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**General principles of law**

Statement of the Chair of the Drafting Committee, Mr. Mario Oyarzábal

27 May 2025

Mr. Chair,

It is my pleasure, today, to introduce the second report of the Drafting Committee for the seventy-sixth session of the International Law Commission, which concerns the topic “General principles of law.” The report, which is to be found in document A/CN.4/L.1018, contains the texts and titles of the 12 draft conclusions on General Principles of Law, adopted by the Drafting Committee and which the Drafting Committee recommends for adoption by the Commission on second reading.

Before commencing with the introduction of the Draft Conclusions, allow me to pay tribute to the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, whose constructive approach, flexibility and patience facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation, significant contributions and efforts to reach an agreement on the text. Furthermore, I wish to thank the Secretariat for its valuable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters as well.

Mr. Chair,

The Drafting Committee devoted four meetings to the topic, from 13 to 16 May 2025. The Drafting Committee proceeded on the basis of the text proposed by the Special Rapporteur in his fourth report, which the Plenary referred to the Committee at its 3712nd meeting, held on 12 May 2025.<sup>1</sup>

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### **Draft conclusion 1 – Scope**

Mr. Chair,

Allow me to begin with draft conclusion 1, which deals with the scope of the entire set of draft conclusions. The Drafting Committee adopted the draft conclusion with no changes to the first reading text.

The title of draft conclusion 1 is “[s]cope”, which was the title adopted on first reading.

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### **Draft conclusion 2 – Recognition**

Mr. Chair,

Draft conclusion 2 concerns the requirement that, for a general principle of law to exist, it must be recognized by the community of nations. The use of the phrase “community of nations” in the English text accords with the text of article 15, paragraph 2, of the International Covenant on Civil and Political Rights,<sup>2</sup> which is followed in all the official languages. Accordingly, the French text uses “*l’ensemble des nations*” and the Spanish text uses “*la comunidad internacional*”.

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<sup>1</sup> [A/CN.4/785](#).

<sup>2</sup>

It also eliminates the anachronistic term “civilized nations”, used in Article 38, paragraph 1(c) of the Statute of the International Court of Justice.<sup>3</sup> While it is primarily recognition by States that contributes to the formation of general principles of law, the term is intended to capture the possibility that international organizations may also contribute to the recognition of general principles of law. This will be further explained in the commentary. The commentary will also clarify that while the positions of other actors, such as NGOs, may be relevant in providing context and for assessing recognition by the community of nations, these positions do not, in and of themselves, form part of such recognition. The Drafting Committee considered a number of alternatives to “community of nations”, including using either “international community” or “community of nations” consistently in all languages, “community of States” or a reference to the “principal legal systems of the world”, but decided to retain the first-reading text of the text of the provision.

I wish to note that the recognition referred to in draft conclusion 2 is 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 be recognized in the contexts of those individual systems and then an assessment is made that it is a general principle. Therefore, the Drafting Committee did not take up a proposal to add the words “as such” after “recognized”. The notion of “recognition” will be further explained in the commentary.

I wish to place on record that, while the Special Rapporteur had proposed additional paragraphs for draft conclusion 2, he withdrew his proposal following the debate in the Plenary. The content of those paragraphs, as mentioned before, will be reflected in the commentary.

The title of draft conclusion 2 remains “Recognition”.

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### **Draft conclusion 3 – Categories of general principles of law**

Mr. Chair,

I will now turn to draft conclusion 3, which concerns the categories of general principles of law. The provision was 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 was 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 considered a number of proposals to amend the chapeau of the provision, for example, by replacing “comprise” by “are” or to say 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 were not considered necessary.

The Drafting Committee retained the title adopted on first reading, which is “[c]ategories of general principles of law”.

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### **Draft conclusion 4 – Identification of general principles of law derived from national legal systems**

Mr. Chair,

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

The Drafting Committee also decided to retain the first reading title of draft conclusion 4, namely “[i]dentification of general principles of law derived from national legal systems”.

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**Draft conclusion 5 – Determination of the existence of a principle common to the various legal systems of the world**

Mr. Chair,

I now turn to draft conclusion 5, which concerns 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, was adopted without modification to the first reading text. The text of the provision is intended to emphasize that the analysis of national legal systems must be as wide and representative as possible.

The title of draft conclusion 5 is “[d]etermination of the existence of a principle common to the various legal systems of the world”, as was adopted in the first reading.

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**Draft conclusion 6 – Transposition to the international legal system**

Mr. Chair,

I now turn to draft conclusion 6, which deals with the second step, which is the transposition of general principles of law formed in national legal systems to the international legal system. The text of the provision remains as adopted on first reading. The Drafting Committee discussed whether it would be better to refer to “transposability” than “transposition”. The term “transposition” was retained to avoid giving the impression that a formal act by States was necessary before applying a principle in the international legal system. Whether a principle determined in accordance with draft conclusion 5 may be transposed to the international legal system depends on whether it is capable of serving a regulatory function in the latter. The commentary to draft conclusion 6 will be expanded to better capture the sense of the provision.

The title of draft conclusion 6 is “[t]ransposition to the international legal system”. The words “[d]etermination of”, which were included in the title as adopted on first reading, were deleted to better align the title with the content of the provision.

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### **Draft conclusion 7 – Identification of general principles of law formed within the international legal system**

Mr. Chair,

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

The Committee considered 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 reflected in draft conclusions 5 and 6 for principles derived from national legal systems. The Committee 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, provide an explanation of the deductive and inductive reasoning involved in such determination.

The Committee 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 elaborate in detail that the formation of a general principle of law does not require the same two-element test—namely, general practice accepted as law—that governs the identification of custom.

The Committee discussed the concerns voiced by some members in the plenary about the role of State consent in the formation of the second category of general principles. It was agreed that this 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 detail in the commentary.

Finally, the Special Rapporteur 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 emphasized that, while examples may be relatively few in number, they should be solid and clearly grounded in practice.

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

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### **Draft conclusion 8 – Decisions of courts and tribunals**

Mr. Chair,

The Drafting Committee adopted draft conclusion 8, entitled “Decisions of courts and tribunals”, on the basis of the text adopted on first reading, with two modifications. The first was to align the formulation of paragraph 1 with the Commission’s work on subsidiary means for the determination of rules of international law. The second was the insertion of a “without prejudice” clause in paragraph 2, to clarify the relationship with draft conclusion 5, paragraph 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 was the subject of discussion. The Committee debated the potential overlap of the provisions with the topic of subsidiary means, the 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. The Committee agreed that retaining the provision was appropriate. While some members noted the importance of consistency with the Commission’s previous conclusions on identification of

customary international law, it was agreed that alignment with the work on subsidiary means was appropriate in the present context, and the text of paragraph 1 was modified accordingly. The provision now reads:

1. *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 was modified to begin with the words “[w]ithout 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 Committee adopted the text of draft conclusion 8 on the understanding that the commentary would provide clarifications, including: 1) that the reference to the International Court of Justice in paragraph 1 does not exclude the relevance of decisions by other international courts and tribunals; 2) that the decisions of national courts referred to in paragraph 2 are basically those of the highest courts, and should be understood as final decisions, not subject to further review; and 3) a detailed explanation of the reasons that led the Committee to include the “without prejudice clause” in paragraph. 2.

The title of draft conclusion 8, “[d]ecisions of courts and tribunals”, remains unchanged from the first reading text.

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### **Draft conclusion 9 – Teachings**

Mr. Chair,

The Drafting Committee 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 the formulation used in the work of the Commission on

subsidiary means for the determination of rules of international law. While there was general support for the adoption of the revised text, two points were the subject of focused discussion.

The first concerned the possibility of including a second sentence on linguistic and gender diversity as criteria to assess the weight of teachings as subsidiary means, in parallel to the formulation used in draft conclusion 5 of the Commission's work on that topic. While the Committee expressed broad support for the substance of the sentence, several members raised reservations about its inclusion in the text. In particular, it was observed that the second sentence proposed was drawn directly from an ongoing project of the Commission. Moreover, members 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 work of the Commission on subsidiary means. In light of such concerns, the Committee agreed not to include the sentence in the text of the draft conclusion. However, the Committee did so on the understanding that the commentary would reaffirm the importance of considering linguistic, regional and gender diversity when assessing the weight of relevant teachings.

The second point concerned the removal of the phrase "with competence in international law" from the description of the most highly qualified publicists. This change was suggested in 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 involves a comparative analysis of domestic legal systems, in which teachings authored by scholars with recognized expertise in comparative law, even if not formally trained as international lawyers, may be particularly relevant. The Committee considered the view that retaining the reference to "competence in international law" might unintentionally narrow the scope of valid teachings. Nonetheless, the Committee ultimately decided to retain the formulation proposed by the Special Rapporteur in his fourth report without changes, considering the term "teachings" at the beginning of the paragraph was wide enough to encompass the work of scholars on different branches of law, and that the commentary would specifically refer to the relevance of experts in comparative law in the context of the first category of general principles of law.

While the draft conclusion was adopted without further modification, it should be noted that one member did not join the consensus.

The title of draft conclusion 9 is “[t]eachings”, which is the same title adopted by the Drafting Committee on first reading.

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### **Draft conclusion 10 – Functions of general principles of law**

Mr. Chair,

I now turn to draft conclusion. The draft conclusion addresses the functions that general principles of law may perform within the international legal system. The version adopted by the Drafting Committee reflects a number of substantive and drafting modifications to the text adopted on first reading. The Committee proceeded on the basis of a revised text proposed by the Special Rapporteur in his fourth report.

#### **Reordering of the paragraphs**

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 began by stating that general principles of law are mainly resorted to when other rules of international law do not resolve a particular issue. This was followed by a second paragraph setting out the functions that general principles may serve. In the text adopted on second reading, the Committee agreed to reverse the order, in line with a proposal by the Special Rapporteur. The new structure places the emphasis first on the potential contribution and functions of general principles of law, and only thereafter on the circumstances in which they are primarily invoked. The Committee considered this reversal to be a logical improvement. The reordered structure allows the reader to first understand what general principles of law may do within the legal system, as a normative proposition, before addressing when they are mainly relied upon, as a factual one. While the Committee considered whether paragraph 2 should be more appropriately located in draft conclusion 11, which addresses the relationship between general principles of law and other sources of international law, the prevailing view was that the content of the paragraph, even though as a statement of fact, is more linked to the functions of general principles and should remain within the present conclusion.

## Paragraph 1

The Committee introduced a number of textual modifications to paragraph 1 compared to the version adopted on first reading. These concerned both the *chapeau* and the formulation and order of the subparagraphs.

First, the Committee decided to qualify the opening sentence by inserting the word “may” before the verb “contribute”. The text adopted on first reading had stated, in what was presented as a statement of fact, that general principles of law “contribute to the coherence of the international legal system”. Members questioned whether this 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 this reason, and in order to provide the first paragraph with normative meaning, the Committee considered it more appropriate to reflect that general principles of law “may” contribute to systemic coherence, without implying that such an effect is automatic or universal. The Committee adopted this change on the understanding that the commentary would provide further explanation of the reasons behind this adjustment. The second sentence of the *chapeau* was also modified, replacing “[t]hey may serve, *inter alia*” with “[t]hey serve, *inter alia*”. This change was 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 Committee reversed the order of subparagraphs (a) and (b). In the version adopted on first reading, subparagraph (a) referred to the interpretative and complementary function of general principles, while subparagraph (b) addressed their normative role as a basis for rights and obligations. During the second reading, it was 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, paragraph 1(c), of the Statute of the International Court of Justice. The Committee agreed with this suggestion, noting also that placing

the interpretative function second helped avoid any implication that general principles serve merely as interpretative tools.

Third, the Committee introduced a terminological change to subparagraph (a) (formerly subparagraph (b)), replacing the expression “primary rights and obligations” with “substantive rights and obligations”. While the Committee considered that the creation of rights and obligations is a fundamental feature of a source of law, this revision was 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 adopted the 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 Committee agreed to delete the second occurrence of the phrase “as a basis” in subparagraph (a). The repetition was considered redundant, and its removal was regarded as a simple improvement in drafting.

## **Paragraph 2**

Allow me to turn to paragraph 2 of draft conclusion 10, which is based on the version adopted on first reading, with one notable drafting modification. The phrase “do not resolve” was replaced by “do not address or resolve”, in order to capture both the situation where no applicable rule exists (non-address) and the situation where an applicable rule exists but fails to provide a complete solution (non-resolution). This dual formulation was seen as more accurate and nuanced, and responsive to State concerns.

The title of draft conclusion 10 is “[f]unctions of general principles of law”, which is the same title adopted by the Drafting Committee on first reading.

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**Draft conclusion 11 – Relationship between general principles of law and treaties and customary international law**

Mr. Chair,

I now turn to draft conclusion 11, which was adopted by the Drafting Committee on second reading without change to the version adopted on first reading.

This draft conclusion affirms that general principles of law are not hierarchically subordinate to treaties or customary international law, that they may exist in parallel with rules of similar content, and that any conflict between sources is resolved through generally accepted techniques of interpretation and conflict resolution.

While no textual changes were made, the Committee considered a number of concerns regarding paragraph 1, particularly in light of the existence of two distinct categories of general principles of law in the draft conclusions. It was observed that the derivation of general principles from national legal systems logically presupposes the absence of a rule of international customary law according to the transposition requirement, and that the development of a customary rule would undermine the existence of a prior general principle. The suggestion to develop the provision to distinguish both 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 by States on “informal hierarchy” —were not pursued. The Committee considered it essential to affirm explicitly the absence of hierarchy between the sources enumerated in Article 38, paragraph 1, of the Statute of the International Court of Justice.

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

The title of draft conclusion 11, “[r]elationship between general principles of law and treaties and customary international law”, was adopted without change to the first reading version.

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## **Draft conclusion 12 – General principles of law with a limited scope of application**

Mr. Chair,

I now turn to draft conclusion 12, entitled “General principles of law with a limited scope of application”. This provision was not part of the set of draft conclusions adopted by the Commission on first reading. It was proposed by the Special Rapporteur in his fourth report, in 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 adopted the draft conclusion on second reading with a slight modification to its formulation, as had been proposed by the Special Rapporteur.

This draft conclusion takes the form of a “without prejudice” clause. It is intended to preserve the possibility that certain general principles of law may form in the context of specific legal systems or regions for a limited number of States.

While there was general agreement on the inclusion of a clause of this nature, considerable discussion was devoted to its precise wording. The Committee considered the delineation of the “limited scope” of certain general principles of law, including a possible enumeration of the dimensions of such limitation. It was agreed that the Committee would retain a general formulation in order to accommodate future developments in international law. At the same time, it was 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 (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 was 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 also introduced a slight drafting adjustment, replacing the phrase “the existence of general principles of law” with the more general reference to “general principles of law”. This change was made because there was no doubt as to the existence of these general principles of law.

The title of draft conclusion 12 is “[g]eneral principles of law with a limited scope of application”, which is the same title proposed by the Special Rapporteur in his fourth report.

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Mr. Chair,

Before I conclude, let me add that a suggestion was 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 was no agreement within the Drafting Committee to reopen the structure of the draft conclusions or to include an additional provision. The Committee therefore decided not to pursue the proposal.

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Mr. Chair,

This concludes my introduction of the second report of the Drafting Committee for this session. Let me clarify that the Commission is requested, at this stage, to take note of the draft conclusions. In accordance with our established practice, the draft articles will be adopted next year, so as to allow for the preparation of the corresponding commentaries.

I thank you for your kind attention.

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