A/CN.4/SR.3492

Provisional

For participants only

2 October 2019

Original: English

International Law Commission

Seventy-first session (second part)

Provisional summary record of the 3492nd meeting

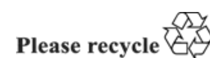
Held at the Palais des Nations, Geneva, on Monday, 29 July 2019, at 10 a.m.

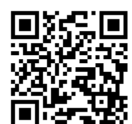
Contents

General principles of law (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

GE.19-12843 (E) 150819 021019





***Present*:**

Chair:	Mr. Šturma
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	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

The meeting was called to order at 10.10 a.m.

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

The Chair invited the Commission to resume its consideration of the first report on general principles of law (A/CN.4/732).

Mr. Argüello Gómez said that the topic of general principles of law was very theoretical and of little apparent practical value, despite the reference to general principles of law in article 38 of the Statute of the International Court of Justice, which was the starting point for the Special Rapporteur's study of the topic. Evidence of the use, in practice, of Article 38 (1) (*c*) on general principles of law was just as scarce as that in respect of Article 38 (2) on the power of the Court to decide a case *ex aequo et bono*. As former Commission member Mr. Pellet had noted in the recently published *The Statute of the International Court of Justice: A Commentary*: "The Court itself has referred to Art. 38 para. 1 (*c)* with an extreme parsimony ... this provision has been expressly mentioned only four times in the entire case law of the Court since 1922 and each time it has been ruled out for one reason or another."

He himself also had personal experience of the lack of practical utility of the provision. In 1984, an unusual situation had arisen when Nicaragua had filed a claim against the United States of America before the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Nicaragua had originally based its application on violations by the United States of various treaties, in particular Article 2 (4) of the Charter of the United Nations, articles 18 and 20 of the Charter of the Organization of American States and article 8 of the Convention on Rights and Duties of States. However, although the United States had made a declaration under Article 36 (2) of the Statute of the Court recognizing the compulsory jurisdiction of the Court, it had entered a number of reservations, including the "Vandenberg reservation", which excluded from the Court's jurisdiction disputes arising under a multilateral treaty, unless all parties to the treaty affected by the decision were also parties to the case before the Court, or the United States specially agreed to jurisdiction. Nicaragua had thus had to remove from its submissions all express references to treaties, including the Charter, and had had the option of invoking Article 38 (1) (*b*) of the Statute on international custom or Article 38 (1) (*c*) on general principles of law. It had ultimately chosen to argue the violation by the United States of various rules of general customary law, such as non-use of force and non-intervention. The Court had also relied on paragraph (1) (*b*) to substantiate its judgment. The fact that neither the Court nor the claimant in that case had invoked the provision on general principles of law highlighted its limited practical use.

The *Military and Paramilitary Activities* case was similar in nature to the case concerning the *Corfu Channel (United Kingdom v. Albania)*, which had also involved the mining of ports. In the latter case, the Court had found that the Albanian authorities had an obligation to notify the existence and location of the minefield, based on "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war". In paragraph 236 of the report, the Special Rapporteur cited the *obiter dictum* in the *Corfu Channel* case to demonstrate the Court's reliance on general principles of international law to substantiate its judgments. However, in *Military and Paramilitary Activities*, despite not being able to apply international conventions, the Court had not considered it necessary to have recourse to general principles of law, instead declaring that "the United States of America, by failing to make known the existence and location of the mines laid by it … has acted in breach of its obligations under customary international law in this respect".

All of that was not to say that he was opposed to the Commission studying the topic. On the contrary, he believed that it was vital for the Commission to consider that source of international law, having already studied treaty law and customary law. However, the highly theoretical nature of the topic and its limited practical value should be taken into account as part of the study.

Turning to the report itself, he said that, like other members, he was not convinced that the general principles of law mentioned in Article 38 (1) (*c*) of the Statute included those formed within the international legal system, as indicated in draft conclusion 3. Some previous speakers had suggested that the Commission's study of the topic should be limited to the general principles of law referred to in the Statute, and one member had even suggested explicitly mentioning that fact in draft conclusion 1. There was nothing in the text of Article 38, in the *travaux préparatoires* or in the judgments of the Permanent Court of International Justice or the International Court of Justice to indicate that the reference to general principles of law covered anything other than those derived from national legal systems. Nor did he believe that the idea of an evolving interpretation of the Statute would support the need for a broader understanding of the original concept of the general principles of law.

As was noted in the report, one of the main reasons for originally including the reference to general principles of law in Article 38 of the Statute had been to avoid a potential *non liquet.* However, in the almost one hundred years since then, the Court had never had to rely on such principles in substantiating a judgment. Given the remarkable evolution in the rules of both treaty and customary international law, the idea that the Court might today have to have recourse to such principles in order to avoid a *non liquet* seemed almost anachronistic.

It was noted in the report that the Court had considered it necessary to develop its interpretation of Article 38 (1) (*c*) to allow for the use of general principles of law formed within the international legal system. The case most often cited to support that position was the *Corfu Channel* case. In his view, the reference in that case to "elementary considerations of humanity" was based not on general principles of law, but rather on customary law. Indeed, in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had stated that the many rules of humanitarian law applicable in armed conflict that were so fundamental to elementary considerations of humanity "constitute intransgressible principles of international customary law". In other words, they were not general principles of national or international law but of customary international law, which fell under paragraph 1 (*b*) rather than (*c*) of Article 38.

Another case cited in support of the argument that paragraph 1 (*c*) also referred to principles formed within the international legal system was the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*. In that case, the Court had made it clear that the fact that the new African States had respected the principle of *uti possidetis* "must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law". He agreed with the points made by Mr. Reinisch on that case.

He doubted that, even outside the context of the Statute, any general principle of law formed within the international legal would not, *ipso facto*, be or become a rule of customary international law. It was inconceivable to think of general principles of international law that were not reflected in practice, in other words, international custom. As Thirlway noted in *The Sources of International Law*: "Customary law, for example, is not merely made up of rules; it also contains established principles ... The application in argument, or in a judicial decision or arbitral decision, is an application of customary law, not of Article 38 (1) (*c*) of the ICJ Statute."

To his mind, it must be concluded that, as soon as those principles were declared to be generally accepted by the international community, they would cease to be simple principles of general international law and would become part of international custom.

For those reasons, he did not believe that the Commission had reached an adequate understanding to discuss the proposed draft conclusion 3. He agreed with Mr. Reinisch and others that the matter required further study.

The report also mentioned the possible existence of general principles with a regional scope of application. If the existence of customary regional law was accepted, he saw no reason not to also accept general regional principles. Furthermore, regional custom could derive from regional general principles which, having been accepted by the States of a region, became regional custom. However, as some members had noted, it was too early to discuss further that aspect of the topic.

The expression "civilized nations" used in Article 38 had given rise to a great deal of commentary, but it was simply an anachronistic expression contained in an old treaty whose meaning had evolved. It should be recalled that, when the text had been drafted in 1920, only 13 of the 34 States with members in the Commission had actually been classified as States. For example, Egypt and India had not been considered States, despite having older civilizations than any of the European States.

In conclusion, he agreed that the proposed draft conclusions should be referred to the Drafting Committee, taking into account the suggestions and comments made in the plenary.

Ms. Oral said that she was grateful to the Special Rapporteur for an excellent and in-depth first report on general principles of law. The topic presented something of a conundrum: although general principles of law were listed as a source of international law in Article 38 of the Statute of the International Court of Justice, they remained elusive, as shown by the statements made by members of the Commission and the doctrinal debates on the topic.

As Ms. Galvão Teles and others had noted, there appeared to be no common understanding of how to define the term "general principle of law". Were "principles" and "rules" interchangeable, as suggested by the International Court of Justice in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, or different, as others had suggested? Moreover, as highlighted in paragraph 11 of the report, the relevant practice of States and international courts was "sometimes described as unclear or ambiguous" and thus did little to clarify what was a seemingly amorphous area of international law. Some members, including Mr. Hassouna and Mr. Murphy, had noted that even the Commission's previous work did not provide clarity. In that context, it was evident that shedding light on the concept of general principles of law, which was a very important aspect of international law, presented a challenge.

In his seminal first report, the Special Rapporteur neatly captured the inherent complexity of the topic. He had successfully outlined the many issues involved and a road map for future work. As several speakers had noted, the first report was preliminary, but the stage had been ably set for the Commission's future work on the topic.

She would begin with some general comments on parts one to three of the report and would then make more detailed comments on part four and the individual draft conclusions.

It was important to be clear as to the nature and purpose of the Commission's work on the topic. On the latter point, the Special Rapporteur noted in paragraph 10 of the report that its purpose was to "provide guidance to States, international organizations, courts and tribunals, and others called upon to deal with general principles of law as a source of international law". She fully supported that statement, which was consistent with the Commission's previous work on the topic "Identification of customary international law". That statement of purpose should also be reflected in the draft conclusions. In essence, the Commission's task was to develop a methodology for identifying general principles of law to be used as a source of international law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice. On that point, she agreed with Mr. Hmoud and others that the Commission's work should be focused on that Article, as it was not addressing "general principles" in an abstract sense but specifically those that were a source of international law under the Statute.

The report also provided an excellent overview of the historical development of general principles of law under the Permanent Court of International Justice and, subsequently, under the International Court of Justice. The relevant parts of the report, spanning paragraphs 76 to 125, were rich in information and interesting to read. They also placed the term "general principles of law" in a broader historical context. However, both international law and national legal systems had evolved since the adoption of the Statute of the International Court of Justice, as shown most saliently by the Commission's rejection of the term "civilized nations". On that point, she agreed with Mr. Jalloh that that term was charged with colonialist ideology and for that reason should no longer be used. Thus, while the origins of the Statute provided a valuable insight into the intent of its drafters, the

Commission need not be restricted by the principle of "original intent". In her view, that point was of particular relevance to the examination of general principles of law as a source of international law emanating from national legal systems or the international legal system.

The Special Rapporteur acknowledged that an important challenge was where to find general principles of law. One of the sources that he examined was "international instruments". In paragraph 111, the Special Rapporteur noted that references to general principles of law could be found in many treaties concluded after the Statutes of the Permanent Court of International Justice and the International Court of Justice. Although the selection provided in that regard was rather limited, she appreciated that the report was only preliminary. Nevertheless, she wondered whether the Special Rapporteur planned to examine soft law instruments as part of his methodology. To some extent, they were related to the practice of international organizations, which the Special Rapporteur intended to examine. The category of soft law instruments was broad, but, in her view, constituted an important source of general principles of law, particularly in certain branches of law, such as international environmental law.

As to the nature of the work, the Special Rapporteur outlined the main issues to be addressed by the Commission in relation to the topic: the legal nature of general principles as a source of international law; their origins; and their functions and relationship with other sources of international law.

The third of those issues was one of the most complex and confusing aspects of the topic. As the Special Rapporteur demonstrated, general principles of law were viewed through a somewhat multipurpose lens. While the original and main purpose of general principles of law was to prevent situations of *non liquet*, as shown by the historical analysis provided in paragraph 50 of the report, they were also seen as having other functions. General principles of law had been described variously as gap-fillers, interpretive tools, sources of rights and obligations and systematizations of legal norms, among other functional categories.

In their statements on the first report, many members of the Commission had focused on the "gap-filling" function of general principles of law. While there was no doubt that they fulfilled that purpose, the Commission also needed to examine their other key functions. The principle of good faith, for example, which was a classic principle present in both national and international legal systems, was not a gap-filler. It was a rule of interpretation of treaties under article 31 (1) of the 1969 Vienna Convention on the Law of Treaties and an obligation in itself, as enshrined notably in article 26 of that Convention ("*Pacta sunt servanda*"). Mr. Hassouna had also referred to the judgment of the International Court of Justice in the case concerning *Nuclear Tests (Australia v. France)*, in which it was stated that: "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith." The Court had reaffirmed that position in its judgment in the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*. As one author had noted, overall, there was little accord in doctrine on the meaning, function and methodology for the identification of general principles of law as a source of law. Likewise, the practice of States and international courts and tribunals remained unsettled. Thus, it would be important for the Commission to assess the exact nature of general principles of law under Article 38 (1) (*c*) of the Statute of the International Court of Justice and determine whether they served multiple functions.

As all previous speakers had highlighted, and as had been examined at length in scholarly writings, the relationship between general principles of law and customary international law raised some important questions. In his first report as Special Rapporteur on the topic "Formation and evidence of customary international law", Sir Michael Wood had noted that the distinction between customary international law and general principles of law was "also important, but not always clear in the case law or the literature".

Members of the Commission had emphasized the need for a thorough analysis of that important distinction. While the very fact that customary international law and general principles of law were listed separately under Article 38 suggested that they were distinct, it remained necessary to articulate that distinction for the purposes of the Commission's work

on the topic. Of course, that line of enquiry would lead to a second question, which would also need to be addressed in future reports: if the Commission accepted that general principles of law could also be a source of rights and obligations under international law, was a lower normative threshold required?

The question of the determination of the origins of general principles of law had given rise to interesting debates, particularly between those who were of the view that such principles could derive only from national legal systems and those, albeit a minority, who believed that they could also be formed "within" the international legal system. The Commission's decision in that regard would affect the methodology used to identify general principles of law as a source of international law.

Like other members of the Commission, she fully supported the two-step approach for identifying general principles of law. It was fairly well accepted and not overly controversial to state that the first of those steps should begin with a review of a majority, or a sufficiently representative sample, of national legal systems. The key issue was the second step of transposition from the municipal level to the international legal system. Sir Michael Wood had raised some important points in that regard, with which she fully agreed.

The more interesting question, however, was whether general principles of law could be found – or "formed" – within the international legal system. On that point, she was inclined to support the Special Rapporteur's assertion that the Commission could not rule out such a possibility and must investigate it further before adopting a position. For example, the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment and the 1992 Rio Declaration on Environment and Development, which States had adopted by consensus, were widely accepted as the progenitors of many key principles of environmental law. The possibility of preparing a new treaty to codify some of those principles had recently been raised. Many of those principles had been transposed to the municipal level or had been reflected in other international instruments. In addition, environmental law was an example of an area in which the line between general principles as a source of rights and obligations and customary international law was blurred.

Her intention was not to oversimplify a highly complex area, but simply to emphasize that it required further exploration in the Commission's future work. It was her understanding that the Commission was seeking to formulate a methodology for identifying general principles of law. She agreed that it would be instructive to offer examples, but the proposal to draw up an illustrative list similar to that prepared in the draft conclusions on peremptory norms of general international law (*jus cogens*) might prove too daunting a task. She nevertheless reserved her position in that regard. In addition, general principles of law that were currently emerging might in the future become fully fledged general principles of law that were binding under international law. The Commission should not dismiss the second category proposed by the Special Rapporteur, which might have a useful application in some areas of international law. She looked forward to a more detailed treatment of those issues, as planned for inclusion in the Special Rapporteur's future reports.

With regard to part four, the core part of the report, she agreed with the Special Rapporteur's approach, which involved the identification of three distinct elements: the notion of general principles of law; the meaning of recognition; and the defunct and anachronistic term "civilized nations". She understood that the analysis in question was preliminary and would be followed up in more detail in future reports.

First, the meaning of the word "general" must be determined in relation to the word "principle". Did it imply an application to all States, as suggested by the Special Rapporteur in paragraph 155? Was that application horizontal, in the sense that it cut across all branches of law, such as principles of interpretation or procedure? Or could general principles include the principles that applied only to a particular branch of law, such as the principles specific to trade law, criminal law or environmental law?

The Special Rapporteur had also sought to determine the meaning of the word "law" in that context. Did it refer to both national and international law, as suggested in paragraph 156 of the report? The Special Rapporteur cited the dissenting opinion of Judge Tanaka in the second phase of the case concerning *South West Africa (Liberia v. South Africa)*, in which the meaning of general principles of law under Article 38 (1) (*c*) had been addressed

rather broadly: "So far as the 'general principles of law' are not qualified, the 'law' must be understood to embrace al1 branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc." The Special Rapporteur had not definitively resolved the question, as he stated merely that different interpretations of the term "law" were "plausible". She had no doubt that that question would serve as the basis for very interesting debates in the Commission.

Another question addressed by the Special Rapporteur was the relationship between general principles of law and "general international law". On that point, she wished to mention the *Case of the S.S. Lotus (France v. Turkey)*, in which the Permanent Court of International Justice had referred to "international law as it is applied between all nations belonging to the community of States … meaning the principles which are in force between all independent nations and which therefore apply equally to all the contracting Parties", when interpreting the meaning of "principles of international law" under the 1923 Treaty of Peace signed in Lausanne.

The current members of the Commission had expressed divergent views on that issue. Nonetheless, the Special Rapporteur concluded that the Commission's previous and current work confirmed that general international law included general principles of law, although it depended on the context. However, she questioned whether the parts of the Commission's work to which he referred actually supported that conclusion.

Consequently, while she was not in principle opposed to the proposition that "general international law" included general principles of law, she did not believe that the Special Rapporteur had sufficiently supported that conclusion.

In addition, like other members of the Commission, she had reservations regarding the suggestion that general principles of law could include a regional or bilateral component, as that seemed to run counter to the plain meaning of the term "general principles of law", particularly as the International Court of Justice had stressed, in the *North Sea Continental Shelf* cases, that norms of general international law "must have equal force for all members of the international community". She took the same view with regard to the notion of regional peremptory norms (*jus cogens*). Such principles belonged in a different category and, in her view, would not fall under general principles of law within the meaning of Article 38 (1) (*c*) of the Statute of the Court. But she was prepared to be persuaded otherwise by the Special Rapporteur's future work.

As for the second element, there was no question that, as underlined by the Special Rapporteur, recognition was the "essential condition" for the formation of a general principle of law under Article 38 (1) (*c*), similar to *opinio juris* for the formation of a customary rule. However, she agreed with several other members that the Commission must distinguish between the requirements for the recognition of general principles of law from those for the formation of customary international law or for the identification of peremptory norms of international law (*jus cogens*). A clear explanation of the element of recognition for general principles of law would assist the Commission in differentiating them from other sources of international law, in particular customary international law. On that point, she would wait until a later stage before setting out her views.

Turning to the draft conclusions, she wondered whether draft conclusion 1 was not overly broad and simple. It did not offer any real guidance and fell short of providing "an authoritative statement of the nature, scope and function of general principles of law".

By way of contrast, draft conclusion 1 on the identification of customary international law defined the scope of that topic: "The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined."

She would be in favour of refining draft conclusion 1 so as to clarify the scope of the project in line with the proposals contained in the syllabus. It could be amended to read: "The present draft conclusions concern the identification of general principles of law, including their nature, scope and functions, as a source of international law."

With regard to draft conclusion 2, her concern was that the provision did not explain what "recognition" entailed. Although the draft conclusions should be general, they should also provide adequate guidance, which could be supplemented by the commentaries. A reader of draft conclusion 2 in its current form would have to rely on the commentaries to an excessive degree.

She was prepared to support draft conclusion 3, which stated that general principles of law comprised those derived from national legal systems and those formed within the international legal system, although, in the light of the statements made by certain members, more work might be needed to support the second category.

In conclusion, she recommended the referral of all the draft conclusions to the Drafting Committee.

Mr. Gómez-Robledo said that the Special Rapporteur's first report, which was well researched and structured and based on impeccable legal reasoning, was an important complement to the Commission's work on the other sources of international law.

He agreed that the output of the Commission's work on the topic should be in the form of draft conclusions, following the same methodology as for the topics on the identification of customary international law and on peremptory norms of general international law (*jus cogens*). He also agreed that it would not be appropriate, at least at that stage, to attempt to draw up a list of general principles of law, although it would be helpful to indicate in the commentaries their origin – whether national or international – with a special emphasis on those recognized as general principles in international and even regional jurisprudence.

It would be essential to clarify the distinction between the "identification" of customary international law and the "recognition" of general principles of law to avoid any confusion arising from the excessive use of analogy. He agreed with the statement in paragraph 173 of the report that "the requirement of recognition would be met by having recourse to those existing rules, which have already been accepted (or recognized) by States". In the same paragraph, the Special Rapporteur recalled that it had been suggested that "the basic element should be the attitude of States to consider themselves bound". That wording was very similar to draft conclusion 9 (1) of the conclusions on the identification of customary international law adopted by the Commission at its seventieth session. Indeed, the similarity was recognized in footnote 307, in which it was stated that "giving relevance to State practice when asserting the existence of this type of principles would bring these principles close to customary rules".

In his view, as other members had already suggested, the most interesting approach would be to examine the extent to which recognition could take the form of acts of international organizations or similar instruments that showed the consensus of States on specific matters, such as resolutions of the General Assembly, provided it was accepted that general principles of law emerged through a process of deduction or abstraction from existing rules of conventional and customary international law. The emphasis on deduction was intrinsically linked to the interpretation of law as a "rational" system of rules and allowed an important distinction to be made with customary law. The view expressed in paragraph 23 of the report that principles founded "on the very nature of man as a rational and social being" were "intrinsic to the idea of law and basic to all legal systems" was very close to the definition of natural law by Saint Thomas Aquinas, namely that it was "nothing other than the light of understanding".

Judge Cançado Trindade's opinion, noted in paragraph 148 of the report, that "it is the general principles of law (*prima principia*) which confer to the legal order (both national and international) its ineluctable axiological dimension", since they "embody important or fundamental values", should be understood in that context. That point was also reflected in the Martens clause, referenced in paragraph 80 of the report, which had been mentioned during the drafting of Article 38 of the Statute of the Permanent Court of International Justice and which provided for the derivation of principles from "the laws of humanity, and the dictates of the public conscience" in the absence of any codified law of war. Similarly, the International Court of Justice had referred to "elementary considerations of humanity" in the *Corfu Channel* case.

Although the International Court of Justice had acted cautiously and on many occasions avoided pronouncing itself on general principles of law, he was convinced that that source of general international law should, in some way, play a subsidiary role in respect of the other two main sources in order to fill gaps in conventional and customary international law and to avoid findings of *non liquet*. If general principles of law were to apply in the relations between subjects of international law generally, as was suggested in paragraph 166 of the report, judges could refer to the interaction between international law, national law and the dictates of reason, common sense or moral considerations.

Turning to a terminological issue, he said that, while draft conclusion 2 referred to the requirement that for a general principle of law to exist, it must be "generally" recognized by States, elsewhere in the report reference was made to other levels of recognition. For example, paragraph 167 mentioned that the requirement of recognition was fulfilled when a principle existed "within a sufficiently large number of national legal systems", whereas paragraph 190 noted that the existence of principles common to "a majority of national legal systems" appeared to be regarded as fulling the requirement of recognition. That matter would have to be discussed in more detail in the Drafting Committee. If the Commission opted for the requirement of existence in "a majority" of legal systems, could a principle be considered to be recognized if it existed in only 50 per cent plus one of legal systems, for example?

The Special Rapporteur and others had already discussed the unfortunate term "civilized nations" used in Article 38 (1) (*c*) of the Statute. Indeed, as the Special Rapporteur had noted, in 1971 his country, Mexico, had suggested the amendment or deletion of the term, describing it as "a verbal relic of the old colonialism". The phrase must be consigned to the past and replaced with a more appropriate alternative. In his view, a suitable substitute would be "international community as a whole", as used in draft conclusion 17 of the draft conclusions on peremptory norms of international law (*jus cogens*); the explanation of what was to be understood by that term was contained in the third report on that topic. As had been established in draft conclusion 12 of the draft conclusions on the identification of customary international law, a resolution adopted by an international organization "may provide evidence for determining the existence and content of a rule of customary international law". It could therefore be said that the General Assembly of the United Nations had taken over the role assigned one hundred years earlier to the "civilized nations". The requirement of the participation of "the main forms of civilization and the principal legal systems of the world" in the recognition of general principles should be retained. In his view, the expression "international community as a whole" would cover all of those concerns.

Part four of the report addressed interesting questions in relation to the origin of general principles. In particular, he welcomed the distinction made between the two categories of general principles of law; that approach provided a solid framework for the analysis of the origins of general principles and the Commission's future work on the topic. For that reason, he supported the use of the word "comprise" in draft conclusion 3 rather than "include". With regard to transposition of general principles derived from national legal systems, the practice cited in the report highlighted the need for a degree of judicial discretion and the avoidance of "mechanical importation".

In conclusion, he supported referring all of the draft conclusions to the Drafting Committee.

Mr. Ruda Santolaria said that he wished to thank the Special Rapporteur for a well-written and well-documented first report on the important and interesting topic of general principles of law.

He fully agreed that the final outcome of the Commission's work on the topic should be a set of draft conclusions with commentaries on general principles of law as a source of international law. The Commission would thereby be addressing the third main source of international law listed in Article 38 (1) of the Statute of the International Court of Justice, following its valuable work on the law of treaties and the identification of customary international law. It would not only be filling a gap in relation to a complex issue, but would also be making a very useful contribution by helping States and other subjects of

international law to come to a clearer understanding of the legal nature of general principles of law and their features and by equipping them with the elements needed to facilitate the identification of such principles.

As noted by the Special Rapporteur, the inconsistent use of terminology in the literature and in practice and the fact that, as mentioned in paragraph 39 of the report, there might be conventional or customary rules that addressed the same situation as a general principle of law were two methodological issues that complicated the Commission’s work.

As noted by the Study Group on the fragmentation of international law, the conclusions of whose work were quoted in paragraphs 66 and 67 of the report, and as had been highlighted by other members, there was no hierarchical relationship among the main sources of international law, namely treaties, custom and general principles of law. A “rule” might thus sometimes be seen as a specific application of a “principle” and understood “as *lex specialis* or *lex posterior* in regard to it”, and might “become applicable in its stead”. The “general or earlier principle” might be understood to “articulate a rationale or a purpose to the specific (or later) rule”.

Paragraph 70 of the report included a useful reference to the first report of the Special Rapporteur on the topic of the identification of customary international law (A/CN.4/663). It had been emphasized in that report that “general principles of law” were listed separately from customary international law in Article 38 (1) (*c*) of the Statute of the International Court of Justice, which was relevant to an assessment of the *effet utile* of that provision in comparison with the first two subparagraphs of Article 38 (1); that, in case law and literature, the term “general principles of international law” was sometimes taken to refer not only to general principles common to the various systems of internal law but also to general principles of international law; and that the International Court of Justice could have recourse to general principles of international law in circumstances when the criteria for customary international law were not present.

In paragraphs 74 and 75 of the report, the Special Rapporteur discussed the conclusion of the Special Rapporteur on peremptory norms of general international law (*jus cogens*) that the term “general international law” encompassed general principles of law, which could serve as the basis for *jus cogens* norms.

With regard to the treaties concluded for the settlement of disputes from the eighteenth to the early twentieth centuries, which, as noted in paragraph 78 of the report, contained broad applicable law provisions, he wished to offer an example from the Latin American context. Article VIII of the General Treaty of Arbitration between Chile and Argentina, which had been signed in Santiago, Chile, on 28 May 1902 and pursuant to which the parties designated the Government of the United Kingdom as arbitrator, provided that: “The Arbitrator must decide in accordance with the principles of international law, unless the submission imposes the application of special rules or authorizes him to decide as amicable compounder.” That reference acquired greater resonance in view of the fact that international disputes between the two parties, such as that of Palena or the River Encuentro in 1966, had been submitted for arbitration under the Treaty. In the Arbitration Agreement or *Compromiso* signed in London on 22 July 1971 by representatives of Argentina, Chile and the United Kingdom, in accordance with which a dispute concerning the Beagle Channel area had been submitted to arbitration under the Treaty, it was expressly stated in article I (7) that: “The Court of Arbitration shall reach its conclusions in accordance with the principles of international law.”

With regard to the section of the report on references to general principles of law in treaties concluded after the adoption of the Statutes of the Permanent Court of International Justice and of the International Court of Justice, the analysis of article 21 of the Rome Statute of the International Criminal Court set out in paragraphs 113 to 120 was particularly apposite. On that point, he found very convincing the approach taken by Rüdiger Wolfrum, as cited in footnote 199.

Also relevant was the Special Rapporteur’s assertion, in paragraph 143 of the report, that general principles of law were not unique to the international legal system, as a similar notion existed in national legal systems, although, as was rightly specified, the same terminology was not always used. By way of illustration, it was worth mentioning that,

since the mid-nineteenth century, it had been stipulated in successive Peruvian civil codes that judges should apply general principles of law in order to avoid failing to administer justice on the grounds that the law was defective or deficient.

Thus, article IX of the Preliminary Title of the Peruvian Civil Code of 1852 stipulated that: "Judges may not suspend or refuse the administration of justice by reason of lacunae, obscurities or inadequacies in the legal provisions: in such cases, they shall decide having regard: l. to the spirit of the law; 2. to other provisions relating to analogous cases; and 3. to the general principles of law, without prejudice to holding separate consultations to obtain a clear rule for any new cases that may occur." Article XXIII of the Preliminary Title of the Peruvian Civil Code of 1936 established that: "Judges may not refuse the administration of justice by reason of the deficiency of the law. In such cases, they must apply the principles of law." Article VIII of the Preliminary Title of the Peruvian Civil Code of 1984, which was currently in force, read: "Judges may not refuse the administration of justice by reason of defect or deficiency of the law. In such cases, they must apply general principles of law and, preferably, those that inspire Peruvian law."

With regard to the relationship between the terms "principle" and "rule", he agreed with Michel Virally's opinion, as quoted by the Special Rapporteur in paragraph 146. Moreover, he supported the Special Rapporteur's conclusion, in paragraph 153, that the term "general principles of law" in Article 38 (1) (*c*) of the Statute of the International Court of Justice referred to norms that had a "general" and "fundamental" character. In that regard, it was worth noting the distinction drawn by Mr. Valencia-Ospina between procedural principles and substantial principles, namely that it was the latter that had that fundamental character.

There might be general principles with a regional scope of application, as pointed out by the Special Rapporteur in paragraph 155 of the report, but the term "general" in Article 38 (1) (*c*) of the Statute of the International Court of Justice was much broader in sense, referring to the universal nature of general principles of law and their applicability to all States and to relations between the subjects of international law in general. In that regard, it was instructive to consider the characterization of *uti possidetis juris* as a general principle in the judgment of the International Court of Justice in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*: "The Chamber … wishes to emphasize its general scope, in view of its exceptional importance for the African continent and for the two Parties. In this connection it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America … Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs."

With regard to the word "law", in accordance with Article 38 (1) (*c*) of the Statute of the International Court of Justice, he believed that a general principle of law could derive both from national legal systems, via its transposition into international law, and from the international legal system. He agreed with the Special Rapporteur's comment, in paragraph 158, that, while those interpretations of the word "law" were plausible, they needed to be further assessed as the topic progressed and with due regard to the practice of States and the decisions of international courts and tribunals. At the same time, he also believed that general principles of law formed part of general international law.

With regard to the requirement of recognition, he agreed with Ms. Galvão Teles and Mr. Tladi that it should not be assimilated to acceptance in the sense of an awareness of the obligatory or *opinio juris* nature of a norm, as was required for international custom. However, such recognition was essential to the existence of a general principle of law, which made it necessary, as suggested by the Special Rapporteur in paragraphs 169 to 175 of the report, to analyse how recognition was established for general principles of law derived from national legal systems and for those formed within the international legal system.

Concerning the use of the expression "civilized nations", he fully shared the Special Rapporteur's opinion, as set out in paragraphs 184 and 185 of the report, which had also been expressed by other members, such as Ms. Galvão Teles, Mr. Hassouna and Mr. Tladi,

namely that it was not only anachronistic, but was also inconsistent with the principle of the sovereign equality of States. However, in that regard, and with reference to article 15 (2) of the International Covenant on Civil and Political Rights, he preferred to speak of “general principles of law recognized by the community of nations”, since such principles might be applicable not only to States, but also to other subjects of international law, such as international organizations.

He also agreed with the Special Rapporteur that general principles of law could originate both in national legal systems and in the international legal system. As the Special Rapporteur noted in paragraph 235 of the report, the latter was corroborated by the practice of States and the decisions of international tribunals. In his view, the principle of *uti possidetis juris*, to which reference was made in paragraphs 242 and 243, offered an important and illustrative example. In its judgment in the above-mentioned *Frontier Dispute* case, the International Court of Justice emphasized that the principle in question originated in an eminently international situation, namely the need to preserve frontiers inherited from colonization and to avoid conflicts between States formed as part of the decolonization process: “The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies al1 subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.”

He agreed that it was relevant to contrast the position of the European Union with that of the United States of America and Canada in the *EC-Hormones* case discussed in paragraphs 250 to 252 of the report. From a conceptual perspective, he agreed with the European Union that: “General principles of law express principles articulated in domestic as well as international law not necessarily fulfilling the tests of practice and *opinio juris*, but expressing common values inherent in human life and society and being now generally accepted by all States and the international community.”

He agreed with the proposed draft conclusions. However, with reference to draft conclusion 2, he would note that, for a general principle of law to exist, it must be generally recognized by the international community, including States and other subjects of international law.

He supported the referral of the draft conclusions to the Drafting Committee, although, as the Special Rapporteur and other members had noted, the Committee should proceed with caution on the basis of a more detailed study of the topic and analysis of practice.

In his opinion, it would be very useful if the valuable support of the Secretariat could be requested in preparing a memorandum containing an analysis of the practice of States and other subjects of international law with a particular focus on the decisions of international courts and tribunals and international arbitral courts. It would also be beneficial to circulate a questionnaire to States so as to elicit further information on their practice and views on the topic.

With regard to the future work programme, it would be better first to address the identification of general principles of law and their requirements, including the requirement of recognition, and then to deal with their functions and relationship with other sources of international law, particularly treaties and international custom. He did not believe that an indicative list of general principles of law should be drawn up, as the considerable effort required, owing to their breadth, would be better devoted to the aspects that he had mentioned. However, he did consider it relevant to offer, in the commentaries, representative practical examples of general principles of law.

Ms. Lehto said that she wished to express her appreciation to the Special Rapporteur for his well-researched, well-structured and well-written first report. She agreed that the Commission was in a good position to provide an authoritative clarification of the nature, functions and categories of general principles of law, in the same way as it had done with regard to customary international law and was currently doing with regard to *jus cogens*. The methodological nature of the topic, as proposed by the Special Rapporteur, and

the suggested final form of draft conclusions, were also consistent with the Commission's recent work and deserved support.

In the interest of time, she would focus her comments on part four of the report, which contained an initial assessment of certain key aspects of the topic, while bearing in mind the issues considered in paragraphs 15 to 20 of the report. She essentially agreed with the content of those paragraphs, namely that the starting point for the work of the Commission on the topic should be Article 38 (1) (*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, and that the question of recognition was of paramount importance for the Commission's work.

With regard to Article 38 (1) (*c*), she agreed that general principles of law were one of the principal sources of international law, distinct from both treaties and customary international law. At the same time, the borders between the three sources were permeable, and it might be particularly difficult to distinguish between general principles and customary international law.

That much was already obvious from looking at the concept of general principle. A "principle" could be said to differ from a "rule" on account of the generality of its content. The term "general principle", however, would also seem to indicate other qualities, such as wide validity. The Special Rapporteur concluded in paragraph 153 of the report that general principles of law in the sense of Article 38 (1) (*c*) were "'general' in the sense that their content had a certain degree of abstraction and 'fundamental' in the sense that they underlie specific rules or embody important values". While that conclusion was well grounded in the preceding paragraphs of the report and consistent with the Commission's earlier work on the identification of customary international law, it was also clear that those qualities alone did not distinguish general principles from customary law.

She wished to say a few words about the references to general principles of law in the practice of the International Court of Justice, in particular from the perspective of the weight to be given to the fact that the Court had rarely, if ever, explicitly referred to that source.

As was well known, the Court had often preferred to use the composite term "general international law" without specifying whether it referred to customary international law or general principles of law. For instance, in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had famously referred to the environmental law principle of prevention as a general obligation which was "now part of the corpus of international law relating to the environment". Such practice had been described as a technique for avoiding taking a stand as to whether that principle was a customary rule or a general principle of law referred to in Article 38 (1) (*c*).

Judge Yusuf, in a recent book, claimed that the reason for the general reluctance to refer to Article 38 (1) (*c*), as far as the International Court of Justice was concerned, lay in the problematic reference to "civilized nations". However, according to Judge Yusuf, the Court had "nevertheless invoked and applied general principles of law in other forms", for instance, when referring to principles enshrined in treaties, or customary principles, but also with regard to principles "that are either inherent in the functioning of a legal system or which reflect a certain conception of objective justice". The latter distinction was very similar to that advanced by Mr. Valencia-Ospina regarding the distinction between procedural and substantive rules.

It was thus possible, as had been done in paragraph 129 of the report, to identify a number of cases in which the Court seemed to have used general principles of law. Future reports might further clarify such use.

Two basic considerations had been raised in the debate regarding the reference to "civilized nations": first, whether "nations" could be replaced simply with "States"; and, second, whether, in the context of "recognition", "States" meant "all States". As the Special Rapporteur pointed out, that notion had not been incorporated in subsequent legal instruments, which provided a number of alternative formulations, ranging from "the community of nations" in the International Covenant on Civil and Political Rights to

"international community of States as a whole" in the Vienna Convention on the Law of Treaties. The choice to be made was between consistency with the Commission's earlier work, such as that on *jus cogens*, and more innovative formulations encompassing, for instance, international organizations.

As to the second consideration, Mr. Nguyen had pointed out that an understanding that "States" meant all States for the purposes of recognition would seem to contrast with the express text of Article 38 (1) (*c*). Sir Michael Wood had expressed doubt as to the need for a given general principle of law to be found in "a majority" or "a sufficiently large number" of national legal systems. She tended to agree with him, in that Article 38 (1) (*c*) implied not a quantitative but, rather, a qualitative standard. It seemed that, for a principle to be suitable to be transposed to the sphere of international law, it must be found in all major legal systems or traditions of the world or be otherwise representative.

Turning to the categories of general principles, she said that much had already been said about the first category, those derived from national legal systems, and that she could be brief as there was little contention regarding that issue and as she had already mentioned the need for such principles to be generally recognized. First, she wished to commend the Special Rapporteur for his excellent analysis in paragraphs 190 to 230 of the report. Second, while such principles seemed to be mostly procedural and evidentiary in nature, they might also include other kinds of principles, from private, criminal or public law. The main criterion was that such principles should be appropriately adaptable to the realm of international law. Third, such domestic law principles must go through a process of transposition, which Judge Yusuf had described as "a process of distillation with the aim of encapsulating the common ground that exists among diverse municipal rules, thus forging them into general principles suitable for international relations".

There is no doubt that the drafters of the Statute of the Permanent Court of International Justice had had in mind general principles that were found *in foro domestico*. The text of Article 38, which had subsequently become Article 38 (1) (*c*) of the Statute of the International Court of Justice, did not, however, exclude other types of general principles, and the drafting history showed that that text, too, was a compromise between two conceptions of general principles.

The existence of principles that were of general validity was an indispensable part of any legal system, and thus both of domestic legal systems and of the international legal system. As Judge Cançado Trindade pointed out in a passage cited in paragraph 148 of the report: "Every legal system has fundamental principles, which ... confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole."

The second category, general principles of international law that had no counterpart in national legal systems, raised a number of questions, most prominently those related to the requirement of recognition, which should also apply to them. One of the questions related to distinguishing such principles from principles of customary law. Words of caution had been heard in the debate regarding the role of general principles of law as "custom lite" or as "custom minus practice" or "custom minus *opinio juris*". Giorgio Gaja had voiced similar doubts in the *Max Planck Encyclopedia of Public International Law*: "Should custom be regarded [...] as 'evidence of a general practice accepted as law', given the insufficiency of practice, several rules of international law which are not based on treaties would not fit in the definition of custom. Hence the reference to principles or general principles."

Ian Brownlie, in *Brownlie's Principles of Public International Law*, had provided a helpful interpretation when referring to general principles of international law as "certain logical propositions underlying judicial reasoning on the basis of existing international law". He had, in that seminal work, mentioned the principles of consent, reciprocity, equality of States and the freedom of the seas and pointed out that, in many cases, "these principles may be traced to State practice. However, they are primarily abstractions and have been accepted for so long and so generally as no longer to be *directly* connected to State practice." That interpretation would obviously exclude general principles that were either customary or might be regarded as emerging custom. At the same time, it could accommodate a number of general principles of international law that had been mentioned earlier in the debate –

general principles governing international relations between States, such as those contained in the Charter of the United Nations or in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, general principles of human rights law, human dignity, considerations of humanity and principles underlying the Convention on the Prevention and Punishment of the Crime of Genocide.

Another question was related to whether general principles of international law should have general application, with regard not only to all States, but also to all areas of law. For instance, the International Court of Justice, in the *Corfu Channel* case, had mentioned, as being among “certain general and well-recognized principles”, “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”. That was a principle that underlay more specific rules in various fields of international law. The Court had itself confirmed that the environmental law principle of prevention, as a customary rule, as well as the more specific obligations of precaution and environmental impact assessment deriving from it, had their origins in that general obligation of due diligence. Furthermore, the International Law Association Study Group on due diligence in international law had pointed out in its second report that the broad principle of due diligence “can be viewed as a default standard that is triggered in operation if no more specific elaboration of due diligence or stricter standard is in existence”, in the absence of more specific treaty-based or custom regulation. According to the report, it was “clear, that its requirements are defined at the level of international, rather than national, law”.

The third question concerned the relationship between general principles in different fields of international law and those of general international law. It had been pointed out by Ms. Oral, among others, that general principles had not only played an important role in the formation of human rights law and environmental law, but had also retained their relevance, providing coherence and unity for the interpretation of the more specific rules derived from them. It was to be hoped that those issues might be studied in the future.

The proposed draft conclusions, like the report, directed attention to key questions related to general principles of law. Those questions, such as those related to the different categories of general principles of law, recognition and the role of general principles of law as a distinct source of international law, were all interrelated. While the report had generated an interesting and inspiring debate, it remained inconclusive; it was possible that the most contentious issues might not be overcome without the benefit of further research and reflection, in line with paragraph 158 of the report, which mentioned the Special Rapporteur’s suggestion that the question of whether the term “law” could be taken as referring to both national and international law required further assessment as the topic progressed, taking into account the practice of States and the decisions of international courts and tribunals.

In conclusion, she said that she supported sending all the draft conclusions to the Drafting Committee.

Mr. Nolte said that he wished to thank the Special Rapporteur for his first report on the topic of general principles of law. His excellent report provided a thoroughly researched, readable and transparently balanced introduction to that important topic.

Given the advanced stage of the debate, and the time pressure under which the Commission currently operated, his comments would not be long.

The Special Rapporteur noted in paragraph 15 of the report that “the starting point for the work of the Commission on this topic should be Article 38, paragraph 1 (*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”. That should indeed be the starting point. However, the identification of general principles of law required a broader base than just the practice of States and the jurisprudence of international courts and tribunals, as they were usually understood in the context of the identification of customary international law. In the present context, the “practice of States” encompassed their domestic law to a greater extent. And the relevant practice might be less visible in diplomatic intercourse than in more general forms of conduct. The relevant means for the

identification of general principles of law also encompassed, probably to a larger extent than in the context of customary international law, the jurisprudence of national courts, the output of international organizations, and academic writings, as had been noted by Mr. Nguyen, Ms. Galvão Teles, Mr. Park and others. Like Sir Michael Wood and Mr. Murphy, he did not think that the topic was only about courts and adjudication; it should thus not be dealt with in a court-centric way.

He agreed with the Special Rapporteur's suggestion in paragraph 24 of the report that the Commission should further explore the interrelationship of general principles of law and other sources of international law. Mr. Reinisch had made comments in that respect, including on the *lex specialis* rule, with which he agreed. He also supported Mr. Aurescu's proposal that the Special Rapporteur should consider the relationship of general principles of law with "equity". Like Sir Michael Wood and Mr. Aurescu, he was not concerned about the use of the term "source". Even if there were different understandings of the term in the academic literature, as Mr. Murase had pointed out, the Commission should simply indicate that it was following the most common understanding, which was, he believed, the legal process and the form by which a legal rule came into existence.

On that basis, he believed that the question of the delimitation between the different sources of international law was less difficult than was sometimes assumed. For example, like Mr. Reinisch, he thought that the distinction between a rule of customary international law and a general principle of law depended not so much on the generality of their content, but rather on the way in which a particular principle had come about, or, as Sir Michael Wood had said, on the distinct rules of recognition. Rules of customary international law might be quite general, and general principles of law might acquire the character of a rule of customary international law – if such principles could be shown to be followed in the practice of States and were generally accepted by States in the form of *opinio juris*. It was somewhat akin to rules of customary international law that might simultaneously be treaty rules. Thus, general principles of law and rules from other sources of international law were not necessarily distinguishable by their formulation or content. They were, rather, distinguished by the process by which they came into existence and by the conditions which they must otherwise fulfil.

He found very useful and convincing the Special Rapporteur's analysis, in paragraphs 77 to 109 of the report, of the "practice prior to the adoption of the Statute of the Permanent Court of International Justice" as well as of the drafting history of Article 38 (1) (*c*) of the Statute of the International Court of Justice and its predecessor. He agreed with the main conclusions derived therefrom in paragraphs 108 and 109, which were: first, general principles should not give the Court the power to legislate, a point which had been emphasized by Mr. Hmoud and others; second, general principles might derive from principles found *in foro domestico*; and, third, the possibility was not excluded that general principles might find their origins elsewhere as well. The overview, in paragraphs 111 to 139, of references to general principles of law in international instruments and in international judicial practice was also very helpful.

Regarding the "elements" of general principles of law in Article 38 (1) (*c*) of the Statute of the International Court of Justice, as discussed in paragraphs 141 to 187 of the report, it was important to ask whether the generality of "general principles" implied that they also had "a more fundamental character", as the Court had seemed to suggest in the *Gulf of Maine* case. The answer to that question depended on what was meant by "fundamental". In his view, in the context of general principles of law, the term "fundamental" did not necessarily indicate a higher rank or a particular substantive quality of any principle, as was the case for peremptory norms of general international law. In the context of "general principles of law", the term "fundamental" indicated, rather, an underlying, or structural, character of any principle. He thus agreed with the conclusion of the Special Rapporteur in paragraph 153 that general principles might be "'fundamental' in the sense that they underlie specific rules". As other colleagues had pointed out, many general principles of law did not embody a particular higher value, but were simply widely recognized as rules of a general nature. Thus, like Mr. Hmoud and Sir Michael Wood, he thought that general principles of law might, or might not, embody important values, a

point put more plausibly by Mr. Valencia-Ospina, who had stressed the procedural nature of a good number of general principles of law.

Concerning the element "recognized", as discussed in paragraphs 163 to 175, he agreed, as had Mr. Aurescu and others, with the Special Rapporteur's view in paragraph 167 that the requirement of recognition "may depend on the category of general principles of law", a point to which he would return.

With respect to general principles of law derived from national legal systems, he agreed with the Special Rapporteur that the element of recognition had a double function, which was, first, "to avoid granting judges overly broad discretion in determining the law", as noted in paragraph 166, and, second, to ensure that "a principle common to national legal systems … is applicable in the international legal system", as stated in paragraph 169. In respect of the latter function, he thought that the conditions should not be formulated too strictly. If there was a principle common to domestic systems of law, there might be a weak presumption that it was "transposable" to the international legal system. Such transposability could not, however, be assumed if, for example, a certain general principle presupposed an institutional arrangement which did not exist at the international level.

He agreed with the Special Rapporteur, in paragraphs 176 to 187 of the report, as well as with Mr. Jalloh and all the other colleagues who spoken before him, that the term "civilized nations" was outdated and should not be used. He believed, however, that the Commission should identify an alternative term which was fully compatible with the fundamental principle of sovereign equality of States and which maintained an important function of the outdated term. Indeed, the original purpose of using the term "civilized nations" had been not only to reaffirm the illegitimate primacy of certain States, but also to ensure that general principles were not identified too easily and without a qualitative collective judgment. The term had also served to ensure that "general principles of law" did not become an instrument for judges and other actors to justify their preferred outcomes.

That issue arose particularly in connection with the second category of general principles of law proposed by the Special Rapporteur, namely those "formed within the international legal system". If general principles of law could be "formed within the international legal system" simply by being "generally recognized by States", then that could justify the concerns of Mr. Tladi, Mr. Murase, Sir Michael Wood, Mr. Rajput and other colleagues that the source "general principles of law" might be used to undermine, or circumvent, the more rigorous conditions for the formation of rules of customary international law. It would indeed be hard to understand why a more general principle of law could be formed more easily than ordinary rules of customary international law.

He therefore proposed that the expression "must be generally recognized by States", in draft conclusion 2, should be replaced with a stricter rule of recognition. One possibility would be to use the term "international community of States as a whole", an expression taken from article 53 of the Vienna Convention on the Law of Treaties. The use of that expression would not mean that general principles of law would thereby be equated to peremptory norms of general international law. That was because the recognition of a general principle of law by "the international community of States as a whole" would not extend to a – non-existent – peremptory character of the general principle in question. The advantage of that expression was that it required not only the addition of the individual positions of States, but also a determination that the collective body of States as a whole considered a principle to be a general principle of law. That form of recognition would require the acceptance by a "very large majority" or an "overwhelming majority" of States, expressions that had been used by, respectively, the Commission in draft conclusion 7 (2) on peremptory norms of general international law (*jus cogens*) and the International Court of Justice in its judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*. Mr. Hmoud had made a similar proposal when he had suggested using the term "international community of States". Another possibility would be to simply say that recognition must stem from the "international community", as Ms. Galvão Teles and Mr. Hassouna had suggested. That proposal would give more room for the inclusion of international organizations and other actors in the group of actors which needed to recognize a general principle of law. He was not sure whether even broader approaches,

based on terms like "transcivilizational", as proposed by Mr. Murase, or "national", including subnational and transnational, as proposed by Mr. Tladi, could be operational.

However, the expression "general principles of law recognized by the community of nations" could perhaps capture the gist of most of the proposals. That expression was contained in article 15 (2) of the International Covenant on Civil and Political Rights, which dated from 1966, a time shortly after decolonization, when States had made successful efforts to translate the old international law to the new era of a decolonized world. In his view, the expression "general principles of law recognized by the community of nations" was a felicitous effort to translate the discredited term "civilized nations" to the current time, while preserving the legitimate part of its object and purpose.

Regardless of how the more stringent standard of recognition was formulated, it was clear, as Sir Michael Wood had said, that its actual operation was not a matter of mathematical calculation. That was particularly important in light of the fact that explicit expressions of recognition might sometimes be limited and that they might come from diverse actors, not only States, but also international organizations and, indirectly, possibly from other actors.

He largely agreed with the convincing description and analysis given in paragraphs 190 to 230 of the report, showing that "general principles of law may be derived from national legal systems". In many cases, it could be assumed that a general principle that was derived from national legal systems was "transposable" to the international legal system. He therefore thought it preferable to speak only of "transposability", not of a stricter requirement of "transposition".

Finally, in paragraphs 231 to 253 of the report, the Special Rapporteur dealt with the category of "general principles formed within the international legal system". As Mr. Hmoud, Mr. Park, Sir Michael Wood, Mr. Murphy and others had said, that category was less well established than the category of "general principles derived from national legal systems". He did not think, however, that the Commission should therefore summarily reject, or overly restrict, that second category. As he had said, the main concern was that the preconditions for such "general principles formed within the international legal system" to arise needed to be sufficiently stringent. In that sense, draft conclusion 3 depended on the precondition which was formulated in draft conclusion 2. In his view, the Special Rapporteur had made a *prima facie* case that general principles of law might also derive from within the international legal system. Depending on the preconditions for their formation, the category of "general principles formed within the international legal system" could be conceived as a form of general principles under Article 38 (1) (*c*) of the Statute of the International Court of Justice. In that case, it would be important to establish a reasonable distinction between "general principles of law formed within international law" and "general principles of international law", perhaps allowing for some possibility of overlap and avoiding being drawn too much into terminological questions – which had been the subject of a mini-debate between Mr. Grossman Guiloff and Mr. Reinisch.

In sum, draft conclusion 3 could be acceptable if the requirement of recognition in draft conclusion 2 was sufficiently strengthened for the category of general principles "formed within the international legal system".

Regarding the future programme of work, it appeared that the Special Rapporteur intended to follow a deductive approach in respect of the order and content of the two envisaged reports, starting with general matters, like function, and only then moving to more specific questions, like recognition. It might be better to start with what was generally accepted, for example, general principles derived from national legal systems, and then move on to what was less accepted, for example, general principles formed within the international legal system, and treat both function and recognition together with the respective categories.

Finally, he wished to encourage the Special Rapporteur to continue with his broad-based approach to the topic, and not limit himself to merely providing a bibliography instead of integrating all kinds of relevant material in the commentaries.

He agreed that the proposed draft conclusions should be referred to the Drafting Committee, although it might be preferable to wait to deal with draft conclusions 2 and 3 until the Commission was able to assess them in the light of the next report.

Mr. Cissé said that he wished first to congratulate the Special Rapporteur on his detailed and well-researched first report. While there was no doubt of the importance of general principles of law as a source of international law, consideration should be given to whether the topic should be limited in scope to general principles of international law or understood in a broader sense, encompassing both general principles of law in domestic legal systems and general principles of law formed within the international legal system. The Commission seemed divided on the matter, but he favoured the latter approach.

Although Article 38 (1) of the Statute of the International Court of Justice listed general principles of law as the third source of international law, it did not define them. Some years previously, the Commission had embarked on the task of clarifying the meaning, nature and scope of the three sources of international law listed in Article 38 (1) and the relationships among them, as well as their relationship with domestic law. While the three sources served different functions, there was no hierarchy among them. General principles of law, listed third, were no less authoritative a source than treaty or custom; they served to fill legal gaps, to provide a framework for judicial decisions in the absence of clear provisions, and to contribute, albeit as a subsidiary means of interpretation, to the progressive development and codification of international law.

The Commission would need a clear definition of “the general principles of law recognized by civilized nations” in order to pursue its work, but defining such abstract concepts might prove challenging. The title of the topic in French should be altered from “*Principes généraux du droit*” to “*Principes généraux de droit*”. In his view, the difference in meaning was substantive: the latter referred to principles defined in internal law, while the former referred to principles formed in international law.

Another issue on which opinions differed was whether the Commission should attempt to draw up a list of general principles of law. The Special Rapporteur considered such an endeavour unnecessary, but he, along with other members of the Commission, disagreed. Some such principles were already well established in either internal or international law. As with the topic of peremptory norms of general international law (*jus cogens*), producing such a list, even if non-exhaustive, could only serve to enhance the Commission’s work and help to clarify matters. Established principles included the period of prescription, *res judicata*, *res inter alios acta*, the state of necessity, *force majeure*, proportionality, good faith, the right of defence, reparation for damages, acquiescence, acquired rights, non-abuse of process, due diligence, the burden of proof, not incriminating oneself, not being both a judge and a party, *stipulatio alteri*, restitution for unjust enrichment, responsibility and, as a corollary, reparation for damages, presumption of innocence, the admission of circumstantial evidence in the absence of written or formal evidence, not pursuing private justice, *pacta sunt servanda*, *rebus sic stantibus* in boundary treaties, *uti possidetis*, the intangibility of inherited frontiers, *stare decisis* in common law, the sovereign equality of States, territorial integrity and non- interference in internal affairs. The Commission could add value to its work on the topic by defining categories of general principles of law for both internal and international law, differentiating between the procedural and the substantive.

A second reason in support of the need for an indicative list of general principles of law of both internal and international law was that Article 38 of the Statute of the International Court of Justice made no such distinction in referring to “general principles of law”. Views differed as to whether the Commission should examine general principles of international law to the exclusion of general principles of internal law, but he maintained, as he had in debates on *jus cogens*, that the barriers between the two should not always be seen as impermeable. The principle of sovereign equality of States, for instance, and its corollary of consent, was regarded as a general principle of international law, but it remained no less a general principle of internal law. Constitutions worldwide enshrined it as both a national and an international principle. It lay at the interface between the domestic and international legal systems but was also a reminder of the maxims that a clear text should need no interpretation and that distinctions should not be drawn where the law did

not distinguish, specifically in Article 38 (1) (*c*), dealing as it did with general principles of internal law that had been transposed into international law. The reverse was also possible: some general principles of international law had been transposed or were transposable into internal law by domestication or reception, depending on whether the legal system involved was dualist or monist.

Such two-way transposition inclined him to favour a global approach to the topic that did not focus too strongly on the distinction between internal and international law, as that approach seemed the most realistic, given the interdependence among States, between States and international organizations, and between States and private entities. Once a general principle of international law had been domesticated into a national legal system, it became a general principle of internal law, but without losing its international nature. The effect of the transposition demonstrated that the principle had become part of the State's legal framework, with all the attendant legal consequences for that State. In various areas of international law, the internal and international legal systems were often connected through diplomatic or judicial channels. Failure to consider both systems under the topic would distance the Commission from the spirit and letter of Article 38.

The wording of draft conclusion 2, which omitted reference to the obsolete and anachronistic term "civilized nations", should cause no controversy. With its focus on sovereign equality and the consent of States in the exercise of their rights and fulfilment of their obligations, it reflected the times and how the world and international relations had evolved. State recognition should encompass general principles of law originating around the world, including in European and non-European legal systems, the Islamic legal system, and the various African, Asian and Latin American customary legal systems. Such general principles existed and could be promoted through more democratic administration of justice both internally and internationally.

One of the unfortunately rare examples that transcended civil and common law was the separate opinion of Judge Weeramantry, then Vice-President of the International Court of Justice, in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, which explored the possible existence of the principle of sustainable development by looking at almost all the world's different legal traditions. The commentaries to the draft conclusions and the Special Rapporteur's future reports should emphasize the lack of universalism that persisted in the identification of general principles of law. Non-European systems flourished, whether Islamic law in Pakistan and Indonesia or the recognition of customary law in Canada, South Africa and the United Nations Declaration on the Rights of Indigenous Peoples. To ignore them in the context of general principles of law would be a mistake and would serve only to perpetuate colonialism.

The Special Rapporteur was right to indicate, in draft conclusion 3, that there existed two categories of general principles of law: those deriving from national legal systems and those formed within the international legal system. The text of Article 38 (1) (*c*), the relevant *travaux préparatoires* and the history of the provision were at odds with the arguments of some authors who maintained that only the former category should be included. The general nature of the text and the absence of any clear indication that the drafters had intended to restrict the paragraph to that category alone justified a broader, more liberal interpretation of the concept, by widening its scope to include general principles of law identified through international law, in other words general principles of law invoked by States and international tribunals that had originally been formed within the international legal system and therefore did not derive from national systems, such as the principle of *pacta sunt servanda*. Recognizing such principles would undoubtedly contribute to the smooth and peaceful functioning of international society and the effectiveness of international law. The principle of common but differentiated responsibilities, for example, was of little interest in internal law as it could only be fully effective in the context of international law and international relations, particularly with regard to the environment. It was the result of the progressive development of international environmental law after the 1972 United Nations Conference on the Human Environment, becoming fully formed at the 1992 United Nations Conference on Environment and Development.

The two categories of general principles should be identified conceptually to aid understanding. It was also important to emphasize the fluid nature of general principles of law, which often applied in national and international forums simultaneously. Principles developed within the international system could influence those developed at national level and vice versa. One might conceive of their development as iterative, passing between the two legal orders, as in the case of the precautionary principle, which had emerged in Germany in the 1970s before being incorporated into various international treaties in the 1980s and enshrined in the 1992 Rio Declaration on Environment and Development. Following the 1992 Conference, it had been consolidated in international law and then transposed into national legal systems worldwide. The development, interpretation and implementation of the precautionary principle, which could be classed as a general principle of law applicable to environmental protection in the broad sense, could be seen as bidirectional. Despite that fluidity, some general principles existed only within the international legal system, completely separate from internal law; nevertheless, both categories should be considered for the purposes of the topic. The content of paragraphs 231 and 232 of the first report and of draft conclusion 3 was reassuring in that respect.

In conclusion, he said that he was in favour of the referral of all three draft conclusions to the Drafting Committee.

Mr. Tladi asked whether there was not an element of contradiction in endorsing the approach taken in draft conclusion 2, which emphasized State recognition of general principles of law, while at the same time espousing Judge Weeramantry's views on seeking such general principles in the customs of communities other than States.

Mr. Cissé said that, while States were the principal subjects of international law, other cultures and their values should be taken into account. General principles of law could emanate from other traditions: the precautionary principle, for example, had long been a maxim of village life in many areas of the world.

Mr. Hmoud, noting that the principle of common but differentiated responsibilities existed in certain civil law traditions, said that he would like to know what led Mr. Cissé to characterize it as a general principle of law rather than a rule of customary international law. Between the 1972 and 1992 conferences, there had been sufficient State practice to regard it as the latter.

Mr. Cissé said that the principle had been of scant interest in domestic legal systems until its development in international law. The key point, however, was to consider the creation of general principles of law in a holistic manner, keeping in mind that they might arise in either internal law or international law and move between the two in either direction.

The meeting rose at 1 p.m.