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International Law Commission
Seventy-third session (second part)

Provisional summary record of the 3611th meeting
Held at the Palais des Nations, Geneva, on Thursday, 4 August 2022, at 3 p.m.

Contents

Present:

Chair:	Mr. Tladi
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3 p.m.

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

Chapter VII. Succession of States in respect of State responsibility (*continued*) (A/CN.4/L.963, A/CN.4/L963/Add.1, A/CN.4/L.963/Add.2 and A/CN.4/L.963/Add.3)

The Chair invited the Commission to resume its consideration of the portion of chapter VII of its draft report contained in document A/CN.4/L.963/Add.3.

Commentary to draft guideline 6 (No effect upon attribution) (*continued*)

Paragraph (3) (*continued*)

Mr. Šturma (Special Rapporteur) proposed that paragraph (3) should read: "While the term 'attribution' in this draft guideline comes from the concept of attribution of conduct addressed in article 2, subparagraph (a), and in chapter II of the articles on responsibility of States for internationally wrongful acts, it does not refer to the term 'attribution of conduct' as such. Instead, the Commission opted for the formulation 'attribution … of an internationally wrongful act' to emphasize that, in the context of succession of States, an internationally wrongful act as a whole remains attributable to the State that committed that act before the date of succession."

Paragraph (3), as amended, was adopted.

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

The Chair said that, on behalf of the Commission, he wished to express his deep appreciation to the Special Rapporteur for the massive amount of effort that he had put into the work on the topic.

Mr. Šturma (Special Rapporteur) said that he wished to thank all his colleagues for their collaboration on a very interesting but complicated topic. As Sir Michael Wood had once said, the Commission was sometimes a dangerous place, but it had been a great privilege to serve that body as a special rapporteur.

Chapter VIII. General principles of law (*continued*) (A/CN.4/L.964, A/CN.4/L.964/Add.1 and A/CN.4/L.964/Add.2)

The Chair invited the Commission to resume its consideration of the portion of chapter VIII of its draft report contained in document A/CN.4/L.964.

Paragraphs 25 to 29 (*continued*)

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, while a summary of the debate on draft conclusion 7 might be useful to readers, Mr. Forteau's proposal that such a summary should not be included separately in the Commission's annual report, in view of the adoption of the commentary to draft conclusion 7, might be the wiser course of action, as it was in line with past practice. Sir Michael Wood had proposed that paragraph 25 should be amended in order to inform the reader that a summary of the debate had not been included in the report because the draft conclusion had been adopted. He therefore proposed the deletion of paragraphs 26 to 29 and the amendment of paragraph 25 to read: "Draft conclusion 7 was provisionally adopted by the Commission with commentaries at the present session. Accordingly, following the practice of the Commission, the summary of the debate on this draft conclusion is not included."

Mr. Rajput said that he wondered whether there should be a reference in a footnote to the summary records covering the debate.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that any such footnote would be unnecessary, as the summary records could easily be found on the Commission's website and in the various editions of the *Yearbook of the International Law Commission*.

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 29 were deleted.

(d) Draft conclusions 10 to 12

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

Mr. Forteau said that, in the final sentence, care must be taken to ensure that the term "subsidiary source" was correctly translated in the French and Spanish versions.

Ms. Escobar Hernández said that the term had been discussed in the Drafting Committee, where Mr. Gómez-Robledo had proposed that the Commission should use the language of Article 38 (1) (*d*) of the Statute of the International Court of Justice, which used "*medio auxiliar*" in Spanish.

Sir Michael Wood said it was important to note that the paragraph was referring to the possibility that general principles of law might be a subsidiary source of international law, whereas Article 38 (1) (*d*) of the Statute was referring to subsidiary means for determining rules of international law. The French translation must make it plain that what was meant was a source subsidiary to treaties and custom.

Mr. Forteau said that, since the paragraph was part of the summary of the debate, it would be necessary to ascertain by whom and in which language the term had been used and the viewpoint of the member in question.

On that understanding, paragraph 31 was adopted.

Paragraphs 32 to 35

Paragraphs 32 to 35 were adopted.

(e) Draft conclusions 13 and 14

Paragraphs 36 to 43

Paragraphs 36 to 43 were adopted.

(f) Future programme of work

Paragraph 44

Paragraph 44 was adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 45 to 62

Paragraphs 45 to 62 were adopted.

The Chair invited the Commission to take up the portion of chapter VIII contained in document A/CN.4/L.964/Add.2.

C. Text of the draft conclusions on general principles of law provisionally adopted by the Commission at its seventy-third session

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its seventy-third session

Paragraph 2

Paragraph 2 was adopted.

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

Paragraph (1)

Mr. Forteau said he regretted that the draft commentary had been prepared rapidly without any detailed analysis of practice, jurisprudence or legal teachings. That omission would make it difficult for States to adopt a clear position on the subject. French international law textbooks espoused a position that was the opposite of that reflected in draft conclusions 3 and 7. Although the lengthy debate on those two draft conclusions in the Drafting Committee had culminated in a compromise whereby the commentary would include a number of items of information, some of those items, which had been mentioned in the statement by the Chair of the Drafting Committee to the Commission, had unfortunately been omitted. For example, in the commentary to draft conclusion 3, there was no explanation of the difference between the notions of "that are derived" and "may be formed", while the commentary to draft conclusion 7 failed to clarify what was meant by "that may be formed", "intrinsic" or "other". For that reason, he did not know whether he could endorse the adoption of such a brief commentary. However, he realized that the Special Rapporteur had the very difficult task of striking a balance between positions that were poles apart.

Mr. Park said that he agreed with Mr. Forteau. The history of the topic and the evolution of the discussions on it should at least be mentioned briefly at the beginning of the commentary to draft conclusion 3. That would be in line with past practice at the first-reading stage. Although delegations in the Sixth Committee could read the summary records of the debate, they would be greatly assisted if a short account of the genesis of draft conclusions 3 and 7 was included in a new paragraph (1) of the commentary.

Sir Michael Wood said that, although he understood the concerns expressed, it was important to remember that the texts were commentaries to the draft conclusions and not a record of their negotiating history. He welcomed the conciseness of the commentaries to the two draft conclusions. A large amount of material was already contained in the footnotes. The Special Rapporteur had done extremely well in providing enough helpful material to enable the Commission to proceed with the topic, given the constraints that he had faced.

Mr. Jalloh said that the Special Rapporteur had indeed done extremely well under difficult conditions. As the Commission had not even reached the first-reading stage, the Special Rapporteur could possibly flesh out the commentary the following year, since it really was important to cite legal doctrine, jurisprudence and literature in support of the Commission's text.

Mr. Llewellyn (Secretary to the Commission) said that it was not the practice of the Commission to consider and adopt commentaries for topics that were taken up during the second part of a session, because it was very difficult for special rapporteurs to prepare commentaries when the documentation services were inevitably short of time.

Mr. Rajput said that the Commission was facing a very unusual situation in that the document before the Commission omitted any reference to criticism of the text proposed by the Special Rapporteur, yet the latter's response to that criticism had been included. The topic dealt with a crucial issue on which members held widely diverging views. Yet States were expected to consult the summary records to discover what those views were rather than being able to read a commentary that encapsulated the essence of members' arguments. The current document gave the impression that the whole Commission agreed to the content of the draft conclusions. That was unfair and inappropriate, not just for Commission members who had expressed a different view based on their research, but also for States and the broader community of readers. He was very uncomfortable with the lopsided approach to the text.

The Chair, speaking as a member of the Commission, said that the lopsidedness of the text could be corrected through the normal practice of reflecting minority views.

Mr. Park said that he concurred with Mr. Rajput that the commentary to draft conclusion 3, as it stood, was too short and unbalanced. The fact that the Commission had discussed draft conclusions 3 and 7 for more than two years was not mentioned. In the statement that he had made to the Commission in his capacity as Chair of the Drafting Committee at the current session, he had noted that one member had dissociated himself from

the adoption of draft conclusion 3. The text of the commentary made no reference to that important fact. He therefore proposed that the commentary should be supplemented with an accurate description of the debate at the seventy-third session.

Mr. Petrič said he had always believed that the Commission was a place of fair play and equality where minority positions were respected, yet the commentary to draft conclusion 3 contained no trace of the views that he had expressed on the topic. He was therefore pleased that two younger colleagues had taken a stand for transparency and fairness, and he fully endorsed their comments.

Mr. Šturma said that he shared the views expressed by other members. In his capacity as Special Rapporteur for the topic of succession of States in respect of State responsibility, he had paid close attention to the relevant statement by the Chair of the Drafting Committee in preparing commentaries, taking care to reflect explanations of how certain drafting decisions had been reached. While he agreed that conciseness was desirable, any unusual formulations, such as the one in subparagraph (b) of draft conclusion 3, should be explained in the commentary.

Mr. Grossman Guiloff, noting that some members were not yet satisfied with the proposed commentary, suggested that informal consultations should be held with a view to reaching agreement and adopting the text the following day. The Commission's work was most effective when all parties were satisfied and the institutional process of exchange with States through the General Assembly worked effectively. References to "majority" or "minority" views might not fully capture the range of positions held within the Commission, but the Special Rapporteur could doubtless find a solution.

Mr. Murphy said that, with some necessary amendments, the Commission might already be in a position to adopt the three existing paragraphs of the commentary to draft conclusion 3, which described the contents thereof. However, it was notable that no paragraphs analogous to paragraphs (6) to (8) of the commentary to draft conclusion 7, outlining dissenting views, had been included for draft conclusion 3. He proposed that various elements from the paragraphs that had been deleted from the summary of the debate contained in section B (2) (c) of chapter VIII could be used to create new paragraphs to rectify that omission. That would, he hoped, serve the aim of prompting comments from States.

Mr. Forteau, expressing support for the thrust of that suggestion, further proposed that an explanation should be included at the end of paragraph (1) of the commentary to draft conclusion 3, or immediately thereafter, as to why subparagraph (b) of the provision had been couched in more tentative terms than subparagraph (a). The explanation could incorporate wording from the statement by the Chair of the Drafting Committee and could read: "The phrase 'may be formed' is used in subparagraph (b) and was considered as being more appropriate to introduce a degree of flexibility to the provision, acknowledging that there is a debate as to whether a second category of general principles of law exists." Since the members agreed on that point, as reflected in the wording of draft conclusion 3, it should be included near the start of the commentary to that provision.

Mr. Rajput said that he fully agreed with the comments made by Mr. Murphy and Mr. Forteau. Using elements of the balanced summary of the debate prepared by the secretariat would be a sensible way to proceed.

Mr. Jalloh said that the paragraphs to which Mr. Murphy had referred were helpful but largely concerned draft conclusion 7. Consideration should be given to the questions of how much of the debate should be reflected and in which part of the commentary.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, as draft conclusion 3 was mainly intended as an introduction, the commentary to draft conclusion 7 included more information on the drafting history and views expressed. Both draft conclusions and the commentaries thereto were succinct and, he hoped, clear; in drafting them, he had been mindful of constraints on time and length. He suggested that additional information could be inserted at the end of paragraph (3) of the commentary to draft conclusion 3 so as to draw a clearer link with draft conclusion 7, indicating, among other things, what elements were included in the commentary to the latter provision. The useful sentence proposed by Mr. Forteau could then be included in the commentary to draft conclusion 7. To take account of

Mr. Park's comments, a footnote could be included in paragraph (1) of the commentary to draft conclusion 3 to the effect that the Commission had decided to deal with draft conclusions 3 and 7 together. Specific proposals relating to the summary of the debate could be incorporated into the commentary to draft conclusion 7.

The Chair, speaking as a member of the Commission, said that focusing on the words "may be formed", in draft conclusion 3 (b), might provide a useful way of introducing the minority opinion within the Commission. Any such reference in the commentary to draft conclusion 3 would need to be brief, with more details given in the commentary to draft conclusion 7.

Mr. Forteau said that draft conclusion 3 was very substantive and not merely introductory in nature. The difference in how the two subparagraphs were couched must be explained in the commentary; some of the wording from the statement by the Chair of the Drafting Committee could be used.

Sir Michael Wood, expressing support for that proposal, said that such an insertion could be made at the end of paragraph (1) of the commentary to draft conclusion 3; alternatively, a new paragraph could be created between existing paragraphs (1) and (2).

Mr. Forteau proposed that two new sentences should be added to the end of paragraph (1) and should read: "In contrast with subparagraph (a) of draft conclusion 3, which starts by 'are derived from', subparagraph (b) starts by 'may be formed'. The phrase 'may be formed' was considered appropriate to introduce a degree of flexibility to the provision, acknowledging that there is debate as to whether a second category of general principles of law exists."

The Chair said he took it that the Commission agreed to add the two new sentences proposed by Mr. Forteau.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Rajput proposed that, in the interest of academic rigour, the single long footnote should be split to reflect the various types of sources referred to in the paragraph, with examples added for the category of teachings and specific references to the *travaux préparatoires* of the Statute of the International Court of Justice. The statement in the last sentence of the footnote to the effect that the derivation of general principles of law from national legal systems was confirmed by pleadings by States before international courts and tribunals should also be supported with specific examples, such as the case that had come before the International Court of Justice concerning the *Temple of Preah Vihear (Cambodia v. Thailand)*.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that information on such pleadings, along with examples of State practice and references to the literature, had been provided in his reports; the aim of the existing footnote to paragraph (2) was to reflect case law. References to the relevant passages of his reports could be included in the commentary if the Commission felt it would be beneficial to the reader. He had followed the approach taken to the commentaries under the topic of identification of customary international law; few references to the literature had been included, given that teachings on the subject varied widely. Suggestions for improving the footnotes were welcome; nevertheless, given the time constraints, they should perhaps be incorporated when the Commission adopted the text on first and second reading.

Mr. Forteau observed that the reference to the case concerning *South West Africa* should be dated 1966, not 1996, and placed in the correct chronological order.

Mr. Murphy said that, if there was no time to insert examples of State practice, teachings and *travaux préparatoires* in footnotes at the current session, reference to those categories should be deleted from the body of paragraph (2). More information could be added when the text was considered at future sessions.

Sir Michael Wood said that it was preferable not to refer to teachings, especially on complex subjects, as they varied so widely. The report of the Swiss Federal Council cited in

the footnote might constitute an example of State practice. Further to Mr. Murphy's suggestion, he proposed that the second sentence of paragraph (2) should be divided in two. The first sentence so created could refer solely to the jurisprudence of international courts and tribunals, with the valuable existing footnote retained. A second sentence could then read: "There is also State practice, and teachings, and it is confirmed by the *travaux préparatoires* of the Statute." It was particularly important to refer to the *travaux préparatoires* in relation to subparagraph (a) of draft conclusion 3. A corresponding footnote would be easy to draft; appropriate references could probably be reproduced from one of the Special Rapporteur's reports.

Mr. Rajput, acknowledging that the footnotes could be further improved at future sessions, nevertheless emphasized the importance of presenting academically rigorous texts to States and the public, regardless of the time constraints. In the current context, it was particularly important to refer to the *travaux préparatoires* of the Statute of the International Court of Justice.

Mr. Jalloh, expressing support for the comments made by Sir Michael Wood and Mr. Murphy, said that incorporating elements of the Special Rapporteur's various reports would enable changes to be made quickly. More examples of State practice would be particularly welcome. A dearth of footnotes in the commentaries might undermine the Commission's explanations.

Mr. Murphy said that he could support Sir Michael Wood's proposal. If a reference to teachings was retained in the text of the paragraph, a separate footnote should be inserted; if that could not be done in the time available, the reference should be deleted.

Mr. Petrič, expressing support for Mr. Murphy's comments, said that the Swiss Federal Council source in the footnote appeared to be a domestic source, rather than international practice. He had yet to see a clear list of examples of general principles of law established in the international legal system and based neither on treaties nor on custom. Mr. Forteau's excellent proposal offered a constructive way forward.

Sir Michael Wood said that paragraph (2) dealt with general principles of law derived from national legal systems; while the existence of the category was uncontroversial, a list of examples would be useful. Teachings in that general field of international law tended to be unhelpful and contradictory, but they were likely to coincide on the specific issue of whether a category of general principles of law derived from national legal systems existed. If examples of teachings were given in relation to subparagraph (a) of draft conclusion 3, they would also need to be provided for subparagraph (b), which would be considerably more difficult. Separate footnotes should be provided for the different sources mentioned in paragraph (2), beginning with case law, then *travaux préparatoires*, then State practice – including the Swiss Federal Council report, which did not concern a specific domestic case – and finally teachings, if the Commission decided to include them.

Mr. Grossman Guiloff proposed that Sir Michael Wood's suggestion should be adopted and that ellipsis points should be inserted in the various footnotes to indicate that they would be completed in due course.

Mr. Ouazzani Chahdi, echoing the views expressed by Sir Michael Wood, said he agreed that the reference to teachings should be removed from paragraph (2), as the sources in the footnote consisted mainly of case law.

Mr. Forteau expressed the strong view that doctrine should be central to the Commission's work, in line with article 20 of its statute. Sir Michael Wood's suggestion offered a good solution; however, if the necessary changes could not be made in time, it would be better to alter the phrase "is established in State practice, the jurisprudence of international courts and tribunals, and teachings, and is confirmed by the *travaux préparatoires* of the Statute" to "is well established" and end the second sentence there, followed by the existing footnote.

Mr. Vázquez-Bermúdez (Special Rapporteur), supported by **Mr. Grossman Guiloff**, said that he preferred Sir Michael Wood's suggested solution. If members wished to see teachings included, references could be taken from his various reports for both

categories of general principles of law, though it must be borne in mind that opinions on the existence of the second category were far from uniform and could prove controversial.

The Chair said he took it that the Commission agreed to leave paragraph (2) in abeyance to allow the Special Rapporteur time to prepare a revised version of the text.

It was so decided.

Paragraph (3)

Mr. Rajput said that, although the second sentence stated that the existence of the category of general principles of law that might be formed within the international legal system appeared to find support in teachings, no examples of teachings were provided in the associated footnote. The Special Rapporteur should consider the possibility of adding such examples.

Mr. Forteau proposed that, after the second sentence, a new sentence should be inserted, which would read: "Some members, however, consider that Article 38 (1) (*c*) of the Statute of the International Court of Justice does not encompass a second category of general principles of law, those allegedly formed within the international legal system, or at least remain very sceptical of their existence as a separate source of international law."

Sir Michael Wood said that, while he had no objection to Mr. Forteau's proposal in principle, the expression "separate source of international law" might give rise to confusion, since it might be interpreted as referring to a source of international law other than those listed in Article 38 (1) of the Statute of the International Court of Justice.

Mr. Forteau said that the word "separate" in the proposed text could be replaced with "autonomous".

Ms. Lehto said that the paragraph was already worded in a highly cautious manner. For example, the first sentence reproduced the phrase "that may be formed" from draft conclusion 3 (b), and the second sentence included the words "appears to find support". In her view, the new sentence proposed by Mr. Forteau, which included the words "those allegedly formed within the international legal system", would tip the balance too far in the direction of scepticism. The opposing view should be set out in a more neutral way.

Mr. Park said that, while he agreed with Mr. Forteau's proposal in principle, the new sentence should in his view be made into a separate paragraph. Moreover, another new sentence should be inserted after the current second sentence to explain the meaning of the words "may be formed". In that connection, inspiration could be drawn from the statement he had made on the topic at the current session in his capacity as Chair of the Drafting Committee.

Mr. Murphy said that it was important to ensure consistency between the second sentence and the associated footnote. If the examples provided in the footnote were to be drawn only from the jurisprudence of international courts and tribunals, the words "the practice of States" and "and teachings" should be deleted from the sentence. If the Commission wished to retain those words, it would need to supplement the footnote with examples drawn from the practice of States and from teachings. Mr. Forteau seemed to be trying to capture the fact that, during the debate, some members had been sceptical about the possible existence of the second category of general principles, while others had gone further by rejecting that possibility outright. The words "those allegedly formed within the international legal system" could be deleted from the proposed new sentence, but members who held such a position should be entitled to have it reflected in the text. He agreed that a modified version of Mr. Forteau's proposed new sentence should be inserted after the second sentence. Lastly, he proposed that, in the current third sentence, the word "Different" should be replaced with "Further" and that the word "further" should be deleted.

The Chair, speaking as a member of the Commission, said that Mr. Murphy's proposal for the deletion of the words "those allegedly formed within the international legal system" might go some way towards addressing the concern expressed by Ms. Lehto.

Mr. Saboia said he agreed with Ms. Lehto and Mr. Murphy that the new sentence proposed by Mr. Forteau could be shortened.

Sir Michael Wood said that he wondered whether the last sentence of paragraph (3) should be made into a new paragraph, since it contained a new idea.

Mr. Murphy said that it would be preferable not to make the last sentence of paragraph (3) into a new paragraph, since it related to subparagraph (b) only.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, while a sentence of the kind proposed by Mr. Forteau could already be found in the commentary to draft conclusion 7, he would not object to the addition of the proposed new sentence to the commentary under consideration. He supported Mr. Murphy's proposal that the new sentence should be shortened.

On the basis of the comments and proposals made by members, he would prepare a new version of the text for consideration at the following meeting.

The Chair said he took it that the Commission wished to leave paragraph (3) in abeyance pending the preparation of a new text.

It was so decided.

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

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Rajput said that he and other members of the Commission had consistently taken the position that the claim made in the third sentence was not true. For that reason, he proposed that, after that sentence, two new sentences should be inserted and that a new footnote should be added to each of them. The first new sentence should read: "However, some members pointed out that during the drafting of the Statute of the Permanent Court of International Justice, the Advisory Committee of Jurists rejected the proposal for creation of general principles of law within the international legal system." The associated footnote should provide a reference to the *procès-verbal* of the Advisory Committee's 15th meeting. The second new sentence should read: "Equally, during the drafting of the Statute of the International Court of Justice, the proposal for creation of general principles of law within the international legal system was rejected." The associated footnote should provide a reference to the summary report of the 5th meeting of Committee IV/1 of Commission IV of the United Nations Conference on International Organization.

Sir Michael Wood said that paragraph (2) set out four justifications for the existence of general principles of law formed within the international legal system. In his view, the third and fourth justifications were more important than the first and second. He therefore proposed that the sentences should be reordered so that the two more important justifications appeared before the two less important ones. A reorganization of the paragraph along those lines would facilitate the implementation of Mr. Rajput's proposal, since the proposed new sentences would appear at the end of the paragraph. Alternatively, it might be more logical if those two sentences were added to one of the subsequent paragraphs in which the minority view was presented.

Mr. Murphy said he agreed with Sir Michael Wood's proposal that the four justifications should appear in order of decreasing importance. While he had no objection to Mr. Rajput's proposal, it might make more sense to add the text in question to paragraph (7), which was one of those in which the minority view was presented.

He proposed that the penultimate sentence should be deleted, since it could be interpreted as meaning that the category of general principles of law formed within the international legal system had not existed in 1920 but now did exist. Moreover, the footnote associated with the last sentence did not seem to correspond to the text of that sentence, since it set out examples of principles rather than of judicial practice. It might be more logical to move the corresponding footnote marker to the end of the first sentence. The principles listed

in that footnote were described as “examples that were referred to during the debates of the Commission”. He wondered how the list had been compiled, since the examples that he had provided during the debate had not been included. In addition, he was not sure that principles I and II of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal were good examples. In any case, it was sufficient to refer to the Principles without reproducing the text of the two principles in question.

Ms. Galvão Teles said she agreed that the commentaries under consideration did not fully reflect the debate that had taken place in the Commission. Moreover, the substance of the commentaries required additional work. The commentary to draft conclusion 7 in particular would benefit from further development, since the Commission’s consideration of the question of general principles of law that might be formed within the international legal system was probably the most significant aspect of the entire project. She agreed with Mr. Murphy that there was a discrepancy between the last sentence of the paragraph and the associated footnote and that the footnote in question did not include all the examples that had been mentioned during the debate. In addition, the Commission needed to demonstrate that the principles cited as examples had been recognized by courts as having been formed within the international legal system, since some of them could be regarded as emanating from customary international law. She wondered whether, in the chapter under consideration, the Commission should explain that it intended to revisit the commentaries before completing the first reading but was providing the current text with a view to eliciting observations.

The Chair, speaking as a member of the Commission, said there was a risk that language of that kind would be misinterpreted.

Mr. Petrič said that he strongly supported Mr. Rajput’s proposals. It was clear from the relevant *travaux préparatoires* that the term “general principles of law” had been understood as referring to principles derived from national legal systems. It was ultimately for States to decide whether that term should now be interpreted as including principles of a kind that had not originally been envisaged. If the Commission wished to take the position that there existed a second category of general principles of law, it needed to base that position on the practice of States. The commentary should be drafted with a view to providing States with all the facts that they needed to give serious consideration to that question.

The Chair, speaking as a member of the Commission, said that he also supported the new text proposed by Mr. Rajput, although he was unsure where it should be inserted in the text.

Mr. Forteau said that the interpretation of draft conclusion 7 hinged on the meaning of the word “intrinsic”. Paragraph 1 stated that, to determine the existence and content of a general principle of law that might be formed within the international legal system, it was necessary to ascertain that the community of nations had recognized it as “intrinsic” to the international legal system. Paragraph 2 concerned “other general principles of law formed within the international legal system”, which meant those that were not “intrinsic” to that system. In the statement made on the topic by the Chair of the Drafting Committee at the current session (A/CN.4/SR.3605), it had been indicated that the meaning of the word “intrinsic” would be explained in the commentary. However, no such explanation had been provided. In addition, footnote 3 mentioned respect for human dignity and principles in the area of environmental law, which for a long time had not been at the centre of international relations and international law. The word “intrinsic” should be defined in paragraph (2) in order to clarify the meaning of draft conclusion 7. Without a definition of that word, it was impossible to determine which principles should be cited as examples.

The Chair, speaking as a member of the Commission, said that the Commission might need to address the question of what was meant by “intrinsic” at a later stage in its work on the topic.

Ms. Oral said that she agreed in large part with the points made by Ms. Galvão Teles. As other members had indicated, the commentary as drafted contained too few examples. The Commission had unfortunately been unable to dedicate sufficient time to the draft conclusions during its plenary meetings and was now essentially attempting to redraft the commentary to a critical draft conclusion on which there clearly were differing views. She

agreed with Ms. Galvão Teles that the Commission had more work to do. The Commission was not yet adopting the text on first reading; the commentaries, particularly the commentary to draft conclusion 7, would need to be revisited. The commentary as drafted did not present the strong foundation that would be needed if the Commission was to support the existence of the second category of general principles of law.

Mr. Rajput said that Mr. Forteau had made an important point about the use of the word "intrinsic", which also appeared in the last sentence of paragraph (3) of the commentary to draft conclusion 7. The meaning of the word should be explained. He supported Sir Michael Wood's proposal to reorder the four reasons set out in paragraph (2), with the sentences that he himself had proposed inserted at the end of the paragraph.

Mr. Murphy said that, if the Special Rapporteur decided to further explain the meaning of "intrinsic", he could expand on what was already suggested in the sentence of paragraph (2) that began "Third, the international legal system": that principles were intrinsic to a legal system if they reflected and regulated its basic features.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he agreed with the proposals to reorder the reasons set out in paragraph (2) and to move footnote 3 to the end of the first sentence. He would also supplement the footnote with other examples mentioned during the Commission's debates. It would perhaps be preferable to include the language proposed by Mr. Rajput in paragraph (7) of the commentary to draft conclusion 7 rather than in paragraph (2) so as not to affect the flow of paragraph (2).

The Chair, noting that there seemed to be a lack of consensus regarding the amendments to be made to paragraph (2), said he took it that the Commission wished to leave the paragraph in abeyance to allow time for informal consultations.

It was so decided.

Paragraph (3)

Mr. Park said that the content of paragraph (3), which dealt with the methodology for identifying general principles of law, was general in nature and should therefore be placed immediately after paragraph (1).

The Chair said he took it that the Commission wished to adopt paragraph (3) and return to the issue of its placement after it had adopted paragraph (2).

Paragraph (3) was adopted on that understanding.

Paragraph (4)

Paragraph (4) was adopted.

Paragraphs (5) to (7)

Mr. Forteau said that paragraph (5) was formulated somewhat oddly, as it essentially said that the Commission had adopted draft conclusion 7 because there was disagreement among its members. The paragraph should be recast in more positive terms to state instead that, although members held different views on the content of draft conclusion 7, the Commission had adopted it in order to seek the views of States in the Sixth Committee.

Mr. Murphy said that paragraphs (5) and (6) seemed unnecessary and should be deleted.

The Chair, speaking as a member of the Commission, said that he agreed with Mr. Murphy. It was never necessary to specify in commentaries, as did paragraph (6), what the majority view in the Commission had been, since the text adopted was by definition the majority view.

Sir Michael Wood said that paragraph (5) made a very important point and that it should be reformulated to read: "Draft conclusion 7 was adopted by the Commission despite different views among its members in the interest of obtaining further comments by States on the matter." The point was in fact so important that the text of paragraph (5) should be placed at the beginning of the commentary to draft conclusion 7 and become paragraph (1).

Mr. Jalloh said that it would be more logical to state first what the majority position was and then to invite States to comment on it. The text of paragraph (6), which addressed the majority position, should therefore appear at the beginning of paragraph (5) and should be followed by the language proposed by Sir Michael Wood.

Mr. Murphy said that Sir Michael Wood's proposed reformulation of paragraph (5) should be placed at the end of the commentary to draft conclusion 7, and paragraph (6) should be deleted for the reason stated by the Chair. As thus amended, the commentary would essentially reflect the majority view in paragraphs (1) to (4), then indicate the minority view in the following two paragraphs, which were currently paragraphs (7) and (8), and then end by saying that the Commission had adopted the draft conclusion despite the differing views in order to invite comments from States.

Mr. Forteau said that he agreed with all the points made by Mr. Murphy. He proposed that the words "before the completion of the first reading" should be inserted between the words "obtaining" and "further comments" in the language put forward by Sir Michael Wood in order to indicate to States that the Commission could take their comments into account even during the first-reading stage.

Ms. Oral said that she agreed with the proposal made by Mr. Murphy regarding the placement of the text of paragraph (5) and the additional language proposed by Mr. Forteau. She was in favour of retaining the reference in paragraph (6) to a majority of members. Without that reference, the commentaries might seem to focus on the views of members opposed to the draft conclusion and leave readers wondering why the Commission had adopted it.

Mr. Park said that the distinction drawn between majority and minority views did not accurately reflect the positions expressed by members during the debates of the Commission and the Drafting Committee. The Special Rapporteur had noted in his third report (A/CN.4/753) that members' views regarding the existence of a second category of general principles of law could be grouped into three general positions: support, openness and opposition. It was difficult to see how those positions could be divided into majority and minority views.

Mr. Vázquez-Bermúdez (Special Rapporteur) said he agreed with the Chair that the very adoption of the draft conclusion signalled that a majority of members had supported it. He therefore did not oppose the deletion of paragraph (6).

Mr. Jalloh said that, like Ms. Oral, he saw utility in including a reference to the majority position, as it would give readers, and particularly the States in the Sixth Committee that were being invited to provide their views, a sense of the balance of views in the Commission.

Sir Michael Wood said that paragraph (6) should be deleted because it broke up the flow of ideas in the commentary. The Commission should, however, signal to readers that the commentary was shifting from addressing the majority position to addressing the minority one by inserting the word "However" at the beginning of paragraph (7).

The Chair said he took it that the Commission wished to incorporate the amendments to paragraph (5) proposed by Sir Michael Wood and Mr. Forteau and to move the text of paragraph (5) to the end of the commentary to draft conclusion 7.

Paragraph (5), as amended, was adopted on that understanding.

The Chair said he took it that the Commission wished to delete paragraph (6).

It was so decided.

The Chair said he took it that the Commission wished to amend paragraph (7) as proposed by Sir Michael Wood.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Sir Michael Wood said that, in the final sentence, the words "was not clear" should be replaced with "would need to be clear". Otherwise, a judge reading that sentence might interpret it as a statement by the Commission that the distinction between general principles of law formed within the international legal system, on the one hand, and customary international law, on the other, was in fact not clear, and might use it as grounds for shifting between one and the other.

Mr. Murphy said that the words "was not clear" were probably a more accurate representation of the view being described in the sentence. The sentences that Mr. Rajput had proposed for insertion in paragraph (2) of the commentary to draft conclusion 7 could be a powerful addition to paragraph (8) – the paragraph on the view that the second category of general principles of law did not exist – since those sentences indicated that the drafters of the Statute of the Permanent Court of International Justice and the Statute of the International Court of Justice had not accepted that category.

Mr. Rajput said that the language that he had proposed was related to the interpretation of the *travaux préparatoires*, and thus would be more appropriately placed in paragraph (2). He agreed with Sir Michael Wood in principle, as there had already been a case before an investment tribunal in which the arbitrator had ignored customary international law and had declared certain notions to be principles of general international law created at the international level.

Ms. Oral said that, while it was true that courts and tribunals sometimes used the terms "general principles" and "customary international law" interchangeably, she read the sentence as merely reflecting an observation made by members, not as an authorization for judges to use whichever characterization they pleased.

Mr. Park said that he opposed the language proposed by Sir Michael Wood because the expression used in the existing text was the expression that had been used by some members.

Mr. Forteau said that the Commission could perhaps get around the issue by inserting the phrase "within the meaning of draft conclusion 7" [*au sens du projet de conclusion 7*] in the final sentence immediately after the words "formed within the international legal system".

Mr. Jalloh said that he supported Mr. Forteau's proposal, which would seem to address the concern expressed by Sir Michael Wood.

Mr. Murphy said that, as amended by Mr. Forteau, the last sentence would seem to be referring to general principles of law formed within the international legal system within the meaning of both draft conclusion 7 and customary international law. If Mr. Forteau's proposal was accepted, the reference to "customary international law" should be placed before the reference to "general principles of law formed within the international legal system". The relevant portion of the final sentence would then read "some members of the Commission considered that the distinction between customary international law and general principles of law formed within the international legal system within the meaning of draft conclusion 7 was not clear".

Mr. Argüello Gómez said that the use of the word "they" in the second sentence suggested that all of the members who were of the view that Article 38 (1) (*c*) of the Statute of the International Court of Justice was limited to the general principles of law derived from national legal systems had cautioned that the Commission should not engage in an exercise of progressive development. However, arguments related to progressive development had had nothing to do with his own opposition to the second category of general principles of law.

The Chair said that, in the light of Mr. Argüello Gómez's comment, the pronoun "they" should be replaced with "some members" in the second sentence. He took it that the Commission wished to accept that proposal and the formulation proposed by Mr. Murphy.

Paragraph (8), as amended, was adopted.

The meeting rose at 6 p.m.