Provisional

For participants only

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International Law Commission
Seventy-third session (second part)

Provisional summary record of the 3605th meeting
Held at the Palais des Nations, Geneva, on Friday, 29 July 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. Huang
	Mr. Laraba
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

General principles of law (agenda item 6) (*continued*) (A/CN.4/753)

Report of the Drafting Committee (A/CN.4/L.971)

Mr. Park (Chair of the Drafting Committee), reporting on the work of the Drafting Committee on the topic "General principles of law", recalled that, at its seventy-second session, the Commission had provisionally adopted draft conclusions 1, 2 and 4 and had taken note of draft conclusion 5. During the first part of the current session, the Commission had provisionally adopted draft conclusion 5. At the two previous sessions, in 2019 and 2021, the plenary had referred draft conclusions 3, 6, 7, 8 and 9 to the Drafting Committee on the basis of proposals made in the Special Rapporteur's first and second reports (A/CN.4/732, A/CN.4/741 and A/CN.4/741/Corr.1). At the current session, the plenary had referred draft conclusions 10 to 14 to the Committee on the basis of proposals made in the Special Rapporteur's third report (A/CN.4/753). He said that, over the course of eight meetings at the current session, the Committee as constituted for the topic had continued its consideration of draft conclusions 3, 6, 7, 8 and 9 and had begun its consideration of draft conclusions 10 to 14, together with a number of reformulations that the Special Rapporteur had proposed in the light of suggestions made, or concerns raised, during the plenary debate.

The consolidated text of the draft conclusions provisionally adopted by the Drafting Committee was available in English in document A/CN.4/L.971; the Commission was being requested to take action on draft conclusions 3 and 7 and to take note of draft conclusions 6, 8, 9, 10 and 11.

The Drafting Committee had adopted the text and title of draft conclusion 6, on determination of transposition to the international legal system, with changes to the original proposal made by the Special Rapporteur in his second report. The word "Ascertainment" in the title had been replaced with "Determination" for closer alignment with the title of draft conclusion 5. The title had also been changed in the French and Spanish versions: the word "*Constat*" had been replaced with "*Détermination*" in the French version and the word "*Constatación*" with "*Determinación*" in the Spanish version. Draft conclusion 6 was intended to clarify the concept of transposition, which, in accordance with draft conclusion 4 (b), was a requirement for the determination of the existence and content of a general principle of law derived from national legal systems.

In 2021, it had been decided that, in draft conclusion 4, the expression "the principal legal systems of the world" should be replaced with "the various legal systems of the world". At the current session, the same replacement had been made in draft conclusion 6. In that connection, the Committee had discussed whether it needed to be indicated that, for the purposes of transposition to the international legal system, a general principle of law should be not only "common to the various legal systems of the world" but also recognized by the community of nations. It had been concluded that no such indication was needed, since draft conclusion 2 on recognition informed the entire set of draft conclusions. It followed that draft conclusion 6 should be read in conjunction with draft conclusions 2 and 4. It had been understood that those points would be explained in the commentary.

The words "may be" had been debated extensively. The central question before the Drafting Committee had been whether transposition was automatic. Members had generally agreed that it was not, since, for various reasons, a particular principle might not be transposed to the international legal system. Divergent views had been expressed regarding the most appropriate word or words to include before "transposed to the international legal system" in order to convey the fact that transposition was not automatic. Some members had been of the view that the word "is" should be used and that the fact that transposition was not automatic should be explained in the commentary. Others had voiced concern that the use of that word would give the mistaken impression that the process was in fact automatic. In particular, the view had been expressed that, by using the word "is", the Commission would be bypassing the requirement of recognition by the community of nations. Accordingly, it had been suggested that the words "can be" or "may be" should be used, thereby emphasizing that transposition was conditional. The Committee had eventually settled on "may be" on the

understanding that, in the commentary, it would be explained that transposition was not automatic and that the transposition of a particular principle might not be possible.

The Drafting Committee had also held a thorough discussion regarding the phrase "in so far as", which was intended to emphasize the requirement of compatibility and indicate that a principle common to the various legal systems of the world could not be transposed to the international legal system wholesale. It had been agreed that the meaning of that phrase would be explained in the commentary. The Committee had also discussed whether express reference should be made in the provision to the issue of the "applicability" of general principles of law; that issue, it had been decided, should instead be addressed in the commentary.

The Drafting Committee had made no changes to the title of draft conclusion 7 as proposed in the Special Rapporteur's second report, namely "Identification of general principles of law formed within the international legal system". The text itself had been reformulated and now consisted of two paragraphs. Its purpose was to set out the criteria for the determination of the existence and content of a general principle of law formed within the international legal system. Over the years, the draft conclusion and the question of the existence of general principles of law formed within the international legal system had given rise to differing views among the members of the Commission, both in plenary and in the Drafting Committee. At the current session, while some members of the Committee had been of the view that such a category existed or were open to the possibility of its existence, others had reiterated that they had yet to be convinced.

Some members of the Drafting Committee had expressed the view that it would be helpful to provide examples or an indicative list of such general principles. Members who considered that such a category existed had drawn attention to the case law cited in the Special Rapporteur's reports and had mentioned examples of principles that, in their view, fell within that category, such as the principles of territorial integrity, non-intervention, consent to the jurisdiction of international courts and tribunals, *uti possidetis juris*, respect for human dignity, and elementary considerations of humanity. Those members had reasoned that, as a legal system, the international legal system was capable of generating its own general principles of law, like a national or regional legal system. Members who doubted the existence of such a category had expressed the view that some or all of the principles mentioned in the Special Rapporteur's reports on the topic were rules of customary international law or treaty rules. According to those members, there were no convincing real examples of general principles of law formed within the international legal system, there was insufficient practice to substantiate their existence, and there was a risk that the category might be interpreted too broadly, thereby creating an additional source of international law.

The Drafting Committee had extensively debated various issues relating to that category of general principles of law and had considered several proposals, including a proposal that the two paragraphs constituting draft conclusion 7 should be replaced with a "without prejudice" clause. A compromise text had been adopted on the understanding that the discussion that had taken place in the Committee and the differing views of its members would be explained in the commentary. It had been emphasized that, as a first-reading text, the draft conclusion remained subject to change and that States should be invited to provide their observations on the existence of such a category of general principles of law in advance of the second reading. One member of the Committee had expressly dissociated himself from the consensus on the draft conclusion. In that member's view, the text adopted did not represent a compromise solution for all members of the Committee.

Draft conclusion 7 (1) set out how to determine the existence and content of a general principle of law that might be formed within the international legal system. It stated that, for the purpose of determination, it was necessary to ascertain that the principle was recognized as intrinsic to the international legal system by the community of nations. The Drafting Committee had considered that the words "may be formed" were more appropriate than the wording originally proposed, since they introduced a degree of flexibility in view of the fact that the existence of a second category of general principles was a matter of debate. The Committee had also discussed the word "intrinsic" extensively and had considered the possibility of using a word such as "inherent" or "essential" instead. Members had agreed on the wording "intrinsic to the international legal system", which, they had considered,

captured the idea that the draft provision dealt with principles that were unique or specific to the international legal system or, in the view of some members, were essential for the functioning of that system. In that connection, it had been considered that such principles were likely to be narrow in range and scope. It had been understood that the meaning of the word "intrinsic" would be explained in the commentary. With regard to the requirement of recognition by the community of nations, it should be recalled that the Commission had adopted draft conclusion 2 on recognition at the previous session. The underlying rationale of that provision was set out in the relevant statement of the then Chair of the Committee (A/CN.4/SR.3557).

Draft conclusion 7 (2) consisted of a "without prejudice" clause. Its purpose was to leave open the possibility that there might exist general principles of law formed within the international legal system other than those dealt with in paragraph 1. As a compromise, the Drafting Committee had decided to use the formulation "the question of the possible existence" to soften the provision and emphasize that it was not intended to prejudge the possibility that general principles of law that belonged to the second category but fell outside the narrow scope of paragraph 1 might exist. Such a compromise had been considered necessary for the purpose of the first reading. The question of whether the word "other" needed to be retained had been discussed extensively. Some members had noted that its meaning in paragraph 2 was unclear. Others had questioned the existence of a category of general principles of law formed within the international legal system that was distinct from that envisaged in paragraph 1. Others still had considered that the word "other" was necessary, as its deletion would give rise to a contradiction between the two paragraphs. The Committee had decided to retain the word on the understanding that its meaning would be explained in the commentary.

After the adoption of draft conclusion 7, the view had been expressed that it would be useful if the Commission could consider an additional draft conclusion or conclusions addressing the question of evidence of recognition of a general principle of law by the community of nations.

At the previous session, the Drafting Committee had decided that it should postpone its consideration of draft conclusion 3 until it could be considered alongside draft conclusion 7. At the current session, at the Special Rapporteur's request, the Committee had not considered draft conclusion 3 until draft conclusion 7 had been adopted. The title of draft conclusion 3 had been adopted as originally proposed in the Special Rapporteur's first report. The provision was intended to set out the categories of general principles of law. Subparagraph (a) set out the category of general principles of law derived from national legal systems, which were dealt with in draft conclusion 4, and subparagraph (b) set out the category of general principles of law that might be formed within the international legal system, which were dealt with in draft conclusion 7. The inclusion of the words "may be" at the beginning of subparagraph (b) constituted an amendment to the Special Rapporteur's original proposal, as contained in his first report, aimed at ensuring alignment with draft conclusion 7 (1). The member of the Committee who had expressly not joined the consensus on draft conclusion 7 had also not joined the consensus on draft conclusion 3.

The Drafting Committee had adopted the text and title of draft conclusion 8, on decisions of courts and tribunals, with no changes to the original proposal made by the Special Rapporteur in his second report. The draft conclusion was intended to introduce the concept of subsidiary means for the determination of general principles of law. The text and title were both modelled on conclusion 13 of the Commission's conclusions on identification of customary international law. The Committee had considered that it should not depart from the Commission's approach to that topic, to avoid giving the impression that the Commission was dealing with each of those sources of international law in a different way.

With regard to paragraph 1, the Drafting Committee had discussed whether it was necessary to reformulate the phrase "concerning the existence and content". Some members had recalled that, while that phrase could be found in conclusion 13 of the conclusions on identification of customary international law, it did not appear in draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*). The Committee had decided that the current text should be retained on the understanding that the meaning of the phrase in question would be explained

in the commentary. The Committee had also considered whether the word "determination" should be replaced with "identification" for consistency with draft conclusion 7. It had been decided that the word "determination" should be retained, as it was used in Article 38 (1) (*d*) of the Statute of the International Court of Justice. Some members had called for further consideration of the question of which other materials could be used for the determination of general principles of law. Moreover, the view had been expressed that the evidence used to determine the existence and content of general principles of law needed to be analysed in greater detail. It had been agreed that additional information on those points would be provided in the commentary.

Following the adoption of draft conclusion 8, members of the Drafting Committee had made general comments on the provision. It had been proposed that, with regard to the determination of the existence and content of general principles of law, the question of whether distinctions needed to be drawn among the different categories of general principles of law should be addressed. Additionally, the Committee had been requested to consider referring to national legislation as a subsidiary means for the determination of general principles of law. It had been recalled that subsidiary means would be dealt with in detail in the context of the topic "Subsidiary means for the determination of rules of international law", which had been added to the Commission's programme of work at the current session.

The Drafting Committee had adopted the text and title of draft conclusion 9 on teachings as proposed in the Special Rapporteur's second report. The provision was modelled on conclusion 14 of the conclusions on identification of customary international law. The Committee had discussed whether the phrase "the most highly qualified publicists of the various nations" was antiquated and should therefore be reformulated. It had been recalled that different wording, namely, "the various legal systems of the world", was used in draft conclusions 4 and 5. The Committee had decided that the phrase should be retained to ensure consistency with conclusion 14 of the conclusions on identification of customary international law and Article 38 (1) (*d*) of the Statute of the International Court of Justice and had agreed that its meaning should be explained further in the commentary. There had been a discussion of whether the draft conclusion should include express reference to the Commission's output. The Committee had decided that no such reference should be included, while recalling that the Commission's output was dealt with in the commentaries to the conclusions on identification of customary international law. It had been understood that the significance of the Commission's output for the determination of general principles of law would be addressed in the commentary.

Draft conclusion 10, entitled "Functions of general principles of law", was based on provisions that the Special Rapporteur had proposed as draft conclusion 13, entitled "Gap-filling", and draft conclusion 14, entitled "Specific functions of general principles of law", in his third report. The Drafting Committee had decided to merge and reformulate those provisions on the basis of a revised proposal from the Special Rapporteur that reflected comments made by members during the plenary debate. The Committee had discussed whether it would be more appropriate to address the functions of general principles of law in a draft conclusion or in the commentaries and had decided to include them in a draft conclusion in order to provide guidance and clarification for practitioners.

Paragraph 1 of draft conclusion 10 was based on the text proposed as draft conclusion 13 in the third report but did not explicitly refer to the "gap-filling" role of general principles of law, as the Committee had considered the term to be colloquial and not entirely accurate. The Committee had decided to begin draft conclusion 10 with that paragraph in order to emphasize the importance of the content of the paragraph. It had also been thought important to avoid the misconception that general principles of law played an ancillary role. The qualifier "mainly" had been used to convey the idea that the role addressed in paragraph 1 was the main role played by general principles of law in practice, while also preserving a certain degree of flexibility, since they could play other roles. It had been understood that use of the word "mainly" would be explained in the commentary. It had been noted that not all lacunae in the law could necessarily be remedied by a general principle of law. The term "other rules of international law" referred to rules of customary international law and treaties. After some discussion as to whether the paragraph should refer to "norms" – the word used in the draft conclusions on identification and legal consequences of peremptory norms of

general international law (*jus cogens*) – instead of "rules", the Committee had decided to retain the word "rules", which was used in Article 38 of the Statute of the International Court of Justice. It had been agreed that the commentary would address that question and the meaning of the word "rules".

The Drafting Committee had held a rich discussion on the phrase "do not resolve a particular issue in whole or in part". The Committee had discussed alternatives such as "regulate", "settle", and "address", but had decided to use the word "resolve" because it had been considered to more precisely capture, for the purposes of paragraph 1, the concept of providing a solution to the question at issue. It should be emphasized that the word "resolve" ought to be interpreted within the context of paragraph 1. It had been considered important to refer to "a particular issue" in the context of the topic and appropriate to reflect, through the expression "in whole or part", the idea that there might be situations where a rule contained in a treaty or a rule of customary international law might only partially resolve an issue. It had been understood that those points would be clarified in the commentary.

Paragraph 2 aimed to illuminate aspects of what general principles of law did in practice in the international legal system, in addition to what was set out in paragraph 1. The *chapeau* contained a factual statement regarding their contribution to the coherence of the international legal system, but it should be noted that it was understood that other rules of international law also contributed to the coherence of that system. The term "*inter alia*" served to highlight the fact that subparagraphs (a) and (b), which described certain functions of general principles of law, did not represent an exhaustive list. It had been understood that the commentary would provide examples of each of the functions listed in the subparagraphs. The function set out in subparagraph (a) was directly linked to the statement in the *chapeau* and should be read within the meaning of Article 38 (1) *(c)* of the Statute of the International Court of Justice. Subparagraph (b) provided for situations where general principles of law constituted a basis for primary rights and obligations and for secondary and procedural rules. Although members of the Committee had generally agreed that the word "independent" – which the Special Rapporteur had used to qualify the word "basis" in the text that he had proposed as draft conclusion 14 in his third report – was to be interpreted in the sense of "autonomous", the Committee had decided not to retain the adjective because of potential confusion as to its meaning and to provide the appropriate explanations in the commentary. Some members had expressed concern that the words "primary" and "secondary" could also create confusion because, for example, there were times when a procedural rule was not a secondary rule. The Committee decided that those concerns could be dealt with in the commentary, which would explain the meaning of the expressions "primary rights and obligations" and "secondary and procedural rules".

Draft conclusion 11, entitled "Relationship between general principles of law and treaties and customary international law", was based on provisions that the Special Rapporteur had proposed as draft conclusions 10, 11 and 12 in his third report. The Drafting Committee had decided to merge and reformulate those provisions on the basis of a revised proposal from the Special Rapporteur that reflected comments made by members during the plenary debate. The Committee had considered it necessary to first specify in paragraph 1, in the context of draft guideline 11 itself, that general principles of law were a source of international law. A long debate had been held on the term "hierarchical relationship", with some members expressing the view that, although Article 38 of the Statute of the International Court of Justice did not present a formal hierarchy, a hierarchy among sources of international law did exist in practice. Those members had proposed that a qualifier, such as "formal", should be introduced before the term "hierarchical relationship" or that no mention should be made of hierarchy in the text of the draft conclusion. Several members had supported the idea underlying paragraph 1 but had found the paragraph redundant, as the lack of hierarchy among sources was implicit in paragraphs 2 and 3, and had proposed that it should be omitted from the draft conclusion. Other members had been of the view that it was necessary to refer to the lack of hierarchy in order to bring clarity to the draft conclusion. It should be noted that the text of paragraph 1 took into account the conclusions of the Study Group on fragmentation of international law. In the end, the Drafting Committee had decided to retain the term "hierarchical relationship" on the understanding that the commentary would address the meaning of the term in greater detail and clearly set out the above considerations.

Several members had expressed the view that there could be a contradiction between paragraph 1 of draft conclusion 11 and paragraph 1 of draft conclusion 10. The concern had also been expressed that paragraph 1 of draft conclusion 11 might give the impression that there was no hierarchy among sources under any circumstances, even though certain treaty regimes – such as the one set out in article 21 of the Rome Statute of the International Criminal Court – provided for a hierarchy among the sources of applicable law. It had been clarified, however, that while States could agree on the applicable law under particular treaty regimes, paragraph 1 of draft conclusion 11 referred to the absence of a hierarchical relationship between general principles of law, as a source of international law, and the other two sources of international law. The Drafting Committee had agreed that those concerns would be dealt with in the commentary. The Committee had tailored the text of paragraph 1 to avoid making any statement on the relationship between treaties and customary international law, as that relationship was considered to be outside the scope of the topic.

There had been some discussion within the Drafting Committee on the use of the expression "same or similar" in paragraph 2, with several alternatives, including "identical or similar" and "analogous or similar", being considered. It had been understood that the meaning of the expression would be explained in the commentary. The commentary would also explain that the "general principle of law" referred to in paragraph 2 was a distinct source of international law; in other words, that even though a general principle of law might exist in parallel with a rule of customary international law or a rule contained in a treaty that had the same or similar content, those rules were distinct and there were different requirements that needed to be met to ascertain their existence. The view had been expressed that it might be useful for the Commission to address the process for distinguishing a rule of customary international law from a general principle of law with identical content.

After paragraph 2 had been adopted, the view had been expressed that the provision was not logical and that there was no reason for a general principle of law to exist where there was a rule of customary international law with identical content. In such a situation, the general principle of law would be absorbed by the rule of customary international law. It had also been highlighted that the provision could cause unnecessary confusion among practitioners.

Paragraph 3 addressed conflicts between a general principle of law and a rule in a treaty or customary international law. In his third report, the Special Rapporteur had proposed a draft conclusion covering the *lex specialis* principle. On the basis of comments made by members in the plenary and the discussions of the Drafting Committee itself, the Committee had decided that a broader provision – one not limited to the principle of *lex specialis* – would be more appropriate. The text of paragraph 3 took into account the conclusions of the Study Group on fragmentation of international law, particularly the terms used therein. It used the phrase "the generally accepted techniques of interpretation and conflict resolution in international law", in line with the conclusions of the Study Group, thereby signalling to the reader that there were techniques that were commonly used to resolve the types of conflicts referred to in the paragraph. It had been understood that the meaning of the phrase would be explained in the commentary.

The Drafting Committee had thus finalized its consideration of all the draft conclusions referred to it by the Commission at its seventy-third and previous sessions. After it had concluded its substantive consideration of the draft conclusions, the Committee had undertaken a final review of the entire set of draft conclusions to ensure that the provisions were coherent.

Mr. Rajput said that he wished to thank the Chair and members of the Drafting Committee and the Special Rapporteur for their efforts. Although he had originally been a member of the Drafting Committee, he had withdrawn from it because of his opposition to the proposition that general principles of law could be created within the international legal system. While the Drafting Committee was a place for making compromises, that position was a matter of principle for him and one on which he could not have made a compromise, given the serious ramifications that the proposition at issue could have, particularly in terms of reintroducing the notion that it was the mission of adjudicators to civilize the world. The statement of the Chair of the Drafting Committee, which presented what had transpired in the Committee, had further reaffirmed his original views. As noted in the statement, none of

the examples that had been cited as the basis for declaring the existence of general principles of law formed within the international legal system were general principles of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice. It should be recalled that the Commission was working on general principles of law as a source of international law within the meaning of Article 38 (1) (*c*), as noted in the commentary to draft conclusion 1, which had been provisionally adopted by the Commission. He therefore continued to be opposed to the proposition that general principles of law could be created within the international legal system and could not agree with the compromise arrived at in the Drafting Committee in the form of draft conclusions 3 (b) and 7. That compromise had the effect of amending the Statute of the International Court of Justice and constituted neither the codification nor the progressive development of international law. Additionally, draft conclusion 11, although not proposed for adoption by the Commission, had the potential to allow adjudicators to disrupt the operation of treaties and custom through the use of general principles. However, since the Commission always worked by consensus, he did not intend to stand in the way of the compromise, even though it compromised the existing position of the law and practice.

Mr. Petrič said that, in a spirit of cooperation, he would not object to the Commission's adoption of the Drafting Committee's recommendations. However, he disagreed with the decision, reflected in draft conclusions 3 and 7, to recognize the existence of general principles of law originating not in domestic legal systems around the world, but in the international legal system. The practice of States, the doctrine and – in the past – the understanding in the Commission itself had been clear: general principles of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice originated *in foro domestico*. The *travaux préparatoires* for Article 38 clearly supported that view. In his research, he had neither discovered sufficient State practice to serve as a basis for the new interpretation of Article 38 (1) (*c*) nor found examples of general principles of law under Article 38 (1) (*c*) that had originated not in domestic legal systems but in the international legal system. According to his research, the principles that were claimed to originate in the international legal system all had their basis either in international treaties or in customary international law. There was neither the need for the Commission to identify a new formal source of international law, thereby broadening the scope of Article 38 (1) (*c*), nor sufficient State practice to justify its doing so. By indicating in its annual report the disagreements within the Commission on the issue and presenting to States the diverse views that had been expressed, the Commission would help States reflect deeply and respond appropriately and thereby help ensure that the Commission's final decision on the issue would be sound.

Draft conclusion 3

The Chair said he took it that the Commission wished to adopt the text of draft conclusion 3.

Draft conclusion 3 was adopted.

Mr. Park, speaking as a member of the Commission, said that, although he had not blocked the consensus on the adoption of draft conclusion 3, he continued to have doubts as to the existence of general principles of law that could be formed within the international legal system. He had consistently raised questions regarding their possible existence since the Commission had started discussing the topic. He had listened carefully to those members who had supported the existence of such general principles, but their explanations had been insufficient to dispel his doubts relating to the lack of sufficient relevant practice, the vague relationship between such general principles and treaty rules or rules of customary international law, and the potential blurring of the distinction between general principles of law and principles of general international law.

Draft conclusion 7

The Chair said he took it that the Commission wished to adopt the text of draft conclusion 7.

Draft conclusion 7 was adopted.

Mr. Argüello Gómez said that, although he had joined the consensus, he wished to reiterate his opposition to draft conclusions 3 (b) and 7. He was in complete disagreement with the assertion that there was a second category of general principles of law which were said to be formed within the international legal system. Given that the purpose of the draft conclusions was to provide practical guidance to anyone needing to apply general principles of law, draft conclusion 7 (1) opened the door to abuse by practitioners in applying general principles of law said to be in that second category. The same was true of draft conclusion 7 (2), which, although presented as a "without prejudice" clause, could in practice be used to reach sweeping conclusions regarding the second category.

Furthermore, the proposed text of draft conclusion 11 indicated that general principles of law, treaties and customary international law were not in a hierarchical relationship. Such a proposition would leave room for a court to decide to apply a general principle that it had found to have been formed directly within the international legal system rather than an existing treaty rule or rule of customary international law. In his view, that did not reflect the actual state of the law and could lead to uncertainty.

Mr. Park, speaking as a member of the Commission, said that he could not associate himself with the content of draft conclusion 7, which set out two different types of general principles of law that could be formed within the international legal system and consequently caused further logical and legal confusion.

The Chair said he took it that the Commission wished to take note of draft guidelines 6, 8, 9, 10 and 11, as contained in document A/CN.4/L.971.

It was so decided.

The Chair said that the Special Rapporteur had prepared commentaries to draft conclusions 3 and 7 for inclusion in the Commission's annual report. He also wished to recall that the commentary to draft conclusion 5 was contained in document A/CN.4/L.964/Add.1.

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

Chapter VI. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.962 and A/CN.4/L.962/Add.1)

The Chair invited the Commission to commence the adoption of the draft report paragraph by paragraph, starting with the portion of chapter VI contained in document A/CN.4/L.962.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

B. Consideration of the topic at the present session

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

Paragraphs 6 and 7

The Chair said that the secretariat would complete paragraphs 6 and 7 with the appropriate dates.

Paragraphs 6 and 7 were adopted on that understanding.

Paragraph 8

Mr. Huang said that he was speaking on the topic at a plenary meeting for the first time since 2019, after having been unable to participate in the seventy-second session of the Commission and the first half of the seventy-third session because of the coronavirus disease (COVID-19) pandemic. It had always been his view that, since 2012, when Ms. Escobar

Hernández had succeeded Mr. Kolodkin as Special Rapporteur, the direction and tone of the study and the debate on the topic had been seriously diverted and had started to go beyond State practice, with no regard being given to the objections of a significant number of United Nations Member States. The Commission had thus embarked on a course of so-called progressive development of international law, in serious violation of the principle of consensus that it had long upheld. Despite the strong opposition of a significant number of members, a roll-call vote on the core provision of the draft articles – namely, draft article 7, entitled "Crimes under international law in respect of which immunity *ratione materiae* shall not apply" – had been forced on members at the Commission's 3378th meeting, on 20 July 2017. Eight members had voted against the draft article, expressing their firm opposition to both the decision-making procedure and the substance of the article, and one member had abstained. It should be emphasized that the principled position they had taken had not been changed or weakened by the adoption of articles on procedural safeguards to limit the abuse of universal criminal jurisdiction. Personally, he remained opposed to the adoption of the draft articles on the topic and the commentaries to them. He wished to have his position placed on record so as to encourage the members who would be joining the Commission at its next session to make corrections on second reading in light of the views expressed by States in the Sixth Committee.

The Chair suggested that paragraph 8 should be left in abeyance until the Commission had completed its consideration of document A/CN.4/L.962/Add.1.

It was so decided.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading

1. Text of the draft articles

Paragraph 9

Paragraph 9 was adopted.

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

The Chair invited the Commission to consider the portion of its draft report contained in document A/CN.4/L.964/Add.1.

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

1. Text of the draft conclusion

Paragraph 1

Paragraph 1 was adopted.

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

Paragraph 2

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

Paragraph (1)

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, in the second sentence, the word "qualifies" should be altered to "describes". In the fourth sentence, the word "clarifies" should be changed to "explains".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Murphy suggested that, in the fourth sentence, the words “the latter” should be altered to “such methodologies”.

Paragraph (2), as amended, was adopted with a minor editorial change.

Paragraph (3)

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, in the first sentence, the words “in order” should be inserted before “to be considered”.

Mr. Murphy expressed concern about the content of the paragraph, which seemed to be suggesting that the characteristics of a given legal principle need not be common to the various legal systems of the world in order for it to be identified as a general principle of law.

Sir Michael Wood said that the paragraph appeared correct to him, but that the drafting might be improved; he suggested adding the word “precise” before “content and scope of general principles of law” in the second sentence. The point being made was valid: a notion such as estoppel might exist in the various legal systems of the world but with some variation in its precise characteristics and the relevant case law.

Mr. Murphy suggested that beginning the first sentence with the phrase “What is meant by a legal principle”, rather than “The characteristics that a legal principle should have in order to be considered”, would clarify matters; nevertheless, he continued to entertain doubts about the content of the sentence.

Mr. Park said that he found the third sentence of the paragraph somewhat obscure. As the French version of the text appeared clearer, he suggested that the English could be aligned on the French.

Mr. Ouazzani Chahdi asked why the specific examples of legal principles given in footnote 3 had been chosen, with particular reference to the right to lawyer-client confidentiality, which, while certainly a general principle, was not without its limitations and could be subject to sanction.

Sir Michael Wood said that the principles listed had been explicitly invoked or applied in practice; he suggested adding citations to the cases concerned. In response to Mr. Park’s comments, he suggested changing the words “a legal principle of a general and abstract character” to “the determination of the existence of a legal principle of a general and abstract character” in the third sentence, to reflect the wording of draft conclusion 5.

The Chair, speaking as a member of the Commission, said that there was a significant difference between invoking a principle and applying a principle in practice, and suggested that the footnote should specify which had been done in each of the cases cited.

Mr. Vázquez-Bermúdez (Special Rapporteur) welcomed the two textual amendments proposed by Sir Michael Wood, along with the suggestion that specific cases should be cited in footnote 3. In response to the concern expressed by Mr. Murphy, he explained that the focus was intended to be on the case-by-case nature of the comparative analysis to be conducted, rather than on specific, predetermined characteristics that would be required for a principle to be identified as common to the various legal systems of the world.

Sir Michael Wood said that, on reflection, he would prefer to withdraw his suggestion to add the word “precise”; the paragraph was clarified sufficiently by Mr. Murphy’s proposed amendment to the first sentence.

The Chair said he took it that the Commission agreed to adopt the paragraph with the changes to the first and third sentences suggested by Mr. Murphy and Sir Michael Wood, respectively, on the understanding that appropriate citations would be added to footnote 3.

On that understanding, paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the second sentence should be amended to read: “This description is aimed at clarifying that, while it is not necessary to

assess every single legal system of the world to identify a general principle of law, the comparative analysis must nonetheless be sufficiently comprehensive to take into account the legal systems of States in accordance with the principle of sovereign equality."

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the words "of national legal systems" should be moved from the middle of the first sentence to the end, after "comparative analysis".

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Vázquez-Bermúdez (Special Rapporteur) said that, in the first sentence, the words "the characteristics of the latter" should be altered to "its own characteristics"; in the third sentence, the phrase "be it private or public law" should be changed to "including both private and public law".

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph 2, as amended, was adopted.

Chapter VII. Succession of States in respect of State responsibility (A/CN.4/L.963 and A/CN.4/L.963/Add.1 to Add.3)

The Chair invited the Commission to consider the portion of chapter VII of its report contained in document A/CN.4/L.963.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

B. Consideration of the topic at the present session

Paragraph 3

Paragraph 3 was adopted.

Paragraph 4

Sir Michael Wood suggested that the beginning of the second sentence should be altered to read: "The Special Rapporteur then examined the question of a plurality of injured successor States and a plurality of responsible successor States (Part Two) …" The sentence would thus mirror the first sentence of paragraph 8.

Paragraph 4, as amended, was adopted.

Paragraphs 5 and 6

Paragraphs 5 and 6 were adopted.

Paragraph 7

The Chair suggested that paragraph 7 should be left in abeyance pending the adoption of the portion of chapter VII contained in document A/CN.4/L.963/Add.1.

It was so decided.

Paragraph 8

Mr. Murphy suggested that, in the first sentence, “the problems of the existence of a plurality” should be changed to “the problems associated with a plurality” and the word “of” should accordingly be changed to “with” before “a plurality of responsible successor States”. He also suggested that the second sentence should be split in two after “the University of Amsterdam”, with the new third sentence beginning “however”, rather than “even though”.

Paragraph 8, as amended, was adopted.

Paragraph 9

Mr. Murphy suggested that the word “distribution”, in the fourth sentence, should be altered to “apportionment”.

Paragraph 9, as amended, was adopted.

Paragraph 10

Mr. Murphy suggested changing the words “should be”, in the fourth sentence, to “was” and the words “one successor, rather than two or more States”, in the last sentence, to “only one successor”.

Paragraph 10, as amended, was adopted.

Paragraph 11

Mr. Murphy suggested that the phrase “to deal with the issue by means of”, in the last sentence, should be replaced with “to include”.

Paragraph 11, as amended, was adopted with minor editorial changes.

Paragraph 12

Paragraph 12 was adopted with minor editorial changes.

Paragraph 13

Paragraph 13 was adopted with a minor editorial change.

Paragraphs 14 and 15

Paragraphs 14 and 15 were adopted.

The meeting rose at 5.20 p.m.