

Provisional

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**International Law Commission**  
**Seventy-sixth session**

**Provisional summary record of the 3721st meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 27 May 2025, at 10 a.m.

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***Present:***

*Chair:* Mr. Paparinskis

*Members:* Mr. Akande  
Mr. Argüello Gómez  
Mr. Asada  
Mr. Cissé  
Mr. Fathalla  
Mr. Fife  
Mr. Forteau  
Mr. Galindo  
Ms. Galvão Teles  
Mr. Grossman Guiloff  
Mr. Jalloh  
Mr. Laraba  
Mr. Lee  
Ms. Mangklatanakul  
Mr. Mavroyiannis  
Mr. Mingashang  
Mr. Nesi  
Mr. Nguyen  
Ms. Okowa  
Ms. Oral  
Ms. Orosan  
Mr. Ouazzani Chahdi  
Mr. Oyarzábal  
Mr. Patel  
Mr. Reinisch  
Ms. Ridings  
Mr. Ruda Santolaria  
Mr. Sall  
Mr. Savadogo  
Mr. Vázquez-Bermúdez  
Mr. Zagaynov

***Secretariat:***

Mr. Pronto Secretary to the Commission

*The meeting was called to order at 10.15 a.m.*

**General principles of law** (agenda item 4) (*continued*) (A/CN.4/785)

*Report of the Drafting Committee* (A/CN.4/L.1018)

**Mr. Oyarzábal** (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic “General principles of law” (A/CN.4/L.1018), said that the report contained the texts and titles of the 12 draft conclusions on general principles of law adopted by the Drafting Committee, which it recommended for adoption by the Commission on second reading. The Drafting Committee had devoted four meetings to the topic, from 13 to 16 May 2025. It had proceeded on the basis of the texts proposed by the Special Rapporteur in his fourth report (A/CN.4/785).

The Drafting Committee had adopted draft conclusion 1, on the scope of the entire set of draft conclusions, with no changes to the text adopted on first reading. The title of the draft conclusion was “Scope”, which was the title adopted on first reading.

Draft conclusion 2 concerned the requirement that, for a general principle of law to exist, it must be recognized by the community of nations. The use of the term “community of nations” in the English text was in accordance with the text of article 15 (2) of the International Covenant on Civil and Political Rights, which had been followed in all the official languages; accordingly, the French text used “*l’ensemble des nations*” and the Spanish text used “*la comunidad internacional*”. It replaced the anachronistic term “civilized nations”, which appeared in Article 38 (1) (c) of the Statute of the International Court of Justice. While it was primarily recognition by States that contributed to the formation of general principles of law, the term “community of nations” was intended to capture the possibility that international organizations could also contribute to the recognition of such principles. That point would be further explained in the commentary. It would also be clarified in the commentary that while the positions of other actors, such as non-governmental organizations, might be relevant in providing context and for assessing recognition by the community of nations, such positions did not in and of themselves form part of such recognition. The Drafting Committee had considered a number of alternatives to “community of nations”, including using “international community” or “community of nations” consistently in all languages, “community of States” or a reference to the “principal legal systems of the world”; however, it had decided to retain the text of the provision as adopted on first reading.

The recognition referred to in draft conclusion 2 was not necessarily recognition as a general principle of law in the sense of Article 38. For example, a general principle of law derived from national legal systems would first be recognized as a principle in the context of those individual systems, and subsequently would be assessed as being a general principle of law. Therefore, the Drafting Committee had not taken up a proposal to add the words “as such” after “recognized”. The notion of “recognition” would be further explained in the commentary.

The Special Rapporteur had proposed the addition of new paragraphs in draft conclusion 2. However, he had withdrawn that proposal following the plenary debate. The content of the proposed new paragraphs would be reflected in the commentary.

The title of draft conclusion 2 remained “Recognition”.

Draft conclusion 3, which concerned the categories of general principles of law, had been adopted without changes to the text adopted on first reading, following a rich discussion on the existence of the category of general principles formed within the international legal system. It had been generally agreed that the examples in the commentary of general principles of law falling within that category, captured by subparagraph (b), could be strengthened. The Drafting Committee had considered a number of proposals to amend the *chapeau* of the provision, for example by replacing the word “comprise” with “are” or indicating that “general principles of law are: (a) derived from national legal systems; [or] (b) formed within the international legal system”, so as to make it clearer that the list of categories was exhaustive. Ultimately, such amendments had not been considered necessary.

The Drafting Committee had retained the title adopted on first reading, which was “Categories of general principles of law”.

Draft conclusion 4 was the first of three draft conclusions that specifically addressed general principles of law derived from national legal systems. It concerned the identification of such principles, setting forth a two-step methodology further detailed in draft conclusions 5 and 6. No proposals had been made for the modification of the provision and its text remained the same as that adopted on first reading.

The Drafting Committee had also decided to retain the first-reading title of draft conclusion 4, which was “Identification of general principles of law derived from national legal systems”.

Draft conclusion 5 concerned the first step in the methodology, the determination of the existence and content of a general principle of law common to the various legal systems of the world. It, too, had been adopted without modification to the first-reading text. The text of the provision was intended to emphasize that the analysis of national legal systems must be as wide and representative as possible.

The title of draft conclusion 5 was “Determination of the existence of a principle common to the various legal systems of the world”, as adopted on first reading.

Draft conclusion 6 dealt with the second step in the methodology, which was the transposition of general principles of law formed in national legal systems to the international legal system. The text remained the same as that adopted on first reading. The Drafting Committee had discussed whether it would be better to refer to “transposability” rather than “transposition”. The term “transposition” had been retained to avoid giving the impression that a formal act by States was necessary before a principle could be applied in the international legal system. Whether a principle determined in accordance with draft conclusion 5 could be transposed to the international legal system depended on whether it was capable of serving a regulatory function in the latter. The commentary to draft conclusion 6 would be expanded to better capture the meaning of the provision.

The title of draft conclusion 6 was “Transposition to the international legal system”. The words “Determination of”, which had been included in the title adopted on first reading, had been deleted to better align the title with the content of the draft conclusion.

The Drafting Committee had adopted draft conclusion 7 with one substantive change to the version adopted on first reading. Specifically, it had agreed to delete the second paragraph of the draft conclusion, which had contained a “without prejudice” clause envisaging the possibility of the existence of other general principles of law formed within the international legal system. That change had been made following a proposal to that effect made by the Special Rapporteur in the plenary debate, on the understanding that it would be reflected in the commentary.

The Drafting Committee had considered the question of whether draft conclusion 7 should include a more developed methodology for the identification of general principles of law formed within the international legal system, similar to the structured approach taken in draft conclusions 5 and 6 for principles derived from national legal systems. The Committee had agreed that the commentary would elaborate in detail on the methodology for identifying general principles of law formed within the international legal system and, in particular, would provide an explanation of the deductive and inductive reasoning involved in such identification.

The Drafting Committee had further agreed that the commentary should clearly distinguish the methodology applicable to general principles of law under the second category from that used for the identification of customary international law. It was understood that the Special Rapporteur would explain in detail that the formation of a general principle of law did not require the same two-element test – namely, general practice accepted as law – that governed the identification of custom.

In addition, the Drafting Committee had discussed the concerns voiced by some members of the Commission in the plenary debate about the role of State consent in the formation of the second category of general principles. It had been agreed that that issue and

the possible relevance of the persistent objector doctrine in the context of the formation of general principles of law under the second category would be addressed in the commentary.

The Special Rapporteur had further agreed to include in the commentary a more refined and carefully selected set of illustrative examples of general principles of law formed within the international legal system. Members had emphasized that, while the examples given could be relatively few in number, they should be solid and clearly grounded in practice.

The title of draft conclusion 7, “Identification of general principles of law formed within the international legal system”, remained unchanged with respect to the title adopted on first reading.

The Drafting Committee had adopted draft conclusion 8, on decisions of courts and tribunals, on the basis of the text adopted on first reading, with two changes. The first change was to align the wording of paragraph 1 with the Commission’s work on subsidiary means for the determination of rules of international law. The second change was the insertion of a “without prejudice” clause in paragraph 2 to clarify the relationship between that provision and draft conclusion 5 (3).

The inclusion of a separate draft conclusion on subsidiary means for the determination of general principles of law in the work of the Commission on general principles of law had been the subject of discussion. The Drafting Committee had debated the potential overlap of such provisions with the Commission’s work on the topic of subsidiary means, the added value of draft conclusions 8 and 9 and the absence of equivalent provisions in the earlier work of the Commission on other sources of international law. It had been agreed that retaining the provision was appropriate. While some members had noted the importance of consistency with the Commission’s previous conclusions on identification of customary international law, it had been agreed that alignment with the work on subsidiary means was appropriate in the context.

The text of paragraph 1 had accordingly been amended to read: “Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of general principles of law.”

Paragraph 2 had been amended so that it began with the words “Without prejudice to their use for the purposes of draft conclusion 5”, in order to distinguish the function of judicial decisions as subsidiary means, relevant in the assessment of international law, from their role in the determination of the existence of general principles common to the various legal systems of the world, relevant in the assessment of domestic law.

The Drafting Committee had adopted draft conclusion 8 on the understanding that the commentary would provide important clarifications, including the fact that the reference to the International Court of Justice in paragraph 1 was without prejudice to the relevance of decisions by other international courts and tribunals, and the fact that the decisions of national courts referred to in paragraph 2 were basically those of the highest courts and should be understood as final decisions not subject to further review. It would also provide a detailed explanation of the reasons that had led the Committee to include the “without prejudice” clause in paragraph 2.

The title of draft conclusion 8, “Decisions of courts and tribunals”, remained unchanged from the first-reading text.

The Drafting Committee had adopted draft conclusion 9 on the basis of the revised text proposed by the Special Rapporteur in his fourth report. That proposal reflected an effort to align the wording of the provisions with that used in the Commission’s work on subsidiary means. While there had been general support for the adoption of the revised text, two points had been the subject of focused discussion.

The first concerned the possibility of inserting a second sentence on linguistic and gender diversity as criteria to assess the weight of teachings as subsidiary means, paralleling the wording used in draft conclusion 5 of the draft conclusions on subsidiary means. While there had been broad support in the Drafting Committee for the substance of that sentence,

several members had expressed reservations about its inclusion in the text. In particular, it had been observed that the sentence proposed had been drawn directly from an ongoing project of the Commission. Moreover, some members had noted that highlighting only certain factors, such as language and gender, as criteria for the assessment of teachings, and not others, would not properly reflect the Commission's work on subsidiary means. In the light of such concerns, the Drafting Committee had agreed not to include the proposed sentence in the text of the draft conclusion. However, it had come to that agreement on the understanding that the importance of considering linguistic, regional and gender diversity when assessing the weight of relevant teachings would be reaffirmed in the commentary.

The second point concerned the removal of the phrase "with competence in international law" from the description of the most highly qualified publicists. That change had been suggested in the light of the methodology for the identification of general principles of law common to the various systems of the world, as contained in draft conclusion 5. The first step in identifying such principles involved a comparative analysis of domestic legal systems, in which teachings authored by scholars with recognized expertise in comparative law, even if they were not formally trained as international lawyers, could be particularly relevant. The Drafting Committee had considered the view that retaining the reference to "competence in international law" could unintentionally narrow the scope of valid teachings. Nonetheless, it had ultimately decided to retain the wording proposed by the Special Rapporteur in his fourth report without changes, on the basis that the term "teachings", which appeared at the beginning of the paragraph, was wide enough to encompass the work of scholars on different branches of law, and that specific reference would be made in the commentary to the relevance of experts in comparative law in the context of the first category of general principles of law.

While the draft conclusion had been adopted without further modification, one member had not joined the consensus.

The title of draft conclusion 9 was "Teachings", which was the same as that adopted by the Drafting Committee on first reading.

Draft conclusion 10 addressed the functions that general principles of law could perform within the international legal system. The version adopted by the Drafting Committee reflected a number of substantive and drafting changes to the text adopted on first reading. The Drafting Committee had proceeded on the basis of the revised text proposed by the Special Rapporteur in his fourth report.

One of the main structural changes introduced to the provision was the reversal of the order of the two paragraphs. As adopted on first reading, the draft conclusion had begun by stating that general principles of law were mainly resorted to when other rules of international law did not resolve a particular issue. That had been followed by a second paragraph setting out the functions that general principles could serve. In the text adopted on second reading, the Drafting Committee had agreed to reverse the order, in line with a proposal by the Special Rapporteur. The new structure placed the emphasis first on the potential contribution and functions of general principles of law, and only thereafter on the circumstances in which they were primarily invoked. The Committee considered that reversal to be a logical improvement. The reordered structure allowed the reader to first understand what general principles of law could do within the legal system, as a normative proposition, before addressing when they were mainly relied upon, as a factual proposition. While the Committee had considered the question of whether paragraph 2 would be more appropriately located in draft conclusion 11, which addressed the relationship between general principles of law and other sources of international law, the prevailing view among the members had been that the content of the paragraph, although a statement of fact, was more closely linked to the functions of general principles and should remain within draft conclusion 10.

The Drafting Committee had introduced a number of textual amendments to paragraph 1 as adopted on first reading. They concerned both the *chapeau* and the wording and order of the subparagraphs.

First, the Committee had decided to add a qualification to the opening sentence by inserting the word "may" before the verb "contribute". The text adopted on first reading had stated, in what had been presented as a statement of fact, that general principles of law

“contribute to the coherence of the international legal system”. Members had questioned whether that could be affirmed as a general and unconditional statement, noting that general principles of law – particularly those of the first category – could, in some cases, give rise to tensions or inconsistencies within the international legal framework. For that reason, and in order to provide the first paragraph with normative meaning, the Drafting Committee had considered it more appropriate to state that general principles “may” contribute to systemic coherence, without implying that such an effect was automatic or universal. The Committee had adopted that change on the understanding that further explanation of the reasons behind the adjustment would be provided in the commentary. The second sentence of the *chapeau* had also been modified, replacing “They may serve, *inter alia*” with “They serve, *inter alia*”. That change had been introduced on the understanding that the qualified and contingent nature of the functions performed by general principles had already been conveyed in the opening sentence of the paragraph. The Committee considered that the phrase “*inter alia*” continued to provide the necessary flexibility.

Second, the Drafting Committee had reversed the order of subparagraphs (a) and (b). In the version adopted on first reading, subparagraph (a) had referred to the interpretative and complementary function of general principles, while subparagraph (b) had addressed their normative role as a basis for rights and obligations. During the second reading, it had been suggested that the normative dimension of general principles should be placed first, in order to underscore their standing as a formal source of international law in accordance with Article 38 (1) (c) of the Statute of the International Court of Justice. The Drafting Committee had agreed with that suggestion, noting also that placing the interpretative function second would help avoid any implication that general principles served merely as interpretative tools.

Third, the Drafting Committee had introduced a terminological change to subparagraph (a), formerly subparagraph (b), replacing the phrase “primary rights and obligations” with “substantive rights and obligations”. While the Drafting Committee considered that the creation of rights and obligations was a fundamental feature of a source of law, the change had been introduced in response to concerns that the distinction between “primary” and “secondary” rules, while useful in the context of the responsibility of States for internationally wrongful acts, had not been used elsewhere in the draft conclusions on general principles of law. The Committee had adopted that change on the understanding that the commentary would elaborate on the nature of the rights and obligations contemplated, as well as the reasoning behind the terminology, and would provide further examples of substantive rights and obligations emanating from general principles of law.

Fourth, the Drafting Committee had agreed to delete the second occurrence of the phrase “as a basis” in subparagraph (a). That repetition had been considered redundant and its removal had been regarded as a simple improvement in drafting.

Draft conclusion 10 (2) was based on the text adopted on first reading, with one notable drafting change. The phrase “do not resolve” had been replaced with “do not address or resolve”, in order to capture both the situation where no applicable rule existed (non-address) and the situation where an applicable rule existed but failed to provide a solution in whole or in part (non-resolution). That dual formulation was seen as more accurate and nuanced and more responsive to State concerns.

The title of draft conclusion 10 was “Functions of general principles of law”, which was the title adopted on first reading.

Draft conclusion 11 had been adopted by the Drafting Committee on second reading without any change to the version adopted on first reading.

That draft conclusion affirmed that general principles of law were not hierarchically subordinate to treaties or customary international law, that they could exist in parallel with rules of similar content and that any conflict between sources was resolved through generally accepted techniques of interpretation and conflict resolution.

While no textual changes had been made, the Drafting Committee had considered a number of concerns regarding paragraph 1, particularly in the light of the existence of two distinct categories of general principles of law in the draft conclusions. It had been observed that the derivation of general principles from national legal systems logically presupposed

the absence of a rule of customary international law according to the transposition requirement, and that the development of a customary rule would undermine the existence of a prior general principle. Suggestions to develop the provision to distinguish between those categories of general principles of law in their relationship with other sources within the provision, or to omit paragraph 1 altogether, so as to address the comments made by States with regard to “informal hierarchy”, had not been pursued. The Drafting Committee considered it essential to affirm explicitly the absence of hierarchy between the sources enumerated in Article 38 (1) of the Statute of the International Court of Justice.

Accordingly, the Committee had retained the three-paragraph structure of the draft conclusion and had agreed that the commentary would elaborate on the different ways in which general principles interacted with other sources, depending on their nature and context.

The title of draft conclusion 11, “Relationship between general principles of law and treaties and customary international law”, had been adopted without change to the first-reading version.

Draft conclusion 12, entitled “General principles of law with a limited scope of application”, had not been part of the set of draft conclusions adopted by the Commission on first reading. It had been proposed by the Special Rapporteur in his fourth report, in the light of developments across various regional legal systems and institutions suggesting the existence and operation of general principles of law with a limited personal scope of application. The Drafting Committee had adopted the draft conclusion on second reading with a slight modification to its formulation, as proposed by the Special Rapporteur. The draft conclusion took the form of a “without prejudice” clause and was intended to preserve the possibility that certain general principles of law might form in the context of specific legal systems or regions for a limited number of States.

While there had been general agreement on the inclusion of a clause of that nature, considerable discussion had been devoted to its precise wording. The Committee had considered the delineation of the “limited scope” of certain general principles of law, including a possible enumeration of the dimensions of such limitation. It had been agreed that the Committee would retain a general formulation in order to accommodate future developments in international law. At the same time, it had been understood that the commentary would clarify that the scope of application of draft conclusion 12 was limited *rationae personae* to general principles of law operating within certain legal systems for a limited number of international actors, whether regional, subregional or other, but would not apply to strictly thematic general principles, such as general principles of international criminal law or international environmental law. The Committee had been of the view that an overreach of draft conclusion 12, in case it included general principles with a limited substantive or thematic reach, could undermine the overall scope of the draft conclusions and the effectiveness or relevance of the work of the Commission on the topic.

The Committee had also introduced a slight drafting adjustment, replacing the phrase “the existence of general principles of law” with a more general reference to “general principles of law”. The change had been made because there was no doubt as to the existence of those general principles of law. The title of draft conclusion 12 remained as it had been proposed in the Special Rapporteur’s fourth report.

A suggestion had been made to include a separate draft conclusion addressing the issue of State consent and the possible applicability of the persistent objector rule to general principles of law formed within the international legal system. However, there had been no agreement within the Committee to reopen the structure of the draft conclusions or to include an additional provision. The Committee had therefore decided not to pursue the proposal.

In conclusion, the Committee recommended that the Commission should take note of the draft conclusions. In accordance with the Commission’s established practice, the draft conclusions would be adopted at the Commission’s next session, so as to allow for the preparation of the corresponding commentaries.

**The Chair** said he took it that the Commission wished to take note of the report of the Chair of the Drafting Committee.

*It was so decided.*

**Mr. Jalloh**, noting that he was the one member who had not joined the consensus on draft conclusion 9 (Teachings), said that he would like to explain his position. A number of States, in their written comments on the topic, had asked the Commission not to address the issue of subsidiary means for the determination of rules of international law in the context of the topic on general principles of law, noting, in particular, that under the topic on subsidiary means, the Commission had adopted separate draft conclusions on decisions of courts and tribunals and teachings and their use as subsidiary means. Those draft conclusions were more detailed and provided a greater level of granularity on the question. Yet the Drafting Committee had decided to retain draft conclusions 8 and 9 under the topic at hand; since that was the view of the majority, he had not objected to it.

Having said that, he believed that the Commission should have been methodologically consistent when borrowing text from the draft conclusions on subsidiary means, in order to avoid providing guidance that could cause confusion for States. Draft conclusion 8, on decisions of courts and tribunals, largely reproduced the text of conclusion 13 of the Commission's conclusions on identification of customary international law, but draft conclusion 9, on teachings, reflected only part of draft conclusion 5 of the draft conclusions on subsidiary means. Unfortunately, the Committee had decided to exclude the very important second sentence of draft conclusion 5 of the draft conclusions on subsidiary means: "In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity." While that exclusion was regrettable, he welcomed the Commission's agreement that it had no implications for the inclusion of those important criteria in the work on the topic of subsidiary means, as they had been strongly endorsed in the Sixth Committee and would afford greater legitimacy to the use of teachings in international law by ensuring that diverse viewpoints from all regions of the world were taken into account.

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

##### *Chapter V. Immunity of State officials from foreign criminal jurisdiction* (*continued*) (A/CN.4/L.1008)

**The Chair** invited the Commission to resume its consideration of chapter V of its draft report (A/CN.4/L.1008), beginning with the paragraphs that had been left in abeyance.

##### *Paragraph 12* (*continued*)

**Mr. Grossman Guiloff** (Special Rapporteur) said that the phrase "serious international crimes" would be replaced with "the most serious international crimes", in line with other references in the chapter.

*Paragraph 12, as amended, was adopted.*

##### *Paragraphs 40 and 41* (*continued*)

**Mr. Grossman Guiloff** (Special Rapporteur) said he believed that paragraph 41 accurately reflected the Commission's plenary debate. Although he understood the theoretical issues pointed out during previous discussions of draft article 7, he did not believe that it was appropriate to retroactively change the content of the debate. Moreover, the reiteration of the same point throughout the report could weaken its overall effect. He would therefore prefer to retain the paragraph as drafted.

**Mr. Patel** proposed the insertion of a new sentence at the end of paragraph 41, which would read: "Accordingly, draft article 7 should be understood as a proposal for the progressive development of international law." That was not a reiteration of a point made elsewhere in the report.

**Mr. Oyarzábal** said that, while he agreed with Mr. Patel that some Commission members considered draft article 7 to reflect progressive development rather than a customary rule, language to that effect did not belong in paragraph 41.

**Mr. Forteau** suggested that the additional sentence proposed by Mr. Patel should be inserted immediately after the third sentence of paragraph 40.

**Mr. Patel** said that, while he could support Mr. Forteau's proposal, he still believed that paragraph 41 was not quite accurate.

**Mr. Grossman Guiloff** (Special Rapporteur) said that, in his view, the second, third and fourth sentences of paragraph 40 sufficiently reflected the range of views expressed in the Commission on whether draft article 7 reflected customary international law, while paragraph 41 logically followed on from that paragraph by noting the view that, instead of focusing on the nature of the draft article, the Commission should focus on its mandate to promote progressive development and codification. If Mr. Patel's specific point was inserted in the paragraph, contrary views would also need to be added, and the report would become very repetitive.

**Mr. Jalloh** said that, in his view, paragraph 40 as drafted already addressed the concern raised by Mr. Patel; moreover, since it had already been adopted, it should not be reopened. He encouraged the members to adopt paragraph 41 as it stood and move forward with the adoption of the rest of the report.

**Mr. Forteau** said that Mr. Patel's point should be included in paragraph 40, which made no mention of progressive development. If the proposed additional sentence was included in that paragraph, there would be no need to modify paragraph 41, as it would be clear why some members considered that the Commission did not need to take a position on whether draft article 7 reflected codification or progressive development. It was, moreover, positive to highlight the fact that at times the Commission engaged in the progressive development of international law.

**Mr. Grossman Guiloff** (Special Rapporteur) said that, although he continued to be of the view that the third and fourth sentences of paragraph 40 were sufficient to address Mr. Patel's concerns, he would, in the spirit of flexibility, agree to the proposed addition of a new sentence between those two sentences noting the view that draft article 7 was a proposal for progressive development. He hoped, however, that the addition would not create a precedent for reopening the debate on text that had already been adopted, except in extraordinary circumstances.

*Paragraph 40, as amended, was adopted.*

*Paragraph 41 was adopted.*

#### *Paragraph 42*

**Mr. Forteau** said that, in the paragraph as currently drafted, the phrase "not covered by immunity" could be misunderstood as referring to "foreign officials", rather than to "crimes". He therefore proposed that the phrase "the issue of crimes committed by foreign officials in the territory of the forum State not covered by immunity" should be revised to read "the issue of crimes which are committed by foreign officials in the territory of the forum State and which are not covered by immunity".

**Mr. Akande** said that he would prefer a different formulation, as, in the newly proposed version, the Commission appeared to have concluded definitively that certain crimes were not covered by immunity.

**Mr. Forteau**, supported by **Mr. Akande**, said that the most straightforward solution would be simply to delete the words "not covered by immunity".

**Mr. Zagaynov** proposed that the phrase "not covered by immunity" should be placed just after the word "crimes".

**Mr. Jalloh** said that he was in favour of the deletion proposed by Mr. Forteau.

*Paragraph 42, as amended, was adopted.*

#### *Paragraph 43*

**Mr. Jalloh** said that an important point that had been raised by several Commission members was missing from the summary of views in paragraph 43. He proposed that a new sentence should be inserted after the fifth sentence of the paragraph that would read: "It was recalled that a more general formulation that would exclude the application of immunity for

the most serious crimes under international law had been proposed in the previous quinquennium and by some States, in their comments, thereby allowing for the draft articles to keep pace with developments in international law.” In the following sentence, the words “of draft article 7” should be added after “paragraph 1”, for the sake of clarity.

**Mr. Sall** said that the second sentence was hard to understand because it said two completely different things: first that having a list of specific crimes in draft article 7 (1) risked excluding crimes that could fall under the provision, and then that it could result in abuse and the arbitrary inclusion of a wide range of crimes. In his opinion, the second sentence should present a simple counterargument to the first sentence. He therefore proposed rewording it to read “*D’autres membres ont estimé que cet élargissement pouvait donner lieu à des abus et à l’inclusion arbitraire de divers crimes*” [Other members expressed the view that broadening the list could result in abuse and the arbitrary inclusion of a wide range of crimes].

**Mr. Patel** proposed inserting two new sentences in paragraph 43. The first, to be inserted after the fourth sentence, would read: “Inclusion of crimes under international law, it was stressed, should be based on express recognition by States.” The second, to be inserted after what was currently the fifth sentence, would read: “It was reiterated that definitions from treaties lacking universal acceptance should not be transposed.” He also proposed that the phrase “due to conceptual ambiguity” should be inserted after the word “questioned” in what was currently the sixth sentence of the paragraph.

**Mr. Akande** said that he had no objection to Mr. Patel’s proposals. However, when the summary reflected more or less verbatim a point that had been made in the plenary, it must be made clear that only one member had said those words.

**Mr. Oyarzábal** said he agreed that views considered to be of particular importance by Commission members should be reflected in the summary. However, it was not possible to reflect everything that each member had said in the discussions. To his mind, the spirit of the current exercise was to ensure that the summary reflected the general nature of the debate. The Commission could decide to include specific points made by individual members, but only when strictly necessary.

**Mr. Forteau** said that he fully shared Mr. Oyarzábal’s views concerning the drafting process. He was unsure whether the amendments proposed by Mr. Patel reflected views that had been expressed orally or only in writing. In his opinion, the summary should reflect only what had actually been said in the plenary. The meaning of the sentence proposed by Mr. Patel on transposition from treaties was unclear to him. Moreover, he did not support the proposed addition of the phrase “due to conceptual ambiguity” to the sixth sentence because the use of the term “crimes under international law” had been questioned for different reasons by different members. The proposal would restrict the scope of the sentence so that it reflected only Mr. Patel’s view. The sentence should thus be left unchanged.

**Ms. Oral**, supported by **Mr. Fife**, said that she entirely agreed with Mr. Oyarzábal’s comments on the spirit of the drafting process. The summaries of the Commission’s debates were not perfect; they were meant to provide an overview of the positions expressed during the debates and, in some cases, specific opinions aired by individual members. She hoped that all members could exercise discipline and caution by proposing the addition of their individual views only when absolutely necessary.

**Mr. Ouazzani Chahdi** said that the final sentence of the paragraph, which suggested that “certain crimes listed in the Malabo Protocol could be considered for inclusion” in the list in draft article 7 (1), seemed inconsistent with the statement, in the sixth sentence, that the definitions of crimes under treaties applied only to the Contracting Parties, while those under customary international law were applicable to all. He would appreciate clarification in that regard.

**The Chair** said that the Commission’s usual approach to adopting paragraphs containing summaries of its debates was to broadly trust the drafts that were prepared for its consideration. The purpose of the exercise was to ensure that the summaries accurately captured the views that had been expressed in the plenary debate. While individual members might understandably be disappointed at the omission of a particular point they had made,

the focus should be on improving and refining the existing language rather than seeking to insert long quotations from individual statements. In any case, all the statements would be reflected in the summary records of the plenary meetings.

**Mr. Patel** said that the Commission's discussions concerning draft article 7 had not been easy. Members should not shy away from tackling contentious issues in the name of discipline and caution. The amendments that he had proposed essentially addressed two substantive concerns raised during the debate: the inclusion of international crimes that had not been expressly recognized as such by States, and the fact that definitions borrowed from instruments that did not enjoy universal recognition could not be transposed.

**Mr. Jalloh** said that the amendment that he had proposed did not concern a view that he had expressed but rather a broader point made by several colleagues. He had made the proposal in the spirit of ensuring that the summary provided an accurate and balanced overview of the debate.

*The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.*

**Mr. Oyarzábal** said that he understood the reasoning behind Mr. Sall's proposed amendment to the second sentence. However, it had not been suggested that the list of crimes in draft article 7 (1) should be broadened; rather, the discussion had focused on whether it should be expressly stated that the list was not exhaustive. He therefore proposed that the second sentence should be amended to read: "Other members deemed that stating expressly that the list was not exhaustive could result in abuse and the arbitrary inclusion of a wide range of crimes."

**Mr. Grossman Guiloff** (Special Rapporteur) proposed that the new sentence that Mr. Patel had proposed to insert after the fourth sentence should be amended to read: "A view was expressed that inclusion of crimes under international law should be based on express recognition by States."

**The Chair** said he understood that Mr. Patel's proposal to insert language on the transposition of definitions from treaties lacking universal acceptance would be considered under paragraph 44 and that the language in the sixth sentence that had been questioned by Mr. Ouazzani Chahdi reflected a substantive point made by Mr. Ma in the plenary. With that in mind, he took it that the Commission wished to adopt the paragraph with the amendments proposed by Mr. Sall, as amended by Mr. Oyarzábal; Mr. Patel, as amended by the Special Rapporteur; and Mr. Jalloh.

*Paragraph 43 was adopted on that understanding.*

*Paragraph 44*

**Mr. Jalloh** said that the paragraph as drafted focused exclusively on the arguments made in opposition to the Special Rapporteur's proposal to add the crimes of aggression, slavery and the slave trade to draft article 7. In order to reflect the support expressed for that proposal, a new second sentence should be inserted in paragraph 44, to read: "It was observed that those three crimes were among the oldest examples of crimes under both customary international law and international treaty law, which, in its separate work, the Commission had qualified as bearing a *jus cogens* character." In addition, at the beginning of the first sentence, the words "A number of members" should be replaced with "Many members".

**The Chair** noted that "many members" was not commonly used in the Commission's summaries of its debates.

**Mr. Akande** noted that the Commission had characterized as *jus cogens* only two of the three crimes mentioned.

**Mr. Zagaynov** said that, with regard to Mr. Jalloh's first proposal, it would be preferable to borrow the carefully negotiated formulation used in draft conclusion 23 of the Commission's draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), which referred to "a non-exhaustive list of norms that the International Law Commission has previously referred to as having" the status of *jus cogens*.

**Ms. Mangklatanakul** said that she supported the positions of Mr. Akande and Mr. Zagaynov with respect to the proposed mention of *jus cogens*. She disagreed with Mr. Jalloh's proposal to use the formulation "It was observed that".

**Mr. Patel** said his proposal that the list of crimes should include terrorism, which impacted the international community as a whole, was not mentioned in paragraph 44. A new sentence with wording to that effect should be added after the first sentence.

**Mr. Grossman Guiloff** (Special Rapporteur) said he agreed that paragraph 44 was unbalanced and did not properly reflect the discussion within the Commission. Members' reasons for supporting the addition of the crimes of aggression, slavery and the slave trade were not included, while members' reasons for opposing it were described at length. A few examples of the arguments in favour could be given, such as Mr. Jalloh's proposed reference to *jus cogens*.

He was amenable to the inclusion of a reference to Mr. Patel's proposal to add terrorism to the list, accompanied by language indicating that some members, while supportive of the idea, had preferred not to add it owing to the lack of an accepted definition of the term.

**The Chair** suggested that paragraph 44 should be left in abeyance to allow interested members to formulate textual proposals to be presented to the plenary at the next meeting.

*Paragraph 44 was left in abeyance.*

#### *Paragraph 45*

**Mr. Forteau** said that, in the first sentence of paragraph 45, the word "sequential" in the phrase following item (c) should be deleted. The second sentence should be reformulated to explain that States would not have had the opportunity to comment on a general text for the provision because the draft articles were already at the second-reading stage.

**Mr. Jalloh** said that, in item (d) in the first sentence, the word "established" should be replaced with the word "pre-agreed". The second sentence should be reformulated to reflect the fact that some members had not favoured a general textual formulation to replace the text of draft article 7 that had been adopted on first reading because States would not have the opportunity to comment on it, as the draft articles were at the second-reading stage.

**Mr. Patel** said that his proposal to include a reference to the consent of States in the recognition of international crimes should be added to the list enumerated in the first sentence.

**Mr. Forteau** said that Mr. Patel's proposal did not belong in the first sentence, which concerned drafting proposals rather than substantive proposals.

**The Chair**, speaking as a member of the Commission, proposed that the words "in the commentary" should be added after "separately indicating" in item (c) of the first sentence, as that was a point that he had made in the plenary debate.

*Paragraph 45, as amended by Mr. Forteau, Mr. Jalloh and the Chair, was adopted.*

#### *Paragraph 46*

**Mr. Akande** said that, to reflect the concern that had been raised by Mr. Patel in the discussion of paragraph 43, the third sentence of paragraph 46 should be reformulated to read: "Some members raised concerns regarding the reliance on the Rome Statute of the International Criminal Court in the annex, and the inclusion of crimes that were set out in treaties that were not universally ratified." The rest of the third sentence as originally drafted would become a new fourth sentence, which would read: "Other members supported the reference to the Rome Statute and its definitions."

**Mr. Jalloh** said that, as the first part of Mr. Akande's proposal introduced a new element referring to treaties that were not universally ratified, the words "and the inclusion of other crimes in treaties which were considered as part of customary international law" should be added at the end of the new fourth sentence.

**Mr. Akande**, agreeing with the point raised by Mr. Jalloh, proposed that the formulation to be inserted at the end of the new fourth sentence should read “as well as to the other treaties referred to in the annex”.

**Mr. Grossman Guiloff** (Special Rapporteur) proposed that paragraph 46 should be left in abeyance to allow interested members to reach an agreement.

*Paragraph 46 was left in abeyance.*

*The meeting rose at 1 p.m.*