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Seventy-fourth session (second part)

Provisional summary record of the 3646th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 26 July 2023, at 10 a.m.

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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. Oyarzábal
	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 10.05 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 of its draft report, as contained in document A/CN.4/L.976/Add.1, beginning with paragraph (2) of the commentary to draft conclusion 10.

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

Paragraph (2)

Mr. Patel said that he was somewhat unsettled by the proposition, set forth in paragraph (2), that general principles of law performed the same function as treaties and customary international law and were applicable in all parts of the world. The case law of the International Court of Justice showed that it was reluctant to invoke general principles and would even decline to do so unless no other rules of international law existed. Furthermore, according general principles greater importance than customary norms or even placing them on the same level would be contrary to the foundational norm of State consent. The particular function that general principles performed thus needed to be made very clear.

Mr. Zagaynov said that, since the Commission had debated those issues at previous sessions and the text of draft conclusion 10 had been adopted, the members should look to the wording used therein for guidance. It could be inferred *inter alia* from paragraph 1 of the draft conclusion that there were differences between the functions of general principles of law and those of other sources of international law. He suggested, therefore, that the first sentence of paragraph (2) should be amended to state that the functions of general principles of law were "in principle, similar to" rather than "not, in principle, different from" those performed by other sources of international law, which would more accurately reflect the content of the draft conclusion itself.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

Mr. Zagaynov said that he had difficulties with the manner in which paragraph (6) was formulated, especially the second sentence. He had particular concerns about the notion that general principles existed in parallel with similar or identical principles of customary international law or general international law. His view was that, once general principles of law started to be applied by States, they were transformed into customary norms. However, the Commission had taken a different approach, and he would work within that framework. Nevertheless, he struggled to see why the proposition put forward in the second sentence – specifically, that general principles of law were better suited to contributing to the coherence of the international legal system than other sources of international law – should be correct.

Taking the principle of *pacta sunt servanda* as an example, he recalled that the Special Rapporteur, in his second report (A/CN.4/741), had treated the principle as falling within both categories of general principles of law; specifically, general principles derived from national legal systems and general principles formed within the international legal system. If the principle was understood to have been derived from national legal systems, a detailed analysis of national legal systems and the manner in which the principle was applied within them would be needed. Since the content of that principle in national legal systems was quite different from its content in the international legal system, it was not clear how the principle would contribute to the coherence of the international legal system more directly than the customary international law principle of *pacta sunt servanda*, which was based on the clear criteria of State practice and *opinio juris*. The principle was also unlikely to contribute in a

more direct manner to coherence if it was understood to have been formed within the international legal system, given the lack of conceptual clarity in that regard and the fact that a number of States did not agree that such a second category of principles existed.

On that basis, he proposed that the second sentence of paragraph (6) should be deleted in order to avoid comparing general principles of law to other sources of international law in terms of their respective contributions to the coherence of the international legal system. The paragraph should simply state that general principles of law contributed to that coherence.

Mr. Patel said that, although *pacta sunt servanda* was a frequently cited example of a general principle, the assertion that all international agreements across all time periods were binding was questionable. In colonial times and in the period immediately following decolonization, for example, international agreements had often been unequal in form and content and in terms of the process by which they had been concluded; the element of mutual consent and acceptance had been lacking. Another principle often cited was good faith, but it was not in itself a source of obligations; rather, it served to inform and shape the observance of existing rules of international law. He suggested, therefore, that *pacta sunt servanda* and good faith should be removed from the list of examples provided in the last sentence of paragraph (6). To replace them, the principle of coexistence and the principle of equality and mutual benefit, which had shaped great civilizations in Asia, could be added. Otherwise, the list looked very Western Europe-oriented.

Mr. Forteau, expressing support for Mr. Zagaynov's suggestion that the second sentence should be deleted, said that the sentence seemed to conflate sources with rules. The quotations provided in footnote 36 offered very clear explanations that precluded the need for any similar explanation in the paragraph itself. However, the last quotation given in the footnote should be removed, since the reference to, for example, "intra-systemic convergence in the constellation of international courts and tribunals" was extremely confusing.

Mr. Jalloh said his understanding was that the Commission had agreed in earlier discussions that general principles of law performed a particular function that must be understood in relation to the functions of other sources of international law and that draft conclusion 10 was addressing that relationship. While Mr. Zagaynov and Mr. Forteau appeared to be taking issue with the manner in which the relationship was expressed in paragraph (6), in his view the language used added value to and followed logically from the text of the draft conclusion itself. Furthermore, the examples provided in the final sentence of the paragraph were relevant and appropriate in the light of previous debate, and added value. He was thus in favour of maintaining the current text, with one minor adjustment, namely the replacement of the phrase "rules of the other sources" at the start of the second sentence with "rules derived from the other sources". He was also in favour of maintaining the full text of footnote 36, as it added clarity.

Mr. Grossman Guiloff said that, while Mr. Zagaynov and Mr. Forteau had raised interesting points, the text drafted by the Special Rapporteur reflected the agreements reached in earlier discussions. In addition, the language used in the paragraph was very tentative – the last sentence, for instance, stated that general principles of law "may" include the examples that followed – and thus allowed for differing interpretations. With regard to the list of examples, the Commission should take the opportunity to provide specific examples of relevant behaviour whenever possible. Although he saw nothing controversial in the notion that general principles could be derived from a number of different sources, the purpose of paragraph (6) was not to analyse their derivation and how they differed from other sources but to recognize their contribution to the coherence of the international legal system. He was therefore in favour of maintaining the paragraph as currently worded. He was also in favour of maintaining footnote 36 in full, as he found the phrase highlighted by Mr. Forteau helpful.

Mr. Forteau said that, whereas draft conclusion 10 (2) and the first sentence of paragraph (6) stated that general principles of law contributed to the coherence of the international legal system, the second sentence of paragraph (6) introduced a different idea, specifically that general principles of law contributed to coherence more directly than other sources of international law. That proposition went too far. In his view, instruments such as the United Nations Convention on the Law of the Sea and the Charter of the United Nations,

for example, contributed more to coherence than the principle of good faith, and that was why the second sentence should be deleted.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the notion that general principles of law contributed to the coherence of the international legal system had been agreed upon after lengthy discussions. The purpose of the second sentence was to explain the scope and nature of that contribution, while the third sentence provided examples and context. The second sentence should not and could not be read in the manner suggested by Mr. Forteau; the language used provided no absolute affirmation and allowed for flexibility of interpretation, as Mr. Grossman Guiloff had noted. Nonetheless, in order to accommodate the concerns raised, he suggested that the sentence should be revised to read: "While rules derived from the other sources of international law also contribute in some way to the coherence of the international legal system, certain general principles appear to be aimed at performing this function in a more direct manner." He was in favour of retaining footnote 36 in full, since it provided useful context. Lastly, in his view, the examples of general principles given in the last sentence of paragraph (6) were useful and were set forth in a flexible manner. However, he would be happy to add the further examples proposed by Mr. Patel.

The Chair, speaking as a member of the Commission, suggested that the additional references should be to the principle of coexistence and the principle of sovereign equality, since "equality" without a qualifier could be interpreted in various ways, and that they should be inserted after the reference to *pacta sunt servanda*.

Mr. Patel specified that the first additional reference should be to the principle of peaceful coexistence.

Mr. Zagaynov suggested that, while the Special Rapporteur's proposed reworking of the second sentence would bridge the gap between the two points of view, the deletion of the words "in some way" might be helpful.

Mr. Forteau said that an additional reference to the principle of coexistence could bring imbalance to the text. If such a reference was added, the Commission should also refer to the duty of States to cooperate, which, in General Assembly resolution 2625 (XXV), was presented as a counterbalance to the principles of sovereign equality and coexistence. Any attempt to extend the list of examples could thus prove an endless exercise.

Mr. Oyarzábal said that his preference was to leave the list of examples as drafted by the Special Rapporteur. He agreed that any extension would be a potentially dangerous undertaking. The Commission should be careful not to stray into substantive discussions as to whether or not the examples proposed were general principles of law. Any additions suggested would heighten the risk of disagreement, as well as the risk of imbalance highlighted by Mr. Forteau.

Mr. Jalloh said that he supported the Special Rapporteur's proposed amendment to the beginning of the second sentence. He agreed with Mr. Zagaynov that the words "in some way" should be deleted and with Mr. Oyarzábal that it was not appropriate to reopen the debate about specific general principles of law during the adoption of the commentaries. For that reason, provided that Mr. Patel did not strongly object, the list of examples proposed by the Special Rapporteur should remain unchanged.

Mr. Nesi said that the first clause of the second sentence, which began with the words "While rules" and ended with the phrase "international legal system", was not entirely necessary and could perhaps be deleted. With regard to the addition of examples to the list in the final sentence of the paragraph, there was a difference between "instrumental" principles and "substantive" principles. While the principles of *pacta sunt servanda*, good faith, *lex specialis* and *lex posterior* were surely instrumental, principles such as respect for human dignity, elementary considerations of humanity, sovereign equality, peaceful coexistence and cooperation were all substantive in nature. The Commission should limit the examples provided in the list to instrumental principles, leaving only the principles of *pacta sunt servanda*, good faith, *lex specialis* and *lex posterior*. He was in favour of retaining footnote 36 unchanged, since the Commission had a responsibility to avoid contributing to the fragmentation of international law, and the contents of the footnote provided a good explanation of why it had to do so.

Mr. Ouazzani Chahdi said that the words "in a more direct manner" should be deleted in order to avoid the implication that there was a hierarchy among the sources of international law.

Mr. Asada said he agreed that the Commission should carefully consider whether it was necessary to add more examples to the list in the final sentence of the paragraph, since readers of the commentaries might infer from a principle's inclusion in that list that there was consensus among the Commission members with regard to that principle. He had no issue with adding the principle of sovereign equality to the list, since it was mentioned in Article 2 of the Charter of the United Nations; peaceful coexistence, however, was a rather historical concept, whose inclusion in the list might not be appropriate.

Mr. Reinisch said he agreed that the list should not be overloaded with examples. He seconded Mr. Nesi's point that, since paragraph (6) addressed the contribution of general principles of law to the coherence of the international legal system, only principles that were "instrumental", to use Mr. Nesi's term, should be included therein. The principles of *pacta sunt servanda*, good faith, *lex specialis* and *lex posterior* fulfilled that instrumental function of fostering coherence and avoiding fragmentation.

Mr. Grossman Guiloff said that it was not necessary to add more principles to the list, which was intended merely to provide examples and was not meant to be exhaustive. However, he did not fully support the proposal to remove the principles of respect for human dignity and elementary considerations of humanity from the list. They also contributed to the coherence of the international legal system, even if they were not instrumental. In the absence of a clear explanation as to why those principles should be omitted, he was in favour of retaining the list unchanged.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, in the light of the discussion thus far, he wished to propose that the second sentence of the paragraph should be amended to read: "While rules derived from the other sources of international law also contribute to the coherence of the international legal system, certain general principles appear to be aimed at performing this function in a more direct manner." The rest of the paragraph would remain unchanged.

Mr. Patel said that he had strong reservations about the Special Rapporteur's proposal in respect of the list of examples. Peaceful coexistence was not a "concept" but a well-established general principle of law. The general principle of equality and mutual benefit was similarly well established. If some members of the Commission took issue with the inclusion of those principles in the list, his preference would be to remove the list entirely. He also had reservations about the principle of good faith, and he had clearly stated his position with regard to the principle of *pacta sunt servanda* and agreements that had been concluded during the colonial period. *Pacta sunt servanda* should not be included in any list of examples of general principles of law.

The Chair said she wished to recall that the list of examples was not intended as a full list of general principles but rather as a tentative list of examples of general principles that contributed to the coherence of the international legal system. While Mr. Patel's position would be noted in the summary record of the meeting, in the light of the preceding discussion it was her understanding that there was consensus on amending paragraph (6) along the lines proposed by the Special Rapporteur.

Paragraph (6) was adopted on that understanding.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Mr. Paparinskis said that the references in footnote 37 to the cases of *Total S.A. v. Argentine Republic*, *El Paso Energy International Company v. The Argentine Republic* and *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India* should be deleted, since there was some doubt as to whether the arbitral tribunals of the International Centre for Settlement of Investment Disputes, in the first two cases, and the Permanent Court

of Arbitration, in the third case, had conducted a wide and representative analysis of national legal systems, which would satisfy the criteria described in draft conclusion 5, in their engagement with general principles of law.

Paragraph (8) was adopted with that amendment to footnote 37.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

Paragraph (11)

Mr. Patel said that he had strong reservations about the notion expressed in the first sentence of the paragraph, namely that general principles of law could serve as the basis for obligations, on the ground that the consent theory and the will theory of rights precluded that possibility. Obligations could not be imposed on all States purely on the basis of a general principle of law. The text should be amended accordingly.

In the list of examples of general principles that could give rise to substantive rights and obligations incumbent upon States – examples that appeared to be skewed towards particular continents – he also had serious reservations about the inclusion of the prohibition of crimes under international law. Footnote 45, which explained the inclusion of that principle in the list, referred to the International Covenant on Civil and Political Rights; however, several States in Asia were not parties to that Covenant. No obligation based on the principle of the prohibition of crimes under international law could be imposed on countries that had not given their consent to be bound by such an obligation. Moreover, the inclusion of "foundlings' right to be presumed to have been born of nationals of the country in which they are found" was based on a single decision of the Philippines Supreme Court; nationality law in the United States of America took the exact opposite approach to the matter. That principle could therefore not be given as an example of a general principle of law. In view of the Commission's influence in the field of international law, it must be very careful when enumerating general principles of law. It should not list contested notions, or principles that were accepted only in certain jurisdictions, as examples of general principles.

Mr. Jalloh said that he appreciated Mr. Patel's concern that the Commission's work and the examples it provided in support of its findings should be broadly representative. However, the finding that general principles of law could serve as the basis for primary rights and obligations was based on a discussion held in the Commission at its seventy-third session and was reflected in the text of draft conclusion 10 itself. That particular debate could not be reopened in the discussion on the commentary to the draft conclusion, which had already been provisionally adopted. In fact, it was important to explain the finding in question in the commentary, so that States could understand the logic of the Commission's approach. Mr. Patel should rest assured that the draft conclusions and the commentaries were provisional and that States would be given ample opportunity to provide input on them over the coming year.

Mr. Forteau said that the debate as to whether general principles of law could serve as the basis for primary rights and obligations had already been closed, and the outcome of that debate was reflected in the text of the draft conclusion. However, the list of examples of general principles provided in paragraph (11) was somewhat problematic. For example, the principle that attribution of territory *ipso facto* carried with it the waters appurtenant to the territory attributed was at the heart of the dispute between Spain and the United Kingdom concerning Gibraltar. To be on the safe side, the clause introducing the list of examples should be amended to read: "*Parmi ces principes généraux, des instruments juridiques et des décisions judiciaires ont évoqué*" [Legal instruments and judicial decisions refer, as examples of such general principles, to]. With that amendment, it would be clear that the Commission was merely giving examples of general principles referred to in legal instruments and judicial decisions and was not expressing its endorsement of any of the principles listed.

Mr. Ruda Santolaria said that substantive points on which consensus had already been achieved could not be reopened for debate during the adoption of commentaries. He supported Mr. Forteau's proposed amendment, which could assuage the concerns expressed by other members of the Commission.

Ms. Mangklatanakul said that she shared Mr. Patel's concerns about some of the examples of general principles of law given in paragraph (11). For example, the reference to principles underlying the Convention on the Prevention and Punishment of the Crime of Genocide was not sufficiently specific. Likewise, elementary considerations of humanity and freedom of maritime communication were not clearly defined.

Mr. Akande said that he too was concerned about the list of examples provided in the paragraph. For that reason, he seconded Mr. Forteau's proposed amendment.

Mr. Jalloh said that he supported Mr. Forteau's proposed amendment. The general principles of elementary considerations of humanity and freedom of maritime communication were referred to in the 9 April 1949 judgment of the International Court of Justice in the *Corfu Channel case*. The relevant part of that judgment was cited in paragraph 44 of the Special Rapporteur's third report on the topic (A/CN.4/753).

Mr. Patel said that he agreed with Mr. Forteau's proposal.

The Chair said she took it that the Commission wished to amend paragraph (11) in line with the proposal made by Mr. Forteau.

Paragraph (11) was adopted on that understanding, subject to verification by the secretariat of an editorial point in footnote 41.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

Mr. Forteau said that the first clause of the sentence should be amended to read "*Entre autres règles secondaires qui ont pu être considérées comme découlant des principes généraux du droit, on peut citer*" [Secondary rules that have been considered as deriving from general principles of law include]. In the list of examples that followed, the "clean hands" doctrine was mentioned. However, in its 30 March 2023 judgment in the case of *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, which was cited in footnote 52, the International Court of Justice explicitly stated that it had never held that the "clean hands" doctrine constituted a general principle of law. The reference to the "clean hands" doctrine should therefore be deleted.

Mr. Paparinskis said that he too was in favour of deleting the reference to the "clean hands" doctrine for the reason outlined by Mr. Forteau. The new language proposed by Mr. Forteau could be revised further to read "Secondary rules of international responsibility that have been considered to be based on general principles" to provide some explanation of what secondary rules were.

Mr. Patel proposed that the reference to the "obligation to pay moratory or compensatory interests" should also be deleted, in addition to the reference to the "clean hands" doctrine.

Mr. Cissé said that the reference to the "clean hands" doctrine could helpfully be replaced with a reference to the general principle that domestic remedies must be exhausted before a case could be brought before an international court.

Mr. Zagaynov, expressing support for Mr. Patel's proposal to delete the reference to the "obligation to pay moratory or compensatory interests", recalled that, when the Commission had started work on general principles of law, the members had agreed to avoid compiling lists of such principles, including in the commentary.

Mr. Akande said that, alternatively, the opening clause could be revised to read "International tribunals have considered that the following principles are secondary rules of responsibility derived from general principles of law". That language was simply factual and could not be interpreted as an endorsement or otherwise of the principles listed.

The Chair, speaking as a member of the Commission, said that the draft conclusions themselves did not include a list of general principles of law. Any rules listed in the commentary were included for illustrative purposes only.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he supported the new language proposed by Mr. Forteau, as subsequently amended by Mr. Paparinskis. However, the alternative wording suggested by Mr. Akande struck him as an even simpler solution.

Mr. Patel said that the commentaries contained over two dozen examples of general principles of law. As Mr. Oyarzábal had pointed out, it would be unwise to list too many examples, since some of them were controversial. Given the sensitivity of the matter, he proposed that the Special Rapporteur should add a statement qualifying the nature of all those examples.

Mr. Grossman Guiloff said that, instead of deleting the reference to the "clean hands" doctrine altogether, the Special Rapporteur could consider amending footnote 52, in light of the point raised by Mr. Forteau, to indicate that, although the doctrine had not been applied in any recent cases, it had not been rejected outright by international courts. If necessary, he could provide a list of older arbitration cases in which it had been successfully applied.

Mr. Akande said that he wished to revise his initial proposal so that the first sentence would read: "International tribunals have considered that some secondary rules of responsibility are derived from general principles of law." The second sentence would then begin "For instance".

Footnote 48 did not currently contain a direct reference to an international court case in which the principle of *force majeure* as a circumstance precluding wrongfulness had been established as a secondary rule. To remedy that oversight, he proposed that one or more of the references appearing in footnote 357, pertaining to paragraph (8) of the commentary to article 23, of the Commission's articles on responsibility of States for internationally wrongful acts should be added to footnote 48.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, if Mr. Akande's revised proposal enjoyed the general support of members, he saw no reason why it could not be accepted. He likewise had no objection to the proposed expansion of footnote 48, provided that the reference to paragraph (8) of the commentary to article 23 of the Commission's articles on State responsibility was retained.

Ms. Ridings proposed that the phrase "principles on succession of individuals to determine reparation", which was unclear, should be replaced with "principles on succession of individuals for the purposes of compensation", which was closer to the language used in the Inter-American Court of Human Rights judgment in *Aloeboetoe v. Suriname.*

Mr. Forteau said that, although he was still in favour of deleting the reference to the "clean hands" doctrine, if it was to be retained, further supporting references would need to be added to footnote 52, which should also expressly mention that, in *Certain Iranian Assets*, the International Court of Justice had stated that the argument based on the "clean hands" doctrine had only rarely been upheld by the bodies before which it had been raised and that the Court itself had never held that the doctrine in question was part of customary international law or constituted a general principle of law.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that Mr. Akande's proposed reformulation of paragraph (13) would address Mr. Patel's concern about the need to qualify the nature of the examples of general principles of law cited in the commentary. He was not opposed to the addition, in footnote 52, of a concise explanation of the position taken by the International Court of Justice on the "clean hands" doctrine in its judgment in *Certain Iranian Assets*.

Mr. Akande said that, like Mr. Forteau and Mr. Paparinskis, he would prefer to delete the reference to the "clean hands" doctrine altogether, firstly because the list contained in the paragraph was not exhaustive, and secondly because, even though the doctrine had been cited by other tribunals, the International Court of Justice, in its judgment in *Certain Iranian Assets*, had explained that it had "always treated the invocation of 'unclean hands' with the utmost caution", supporting its position by stating that the International Law Commission had "declined to include the 'clean hands' doctrine among the circumstances precluding wrongfulness" in the articles on State responsibility. Therefore, to include a reference to that

doctrine so soon after the Court had issued its judgment in *Certain Iranian Assets* could give the impression that the Commission was contradicting the Court's position.

Mr. Grossman Guiloff said that he would appreciate clarification as to whether, in its 2023 judgment in *Certain Iranian Assets*, the International Court of Justice had rejected the "clean hands" doctrine as a rule of customary international law or as a general principle of law. That distinction was important, as the Inter-American Court of Human Rights and other regional tribunals continued to apply that doctrine.

The Chair said she took it that the Commission wished to accept the amendments proposed by Mr. Akande and Ms. Ridings and to delete the reference to the "clean hands" doctrine.

Paragraph (13) was adopted on that understanding, subject to its completion by the secretariat.

Paragraph (14)

Mr. Vázquez-Bermúdez (Special Rapporteur) proposed that the words "no one can be judge in its own suit" in the last sentence of the paragraph should be replaced with "no one can be judge in his own suit".

Mr. Forteau, supported by **Mr. Sall**, proposed, for the sake of clarity, that the words "excess of mandate" should be replaced with "the prohibition of excess of mandate", "burden of proof" with "the rule of the burden of proof", "indirect evidence" with "the admissibility of indirect evidence" and "trial *in absentia*" with "the possibility of trial *in absentia*".

Mr. Reinisch proposed that the words "no one can be judge in its own suit" should be replaced with "no one can be judge in his or her own cause". One of the cases cited in footnote 59, the *International Thunderbird Gaming* case, had been adjudicated under the North American Free Trade Agreement in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Thus, for the sake of accuracy, the words "International Centre for Settlement of Investment Disputes" at the start of the footnote should be deleted and the acronym "UNCITRAL" should be inserted before "Award" after the words "*International Thunderbird Gaming Corporation v. United Mexican States*".

Mr. Cissé, expressing support for the amendments proposed by Mr. Forteau, said that he was unsure whether the principle of "*compétence-compétence*" was usually referred to as such.

Mr. Paparinskis said that the *Abyei Area* case mentioned in footnote 57 referred not to the impermissibility of excess of mandate but to the principle of review by another body of excess of mandate. The words "review of" should therefore be inserted before "excess of mandate" and, for the sake of completeness, in footnote 57, "para. 401" should be replaced with "paras. 401–406".

Mr. Forteau said that, in paragraph (3) of the commentary to draft conclusion 1, the Commission clearly stated that the aim of the draft conclusions was not to describe the content of general principles of law but to clarify their scope and the method for their identification. He accordingly proposed that, in the last sentence of paragraph (14), the words "Other such principles include" should be replaced with "International courts and tribunals have also referred to", in order to make the sentence descriptive rather than prescriptive.

Mr. Oyarzábal said that he was unsure as to whether the principle of "trial *in absentia*" should be included in the paragraph, as it remained quite controversial. He also wondered whether the case that was cited in footnote 61 fully reflected the scope of "trial *in absentia*" as a general principle of law, if such a principle was held to exist.

The Chair said that, in the light of the suggestions made, the last sentence of paragraph (14) could read: "Other such principles referred to by international courts and tribunals include *iura novit curia*, *compétence-compétence*, review of excess of mandate, the principle that no one can be judge in his or her own cause, the rule on the burden of proof, the admissibility of indirect evidence and the possibility of trial *in absentia*." The term

"*compétence-compétence*" would need to be checked and minor amendments would be made to footnotes 57 and 59.

Paragraph (14), as amended, was adopted.

Commentary to draft conclusion 11 (Relationship between general principles of law and treaties and customary international law)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Nguyen said that the conclusions of the work of the Study Group on the fragmentation of international law fell within the category of teachings, which were not among the sources of international law listed in Article 38, paragraph 1 (*a*)–(*c*), of the Statute of the International Court of Justice. Accordingly, he proposed that the second sentence of paragraph (2) should end after the words "any hierarchy among them" and that the end of the sentence should become a new third sentence, which would read: "In addition, the conclusions of the work of the Study Group on the fragmentation of international law confirm also that no such hierarchy exists."

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted with minor drafting changes.

Mr. Forteau said that the issue of footnote 10, which pertained to paragraph (3) of the commentary to draft conclusion 3, was still pending. He proposed the addition, at the beginning of the footnote, of the words "Teachings are divided on the subject. See, in favour of this second category of general principles of law,". The text would then continue with the words "for example, L. Siorat", followed by the other examples provided. The indication that teachings were divided on the subject corresponded to what the Special Rapporteur had said at the Commission's 3611th meeting (A/CN.4/SR.3611).

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he had reviewed the summary record of that meeting and had found that his statement had been summarized inaccurately; the record reflected the opposite of what he had said. He had been referring more generally to teachings on general principles of law rather than the specific categories of general principles of law. It was true that there were some authors who considered that general principles of law were limited to those that were derived from national legal systems. Others were of the view that there could be more than two categories. Nevertheless, he could agree to add a sentence after the list of scholarly works in footnote 10. The sentence would read: "*Otros autores consideran que los principios generales del derecho están limitados a aquellos derivados de los sistemas jurídicos nacionales*" [Other authors consider that general principles of law are limited to those derived from national legal systems].

Mr. Ouazzani Chahdi said he agreed with Mr. Forteau that it was important to point out that teachings were divided on the question of whether there were different categories of general principles of law.

Mr. Jalloh said that he understood the concern raised by Mr. Forteau and Mr. Ouazzani Chahdi. In the footnote under discussion, however, it would be sufficient to adopt the Special Rapporteur's suggestion, because the Commission had accepted the existence of the second category. The footnote simply listed examples of teachings that supported the proposition in paragraph (3), namely that there was support for the second category in both jurisprudence and teachings. A reference, at the end of the footnote, to other authors who considered that general principles of law were limited to those derived from national legal

systems would clearly show that there were contrasting views on the issue. It might not be advisable to emphasize that division, given that the Commission had already taken a position on the matter. He had in the past advised caution when the Commission sent its commentaries to States, as it should not appear to be undermining its own conclusions. The Special Rapporteur's proposed addition struck an appropriate balance.

Mr. Forteau said that he did not object to the sentence proposed by the Special Rapporteur but did not think it should be placed at the end of the footnote, where it was less likely to be noticed. He believed that his own proposal was balanced, as the footnote would still give a great deal of weight to authors who were in favour of the second category. It was simply a matter of recalling that teachings were divided on the issue. That was a statement of fact that had been raised by several members of the Commission and deserved to be included explicitly at the beginning of the footnote.

Mr. Grossman Guiloff said that to say that teachings were divided on the matter would contradict the statement in paragraph (3) that the existence of a second category of general principles of law "appears to find support" in teachings. The paragraph also mentioned explicitly that some members considered that Article 38 (1) (*c*) did not encompass a second category, thus indicating that there were differences of views. The placement of the amendment proposed by the Special Rapporteur would thus not prevent readers from understanding that fact. He therefore agreed with Mr. Jalloh on the matter.

Mr. Fife said that he supported the thrust of what Mr. Forteau had suggested. There was no potential for such a factual statement to undermine the unity of the Commission. Rather, it would bolster the Commission's credibility by displaying the intellectual honesty on which the Commission depended in making proposals on the codification and progressive development of international law.

Mr. Jalloh said that, as Mr. Grossman Guiloff had pointed out, paragraph (3) stated that teachings appeared to support the existence of a second category. By way of compromise, a new footnote along the lines suggested by Mr. Forteau could be added after the third sentence, which noted that some Commission members remained sceptical of the existence of a second category of general principles or at least of its existence as an autonomous source of international law.

Mr. Forteau said that he could go along with the thrust of Mr. Jalloh's proposal. However, instead of adding a new footnote, he proposed that the words "and note that teachings are divided on this issue" should be added after the words "autonomous source of international law" at the end of that sentence.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that Mr. Jalloh's proposal could represent a solution, although he did not think there was a need to put the amendment in the commentary itself instead of in a footnote. If that was to be done, however, the wording should be modelled on that of the previous sentence and should say that teachings "appear to be divided" on the issue.

Mr. Forteau said that "teachings are divided" would be more accurate, as it was a statement of fact.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he would be willing to include the phrase proposed by Mr. Forteau in paragraph (3) of the commentary. He would also supplement footnote 10 with additional bibliographical references, as he had mentioned at an earlier meeting, and circulate the text to members.

Paragraph (3), as amended, was adopted on that understanding.

Chapter IV of the draft report, as a whole, as amended, was adopted.

The meeting rose at 1 p.m.