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Present:

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Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
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	Mr. Huang
	Mr. Jalloh
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	Mr. Ouazzani Chahdi
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	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

General principles of law (agenda item 7) (*continued*) (A/CN.4/732)

Sir Michael Wood said that he wished to thank the Special Rapporteur for his first report on general principles of law (A/CN.4/732) and his oral introduction thereof. The topic was of the highest interest – the present debate was witness to that – although care should be taken not to exaggerate its importance in practice. As had often been pointed out, recourse to that third source of international law listed in Article 38 (1) of the Statute of the International Court of Justice was rare, and with good reason.

For the Commission to take up the topic was nevertheless an important step. Article 38 (1) of the Statute listed "the general principles of law recognized by civilized nations" as a distinct source of law. Over the years the Commission had done important work on the other two sources listed in Article 38: treaties and customary international law. Those sources were generally regarded as the main sources of international law, as borne out in practice. However, general principles of law also played a role, although, as other speakers had already noted, they were often, rightly, seen as "supplementary" to treaties and customary international law.

The general principles of law recognized by civilized nations, as a source of law, had given rise to not a little confusion ever since their inclusion as a source of international law in the Statute of the Permanent Court of International Justice in 1920. While much had been written about general principles of law as a source of international law, there seemed to be few teachings on the matter that were widely regarded as authoritative, with the possible exception of the writings of a former member of the Commission, Professor Alain Pellet. Many writers had discussed Article 38 (1) (*c*) in ways that added little but confusion; nor was much clarification to be found in the decisions of international or national courts and tribunals, as the case law mentioned in the first report showed. Relevant State practice was hard to find, though the Commission's consideration of the topic might perhaps stimulate helpful views from States.

However, the relative lack of materials was not a reason for the Commission to steer clear of the topic. The Commission had played an important role in shedding light on fundamental aspects of the international legal system, especially on the sources of international law. It was currently doing so on *jus cogens*, another subject of high interest but relatively rare application in practice. The lack of helpful court decisions and State practice was, however, a reason for the Commission to seek to work, so far as possible, in a pragmatic way based on current law and practice and to adopt a cautious and rigorous approach, as suggested by the Special Rapporteur in his report.

In short, the present topic, general principles of law, was an opportunity for the Commission to explain and clarify that source of international law: its scope and place within the international legal system, and the various questions surrounding it, not least how general principles as a source of law were to be identified. He had no doubt that the Commission would be able to provide valuable assistance to States and all others that found themselves having to deal with general principles of law.

He would first offer a few general observations on the report before commenting on each section thereof.

He welcomed the fact that the first report was preliminary and introductory in nature. As a starting point for future work, it served its purpose effectively, being well researched and carefully drafted, taking a sound overall approach, and referring to a wealth of interesting materials. Given the real difficulties underlying the topic, it represented a considerable achievement. The Special Rapporteur's clear oral introduction had explained the main issues well without making them overcomplicated.

In his introduction, the Special Rapporteur had indicated that he would welcome members' views on a number of central issues that arose under the topic, such as the precise meaning of "recognition" and the so-called "categories" of general principles of law. However, he would not, at the current stage, be expressing definitive views on all the matters that the Special Rapporteur had raised.

There was much in the report with which he agreed, including the overall approach. He particularly agreed with the Special Rapporteur on the following points.

First, he agreed that draft conclusion 1 accurately stated the scope of the topic. As work proceeded, however, consideration might be given to clarifying the title of the topic, for example by altering it to "General principles of law as a source of international law" so as to better capture the scope and nature of the topic, especially for those not expert in international law. The current title might be construed as a comparative study of national laws or an exercise in listing general principles of law. A similar change had been made to the title of the topic on *jus cogens*, so as to include a reference to international law.

Second, he agreed that, as noted in paragraph 15 of the report, the starting point for the Commission's work on the topic should be Article 38 (l) (*c*) of the Statute of the International Court of Justice, analysed in the light of the practice of States and the jurisprudence of international courts and tribunals. By "starting point" he understood that Article 38 (1) (*c*) identified the source of international law that the Commission was addressing in the current topic. The Commission was not, of course, limiting itself to the use of that source by the International Court of Justice; on the contrary, as the Special Rapporteur made clear, it was a source relevant for all who were called upon to determine and apply international law. At the same time, the Commission would not, as he understood it, look beyond the source of law listed in Article 38 (l) (*c*).

Third, he agreed that the output of the Commission's work should take the form of draft conclusions, with commentaries.

Fourth, he agreed with the Special Rapporteur that the Commission needed to be cautious when examining case law and writings: some of the terminology used therein was confusing, as noted by the Special Rapporteur. He would refrain from commenting at the current stage on certain references in the report to the case law which he did not find relevant, including because they dealt with rules of customary international law and not with the general principles of law within the meaning of Article 38 (l) (*c*) of the Statute of the International Court of Justice. He did believe, however, that a careful explanation of the relevant or prevalent terminology might be a useful part of the Commission's eventual output. Contrary to the view of the Special Rapporteur, however, he would prefer not to depart – accidentally or otherwise – from the precise terminology of Article 38 (l) (*c*) of the Statute in French or Spanish, either in the title of the topic or in the Commission's documentation, whether or not any difference in meaning resulted.

Fifth, he agreed that a bibliography on the topic to accompany the final output would be useful, particularly if additions could be proposed as work progressed.

Sixth, he agreed that it was not part of the Commission's task to examine the substance of general principles of law within the meaning of Article 38 (l) (*c*), although examples could certainly be given when explaining conclusions. As with the topic "Identification of customary international law", references to cases should not be taken as agreement with them.

Seventh, he agreed that general principles of law were derived from national legal systems and then transposed to the international legal system; on the other hand, he was yet to be convinced that general principles of law could be derived solely from "within the international legal system".

Eighth, he agreed that the requirement of "recognition" was essential for determining the existence of a general principle of law and that explaining the meaning of recognition in that context, and how it could be assessed, would be central to the Commission's work.

Finally, he agreed that, in the today's international system, the term "civilized nations" must be read as referring to all States.

Turning to part one (I) (A) of the report, he said that he agreed, in principle, with the issues set out by the Special Rapporteur; they were all central to the topic, and the Commission needed to clarify them. However, he did not fully agree with the order in which the Special Rapporteur intended to address them. The identification of general principles of law recognized by civilized nations was closely linked to the functions of such general principles of law and their relationship to other sources of international law. Accordingly, in his view, it would be necessary to address both matters together, in a holistic way. The Special Rapporteur's second report could assist the Commission in

exploring in more depth the requirement of recognition and what exactly was covered by Article 38 (l) (*c*) of the Statute of the International Court of Justice, the so-called "categories" of general principles of law. The Commission could then proceed to analyse matters related to the functions of the general principles of law and their relationship to other sources.

Paragraph 33 of the first report referred to the possibility of addressing general principles of law with a "regional" or "bilateral" scope of application. That was something to which the Commission could return as work progressed, in the light of further research.

He questioned the views referred to in paragraph 32 of the report to the effect that decisions of international courts and tribunals played a substantive role in the formation of general principles of law, for which only one author was cited. If the suggestion was that recognition might be by courts and tribunals, rather than by States, and that in that field the decisions of courts had a role beyond that of a "subsidiary means" within the meaning of Article 38 (l) (*d*) of the Statute, that would amount to saying that courts and tribunals had a law-making power. That did not reflect the existing international legal system.

Part two of the report provided an account of the previous work of the Commission relating to general principles of law, which should be taken into account as appropriate. The Special Rapporteur pointed out, in paragraph 28 of the report, that the relationship between general principles of law and customary international law deserved particular attention. It was an issue that had been touched on briefly under the topic "Identification of customary international law". It had been agreed that, although the distinction between customary international law and general principles was important, nevertheless "definitive pronouncements on the latter should be avoided, as general principles possessed their own complexities and uncertainties" (A/67/10, para. 175).

Under the present topic, however, the Commission should squarely confront those complexities and uncertainties. There was a risk that, if the distinction between general principles of law and customary international law was not explained clearly, there might be a certain confusion between those two sources of international law. The Commission should not send the message that, if an applicable rule of customary international law could not be identified, then a general principle of law might nonetheless be invoked because the criteria for its identification were less stringent. Nor should it send the message that, assuming that the function of general principles of law was to avoid a *non liquet*, then a general principle of law must necessarily be identified. The Commission should not present general principles of law as some sort of "custom lite", to use the expression of Jan Klabbers, as that would reflect negatively on both customary international law and general principles of law, and on the international legal system as a whole.

Accordingly, the relationship between those two sources not only deserved particular attention; it also required particular caution. It was to be hoped that, under the topic, the Commission would not only explain the limits of the general principles of law as a source of international law, but also clearly state the distinction between that source and customary international law. They were distinct sources of international law, with distinct "rules of recognition". Where it was not possible to identify an applicable rule of customary international law, because of the absence of one or both of the two constituent elements thereof, it could not be the case that one could turn lightly to general principles of law to find a desired rule.

Part three of the report, which dealt with the development of general principles of law over time, contained a wealth of materials. He largely agreed with the observations of the Special Rapporteur, in particular that, prior to the adoption of the Statute of the Permanent Court of International Justice, States and adjudicative bodies had often relied on rules or principles derived from sources other than treaties and custom, and that those rules and principles were usually taken from domestic legal systems and Roman law. That, at least, was what those drafting Article 38 (l) (*c*) of the Statute appeared to have believed, and it significantly informed the scope of that provision.

He supported the conclusions drawn by the Special Rapporteur from the *travaux préparatoires* of the Statute of the Permanent Court. The drafters seemed to have been driven by a concern to avoid findings of *non liquet*. That confirmed the supplementary

nature of general principles of law; Hersch Lauterpacht had referred to them as a "residuary source". At the same time, it had generally been agreed that the Permanent Court should not have a power to create law. States maintained control over the process of formation of the general principles of law. Furthermore, the *travaux* also showed that the drafters had in mind, in essence, that the general principles of law were to be found *in foro domestico*.

Part three (III) provided a brief, non-exhaustive account of recent practice relating to the general principles of law. It concluded that that source of international law had been invoked and applied in various different contexts, and that it continued to have relevance in today's international legal system. He agreed that the general principles of law continued to be a relevant source of international law; that was so to the extent that they provided rules not found in treaties or customary international law.

However, part three (III) seemed to prejudge certain aspects of the topic. By selecting the case law that he considered relevant, the Special Rapporteur appeared, in his first, preliminary, report, already to have decided what the general principles of law recognized by civilized nations were, even though the Commission was only beginning to grapple with that question. That said, the Special Rapporteur's pragmatic approach in pointing the Commission towards the practice he considered relevant, at least *prima facie*, was understandable.

He agreed with the remark made in paragraph 126 of the report that the general principles of law, as a source of international law, applied to the relations between subjects of international law generally. Clearly, they did not apply only in the context of litigation. That would make no sense if they really were a source of international law.

Although interesting, he doubted how helpful the section of the report on general principles of law in specific treaty regimes would be. For example, the analysis of article 21 (1) (b) and (c) of the Rome Statute of the International Criminal Court was very interesting, particularly as a reminder that, when drafting applicable legal provisions, States did not always simply make reference to, or copy, Article 38 (1) of the Statute of the International Court of Justice. But when they departed from it, the result might be hard to interpret. In the case of the Rome Statute, it might have been that, in the particular context of international criminal law, the drafters had really intended to refer to some law other than international law as specified in Article 38. The extent to which the Commission needed to take account of those different treaty provisions, with their different ways of referring, or not referring, to general principles of law, was something it might need to bear in mind, as it proceeded with its work on the topic. He was not convinced, however, that it needed to add its views to those of commentators who had sought to understand article 21 of the Rome Statute.

Nor was he convinced that the reference to general principles of law in the human rights context, specifically in the particular context of the principle of legality, shed much light on the more general enquiry. However, that and other examples undoubtedly gave the Commission much food for thought.

In part four of the report, the Special Rapporteur made an initial assessment of certain basic aspects of the topic. Chapter I (A) thereof sought to explain the meaning of the term "general principles of law" in Article 38 (l) (*c*) of the Statute. The Special Rapporteur had omitted the definite article that appeared at the beginning Article 38 (1) (*c*), at least in English; however, its original inclusion might indicate that the drafters had envisaged a particular set of principles, and it therefore merited consideration.

He did not find it helpful to consider, under the current topic, the place of "general principles" within national legal systems. The international legal system was sufficiently different from national legal systems that any potential insights would be of strictly limited significance. As the Special Rapporteur rightly noted in paragraph 144 of the report, "general principles of law in the sense of Article 38, paragraph l (*c*) of the Statute of the International Court of Justice, being a source of law, are likely to have their own unique features due to the structural differences between the international legal system and domestic legal orders". He was therefore not convinced by the hesitant conclusion drawn by the Special Rapporteur in paragraph 162 of his report.

In paragraphs 145 to 153, the Special Rapporteur attempted to explain that general principles of law were "general" and "fundamental". He was not sure what precisely the Special Rapporteur had in mind with those terms. In any event, in paragraph 154, it was correctly noted that, when one looked at practice, not all general principles of law had such a character. Some of the general principles of law might be "general" and "fundamental", while others, such as those concerning procedural matters, might not. It was also conceivable that, just as States might conclude a treaty in order to make inapplicable between themselves a certain rule of customary international law that was not of a *jus cogens* character, they could do likewise with regard to certain general principles of law. Furthermore, as noted in paragraph 150, Article 38 did not seem to make a distinction between "rules" and "principles". He therefore doubted whether general principles of law were necessarily different from other rules of international law in terms of being "general" or "fundamental". Certain rules of conventional and customary international law might also be considered to be "general" and "fundamental", depending on their content.

It would be interesting to hear the view of the Special Rapporteur regarding the word "general" in Article 38 (l) (*c*) of the Statute and what it added to the word "principle". In paragraph 147 of his report, the Special Rapporteur suggested that "general principle" related to the range of domestic legal systems that one must look at to identify a general principle of law. If that were so, the term would have a meaning similar to "general" in Article 38 (l) (*b*), which referred to "a general practice".

In paragraphs 156 and 157 of the report, the meaning of the word "law" in Article 38 (1) (*c*) was considered. He disagreed with the author cited at footnote 285: in the context, "law" could not be read as referring to public international law. The drafters of Article 38 had primarily had in mind national law. In any event, the Special Rapporteur was right to consider that the various views on the matter would need to be further assessed as the topic progressed, taking into account the practice of States and the decisions of international courts and tribunals.

Part four (I) (B) of the report included some general remarks concerning the requirement of recognition. He largely agreed with the position of the Special Rapporteur on the matter, in particular the statement in paragraph 165 that recognition was the essential condition for the existence of a general principle of law as a source of international law and that to identify a general principle of law therefore required careful examination of available evidence showing that it had been recognized.

The crucial question was what forms recognition might take. The first report, being preliminary, did not deal with the question in detail, but some helpful indications were provided. As the Special Rapporteur noted, the most widely accepted view was that recognition took place when a principle existed within a sufficiently large number of national legal systems. However, the question raised in paragraph 170 of the report was also important: was recognition relevant when determining whether a principle common to national legal systems was being transposed to the international level? In other words, if a process of transposition was required, what was the role, if any, of State recognition in that process? If recognition played no role, what were the criteria for determining that a legal principle that existed within a generality of domestic legal systems was suitable for transposition into the international legal system?

If, *arguendo*, one were to accept the existence of a second category of general principles of law, doubts would arise regarding the forms of recognition of such category mentioned in paragraph 174 of the report. The propositions in the literature referred to in the report seemed to make it all too easy for a general principle of law to be invoked and could potentially transform the general principles of law into "custom lite". Moreover, those propositions seemed to be based on very little practice, if any.

Part four (I) (C) of the report dealt with the term "civilized nations". Mr. Tladi's remarks about the words "nations" had been interesting, but, the name of the Organization of which the Commission was an organ notwithstanding, the word "nations" should not be used as it was obscure and lacked legal significance. The Special Rapporteur's proposal to use the word "States" should be taken up instead.

The point made in draft conclusion 2 was important but the text read oddly, begging the question of what was meant by recognition in the context of the general principles of law. The repetition of "general" and "generally" raised questions, particularly regarding the meaning of "general" in that context. Another issue that no doubt would be raised was whether the reference to "States" was too limited. He tended to think it was right in that context, which focused first and foremost on the general principles of law derived from domestic law. Draft conclusion 2 would be examined in greater detail in conjunction with identification. In the meantime, the Drafting Committee might wish to consider redrafting the proposed draft conclusion, without changing its substance, along the lines of conclusion 2 of the conclusions on identification of customary international law. It could for instance read: "To determine the existence and content of a general principle of law, it is necessary to ascertain whether it has been generally recognized by States."

Part four (II) addressed the types or categories of general principles of law that might exist according to their possible "origins". He largely agreed with the Special Rapporteur's preliminary analysis on the general principles of law derived from domestic legal systems, in which regard there seemed to be a reasonable amount of practice.

However, he did not understand the basis for the references in the report to "a majority of national legal systems" or "a sufficiently large number of national legal systems". For a principle to be a "general principle of law" within the meaning of Article 38 (l) (*c*), it should be found in legal systems in general, not a numerical majority or sufficiently large number thereof: it was not a matter of simple mathematical calculation.

A central question raised in the report was whether the general principles of law as a source of international law extended beyond those having their origin in domestic legal systems, and, if so, how any additional category or type of the general principles of law should be described. Related to that was the precise role of "recognition", in relation both to those general principles that were found *in foro domestico* and to any other general principles within Article 38 (l) (*c*) that might exist. The report addressed the matter somewhat tentatively.

As he had already explained, there was a danger that, without sufficient clarity, the two sources of law, general principles of law under Article 38 (1) (*c*) and rules of customary international law under Article 38 (1) (*b*), might be confused. Those were clearly distinct sources of international law, with distinct "rules of recognition" and a distinct place within the system of international law.

Some authors were of the view that Article 38 (1) (*c*) covered certain types or categories of general principles of law beyond those derived from domestic legal systems. The Special Rapporteur did not address all such proposed categories in his report, but he did point in particular to one that he considered to be "supported by practice and widely accepted by scholars", which he termed "general principles of law formed within the international legal system", or "general principles of international law".

That was perhaps where the confusion between general principles of law and customary international law was most apparent; but the general principles of law within the meaning of Article 38 (l) (*c*) must be distinguished from "general principles of international law" – if such a category had any meaning. That had been made clear by Sir Humphrey Waldock in a lecture given in The Hague as part of his "General Course on Public International Law", in which he had stated:

> "a word of warning must be said as to the necessity to keep clear the distinction between the 'general principles of law recognised by civilised nations' discussed in the present lecture and 'general principles of international law'. The latter phrase is sometimes used to denote what are considered to be particularly important and deep-rooted principles of international law; and it is, of course, true that international law does have a number of fundamental, constitutional principles, such as those surrounding the independence and equality of States ...".

In short, the term "general principles of international law" was ambiguous and best avoided. If used at all in legal discourse, it should be reserved for those principles of international law that were especially general or fundamental in nature, whether derived

from treaty, customary international law or even general principles of law. That seemed to be the sense in which the International Court of Justice had used the term in its judgment of 6 June 2018 on preliminary objections in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, when it had stated that article 4 of the Palermo Convention referred "only to general principles of international law", not to the various rules of international law that derived from or sought to safeguard those principles. Even there, it was not entirely clear what the Court had meant to imply by describing the principles of sovereign equality and non-intervention as "only" general principles of international law. Clearly, its meaning had not been that those principles were not rules of law. If the explanation of the Chamber of the Court in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* – that "principles" and "rules" did not designate different things, although the use of "principles" might be justified because of their more general and more fundamental character – was kept in mind, then the word "general" in the term "general principles of international law" would not appear to add much. In any case, it would be highly confusing to refer to a possible category of "general principles of law" within the meaning of Article 38 (l) (*c*) as "general principles of international law", since that term, if it had a meaning, would actually denote a wider class of rules of international law.

Even if the Commission avoided – as he believed it should – a category termed "general principles of international law", the question arose as to whether it was still possible to consider one or more other categories of "general principles of law", beyond those derived from domestic legal systems. While the Special Rapporteur had proposed a draft conclusion in that connection, draft conclusion 3 (b), he had done so tentatively. The first report, which was expressly stated to be preliminary in nature, avoided adopting a definitive position at the current juncture. Such caution was understandable, indeed welcome; the practice referred to in the first report and the arguments adduced in support of a second category was unconvincing and hardly sufficient to reach a conclusion on the matter.

He shared the doubts expressed by a number of speakers about the possible existence of a second category of general principles of law, beyond those having their origin *in foro domestico* and transposed into international law. He did not find the "various arguments" referred to in the first report, and in the Special Rapporteur's oral introduction thereof, sufficiently convincing. It was hardly enough to say that the *travaux préparatoires* of Article 38 or the text of Article 38 (l) (*c*) did not exclude such further category.

If the Commission sought to go beyond general principles of law found in domestic legal systems and transposable to the international legal system, it would have to capture any other or wider category in clear language, which would not be easy. The wording of draft conclusion 3 would not be adequate to the task. The expression "general principles of law ... formed within the international legal system" did not shed light on what that category might be. The expression "formed within the international legal system" was not explained, and its import was far from clear. Rules of international law derived from each of the primary sources listed in Article 38 might be said to be "formed within the international legal system". Perhaps the Special Rapporteur had in mind general principles of law that had their origin within the international legal system, as opposed to in national legal systems, but there was little practice in that sense.

Draft conclusions 2 and 3 were central to the topic. What the Commission did at the present session would inevitably be provisional, pending further discussion and study. The draft conclusions were closely related to the question of how to identify the types or categories of general principles of law covered by Article 38 (l) (*c*). Where did they come from? How were they identified? What made them a source of international law? What was their origin? Such questions would need to be considered again in the context of identification. For the present, draft conclusions 2 and 3 should be held within the Drafting Committee. If any wording was adopted, even within the Drafting Committee, it might be difficult to revise later. In particular, a decision on a further category, beyond the *in foro domestico* category, and how to describe it, should not be based on the first report but should await a more in-depth study.

The Special Rapporteur's indications for future work on the topic seemed eminently sensible. It would be good to aim to conclude a first reading by the end of the quinquennium. However, consideration should be given to the order in which the issues set out by the Special Rapporteur would be addressed and to turning next to the identification of general principles of law. Unlike Mr. Park, he did not think that it would be a useful exercise to seek to draw up an indicative list of general principles of law, which might become a considerable distraction, although specific examples would doubtless arise as work progressed.

He would be happy to see the three draft conclusions proposed in the first report transmitted to the Drafting Committee for initial consideration, which would greatly help the Commission in its future work on the topic.

Mr. Murase said that it would be helpful to know how Sir Michael Wood defined the term "sources of international law", given that he had proposed its inclusion in the title of the topic.

Sir Michael Wood said that the sources of international law were listed in Article 38 (1) of the Statute of the International Court of Justice and therefore, in his view, the meaning of the term in the current context was perfectly clear.

Mr. Murphy said that he wished to thank the Special Rapporteur for his extremely well-organized and well-researched first report and his oral introduction thereof.

He agreed with the proposed scope of the topic as outlined in paragraphs 10 to 33 of the report, namely to examine the legal nature, origins and functions of general principles of law, consider the relationship of those principles with other sources of international law and seek to establish rules for the identification of general principles of law. The proposed outcome of the topic, as indicated in paragraph 34 of the report, appeared to be fully consistent with the prior work of the Commission.

The methodological approach outlined in paragraphs 35 to 41 placed an appropriate emphasis on the practice of States. While it was inevitable that the approach would also involve the analysis of international jurisprudence and academic writings, when relying on such subsidiary sources it was necessary to consider the degree to which the subsidiary source had itself analysed the practice of States and primary sources of international law. If no such analysis was present, the subsidiary source should be given less weight.

However, if the Commission took seriously the fact that States were the central players in how that source of law operated, he doubted whether sufficient examples of State practice would be available, in particular regarding some of the more granular questions the Special Rapporteur hoped to answer. In his presentation of the report, the Special Rapporteur had said that there were many examples of States referring to general principles of law, which was quite true. However, was it in fact the case that States had really addressed in their practice the functions of general principles of law? Had they really addressed the relationship of general principles of law to other sources of international law? Had they articulated clearly their views about the rules applicable for identifying general principles of law?

Perhaps the Special Rapporteur would find otherwise, but in his own view States had not been especially clear in their views about the nature and function of that source of law, including on the more abstract questions to which Mr. Tladi had referred. If that was indeed the case, then the absence of significant State practice on those questions would make it difficult, albeit not impossible, for the Commission to draw concrete conclusions based on existing and well-established law, a point that Sir Michael Wood had also raised. The Commission needed to approach the matter cautiously and be transparent about the information it did or did not have at its disposal.

In paragraph 38 of the report, the Special Rapporteur quite rightly recognized a key challenge, namely the terminology used by various relevant actors. That terminology was often imprecise and led to uncertainty about whether a general principle of law as understood for the purposes of the current topic was actually at issue in any given example cited. In the same paragraph, the concept of general international law was not referred to, but that particular phrase was often used by international courts and tribunals without

clarification of its meaning. The factors proposed by the Special Rapporteur in paragraph 39 would assist in the examination of the meaning of "general international law" and other similar phrases. At the same time, however, it was unclear whether the Special Rapporteur had used those factors in his examination of the different examples. He wished to encourage the Special Rapporteur to continue to consider the question going forward.

A further challenge for the Special Rapporteur would be to canvass global information on the topic. For example, paragraph 143 of the report listed a series of national legal systems, all of which came from the civil law tradition. In his own view, when advancing a proposition about that particular source of international law it was important to analyse all the major legal systems of the world, including common law and Asian and African traditions.

He was in full agreement that the Commission's goal was not to catalogue the substance of the general principles of law that currently existed in international law, as noted in paragraph 41. Doing so would be both unnecessary and incomplete. He agreed with Sir Michael Wood that Mr. Park's proposal of an illustrative list was not appealing. The examples that would be provided in the course of the commentaries should be sufficient.

Turning to parts two and three of the first report, he said that he had greatly enjoyed reading them. Their in-depth discussion of the Commission's prior work relating to the topic and the development of general principles of law over time laid a very important and useful foundation for further work on the topic. At the same time, however, the Commission needed to be careful about how it quoted and characterized its own prior work, and in particular about the degree to which it relied on such work when that work was somewhat cursory or unsupported.

By way of example, paragraph 66 (c) of the report stated that "general principles of law can serve as a source external to a treaty for purposes of interpretation under article 31 (3) (c) of the 1969 Vienna Convention on the Law of Treaties". In support of that proposition, the report cited the 2006 conclusions of the Commission's Study Group on fragmentation of international law, as contained in A/CN.4/L.682, A/CN.4/L.682/Corr.1 and A/CN.4/L.682/Add.1. The Commission had taken note of, but not adopted, those conclusions. While the conclusions did include an assertion pertaining to the statement in paragraph 66 (c) of the Special Rapporteur's report, the only support cited for that assertion in the work of the Study Group was a passage from the judgment of the International Court of Justice in the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*. That judgment, however, made no reference to general principles of law as being among the "relevant rules of international law" referred to in article 31 (3) (c) of the 1969 Vienna Convention. While it was not his intention to contest whether the Study Group's conclusion had been correct, he did not think it sufficient simply to cite an earlier study by the Commission without scrutinizing carefully the basis upon which certain statements might have been made.

Similarly, paragraph 66 of the first report cited other statements from the Study Group's conclusions about the role general principles of law might play in treaty interpretation. However, the Study Group's report did not cite any authority for those assertions but simply stated a bald claim. A similar situation arose in paragraph 63, which cited the Guide to Practice on Reservations to Treaties in connection with the proposition that good faith and reciprocity were general principles of law. While he did not wish to dispute the accuracy of the statement, the Guide itself cited only the views of scholars in that regard. While such views were a relevant source of international law, in his view the Commission should be more rigorous when making claims about the veracity of a proposition. In short, although the Commission should look at its own prior work, it should avoid the use of unsupported statements that it had previously made.

In paragraphs 113 to 118, the first report analysed the "applicable law" provision of the Rome Statute of the International Criminal Court, namely article 21. While it was reasonable to note the existence of that provision and the differing views as to its meaning, as set out in paragraphs 119 to 120 of the report, he was less persuaded that the Commission should be taking a position on whether a particular view about the

interpretation of article 21 was correct, which the report appeared to go some way to doing. It was unclear whether the report was correct in that regard, and or even whether it was consistent with the jurisprudence of the International Criminal Court itself. Since he did not think it relevant for purposes of the draft conclusions in the report, it was best to stay away from that particular debate.

Paragraph 123 contained a reference to "fair and equitable treatment". If that discussion ultimately made its way into the commentary, he hoped that it would be made clear that while the fair and equitable treatment obligation existed in treaties and under customary international law, it was not viewed as a general principle of law. In paragraph 123, the text quoted from the free trade agreement concluded between China and New Zealand was best understood as saying that the obligation as arising under that treaty could be applied having "regard" to general principles of law, which was a different proposition.

A variety of pertinent and interesting case law was discussed in paragraph 126. However, it seemed that in some places the Special Rapporteur might have inadvertently misstated certain things. In that connection, he wished to draw attention to a few issues that might help the Special Rapporteur in the preparation of future reports.

For example, in paragraph 135, it was asserted that the Inter-American Court of Human Rights "has considered on various occasions that general principles of law form part of the body of human rights law that it must apply". In his view, that assertion was not correct and certainly was not supported by the citations referred to in the report. What the Court had said was that it could refer to general principles of law as one source of international law, alongside treaty and custom, and that it could use that source of law when interpreting human rights law. Further, the Court had in particular instances applied certain general principles of law when deciding cases; however, that was not the same thing as saying that such general principles of law "form part of the body of human rights law". In his view, the Court had not said that, and nor should the Commission say such a thing.

While it was tempting to identify all the situations where a court or tribunal had perhaps referred to "general principles of law", caution should be exercised in so doing. Some situations in which a claim had been made about something being a general principle of law went beyond the bounds of what the Commission would likely find to be correct. One example, provided in paragraph 135 of the report, was the claim made by the Inter-American Court of Human Rights with regard to *jus cogens*. He found that claim to be implausible; while he accepted that prohibitions on racial discrimination and apartheid were *jus cogens* norms, the Court had gone much further in speaking about equality before the law as being *jus cogens* in a general principle of law context. In his view, that position was very contestable. The Commission therefore needed to be careful in the examples it used, even if just as an illustration.

The Commission might well put itself in a difficult position if it portrayed the precautionary principle as a general principle of law. Paragraphs 250 to 252, while not expressly stating that the precautionary principle was a general principle of law, quoted extensively from the position of the European Union, implicitly suggesting that that position was correct, while the contrary position, including that of the United States, was considerably downplayed. While it would be best to stay away from the issue, if it was included it would be preferable to indicate that opinions differed on whether or not the precautionary principle was a general principle of law.

Part four of the report analysed the three main elements of "general principles of law", the first of which was the term itself. While overall he was in agreement with the analysis set forth in that part of the report, one distinction that might be worth addressing was whether the so-called maxims or canons of treaty interpretation should be regarded as "general principles of law". Given that those canons were often referred to as principles for interpreting treaties, it was perhaps inevitable that the Commission would need to state its views on that matter.

The issue of whether canons of interpretation were ones that were a part of international law that should be applied in treaty interpretation had been wrestled with in the Commission's work leading up to the 1969 Vienna Convention and in the work of James Brierly, Sir Humphrey Waldock and Sir Gerald Fitzmaurice. Ultimately, it appeared

to have been decided that there were certain types of canons that were part of international law that had to be applied, and those had been incorporated into articles 31 and 32 of the Vienna Convention. All of the other canons had been viewed as non-obligatory in character and had been set aside. In his view, that decision made it clear that those canons were not general principles of law, a point that the Special Rapporteur might wish to address at some point in his work on the topic.

The second main element of "general principles of law", namely the requirement of recognition, was discussed in paragraphs 163 to 175. He wished to make a few comments that might be useful to the Special Rapporteur when dealing with the question in greater depth in a future report.

First, as a general matter, he himself agreed that recognition by States was a prerequisite for a general principle of law to be regarded as part of international law.

Second, one area of study in that regard was the threshold of recognition that must be met for a general principle of law to be regarded as existing in international law. There were a number of different possible thresholds that could be considered in that context, including the treatment of practice for a customary international law. Recognition should be consistent, as well as widespread and representative. Another possibility was to conceptualize it more as akin to the requirements relating to *opinio juris* in customary international law. If he had understood correctly, both Mr. Tladi and Ms. Galvão Teles had said that such an approach confused the matter with a customary international law analysis. Another possibility was that general principles of law were recognized "by a very large majority of states", which was a standard the Commission had used in the context of *jus cogens*. The *travaux préparatoires* of the Statutes of both the Permanent Court of International Justice and the International Court of Justice, as discussed in paragraphs 90 to 109 of the report, seemed to indicate that at least some members of the Advisory Committee of Jurists had believed that principles should have universal or unanimous recognition across national legal systems in order to be considered "general principles", which was a very high standard. The Special Rapporteur might need to discuss the differing standards among differing sources when settling on the standard he viewed as appropriate.

Third, another area of study that should be considered concerned whether recognition arose at differing stages, in which case there might be differing standards of recognition at each stage. For example, there might be two stages relating to general principles of law derived from national legal systems, in the sense that in the first instance a principle of law had to be operating in some sense across legal systems. If only some of those general legal principles were transposed to the international domain, a second stage of recognition might then occur in the course of that transposition. If that was the case, then a question arose as to whether two different standards of recognition were operating. How should recognition be thought about in the two different contexts if it applied in both places?

The final area of study on the issue was the materials the Commission should look for to find such recognition. In the topics on customary international law and *jus cogens*, the Commission had viewed it as important to indicate where information could be found, for example in government statements or court decisions. The question for the Special Rapporteur was whether to do likewise in the current topic.

The third main element of the constellation of "general principles of law" was who did the "recognizing". The discussion in paragraphs 176 to 187 of the first report seemed to be saying that the answer was "civilized nations". Within the Commission and the broader international community, the reference to "civilized" was problematic, and needed to be either essentially ignored or explained in some way. Mr. Tladi's queries regarding the meaning of "nations" were very interesting and merited attention. When asking why that term was used in that particular context, Mr. Tladi had suggested that it was because a nation was different from a nation State. There could be nations within States, and there could also be nations that crossed State boundaries, depending on one's view of the term "nations". At the end of the day, the discussion might simply lead back to "States". Mr. Tladi had mentioned, for example, nations of Native American Indians. There were in fact many nations of Native American Indians in the United States, rather than just a single nation. While each of those individual nations might well have principles of law operating

within them, there was also Indian law operating within the federal law of the United States. While it was uniform in the way it related to the various nations, that Indian law essentially constituted the relationship of the Federal Government *vis-à-vis* the nations rather than being law that emanated from the nations themselves. In examining Indian law, the common law system – which was the dominant system in the United States – and the civil law system operating in the State of Louisiana, the question would likely ultimately be whether there was a general principle of law operating in the United States across those domains. Consequently, although he welcomed the inquiry, it seemed that the discussion of it might well finish precisely where the Special Rapporteur had begun, essentially about recognition by States.

Part four (II) was the most challenging in the report. It addressed two distinct categories, namely general principles of law derived from national legal systems and those "formed within" the international legal system.

With regard the first of those categories, the analysis in the report was very thorough and thoughtful. In his view, it was commonly accepted that general principles of law within the meaning of Article 38 (1) (*c*) could be derived from general principles operating *in foro domestico*. He agreed with the Special Rapporteur that such general principles were identified via a two-step process: first, a general principle operating across national legal systems had to be identified; second, it had to be determined whether that general principle could be transposed into the international legal system. The second of those steps posed the greater challenge, as it was not obvious how to determine whether the process of transposition should occur or why only certain general principles were transposed.

Nevertheless, it seemed clear that many general principles of law operating at the national level did not operate at the international level. One example was the general principle according to which a person could gain an easement to another's property by continued passage without protest. He was not aware of any willingness to transpose that principle into the international legal domain, including in the case concerning the *Right of Passage over Indian Territory (Portugal v. India)*. Thus, even if the Special Rapporteur's second category was accepted as relevant, there were important issues that needed to be addressed.

The claim that general principles of law could be derived from the international legal system itself was more controversial. Indeed, other members had voiced doubts about the very existence of that second category, and those doubts were shared by a number of academics. The practice presented in support of that second category was more limited than that presented in support of the first. It was not at all clear that, in the examples given, a general principle of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice was at issue. For instance, although the Court had referred to general principles of law in the case concerning the *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* and the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, it had not referred specifically to Article 38 (1) (*c*) of its Statute, which left open the question of whether those references were to general principles of law within the meaning of that Article or to a principle emanating from customary international law or treaty law. Mr. Park had also made that point.

Some such references might be understood as references to principles derived from national legal systems. In his view, the use of the expression "principles" in the descriptions of the Nürnberg trials and the Nürnberg Principles, as quoted in paragraphs 248 and 249 of the report, might be understood as referring to the first rather than the second category. Indeed, many of the principles discussed in the context of general principles of law had counterparts in national legal systems. Principles such as *pacta sunt servanda*, *res judicata* or *lex posterior derogat priori*, for example, seemed intrinsic to the very idea of law, and they accordingly operated at the national level. Although it could be claimed that those principles emanated from the international legal system, there was so much crossover that it was difficult to state definitively that they did so. It was thus a challenge to determine whether that second category was truly accepted by States and other relevant actors.

If that second category did exist, a further challenge was how to determine its limits. The Special Rapporteur was rightly concerned about the possibility of judges being given excessive and subjective discretion in the application of a second category of that kind. There were different ways in which the Commission could approach the question of limits. One possibility would be to conceptualize that second category as limited to those general principles of law that depended on the existence of a system of sovereign States. For example, if one wished to claim that there existed a general principle of law on non-intervention, it might be argued that such a principle was necessarily brought into being by the existence of a legal system of sovereign States. The same could be said of a general principle of law on sovereign equality. In any event, the Special Rapporteur would have to exercise caution in relation to that second category of general principles of law, both with regard to the question of its existence and to the determination of its limits.

Concerning the proposed draft conclusions themselves, he saw no difficulties with draft conclusion 1, on scope.

He wondered whether it might be possible to add a new draft conclusion, to follow draft conclusion 1, that replicated Article 38 (1) (*c*) of the Statute of the International Court of Justice. The Commission had adopted a similar approach in the preparation of its draft provisions on the topics of identification of customary international law and of peremptory norms of general international law (*jus cogens*). The idea would be to set out a common reference point as the first substantive draft conclusion and then to explore its meaning in the subsequent provisions. That new draft conclusion might read: “One of the sources of international law is the general principles of law recognized by States.” That language, which was based on Article 38 (1) (*c*), could in turn serve as the basis on which the subsequent draft conclusions could be built.

There were some drafting issues that needed to be addressed in relation to draft conclusions 2 and 3. In draft conclusion 2, he was not sure that the word “generally” was needed before “recognized”. In draft conclusion 3, he wondered whether the transposition element should be mentioned in subparagraph (*a*). The Commission would have to decide whether to retain subparagraph (*b*). If it did so, the words “formed within” would have to be replaced, probably with “derived from” or “originating in”.

With regard to the future programme of work, he would encourage the Special Rapporteur to concentrate on providing a rigorous assessment of those two categories, including the issue of transposition and the question of whether the second category actually existed and, if it did, what its limits were. Once that had been done, it would be possible to move on to other issues, such as the functions of general principles of law and their relationship with other sources of international law. He shared Mr. Hmoud’s doubts about the proposed analysis of general principles of law at the regional level, and he was not sure that they fell within the scope of the topic.

He supported the referral of all the proposed draft conclusions to the Drafting Committee.

Mr. Rajput, noting Mr. Murphy’s passing comment to the effect that the fair and equitable treatment standard might originate in treaty or in custom, said that although it could be claimed that it originated in treaty law, the claim that it originated in customary international law was doubtful. One could agree with the position that the international minimum standard originated in customary international law, but it was controversial to claim that fair and equitable treatment did so too.

Mr. Murphy said that he had not been seeking to make any particular claim about other sources of international law, but merely to note that the Commission should avoid asserting that fair and equitable treatment was a general principle of law.

Mr. Rajput said that he wished to thank the Special Rapporteur for a well-researched and thorough first report, which provided a sufficiently broad overview of general principles of law and traced their historical development. The report served as a solid basis on which the Commission could begin its work on the topic and determine the direction that it wished to take in the future.

He would begin with a number of preliminary remarks. In his view, the Commission should revisit the title of the topic, as the expression “general principles of law” was used in several ways that did not necessarily reflect the area that the Commission intended to cover. An uninformed reader might assume that the Commission’s work was a collection of some general principles that might not have anything to do with international law.

Even an informed reader might assume that the expression referred to legal principles that existed in the field of international law but were not a source under Article 38 (1) (*c*) of the Statute of the International Court of Justice. The principle of proportionality, for example, was certainly a legal principle, and it was applied by the World Trade Organization and investment tribunals, but it was not a general principle of law within the meaning of Article 38 (1) (*c*). Another example was the principle of due diligence, which was a legal principle but, unless contained in a treaty or in customary law, did not by itself constitute a rule. The title of the topic needed to convey the fact that the Commission was dealing specifically with general principles of law as a source of international law under Article 38 (1) (*c*) of the Statute of the International Court of Justice. For that reason, it should be amended to read: “General principles of law as a source of international law under Article 38 (1) (*c*) of the Statute of the International Court of Justice.” If that title was too long, the reference to Article 38 (1) (*c*) could be dropped, such that the title read: “General principles of law as a source of international law.” For the reasons set out by the Special Rapporteur, he did not believe that the title should include a reference to “civilized nations”.

In paragraph 35, the Special Rapporteur pointed out that the Commission’s work would be primarily based on “the practice of States”, which would include “statements, diplomatic exchanges, pleadings before international courts and tribunals, treaties and their drafting histories, and decisions of national courts”. He doubted that all of those forms of practice were or could be of relevance to the topic. The most relevant form of practice was judicial practice, but there were few decisions of the Permanent Court of International Justice or of the International Court of Justice that could be relied on. References to general principles of law appeared most often in decisions of arbitral tribunals and in individual opinions of judges. Pleadings before international courts and tribunals were an acknowledged source of practice involving States, but care had to be taken when deciding how much weight to attach to them, as there were few occasions on which an international court or tribunal had accepted the existence of a general principle of law. The drafting history of the Statute of the Permanent Court of International Justice, which was discussed extensively in the report, could by no means be said to constitute State practice, as it reflected the work of independent experts. His intention was not to undermine the value of that source, but only to point to the need for caution about the extent to which the Commission could rely on it.

General principles of law as a source of international law had principally been used in relation to adjudication. It was thus rare to find references in treaties to general principles of law, unless the treaty in question or one aspect of it dealt with adjudication. He made that point because, to date, only one State had cast doubt on the existence of relevant State practice. As the Commission’s work on the topic progressed, more and more States might raise concerns of that kind.

In the absence of sufficient practice and given the theoretical nature of the topic, a large part of the Commission’s work might involve theoretical deliberations and conceptual choices, as Mr. Murase had noted. However, the Commission should avoid seeking to settle any theoretical debate or addressing what the Special Rapporteur described in paragraph 11 as the “the need for clarification” in the light of the diversity of views that existed. He fully agreed that a “cautious and rigorous approach” was needed, as noted in the same paragraph and in the Special Rapporteur’s presentation of the report. The objective should be to provide practical solutions. Although the Special Rapporteur’s intention was to provide solutions for States, those solutions would essentially be for courts and tribunals, which would be called upon to apply general principles, rather than States.

In effect, the Commission’s work would affect the role and functioning of international courts and tribunals more than States. But that was no reason to raise concerns about the topic and its outcome. The Commission should simply stay within reasonable

bounds and avoid introducing any subjective standards that awarded too much discretion to adjudicators, as that would introduce, or had the potential to introduce, uncertainty into international adjudication. The report was broadly balanced in that regard, with the exception of the section on general principles formed within the international legal system, which, in his view, risked giving excessive discretion to international adjudicators.

He was grateful to the Special Rapporteur for leaving open, in paragraph 36, the question of the relevance of the practice of international organizations. He was not convinced that that practice was relevant, particularly as Article 38 (1) (*c*) of the Statute of the International Court of Justice referred to legal principles as recognized by States in their municipal legal systems. It would not be appropriate to compare domestic law with the internal functioning of an international organization. The Commission was discussing legal principles and not corporate good practices.

He wished to make a few preliminary remarks on the nature of general principles of law and their relationship with other sources of international law, namely custom and treaties taken together and not individually.

Unlike judicial decisions and the teachings of the most highly qualified publicists, which were expressly referred to in Article 38 (1) (*c*) of the Statute of the International Court of Justice as "subsidiary means", general principles of law occupied the same level in the structure of that Article as treaties and custom. The drafting history of the Statute of the Permanent Court of International Justice and subsequent practice showed that there was no formal hierarchy, or *ordre successif*, among those sources. The Commission needed to distinguish between general principles and other material sources on the basis of their nature and their application.

General principles were of the same nature as other material sources, namely treaties and custom, which meant that, when a court or tribunal declared a certain principle to be a general principle of international law, it had no less value than treaties or custom. Nevertheless, the function of general principles was merely to fill gaps.

In application, general principles of law were relegated to a lesser role because other material sources were clearer. In the case of treaties, the content of the law was precisely identified and the consent of States was clearly manifest. In the case of custom, it must often first be established that the law existed and what its content was, which introduced a degree of abstraction. The move towards general principles was a move further in that direction. Ideally, in any dispute, all the disputing parties would be aware what law would be applied. In the case of general principles, however, the law was identified in the unfolding of the adjudication process.

The test for establishing custom was much more rigorous than that for establishing general principles. If general principles were treated as being of equal value to other material sources, a vaguer rule might end up competing with a more certain and rigorous one. An anomaly would be created if general principles of law as a source of international law were allowed to play a function greater than gap-filling. If all material sources were equivalent, an adjudicator could decide to resolve a dispute based solely on general principles, which, being much easier to identify than customary rules, offered an easy solution. The problem with that solution was the excessive discretion that it would give to adjudicators. Although judges in domestic courts were able to exercise a similar degree of discretion, they were subject to several checks and balances and were well aware of the social, economic and political context of their country and could exercise that discretion accordingly.

The same could not be said or expected of international judges. If general principles were declared to have the same value as custom, a greater degree of subjectivity would be introduced into the adjudication process. It was aptly noted in the report that, in the view of Descamps, the judge should be saved from the temptations of applying the principles as he or she pleased. In paragraph 99 of the report, the Special Rapporteur reproduced Root's warning that the Permanent Court of International Justice "must not have the power to legislate". That warning was also relevant in the context of general principles. The Commission should avoid the temptation of introducing any subjective element, which, in his view, seemed to have been done in the last part of the report.

The report contained a helpful discussion of the Commission's previous consideration of general principles of law. However, it was important to exercise caution in that regard. The expressions used in the Commission's previous work, and in the literature on the topic, among them "rules", "principles", "general principles", "general principles of law" or "general principles of international law", sounded similar but were subtly different. Thus, whenever those phrases were encountered in the Commission's previous work or in judicial decisions, it was the substance, rather than the form, that mattered. In its work on the topic "Formulation of the Nürnberg Principles", the Commission's reference to principles appeared to be a reference to legal principles generally and not to general principles of law as a source of international law under Article 38 (1) (*c*). Article 5 of the 1921 Treaty of Arbitration and Conciliation between Germany and Switzerland referred to in paragraph 112 of the report was an example of that distinction in treaty practice: its article 5 directed the tribunal to apply treaties, customs or general principles of law and, in their absence, mere "principles of law". Thus, principles of law were to be understood as distinct from general principles of law as a source of international law under Article 38 (1) (*c*).

The Special Rapporteur had drawn the distinction between a general principle and a general principle of law as a source of international law in paragraph 120 of the report, where he acknowledged that it might be inappropriate to rely on article 21 (1) (c) of the Rome Statute, given its *sui generis* nature as compared to Article 38 (1) (*c*). Likewise, references to general principles of law in investment treaties and free trade agreements, as discussed in paragraph 123 of the report, were references to legal principles generally rather than to general principles of law as a source of international law.

The reference to the principle of *aut dedere aut judicare* in paragraph 55 of the report was another example of a confusion between form and substance. It was described in the report as a "general principle". However, it was a general principle of law in the sense of being understood generally and not a general principle of law as a source of international law under Article 38 (1) (*c*). *Aut dedere aut judicare* was a legal principle, but not one that could be found in sufficient national jurisdictions as to be called a general principle of law as a source of international law. The Commission had used *aut dedere aut judicare* in paragraph (2) of the commentary to article 9 of the draft Code of Crimes against the Peace and Security of Mankind because it was used in several treaties, not because it was a general principle of law as a source of international law.

If the test to distinguish between substance and form was not applied properly, general principles of law might be confused with customary law or even peremptory norms.

For example, in paragraph 47 of the report, it was explained that, during the Commission's work the topic "Formulation of the Nürnberg Principles", one member had noted that general principles of law had to originate in municipal legal systems, while another had objected that they could also originate in the international legal system. The passage quoted in footnote 32 showed that, for that second member, every principle of international law had to be in the nature of customary law. The claim that a general principle of law could originate at the international level reflected a confusion between general principles of law and customary law and among similar terms being used in different senses. That showed, once again, the need to distinguish form from substance.

In paragraph 148 of the report, the Special Rapporteur quoted the separate opinion of Judge Cançado Trindade in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, according to which general principles of law "reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves". But could that standard be applied in order to identify general principles of law as a source of international law? *Res judicata*, to take one example, was a general principle of law and indeed a very important rule in domestic legal systems. But could it be said that it inspired the entire legal system as a whole or that it was the foundation of the domestic legal order? It was only one of several rules that had developed and were used in the domestic legal order. He did not wish to declare all general principles to be *jus cogens* norms of some kind, as was the intention of the separate opinion. He therefore could not agree with the conclusion reached in paragraph 153 that general principles of law "underlie specific rules or embody important values". General principles could not and need not

represent any particular value, as was the case with *jus cogens* norms. They were rules applied to resolve what might be considered mundane and practical issues, often those concerning procedure and evidence in international adjudication.

The last example of terminological confusion leading to incorrect conclusions related to the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, as referred to in paragraph 151 of the report. In that case, the special agreement had noted that the International Court of Justice could apply "rules" and "principles" as a source of law to resolve the dispute. The reference to "principles" in that context needed to be understood as legal principles generally, and not general principles of law as a source of international law under Article 38 (1) (*c*). General principles of law as a source of international law constituted a rule of international law and not a principle even though the word "principle" was used to describe that source. If that distinction was not made, every legal principle in use might, through Article 38 (1) (*c*), be presumed to be a rule, even if it was not. The Court had felt that there was no need to make a distinction between the two since it could apply a range of legal principles to resolve the dispute. In other words, the Court could apply general principles of law that emanated from Article 38 (1) (*c*), as rules, and also other legal principles that were not necessarily general principles of law. He was of the view that rules, apart from being a broader set of legal principles, also performed the function of being an abstract representation of certain concepts underlying rules.

Ms. Galvão Teles had pointed out that distinction when she had noted that a rule was based on a principle but that not all principles were rules. He agreed with that proposition. The argument that a principle was something of a higher origin than a rule, or above it, resulted from a misreading of Dworkin, who had argued, in *Taking Rights Seriously*, that principles were higher values than rules; however, that discussion had related to the domestic legal order, especially the practice of common law judges. The Commission should not take that route and seek to give a higher status to principles, as compared to rules of international law.

At the current stage, he was not convinced by the efforts to analyse "general principles of law" by dividing that phrase into three separate elements, namely "general", "principles" and "law", and then looking at the literature to finalize its interpretation. That approach had been adopted in some academic writings, but it might result in confusion. That methodology was used in paragraph 156 of the report to conclude that since there was a reference to law, there was nothing to preclude international law, in addition to domestic law, being taken as a source of general principles. That interpretation, as applied by certain scholars, was casual and did not follow the canons of interpretation; furthermore, it did not accord with the drafting history of the Statute of the Permanent Court of International Justice and was based on misunderstanding of judicial decisions. He was sure that the Special Rapporteur, as he proceeded with his work, would take a more careful approach in respect of terminology and the methodology used.

He agreed with the Special Rapporteur that general principles originated in the national legal system and had to be adapted to the international legal order, but disagreed with the claim that general principles could originate in the international legal system. That claim was based on a textual interpretation of Article 38 (1) (*c*) found in academic writings. The scholars who had made that claim seemed to have based that conclusion on the drafting history of the Statute of the International Court of Justice; it had been based on an assumption rather than any concrete basis. To quote the words of a scholar cited in paragraph 232 of the report: "The framers of that paragraph must be deemed to have by implication assented to the use of general principles of international law for that same purpose, for it can hardly be believed that they would have permitted the filling of gaps ... with principles of national law, but not with those of international law." The Commission should not base such a serious claim on the inventive assumptions of a scholar without there being any actual support for it in the drafting history. The only express mention to be found in the discussions of the Advisory Committee of Jurists appeared to refer to general principles originating in the domestic legal order. He was sure, however, that the Special Rapporteur would conduct further research with a view to arriving at conclusive views on the matter.

The argument that there was judicial practice to that effect was not convincing either. The references in judicial decisions cited in paragraphs 236 to 255 related to legal principles either generally or in connection with peremptory norms or customary law, not general principles of law as a source of international law under Article 38 (1) (*c*). For example, the reference in paragraph 236 to "elementary considerations of humanity", as it appeared in the *Corfu Channel* case, was a reference to considerations of humanity not as a general principle of law, as a source under Article 38 (1) (*c*), but merely as source of a legal principle. The references relating to the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* and to the *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* were references to peremptory norms of international law, rather than a reference to general principles of law. Therefore, mere references to "general principles" and "civilization" should not lead to the assumption that the Court was referring to general principles as a source of international law under Article 38 (1) (*c*). Thus, the distinction between form and substance must be applied by carefully studying the material.

There was a difference in the process by which general principles of law and customary law rules were made. The process of making a customary law rule occurred at the international level through the interaction of States, while that of generating general principles began at the domestic level. If two competing processes were allowed to develop at the same level, with stronger evidence required for customary law and only some form of recognition being sufficient for general principles, the role and value of custom would be undermined – in fact it would be made redundant. In its work on the identification of customary international law, the Commission had concluded that General Assembly resolutions could not in themselves constitute custom. It might, however, be argued that a General Assembly resolution represented recognition by the international community and so constituted a general principle. In fact, it was not really known what "recognition at the international level" would comprise and what its consequences would be. If *opinio juris* and State practice were needed for recognition at the international level, then it might be asked how a general principle differed from custom. If a much higher standard was required, such as recognition by a very large majority from which no derogation was permitted, it might be asked how different a general principle would be from *jus cogens*. In seeking to raise the status of general principles, other material sources, most importantly customary international law, might be downgraded. He fully agreed with the views of Sir Michael Wood in that regard. He therefore did not support the inclusion of recognition of general principles formed within the international legal system.

He supported all the draft conclusions, subject to some improvements, except draft conclusion 3 (*b*), and supported the referral of the draft conclusions to the Drafting Committee.

He wished to propose that the Secretariat should be requested to conduct a thorough analytical study of judicial practice. The Secretariat compiled the Reports of International Arbitral Awards and had access to a broader range of judicial decisions; it could assist the Commission in terms of collecting that material and providing it with the necessary information. The Special Rapporteur should consider sending a questionnaire to Member States requesting information on their practice, which could also form a basis for the Commission to conclude on what basis general principles of law were identified.

Mr. Hassouna said that he wished to thank the Special Rapporteur for his well-researched and detailed first report, which tackled many relevant preliminary issues and thereby laid the groundwork for a thorough examination of the topic. He especially welcomed the extremely rich material included in the footnotes and the use of several multilingual sources in the original languages.

Following the inclusion of the topic in the Commission's long-term programme of work in 2017, the vast majority of States that had commented on it in the Sixth Committee had emphasized the importance of the topic, which would continue the Commission's standard-setting work in the area of sources of international law. A successful achievement regarding "general principles of law" would complement the landmarks of the Commission in the field of the law of treaties, customary international law and related issues such as *jus cogens*. In contrast to other sources of international law, and despite the rich contribution to

"general principles" in the literature, there was still considerable ambiguity and controversy concerning the topic. That underlined the highly practical value of guidance the Commission could provide to States, international organizations, courts and tribunals.

The Special Rapporteur rightly asserted in paragraph 11 of the report that "general principles of law" was a classic topic of international law. As a consequence, considerable relevant jurisprudence and academic scholarship on the subject had accumulated over the previous century. However, in contrast to other fundamental topics of international law, the discussion of "general principles" among both academics and courts could be characterized as diverse and unsettled. Keeping in mind the "diversity of views" and the "need for clarification" referred to in paragraph 11 of the report, he agreed with the Special Rapporteur that a cautious and rigorous approach was required. It would be helpful, given that the report mentioned obscurities and ambiguities in relation to the topic, if the Special Rapporteur could clarify the areas that were unclear so that they could be addressed in future work.

Turning to general observations concerning the four substantive parts of the report, he said that in part one, paragraphs 13 to 33, the Special Rapporteur provided an outline of "issues to be considered by the Commission". He briefly addressed four main areas in which further analysis was required. In relation to the first issue, the legal nature of general principles of law as a source of international law, he agreed that the starting point for work on the topic should be Article 38 (1) (*c*) of the Statute of the International Court of Justice, as that article seemed to provide the most authoritative definition of "general principles of law" as a source of international law. However, in his view, other more contemporary instruments which referenced general principles of law could also be taken into account. Concerning the second issue, the origins of general principles of law, he welcomed the fact that the Special Rapporteur had been able to identify more possible origins than was generally the case. Third, the Special Rapporteur acknowledged the very important issue of the functions of "general principles of law" as well as their relationship to other sources of international law. Apart from the two most frequently mentioned functions, namely as a supplementary source or as a gap filler in order to avoid the finding of a *non-liquet*, the Special Rapporteur had identified several others, such as the use of general principles in interpreting other sources of international law. He appreciated the variety of scholarly and judicial resources the Special Rapporteur had relied on in that regard but would have liked to see some specific examples of the functions mentioned. Noting that the Commission had previously been able to codify new standards with regard to the law of treaties and customary international law, he agreed that the relationship between general principles and other sources of international law should be thoroughly examined. To that end, clarification of the meaning of sources of international law and the distinction between rules and principles would be needed. Another equally important issue was the identification of general principles of law. In that respect, he agreed that the issue of regional general principles should be addressed and clarification provided of whether such principles would be consistent with the concept of universality of general principles. In short, he supported the Special Rapporteur's intention to focus on those four areas of inquiry, especially since they were a good reflection of issues raised by Member States in the Sixth Committee.

He agreed that, at the current stage of work, draft conclusions would seem to be the most appropriate form of outcome of the topic and would allow the Special Rapporteur to present the results of his comprehensive analysis of the topic as an authoritative codification of international law. Nonetheless, a definitive decision on matter should be left until a later stage of the Commission's work.

It was commendable that the Special Rapporteur planned to base his analysis primarily on State practice, the practice of international organizations and international jurisprudence. However, he would have welcomed a *prima facie* assessment of the extent to which sources were available and how useful they appeared to be. It was noticeable that, while the Special Rapporteur provided various examples of State practice and jurisprudence in later parts of the report, the practice of international organizations was largely absent. In the past, when a legal question concerning international organizations could not be answered by conventional instruments, international courts and tribunals had relied on general principles of law. For instance, the contentious question of the judicial review of

decisions taken by political organs such as the United Nations Security Council had been discussed in the context of a general principle of judicial review in municipal law. The practice relating to international organizations should therefore be taken into account as well.

The Special Rapporteur also indicated that he intended to rely on scholarly work, as appropriate. In that connection, he hoped that the Special Rapporteur would be able to include his planned "widely representative bibliography" as an annex to the next report.

In respect of the terminological inconsistency that might pose a difficulty at a later stage, mentioned in paragraph 38, the criteria identified by the Special Rapporteur in paragraph 39 confirmed the differentiation of general principles of law from other sources of international law. Nevertheless, that paragraph raised an important question: if the content and delimitation of "general principles of law", as referred to in Article 38 (1) (*c*) of the Statute of the International Court of Justice, were rather ambiguous, would it not be helpful as a first step to develop at least a working definition based, for instance, on the five criteria mentioned in paragraph 39? He agreed with the Special Rapporteur's conclusion in paragraph 41 that the focus of the project was the general nature, origins, functions and identification of general principles of law, and not the substance. It would, however, be helpful to provide in the commentaries if not a list of general principles, at least a number of examples of those principles.

Part two of the report, which summarized the Commission's previous work on general principles of law, allowed two conclusions to be drawn from the analysis provided in paragraphs 42 to 75. First, the Commission had thus far used the expression "general principles of law" in a loose and sometimes inconsistent way. Second, previous statements by the Commission concerning general principles could serve only as vague indications of the meaning of the term and might at times even cause confusion. The Commission's inconsistent use of terminology – "general principles of law", "general principles", or "general principles of international law" – left the reader wondering whether those different terms all referred to the same issue and highlighted the need for a definition. Furthermore, it seemed that the five criteria outlined in paragraph 39 for the coherent identification of relevant materials were not applied strictly; it was therefore debatable whether some of the examples mentioned were indeed general principles of law. For instance, in paragraph 47, the Special Rapporteur noted the "inherent right to self-defence" as an example of an instance where the Commission had previously referred to a "general principle of law" in the sense of Article 38 (1) (*c*). His own understanding was that the inherent right to self-defence, which was enshrined in Article 51 of the Charter of the United Nations as an exception to the prohibition on the use of force set out in Article 2 (4) of the Charter, was a fundamental principle of contemporary international law. The exceptional right to self-defence was subject to strict limitations and was largely distinct from the natural right to self-defence, which was certainly part of the law of nations, particularly *jus ad bellum* prior to 1945. The prohibition on the use of force and the right to self-defence were now fundamental principles of international law, most of them enshrined in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, contained in General Assembly resolution 2625 (XXV), and not mere general principles of law. The second such example, to be found in paragraph 63, related to the characterization of good faith as a general principle of law. In his opinion, good faith was something even more fundamental than a general principle or, as the International Court of Justice had eloquently stated: "The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' (*Nuclear Tests, I.C.J. Reports 1974, p. 268, para. 46; p. 473, para. 49)*; it is not in itself a source of obligation where none would otherwise exist." That led him to conclude that the Commission's previous work should not always be determinative for the project at hand.

In paragraphs 77 to 89 of the report, the Special Rapporteur provided a concise overview of treaties and cases that had made reference to general principles before the Statute of the Permanent Court of International Justice had been drafted. In paragraph 89, the Special Rapporteur drew four logical conclusions which illustrated the legal environment in which Article 38 of the Statute had been formulated.

He went on, in paragraphs 90 to 109, to present a brief summary of the controversial 1920 discussions in the Advisory Committee of Jurists concerning the proposal for a statute for a Permanent Court of International Justice. While that was a highly interesting episode of the history of international law, the Special Rapporteur should not overemphasize the value of those *travaux préparatoires* for two reasons. First, resorting to the preparatory work in order to interpret a provision in an international agreement under article 32 of the 1969 Vienna Convention on the Law of Treaties was only a supplementary means of interpretation. Second, *travaux préparatoires* were often of limited help because they reflected an amalgamation of different opinions and might not offer any clear trend. Moreover, that preparatory work was limited to the views of 10, primarily European, jurists representing only a few States. He therefore agreed with the warning given by the Special Rapporteur in paragraph 90 that "definitive conclusions may not necessarily be drawn from the *travaux* alone". Nonetheless, he also agreed with the four general conclusions drawn in paragraphs 108 and 109.

The Special Rapporteur noted, in paragraph 110, that general principles of law appeared frequently in international instruments and in the jurisprudence of international courts. In paragraphs 111 to 139, he provided a short and non-comprehensive overview of references to general principles; that part served only as a first attempt to show the variety of sources available and thus did not provide a structured analysis or evaluation of the findings. While, in paragraph 139, the Special Rapporteur concluded only that the examples mentioned were evidence of the relevance and complexity of the topic, in his own view some further conclusions could be drawn from the material presented. First, general principles appeared in almost all areas of international law, mostly in reference to legal norms of a procedural character, such as *res judicata* or estoppel. Second, according to the Special Rapporteur, general principles were invoked more frequently by States than by international courts and tribunals. Third, the use of the term "general principles" and its legal definition remained rather ambiguous and no clear trend could be identified. Further analysis of the wealth of jurisprudence was therefore warranted and the Special Rapporteur was to be commended for his statement in paragraph 126 that a comprehensive discussion of case law would be included in future reports concerning specific issues.

In part four of the report, the Special Rapporteur began to dissect Article 38 (1) (*c*) of the Statute of the International Court of Justice. Following his analysis of the first part, namely general principles of law, he proposed four conclusions. He agreed with the Special Rapporteur's interpretation of the word "law" in paragraph 156, which allowed general principles to be derived both from domestic legal systems and from the international system. He also agreed with the last conclusion, that general principles of law were generally of a universal application. With regard to the interpretation of the word "recognized", he fully supported the Special Rapporteur's finding in paragraphs 165 and 175 that recognition was the essential condition for the existence of a general principle of law. In assessing a broad spectrum of academic scholarship, the Special Rapporteur established two general forms of recognition, one relating to the existence of a general principle within a sufficiently large number of national legal systems, and the other to the formation of a general principle within the international legal system itself. The conclusion drawn was that the requirement of recognition was crucial for the identification of general principles of law and needed to be addressed thoroughly in a future report. In that context, the difference between recognition and acceptance as law, one of the essential requirements for the identification of a customary rule of international law, should also be clarified in the future report focusing on the identification of general principles of law.

The third element of Article 38 (1) (*c*) concerned the fundamental question of whose recognition was required. According to the Statute, it was recognition by "civilized nations". However, as rightly explained in the report, that term was one of the most obvious illustrations of the colonial legacy still present in international law. It was certainly a consequence of the historical circumstances in which the Statutes of the Permanent Court of International Justice and the International Court of Justice had been drafted and adopted. Since that time, the process of decolonization had left its impact on international law and had highlighted the obligatory legal equality of States. It was therefore more than appropriate that the anachronistic term should finally be deleted from the Commission's work.

One question that was not addressed in part four of the report related to the controversy over the issue of intertemporal law and general principles: namely, whether Article 38 (1) (*c*) was restricted to the general principles that existed in 1920 or in 1945, or whether it was also open to progressive principles that had come into existence after its adoption or might develop in the future, such as "intergenerational equity" or "the duty to protect and preserve the natural order and the environment". Different views had been advanced in the literature on that question, but he was personally convinced that general principles, as the foundation underlying any legal system, might evolve over time, as the system was in flux. It would be helpful if the Special Rapporteur could clarify his position in that regard, as it might have implications for his future work.

In part four (II), the Special Rapporteur turned to the origins of general principles of law, an issue which should not be confused with the identification of general principles, to be explored in a future report. The two main origins or categories of general principles of law discussed were those derived from national legal systems and those formed within the international legal system. Relying on various well-selected sources, the Special Rapporteur explained that general principles of law were derived from national legal systems in a two-step process: first, they must be found in an adequately high and representative number of national legal systems; second, those general principles must in addition be transposed to the international legal system. While the first step seemed relatively clear, the second raised several questions. How was the act of transposition, adaptation or transfer administered? How did transposition change the normative value or the substance of a municipal general principle? Which factors had to be taken into account to assimilate a general principle into the international legal system? He therefore fully agreed with the Special Rapporteur that the issue merited further study in the future report on the identification of general principles of law.

The second category of general principles, namely those formed within the international legal system, was addressed in paragraphs 231 to 253 of the report. The Special Rapporteur presented a selection of relevant State practice and jurisprudence and referred to some of the main issues. In that context, the close relationship between the act of recognition by States and the function of a general principle of law deserved closer scrutiny. The Special Rapporteur should also investigate how the common distinction between general principles of a procedural nature and those of a substantive nature related to the two different origins. Again, many crucial questions remained open in that regard including the very existence of that second category. However, the Special Rapporteur had promised to provide the necessary answers in his future report on the identification of general principles.

The discussion in paragraphs 254 to 258 of the inconsistent use of terminology would have been better placed at the beginning of the report. However, he agreed with the Special Rapporteur's choice of terminology and deemed wholly appropriate the decision to abandon the use of the term "civilized nations".

Turning to his observations on the three proposed draft conclusions, he said that the wording of draft conclusion 1 seemed short and concise. He would therefore welcome further clarification and elaboration in the commentaries. While the most important focus of the project was the function of general principles as a source of international law, several other functions that were mentioned in paragraph 26 should also be examined as part of the project.

He generally agreed with and supported proposed draft conclusion 2. However, as other speakers had noted, the term "States" might narrow the scope and exclude other relevant actors. That term could perhaps be replaced with "international community", but further discussion was required in that regard. He also agreed with the Special Rapporteur that some of the most important questions relating to draft conclusion 2, particularly those mentioned in paragraph 187, required clarification in a future report and might therefore have an impact on the draft conclusion.

As to proposed draft conclusion 3, noting that concerns had been expressed by many speakers regarding category (b), general principles formed within the international legal system, he thought it preferable that the issue should be addressed at a later stage, after the Commission had considered the identification of general principles of law.

In general, he supported the Special Rapporteur's proposed future programme of work, but wondered whether it might have been more appropriate to begin by identifying general principles of law and then consider their functions. Information on the practice of States in that context would be of real value to the Special Rapporteur's work on the topic; the Commission should therefore consider inviting States to provide such information by means of a questionnaire.

In conclusion, he supported the referral of all three proposed draft conclusions to the Drafting Committee.

The meeting rose at 1 p.m.