic of subsidiary means for the determination of rules of international law. In the draft conclusions under consideration, changing "determination" to "identification" in paragraph (2) would have consequences in terms of how the words "determine" and "determination" were used in later paragraphs of the commentary.

Mr. Paparinskis proposed that the words "or otherwise" in the first sentence of the paragraph should be replaced with the phrase "or lack thereof".

Mr. Asada said that draft conclusion 8 referred to decisions of international courts and tribunals as "a subsidiary means for the determination of such principles". He supposed that the choice of the word "identification" in paragraph (1) had been influenced by the title of the conclusions on identification of customary international law. In paragraph (2), however, the word "determine" was used appropriately.

Mr. Fathalla said that the words "or otherwise" in the first sentence of the paragraph could simply be deleted and that the word "identification" in paragraph (1) could be replaced with "determination" to reflect the language used in draft conclusion 8.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he would prefer to retain the word "determine" in the second line of paragraph (2) to ensure consistency with the wording of the draft conclusion and because "determine" collocated better with "existence". He agreed that it might be simpler to delete the words "or otherwise" without substituting a different expression.

The Chair said that the question of "identification" versus "determination" had already been discussed by the Drafting Committee in connection with the topic "Subsidiary means for the determination of rules of international law" and would need to be discussed

further. Members should bear in mind that draft conclusion 8 was also based on the commentary to the Commission's conclusions on identification of customary international law, in which "identification" and "determination" were used interchangeably. She understood that members wished to retain "identification" in paragraph (1) and "determine" in paragraph (2).

Mr. Jalloh said that Mr. Paparinskis' proposal to replace the words "or otherwise" in the first sentence of paragraph (2) with the phrase "or lack thereof" warranted further consideration. If the words "or otherwise" were simply deleted, the possibility of determining general principles of law not to exist would no longer be explicit in the text.

Regarding the question of "identification" versus "determination", he wished to point out that, in subsequent paragraphs, "identification" and "determination" were essentially used interchangeably to describe the same process, namely the "determination" of general principles of law referred to in draft conclusion 8 (1), whose pedigree, as was explained in paragraph (5) of the commentary, could be traced back to Article 38 1 (*d*) of the Statute of the International Court of Justice. Where possible, a measure of linguistic consistency was warranted. However, that was without prejudice to any other decisions that the Commission might take in relation to the commentary to the draft conclusions on subsidiary means for the determination of rules of international law.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that nothing would be lost if "or otherwise" was simply deleted, as the possibility of determining general principles of law not to exist would still be implicit in the text. However, if the consensus was that explicit mention should be made of that possibility, "or otherwise" could be replaced with "or lack thereof", as proposed by Mr. Paparinskis.

Paragraph (2), as amended, was adopted with a minor drafting change to the French text.

Paragraph (3)

Ms. Okowa said that she was curious as to why the Latin maxim *iura novit curia* appearing at the end of the first sentence of the paragraph was not accompanied by a translation or explained in footnote 32. That principle was applied primarily in civil-law systems and its meaning might not be obvious to common lawyers. The insertion of a translation such as "the court knows the law" would be helpful to the reader.

Mr. Forteau said that Ms. Okowa's comment raised a more general question about the origins of the principle, which, as he understood it, was also found in judgments of the International Court of Justice, *inter alia* in *Military and Paramilitary Activities in and against Nicaragua*. *Iura novit curia* was the principle according to which the parties to legal proceedings did not have to prove the law because the court already knew the law. The first sentence could perhaps be reworked and references to non-regional case law added to footnote 32 to clarify that point.

Mr. Sall proposed that the word "prior" in the phrases "prior international decisions" and "prior decisions" should be deleted.

Mr. Grossman Guiloff said that, by citing only the 1988 judgment in the first contentious case tried by the Inter-American Court of Human Rights, footnote 32 failed to convey the fact that the Court's case law had been constantly reaffirmed in subsequent decisions. The footnote should list several more recent decisions issued by the Court. He could assist the Special Rapporteur by providing the necessary references.

Mr. Paparinskis said that the International Court of Justice had referred to the principle of *iura novit curia* without further explanation in paragraph 29 of its judgment in *Military and Paramilitary Activities* and in paragraph 311 of its judgment in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*. To his mind, that indirectly supported the argument that the Latin maxim in question was sufficiently recognized by practitioners of international law so as not to warrant further clarification. However, he did not oppose the inclusion of an elegant translation or explanation of the principle if members had doubts over whether it was universally recognized.

Mr. Jalloh said that, while he did not object to the addition of a translation or explanation such as "the court knows the law" in parentheses after *iura novit curia*, it was important to ensure consistency in the treatment of Latinisms in the commentaries to the Commission's outputs on the different topics on its agenda. The secretariat could perhaps advise on the best approach to take. The Special Rapporteur might also consider, perhaps at the second-reading stage, specifying the general principles of law that had been identified in each of the international court decisions listed in footnote 33, as that information would greatly assist readers of the commentary.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that it might indeed be useful to insert a reference to the cases mentioned by Mr. Paparinskis in footnote 32. To his mind, the Latin phrase captured the exact meaning of the principle; if a translation or explanation was included, there was a risk that its meaning might be distorted. The reference to the Inter-American Court of Human Rights judgment in *Velásquez Rodríguez v. Honduras*, which provided a clear explanation of *iura novit curia*, could indeed be complemented by references to more recent cases, bearing in mind the need for concision in footnote 32. He would not object to the deletion of the word "prior", as proposed by Mr. Sall.

Ms. Okowa said that she too would welcome guidance from the secretariat on the appropriateness of including Latin phraseology in documents produced by the Commission. Even though the International Court of Justice and other tribunals made frequent use of Latinisms in their decisions, the Commission's mandate was to promote the progressive development of international law and its codification and to provide guidance to all States, many of whose practitioners might not be well versed in Latin. The inclusion of Latin terms without further explanation raised questions of democratic accessibility, even if their meaning could be intuited from the context. She would be in favour of providing an explanation of the meaning of *iura novit curia* in accessible language.

Mr. Forteau said that, as Ms. Okowa had rightly pointed out, *iura novit curia* was a civil-law and not a common-law principle. It was therefore not a general principle of law. In the cases cited by Mr. Paparinskis, the International Court of Justice had not stated that to be the case; rather, the Court had identified *iura novit curia* as a principle that it applied in its own jurisprudence. Thus, a simpler solution might be to remove all reference to *iura novit curia* from the Commission's output on general principles of law. Furthermore, paragraph 41 of the judgment of the European Court of Human Rights in *Handyside v. the United Kingdom* made no mention of the principle of *iura novit curia*. All the judgments mentioned in footnote 32 should therefore be checked to ensure that they actually referred to that principle.

Mr. Ouazzani Chahdi said that there were also some methodological considerations that needed to be explored. It seemed to him that, if the Commission decided to start translating or explaining frequently occurring Latin phrases in its documents, it would need to do so in the six official languages of the United Nations, which would create extra work for the secretariat.

Mr. Grossman Guiloff said he agreed with Ms. Okowa that the Commission's outputs should be accessible to all readers and users, including States, and that persons who did not practise law could not reasonably be expected to understand Latin terms. In the case of *iura novit curia*, a courtesy translation could simply be provided in parentheses after the term or in footnote 32. There was no need for the Commission to be constrained by past practice.

Mr. Akande said that there was no need for the secretariat to advise the Commission on current practice, as the Commission's previous discussion on the principle of *uti possidetis juris* had confirmed that Latinisms were not usually accompanied by a translation.

Mr. Fife said that *iura novit curia*, a principle closely associated with a particular tradition in civil-law countries, warranted different treatment from *uti possidetis juris*. As Mr. Forteau had rightly pointed out, *iura novit curia* was not a general principle of law. The phrase in Latin should either be retained and translated to make the text more accessible or be deleted altogether.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that paragraph (3) was intended to show that courts and tribunals relied on previous decisions by international courts and

tribunals to determine the existence of general principles of law or to apply such principles. It would therefore be inappropriate to mention the International Court of Justice in that context, as, although it had referred to the principle of *iura novit curia* in its decisions, it had not relied on other international decisions to determine the existence of that principle or to apply it. Conversely, the Inter-American Court of Human Rights had done just that and provided a useful example. The discussion on the use of Latin phrases with normative content was broader and could not be resolved immediately.

The Chair said she took it that the Commission wished to suspend its consideration of paragraph (3) to allow the Special Rapporteur to draft a revised text.

It was so decided.

The meeting rose at 1.05 p.m.