Provisional

For participants only

22 September 2023

Original: English

International Law Commission

Seventy-fourth session (second part)

Provisional summary record of the 3645th meeting

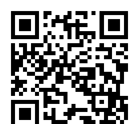
Held at the Palais des Nations, Geneva, on Tuesday, 25 July 2023, at 3 p.m.

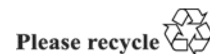
Contents

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

Chapter IV. General principles of law (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).





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 3.10 p.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 the draft report, as contained in document A/CN.4/L.976/Add.1, continuing with the commentary to draft conclusion 8.

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

Paragraph (3) (*continued*)

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the paragraph under consideration concerned the reliance of courts and tribunals on prior decisions for the purposes of determining the existence of general principles of law or applying such principles. The footnotes associated with the paragraph included references to relevant cases. An alternative to citing additional cases of the Inter-American Court of Human Rights in footnote 32, as had been suggested by Mr. Grossman Guiloff at the previous meeting, would be to insert the words “see, *inter alia*” after “Inter-American Court of Human Rights”. In his view, the other references included in that footnote should be retained, as they provided evidence in support of the first sentence of the paragraph.

Mr. Forteau said that the statement made in the first sentence did not seem to be supported by the two cases of the European Court of Human Rights cited in footnote 32, namely *Handyside v. United Kingdom* and *Guerra and Others v. Italy*. First, in those two cases, the Court had referred not to prior international decisions but to its own decisions. Second, in its judgment in *Guerra and Others v. Italy*, *iura novit curia* was described as a “principle” rather than as a general principle of law. Third, *iura novit curia* was not mentioned in the Court’s judgment in *Handyside v. United Kingdom*. Fourth, and most importantly, the Court had invoked *iura novit curia* in the context of the legal characterization of the facts, namely the selection of the articles of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) on the basis of which the facts would be examined, rather than as a principle according to which the court knew the law. The inclusion of references to those two cases introduced a great deal of confusion and obscured the meaning of the paragraph as a whole.

Mr. Grossman Guiloff said that, while he would not object to the Special Rapporteur’s proposal, there were other cases of the Inter-American Court of Human Rights that could be cited in addition to *Velásquez Rodríguez v. Honduras*. The Court had referred to the principle of *iura novit curia* in cases in which, for example, the parties had argued the law incorrectly. Indeed, *iura novit curia* had been invoked in the context of general principles of law and with explicit reference to the Statute of the International Court of Justice. An alternative to inserting the words “see, *inter alia*” after “Inter-American Court of Human Rights” in the text of footnote 32 would be to note that, following its judgment in *Velásquez Rodríguez v. Honduras*, the Court had further elaborated the principle of *iura novit curia* in such cases as *Lacayo v. Nicaragua*.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, according to the principle of *iura novit curia*, it was for the court alone to determine the applicable law, regardless of the law invoked by the parties. In its judgment in *Handyside v. United Kingdom*, the European Court of Human Rights had reasoned that it was “master of the characterization to be given in law” to the facts, citing two of its previous judgments as a basis. Footnote 32 thus provided evidence in support of the first sentence of the paragraph, since it included references to cases in which a court had relied on previous decisions.

Mr. Forteau, referring to the first sentence, proposed that the words “their own decisions and” should be inserted before “prior international decisions” and it should be clarified that the Commission was describing the cases cited in footnote 32 without necessarily endorsing the conclusions of the two courts.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that deleting the word "international" before "decisions" would be a way of addressing Mr. Forteau's concern without overburdening the text.

Mr. Grossman Guiloff said that, when drafting its judgment in *Velásquez Rodríguez v. Honduras*, the Inter-American Court of Human Rights could not have cited its own jurisprudence, as that was the first case that it had ever decided. According to that judgment, although the Inter-American Commission on Human Rights had not alleged a violation of article 1 (1) of the American Convention on Human Rights, the Court was not precluded from applying that provision, since, "by virtue of a general principle of law, *iura novit curia*", it had the power and the duty to apply relevant provisions even when the parties had not expressly invoked them. In support of that reasoning, the Court had cited international jurisprudence, namely the judgment of the Permanent Court of International Justice in *The Case of the S.S. "Lotus"* and the judgment of the European Court of Human Rights in *Handyside v. United Kingdom*.

Ms. Okowa said that she wished to know whether the Latin phrase *iura novit curia* would be retained and, if it would, whether a translation would be provided. In view of the Commission's mandate to promote the progressive development of international law and its codification, it was unhelpful to use phrases that were obscure even to international lawyers.

Mr. Forteau said that any attempt to define the principle of *iura novit curia* might pose problems, as it was interpreted differently by the European Court of Human Rights and the International Court of Justice. One solution might be to reformulate the first sentence along the lines of the second, such that no specific examples of general principles of law were given. The phrase "the existence of the principle *iura novit curia*" could thus be replaced with "the existence of general principles of law".

Mr. Vázquez-Bermúdez (Special Rapporteur) said that readers who were interested in the different ways in which *iura novit curia* had been interpreted could consult the cases cited in footnote 32. The reference to *iura novit curia* should be retained, as it offered a useful example.

The Chair said that the two proposals made by the Special Rapporteur, namely the insertion of the words "see, *inter alia*" after "Inter-American Court of Human Rights" in the text of footnote 32 and the deletion of the word "international" in the first sentence of the paragraph, appeared to enjoy the support of the Commission.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Patel said that the first sentence, according to which the decisions of the International Court of Justice had "no binding force except between the parties", was somewhat misleading, as it did not fully reflect the wording of the relevant provision of the Statute of the Court. Article 38 (1) (*d*) of the Statute included a cross reference to Article 59, which, in turn, stated that: "The decision of the Court has no binding force except between the parties and in respect of that particular case." He therefore proposed that, in that sentence, the words "on disputes submitted to it" should be inserted after "binding force".

Mr. Paparinskis said that the sentence under consideration was based almost word for word on a sentence included in the commentary to conclusion 13 of the Commission's conclusions on identification of customary international law. The argument could be made that, as States had not objected to that wording in the context of identification of customary international law, it could be reproduced in the context of general principles of law.

Mr. Jalloh said that he would not object to Mr. Patel's proposal. There was nothing to prevent the Commission from improving on text that had appeared in another set of commentaries.

Mr. Akande said that Article 59 of the Statute had two elements: the Court's decisions had binding force only between the parties and only in respect of that particular case. Only one of those two elements was reflected in the first sentence as currently drafted.

Mr. Forteau said that, in the English version, the first sentence was ambiguous, as the word "parties" could be interpreted as a reference to the parties to the Statute. In the French version, the inclusion of the words "*au litige*" after "*parties*" excluded such an interpretation. He proposed that the English version should be aligned with the French in order to more closely reflect the content of Article 59 of the Statute.

Mr. Grossman Guiloff said that he supported Mr. Forteau's proposal. In the Spanish version, the inclusion of the words "*en litigio*" after "*partes*" served a similar purpose.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, while he could accept Mr. Forteau's proposal, any deviation from the wording used in the commentaries to the Commission's conclusions on identification of customary international law might be misinterpreted. Another option would be to reproduce the exact wording of Article 59 of the Statute, which would involve inserting the words "and in respect of that particular case" after "except between the parties". The entire string of words, "no binding force except between the parties and in respect of that particular case", could then be enclosed in quotation marks.

Mr. Akande, supported by **Mr. Jalloh**, said that, as the first sentence began with a reference to the language of Article 38 (1) (*d*) of the Statute, it would be confusing to include a quotation from Article 59 in the same sentence.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the simplest solution would be to insert the words "and in respect of that particular case" after "except between the parties" and not to use quotation marks.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Forteau said that, towards the end of the paragraph, the words "and statements made by States" should be inserted after the phrase "relevant resolutions adopted by international organizations or at intergovernmental conferences" to align the materials for analysis referred to with those mentioned in paragraph (3) of the commentary to draft conclusion 7.

Mr. Patel said that he wished to know whether the phrase "courts and tribunals" was being used in the first sentence to refer to national courts and tribunals, as paragraph 2 of draft conclusion 8 referred only to national courts and not to national tribunals.

Mr. Paparinskis said that, in the language in brackets in the second sentence, the word "primarily" should be inserted between the words "including" and "the extent" and the phrase "an examination" should be changed to "a thorough examination" to bring the wording into line with paragraph (3) of the commentary to conclusion 13 of the conclusions on identification of customary international law, from which the language of paragraph (6) significantly borrowed and from which, in the cases that he had mentioned, there was no reason to depart. Because the word "examination" would be qualified with the adjective "thorough", the word "analysis" should be qualified with a synonym, such as "comprehensive". In addition, at the end of the paragraph, the words "case law" should, as in paragraph (5) of the commentary to draft conclusion 7, be replaced with "decisions of courts and tribunals". The phrase "the reception of the decision", which appeared earlier in the same sentence, should be changed to "their reception".

Mr. Asada said that, in the first sentence, the phrase "the existence or otherwise" should be replaced with "the existence or lack thereof", in line with the change made to paragraph (2) of the commentary to draft conclusion 8.

Mr. Jalloh said that he was sceptical of the need to align the language of paragraph (6) with that used in the commentaries to the conclusions on identification of customary international law, as the specifics of the topic at hand might require some deviation from the language of the conclusions. Furthermore, the phrase "case law" conveyed more clearly than

"decisions of courts and tribunals" the idea that the Commission was referring to a body of judicial decisions.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the reference to courts and tribunals in the first sentence was a general one that related to both paragraphs 1 and 2 of draft conclusion 8. He suggested that paragraph (6) should be amended by adding the words "and statements made by States" after "intergovernmental conferences", inserting the word "primarily" between the words "including" and "the extent", replacing the words "case law" with "decisions of courts and tribunals", and replacing the word "otherwise" with "lack thereof".

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Patel said that he wished to know whether the International Court of Justice had, as indicated in the third sentence, expressly mentioned Article 38 (1) (*c*) of its Statute in the cases cited in footnote 34.

Mr. Paparinskis said that, in the second sentence, the phrase "case law" should be replaced with the word "decisions", which was a more internationally accepted term and in line with Article 38 (1) (*d*) of the Statute.

Ms. Okowa, supported by **Mr. Jalloh**, said that, in the fourth sentence, the phrase "other international criminal tribunals" should be replaced with "*ad hoc* criminal tribunals", the term of art for criminal tribunals not included in the other categories mentioned in the sentence. In the fifth sentence, the word "any" should be inserted before the phrase "other arbitral tribunals".

Mr. Akande said that, while he could not speak to all the cases mentioned in footnote 34, he could say that the International Court of Justice had made reference to Article 38 (1) (*c*) in paragraph 17 of its judgment in *North Sea Continental Shelf*. However, it was his understanding that footnote 34 related to the proposition contained in the third sentence as a whole: that the Court had mentioned Article 38 (1) (*c*) on only a few occasions but had, on other occasions, referred to several general principles of law. It should not be understood that the Court had referred to Article 38 (1) (*c*) in all the cases cited in the footnote.

Mr. Forteau said that a footnote providing examples of cases where the Court had expressly mentioned Article 38 (1) (*c*) should be inserted in the third sentence, after the words "on only a few occasions".

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, as Mr. Akande had noted, the references contained in footnote 34 related to the third sentence as a whole. He agreed that, in the second sentence, the words "case law" should be replaced with "decisions" and that, in the fourth sentence, "other international criminal tribunals" should be replaced with "*ad hoc* international criminal tribunals". He would provide the secretariat with the relevant text for the footnote proposed by Mr. Forteau.

Paragraph (7), as amended, was adopted on that understanding.

Paragraph (8)

Mr. Savadogo said that certain changes should be made to the French version of paragraph (8) in order to align it with the English version – for example, in the first sentence, the word "*jugements*" should be replaced with "*arrêts*" – and improve it stylistically. He would provide the secretariat with suggestions in writing.

Paragraph (8) was adopted on that understanding.

Paragraph (9)

Mr. Jalloh said that the descriptions of the different levels of court should be more comprehensive. In particular, some "national" courts, such as the Residual Special Court for Sierra Leone, were neither part of the domestic legal order, nor were they covered by the

description of “hybrid” courts. The word “some” should therefore be included before “‘hybrid’ courts and tribunals”.

Mr. Patel said that there were in fact three levels of courts: international courts, such as the International Court of Justice; national courts, such as supreme courts; and the level described by Mr. Jalloh, which fell into neither of those two categories.

Mr. Reinisch said that the words “in the present draft conclusions” in the second sentence made it clear that the descriptions pertained only to the present text. The addition of the word “some” as suggested by Mr. Jalloh, would ensure that all courts and tribunals were taken into account.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

Commentary to draft conclusion 9 (Teachings)

Paragraph (1)

Mr. Paparinskis proposed that, in the first sentence, after the words “role of teachings”, the French and Spanish terms for “teachings” – “*la doctrine*” and “*la doctrina*” – should be included in parentheses.

Mr. Jalloh proposed that, in line with the United Nations policy of multilingualism, the equivalent terms in Arabic, Chinese and Russian should also be included.

Mr. Huang, after a discussion in which **Mr. Paparinskis**, **Mr. Patel**, **Mr. Grossman Guiloff**, **Mr. Jalloh**, **Mr. Zagaynov**, **Mr. Ouazzani Chahdi** and **the Chair** participated, said that, if the equivalent terms for “teachings” in the other official languages was to be included in parentheses, the same would have to be done when other specific terms were mentioned, and in all the different language versions. The fact that all the Commission’s output existed in each of the official languages meant that the approach proposed was unnecessary.

Paragraph (1) was adopted.

Paragraph (2)

Mr. Forteau said that the reference in the second sentence to “relevant rules in the international legal system and relevant resolutions adopted by international organizations or at intergovernmental conferences” should also mention the relevant rules adopted by States. At the beginning of the final sentence, the words “Use of” should be inserted before “Teachings”.

Ms. Okowa said that the phrase “*in foro domestico*” in the second sentence should be replaced with its English equivalent.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the Latin expression was generally used in the Commission’s texts, but “a principle *in foro domestico*” could equally well be rendered in English, as “a principle common to the various legal systems of the world”, in line with the wording of draft conclusions 4 and 5.

Mr. Forteau said that the paragraph highlighted the distinction between the two categories of general principles. He suggested that wording from draft conclusion 3 (a) should be used instead of the Latin expression, so that the phrase would read, “and the compatibility with the international legal system of principles that are derived from national legal systems”.

Ms. Okowa proposed that the phrase should read “and the compatibility of a principle in domestic law with the international legal system”.

Mr. Sall said that the words “the compatibility of a principle *in foro domestico*” should be rendered as “the compatibility of a principle in the domestic legal system” [*un principe applicable dans le for domestique*].

The Chair said that the intention was to refer to the first category of general principles – those common to the different legal systems – in contrast to the general principles within the international legal system, rather than to their application in domestic courts. She took it that the members agreed to replace the Latin expression "*in foro domestico*" with the words "common to the various legal systems of the world".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Savadogo suggested that, in the French text, the words "*Il faut être prudent*" should be replaced with the words "*Il convient d'être prudent*".

Mr. Forteau suggested that, in the first sentence, the words "and content" should be added after the words "the existence".

Paragraph (3) was adopted with those amendments.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Ms. Okowa, noting that the value of the output of each international body engaged in codification needed to be carefully assessed in light of the expertise of the body concerned, but that only two bodies were mentioned by name, said that, in the interests of completeness, a footnote listing other international codification bodies should be inserted at the end of the second sentence.

Mr. Patel said that the International Committee of the Red Cross should be included in the list in the second sentence and, consequently, the word "collective" should be deleted.

Mr. Jalloh said that the word "private" in the first sentence should be deleted, as some international codification bodies, including some regional ones, were not of a private character. Furthermore, it did not appear in a similar reference in paragraph (5) of the commentary to conclusion 14 of the conclusions on identification of customary international law, in which a footnote referencing the Commission's own outputs had been included.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the word "private" had been used to encompass those international bodies that were neither subsidiary bodies of international organizations nor bodies set up pursuant to an intergovernmental agreement: however, if there was general support for the deletion of the word "private", he would not oppose it. The use of the word "include" in the second sentence meant that the list of bodies given was not exhaustive. The International Committee of the Red Cross was a body of *sui generis* character; he would welcome members' views on whether it should be mentioned in the draft conclusion on teachings.

Mr. Grossman Guiloff expressed concern about deleting the word "private", which accurately characterized the two bodies specifically mentioned in paragraph (5). Their work was clearly of value; and, in any case, numerous qualifiers were included to ensure that any output used was relevant and valuable in a given context. If deleting the word "private" was intended to exclude the work of the Institute of International Law and the International Law Association from the category of teachings, he would find it problematic.

The Chair said that, if the word "private" was retained, it would be illogical to add a footnote referring to public codification bodies such as regional international law commissions or to mention the International Committee of the Red Cross. As Mr. Grossman Guiloff had pointed out, the collective bodies given as examples were both private in nature; it would therefore be illogical to delete the word "private", especially in view of the caveats set out later in the paragraph.

Mr. Jalloh suggested that, even if the word "private" was deleted, the nature of the bodies referred to in the paragraph would be evident from the two examples given. The fact that the output of the Commission was dealt with separately, in paragraph (6), should also

serve to highlight the distinction. The various caveats mirrored those found in paragraph (5) of the commentary to conclusion 14 of the conclusions on identification of customary international law and would also inform work on the topic of subsidiary means for the determination of rules of international law.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, in the commentary to conclusion 14 of the conclusions on identification of customary international law, the work of the Commission was referred to in the general commentary to Part Five, of which conclusion 14 formed part; it had therefore been considered useful to include a footnote in paragraph (5) of the commentary to conclusion 14 directing the reader back to the general commentary. In the present case, however, there was no general commentary and the output of the Commission was discussed in the very next paragraph, as one of several subsidiary means, so he saw no need for such a footnote. Neither did he consider it necessary to include a footnote listing other collective bodies, as the list in paragraph (5) was non-exhaustive. Given the historical context and development of codification, he had thought it important to refer to “private international bodies”, to distinguish them from the Commission, but he could accept the deletion of the word “private” if the Commission so decided.

Mr. Grossman Guiloff reiterated his view that it would be better to retain the word “private”, which reflected the reality of the situation. There was nothing to be gained by deleting it. The commentary to draft conclusion 9 considered a number of types of teachings in turn, with increasingly strict caveats on their use, as appropriate.

Mr. Reinisch, expressing support for keeping the phrase “private international bodies” in paragraph (5), said that deleting the word “private” was likely to mean that the wording of paragraph (6) would also need some alteration, in particular the phrase “among other subsidiary means”.

Mr. Jalloh said that he would not object to retaining the word “private”; however, he strongly rejected the implication that the intent of paragraph (6) was to classify the work of the Commission as “teachings”. In his work as Special Rapporteur for the topic of subsidiary means for the determination of rules of international law, he would certainly not proceed on that basis. For the reasons set out in paragraph (6), the output of the Commission, as a State-created body with a unique mandate and functions and a close relationship with States, stood apart from teachings. The commentary to conclusion 14 of the conclusions on identification of customary international law was structured differently, with a cross reference to a separate discussion of the significance of various materials.

The Chair said that, when opinions seemed to be equally divided, the Commission’s usual practice was to leave the text unamended. She would like to know if the Commission could agree to adopt paragraph (5) as originally drafted.

Mr. Patel sought clarification as to whether reference would be made to the International Committee of the Red Cross.

The Chair said that such a reference would be incompatible with the paragraph as it stood, although the non-exhaustive list of international bodies left the matter open to interpretation. She took it that the Commission agreed to adopt paragraph (5) unamended.

Paragraph (5) was adopted.

Paragraph (6)

Mr. Vázquez-Bermúdez (Special Rapporteur) expressed strong support for the comments already made by Mr. Jalloh regarding paragraph (6) and the status of the Commission’s work and output. In discussing the then draft conclusions on identification of customary international law, he had opposed the notion that the Commission’s output constituted teachings, and in the present commentary he had used the introductory phrase “among other subsidiary means” specifically to differentiate the two. In the absence of a general introductory commentary, the content of paragraph (6) seemed most logically placed at the end of the commentary to draft conclusion 9.

Mr. Forteau, echoing that view, suggested that inserting the words “beyond teachings” before the phrase “special attention is warranted” might clarify matters;

alternatively, paragraph (6) could be deleted, so that the Commission avoided taking any position on the issue while work on the topic of subsidiary means for the determination of rules of international law continued.

The Chair said that work on the topic of subsidiary means for the determination of rules of international law would have advanced by the time the draft conclusions on general principles of law were considered on second reading.

Mr. Jalloh said that his preference would be to adopt the second approach suggested by Mr. Forteau, namely, to delete paragraph (6), especially in view of the hierarchy of teachings implied by the structure of the commentary to draft conclusion 9. The explanations given in paragraph (6) made the *sui generis* nature of the Commission and its work clear. The relationship between subsidiary means for the determination of rules of international law and the various sources of international law listed in Article 38 of the Statute of the International Court of Justice would be considered under the topic of subsidiary means for the determination of rules of international law. In discussions within the Sixth Committee of the General Assembly in 2022, a number of States had expressed the view that it would no longer be appropriate for the issue of teachings and judicial decisions to be considered under the present topic in light of the decision to add the topic of subsidiary means for the determination of rules of international law to the Commission's programme of work. Deleting paragraph (6) would give the Commission more leeway to consider the nature of its own output within the context of that topic.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that it had been agreed during discussions in the Drafting Committee to refer to the Commission's contribution to the determination of general principles of law in the commentaries to the draft conclusions on the present topic. Without prejudging the outcome of work on the topic of subsidiary means for the determination of rules of international law, it was his view that deleting paragraph (6) would send the wrong signal by implying that the Commission had no contribution to make.

Mr. Savadogo suggested that, if paragraph (6) was retained, it should be split in two after the words "and its codification", for ease of reading.

Mr. Grossman Guiloff said that, while he had initially been of the same opinion as the Special Rapporteur, he was now inclined to agree with Mr. Forteau and Mr. Jalloh that the paragraph should be deleted, partly because the topic of subsidiary means for the determination of rules of international law had been added to the Commission's programme of work, but also to avoid any appearance of self-promotion on the part of the Commission.

Mr. Forteau said that no analogous paragraph appeared in the commentary to conclusion 14 of the conclusions on identification of customary international law; its inclusion in the present commentary therefore seemed to represent a backward step by not clearly separating discussion of the Commission's output from consideration of the various types of teachings. He would prefer to see the paragraph deleted. If, however, it was retained, altering the opening phrase to read "Beyond teachings, special attention is warranted, among other subsidiary means, as regards the output of the Commission …" might serve to highlight the distinction and avoid any confusion.

Mr. Jalloh said that there was no need to retain paragraph (6) of the present commentary for the sake of consistency with the commentaries to the conclusions on identification of customary international law, since a different approach had been taken in the work on that topic. It should also be borne in mind that paragraph (2) of the general commentary to Part Five of the conclusions on identification of customary international law was carefully couched to refer to the value that other bodies ascribed to the Commission's work.

While the Drafting Committee might have agreed that the Commission's contribution to the determination of general principles of law should be mentioned in the present commentaries, subsequent developments, such as the addition of the topic of subsidiary means for the determination of rules of international law to the Commission's programme of work, must be taken into account. He maintained the view that the best approach in the circumstances would be to delete paragraph (6). If it was to be retained, however, he would suggest the addition of a new sentence at the end, to read: "This understanding is without

prejudice to the work of the Commission on the topic of subsidiary means for the determination of rules of international law." He also supported the amendment suggested by Mr. Forteau.

Mr. Reinisch said that making multiple changes to the wording of the paragraph might in fact have the effect of prejudging work on the topic of subsidiary means for the determination of rules of international law.

The Chair, supported by **Ms. Oral**, said that the Drafting Committee had indeed agreed that the issue should be addressed in the present commentaries; the amendments proposed appeared to be in line with the Commission's work on the topic of subsidiary means for the determination of rules of international law and would not, in her opinion, prejudge the outcome thereof. If necessary, further changes could be made when the draft conclusions were considered on second reading. She therefore suggested that the paragraph should be adopted with the amendments proposed during the discussion.

Mr. Ruda Santolaria, supported by **Mr. Ouazzani Chahdi**, expressed support for retaining paragraph (6) but amending it as proposed by Mr. Forteau, Mr. Jalloh and Mr. Savadogo.

Paragraph (6), as amended, was adopted.

Commentary to draft conclusion 10 (Functions of general principles of law)

Mr. Patel, by way of a general comment, said that the nature of the functions of general principles of law must emerge clearly from the commentary to draft conclusion 10. They played a subsidiary role, principally in interpretation, in filling gaps and in situations of *non liquet*. As drafted, the commentary gave the impression that general principles of law outweighed custom and even treaties. Given that the issue of norm creation in international law was being addressed, the will and consent of States was vital, even with respect to general principles of law. In due course he would make specific comments on individual paragraphs of the commentary.

Paragraph (1)

Paragraph (1) was adopted.

The meeting rose at 6 p.m.