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Seventy-first session (second part)

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Held at the Palais des Nations, Geneva, on Monday, 29 July 2019, at 3 p.m.

Contents

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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 3.05 p.m.

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

Mr. Grossman Guiloff said that he wished to begin by thanking the Special Rapporteur for the excellent first report on general principles of law (A/CN.4/732), which offered much food for thought and laid a solid foundation for the Commission's work on the topic. He was also grateful to the other Commission members, whose comments had spurred a thoughtful debate and had provided the Special Rapporteur with the necessary guidance for further work on the topic.

By way of a general comment, he considered the topic to be of great relevance, as general principles of law were not only essential in the judicial context but also applicable on a daily basis in the sphere of international relations, including diplomatic negotiations, policymaking and even the adoption of rules. For example, valuable contributions in that regard had been made by the Inter-American Juridical Committee. As early as 1942, the Chair of the Inter-American Juridical Committee had submitted a document to the Director-General of the then Pan American Union, the predecessor of the Organization of American States (OAS), on the reaffirmation of fundamental principles of international law. The reports of that Committee had made a crucial contribution to the identification of the general principles of law that had shaped the Charter of OAS, in particular article 3. Those principles had proved to be particularly relevant in cases where the standards set by a State were insufficient to ensure that human rights were duly protected in new and progressive situations and where the standards might have been sufficient but the State had experienced a degree of regression in its political and juridical structures and practices. In 2016, the Committee had issued a report on the application of 13 general international principles concerning the application of human rights standards to surveillance in the digital era. Those principles included proportionality, necessity, a legitimate aim and legal certainty. He therefore wished to encourage the Special Rapporteur to examine the valuable contributions of the Inter-American Juridical Committee more closely and to study the available State practice in a broader sense, particularly as those principles might be less contentious in the sphere of international relations.

On that note, he concurred that the Commission should keep an open mind about the role and function of general principles of law. The world was a dynamic and complex place where conventions and customary law could not resolve every issue, especially in view of the speed at which change was taking place. General principles of law could play a role in guiding decisions that otherwise would not be subject to universally shared standards. Decision-making in new areas could acquire broader legitimacy if it was based on shared principles. In that regard, the Commission should avoid being too formalistic with regard to the specific terminology used by different actors in the field of international law to refer to those principles. Instead, it should focus on how such terminology was used in context, as that would reveal that general principles of law were often at play, even when they were not expressly referred to as such. The Special Rapporteur had captured some of those considerations by quoting the judgment handed down by the International Court of Justice in *Delimitation of the Maritime Boundary in the Gulf of Maine Area*.

The Special Rapporteur likewise mentioned a few cases of the Inter-American Court of Human Rights as examples of practice. The Court had, in fact, employed general principles of law on numerous occasions. Although it had not always used that exact phrase to identify them, it also had not always used exact terms in relation to treaties, conventions, protocols and the like; the Commission therefore should not make too much of that fact. General principles of law had, however, been constantly and explicitly mentioned, identified and applied in the inter-American system. Relying on a restrictive analysis based only on a few quotations without taking into account the consistent and coherent use of principles in the inter-American system could unduly limit the Commission's work. For example, the general principle of the best interests of the child had been applied in the case of *Niños de la Calle* (*Villagrán Morales et al. v. Guatemala*) in 1999 and in the case of *Bulacio v. Argentina* in 2003. Another example was the *pro homine* principle in the human rights context, which had been applied and referred to as an interpretative tool. In the case of *López Soto et al. v. Venezuela*, in 2019, the Court had recalled the general principle of

international law regarding reparation as a consequence of an internationally wrongful act that had caused harm. In the case of *Villaseñor Velarde et al. v. Guatemala*, in 2019, the Court had recalled that the State must refrain from undue interference with the judiciary or its members, in accordance with the United Nations Basic Principles on the Independence of the Judiciary. In the case of *Povo Indígena Xucuru and its members v. Brazil*, in 2018, the Court had recalled that, in accordance with the principle of legal certainty, it was necessary to realize the land rights of indigenous peoples through the adoption of legislative and administrative measures. In the case of *Zegarra Marín v. Peru*, in 2017, the Court had recalled that the general principle of the presumption of innocence was a fundamental element of a trial and a fundamental standard in the weighing of evidence that placed limits on adjudicatory discretion and subjectivity. Moreover, in its advisory opinion of 2017 on the environment and human rights, the Court had recalled that the American Convention on Human Rights must be interpreted in accordance with other principles of international law. The Commission should give serious consideration to such regional jurisprudence before drawing any conclusions on the inapplicability of a particular principle or on the scope of its application.

For the sake of transparency, he wished to draw members' attention to the fact that, in the case of *Aloeboetoe et al. v. Suriname*, he had served as counsel for the Saramaka tribe and the legal adviser of the Inter-American Commission on Human Rights before the Court. As the Special Rapporteur noted in the report, the Court, when determining the amount of reparation due to the families of the victims, had made specific reference to Article 38 (1) (*c*) of the Statute of the International Court of Justice, since the State concerned was not a party to any relevant convention and there was no customary law applicable to the situation before the Court. According to the judgment, "The I.L.O. Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) has not been accepted by Suriname. Furthermore, under international law there is no conventional or customary rule that would indicate who the successors of a person are. Consequently, the Court has no alternative but to apply general principles of law (Art. 38 (1) (*c*) of the Statute of the International Court of Justice)." The Court's specific mention of that provision should not be disregarded. Moreover, in that case, the Government of Suriname had recognized the applicability of general international principles, based on Article 38 (1) (*c*) of the Statute, for the purpose of determining the amount of reparation payable: "As for the compensation for actual damages suffered, the Government declares that such compensation should be based on the American Convention and the applicable principles of international law, as the Court indicated in the Godínez Cruz Case". Additional examples from 2019 included the cases of *Villaseñor Velarde et al. v. Guatemala*, *Martínez Coronado v. Guatemala* and *Muelle Flores v. Peru*. Examples from 2018 included the cases of *López Soto et al. v. Venezuela*, *Alvarado Espinoza et al. v. Mexico*, *Mujeres Víctimas de Tortura Sexual en Atenco v. Mexico* and *Órdenes Guerra et al. v. Chile*. Examples from 2017 included the cases of *Trabajadores Cesados de Petroperú et al. v. Peru*, *Favela Nova Brasilia v. Brazil* and *Zegarra Marín v. Peru*. Those cases provided interesting material that could enrich the Commission's discussion on the topic.

He wished to reiterate, however, that he did not think that the Commission should take a binary approach to general principles of law. Extremes were rarely good: the Commission should not deny the existence of such principles or overly restrict their application, but it also should not broaden the scope of their application to the point where it lost sight of their limits, as compared to other sources of law. In that regard, he agreed with the Special Rapporteur's proposal to identify general principles of law by means of a two-step analytical method that consisted of first identifying a principle that was common to a majority of national legal systems, although he concurred with Sir Michael Wood that the notion of a "majority of national legal systems" needed to be clarified, and then determining whether that principle was applicable in the international legal system.

Mr. Valencia-Ospina had rightly drawn the Commission's attention to the relevance and importance of distinguishing between the procedural and substantive functions of general principles of law by focusing on their function instead of their origin. To his mind, it would be useful if the Special Rapporteur could explore that distinction further. Regarding Mr. Tladi's suggestion that a definition of "general principles of law" should be developed, he agreed that, without such a definition, the Commission would have difficulty

in effectively evaluating the substance of the proposed draft conclusions. While he acknowledged that agreeing on such a definition would be a complex task, it would serve to clarify the scope of the Commission's future work on general principles of law and their position in the international legal system. As pointed out by Mr. Hmoud, there were misunderstandings and inconsistencies in the application of general principles of law as a source of international law, and the Commission should clarify the nature, content and functions of such principles and their relationship with other sources of international law. Ideally, a definition of general principles of law would take into account the debate within the Commission on the distinction between "rules" and "principles". In any event, he hoped that the definition would leave room for further elaboration and more specificity, while recognizing the generality of the concept and the need to preserve the evolutionary character of international law.

With respect to draft conclusion 1, he appreciated the Special Rapporteur's analysis of the different elements present in Article 38 (1) (*c*) of the Statute of the International Court of Justice. Both the structure of that Article and State practice appeared to confirm the role of general principles of law as a source of law, including the fact that they were not hierarchically inferior to other sources of international law.

In *General Principles of Law as Applied by International Courts and Tribunals*, Bin Cheng pointedly outlined the functions of general principles of law, postulating that they could serve as sources of various rules of law, which were merely an expression of those principles; guidelines or interpretative frameworks for the application of positive rules of law; and norms that could be applied to matters that were not governed by any other law. His own view was that, although those principles played a very important role in filling gaps in international rules, they were not limited to that function. The Commission might wish to conduct a more in-depth study of the functions of general principles of law mentioned by Bin Cheng, which the Special Rapporteur had rightly recognized.

Concerning the use of general principles of law as an interpretative tool, those principles could play an important role in helping to clarify treaty rules or customary rules that were unclear or in dispute. It could be argued that such rules should be assumed not to contradict general principles of law. In that regard, it could be useful to recall once again the words of Bin Cheng, who had stated that "general principles" were "cardinal principles of the legal system, in the light of which international ... law is to be interpreted and applied". Furthermore, in contrast to the way in which law had been understood at the time of the adoption of the Statute of the International Court of Justice in 1945, international law currently comprised a variety of specialized branches of law, including international environmental law, law of the sea, international humanitarian law, human rights law, international commercial law and investment law. The fact that specific rules belonging to those branches of international law might be applied in preference to rules of general international law did not, in his view, reveal the existence of a hierarchy among the sources of international law. As many Commission members had pointed out, it simply confirmed an underlying general principle of interpretation, namely *lex specialis*.

As for the relationship between general principles of law and other rules of international law, it was understood that general principles of law could help to fill gaps in conventional and customary international law when those rules were not sufficiently clear. He agreed with Sir Michael Wood, Ms. Lehto and others that a distinction should be drawn between general principles of law and customary law. The existence of a grey area between the two did not, in his view, undermine the validity of general principles of law as a source of law. Additionally, the Commission could not conclude *a priori* that general principles of law could not override any of those other sources. For instance, as Mr. Hmoud and others had correctly pointed out, if a general principle of law developed into a rule of *jus cogens*, it would be superior to any other rule of international law. However, as Mr. Hmoud had also asserted, a normal general principle of law would be overruled by a conflicting conventional or customary rule. It would be helpful if the Special Rapporteur could elaborate on that point in the next report.

With respect to draft conclusion 2, he concurred with Mr. Park's observation that the term "generally" could be further clarified. In his view, in order for a general principle of law to be "generally recognized", regional diversity and different legal cultures, among

other factors, ought to be taken into consideration. Regarding the term “recognized”, he agreed with the Special Rapporteur that a key issue to be analysed was how principles that were common to national legal systems were transposed to the international legal system. The Special Rapporteur might also wish to analyse the extent to which express consent should be an element of recognition. In that regard, he recalled Cherif Bassiouni’s position that the consequences of assuming that general principles were not binding without the express consent of States could include the denial of justice, a static body of international law and a judicial system that was unable to resolve contentious issues on which positive law was absent, insufficient, unclear or ambiguous.

While he appreciated Mr. Tladi’s assertion that actors other than States, such as tribal nations, indigenous groups and others, might be of relevance in the assessment of recognition, he thought that the Commission should emphasize the role of States in recognizing general principles of law, as the consideration of other actors could seriously complicate the issue. He likewise agreed with the position taken by Mr. Hassouna and others that the practice of international organizations could usefully be taken into account. While he agreed that the General Assembly was not a law-making organ in the international community, its resolutions could be seen as crystallizing customary international law or principles or as representing a step in the process of identifying norms.

The Organization of American States was another example that could provide valuable insight into State recognition of general principles of law. In particular, article 3 of its Charter listed a series of principles reaffirmed by States. Those principles served as the basis for interpreting the Charter and had a bearing on the conduct of international relations in the region. Some of the principles codified in article 3 included good faith, solidarity, economic cooperation and the right of each State to choose its political, economic and social system without external interference and to organize itself in whatever way it saw fit. The Commission could explore that idea further while bearing in mind the practical limits on what it could feasibly achieve. In addition, as Mr. Hassouna and others had stated, the Commission should draw on the examples of all other regional systems, in addition to that of the Americas.

As for the debate surrounding the term “civilized nations”, which had been mentioned by almost all members, he agreed with authors such as Liliana Obregón that the dichotomy of “civilized” and “uncivilized” nations was not applicable in the modern world, particularly in the wake of the devastation of the two world wars in the first half of the twentieth century. The literature showed that the expression “civilized nations” was rooted in nationalism, including self-interest and the projection of certain cultural and religious norms as being superior. For instance, at the time of the Spanish conquest of Latin America, the colonizers had claimed to be bringing “civilization” to “uncivilized” peoples; in the modern world, much more was known about the limits inherent in such a dichotomy. At the same time, the “civilizing” enterprises’ cost in human lives had been tremendous. The region’s population of 65 million had been reduced to only 5 million by 1700, even though over 90 per cent of those deaths were attributable to imported illnesses. It could be argued that the term “civilized”, when used to refer to colonization-related practices, was not only obsolete but had never had real legitimacy. Perhaps it would have been more accurate to replace “civilized” with “more powerful”. At the same time, some of the principles developed by those who had claimed to be more civilized remained valid. Some of the criticism of the notion of “civilized nations” was due to the exclusion of certain States from the international community on the grounds of perceived unworthiness and to the fact that many of those “civilized” principles, such as equality before the law and access to justice, applied only to a small group of people. The process of decolonization and the creation of new States had paved the way for the emergence of international organizations and a community of nations and for the universal application of those principles. The notion of “civilized” and “uncivilized” nations was therefore no longer being defended.

As a procedural matter, he wished to emphasize the importance of highlighting, in draft conclusion 2, the need for a diversity of States and legal systems to be represented in the process of identifying general principles of law, as well as the role played by other actors, such as international organizations, in terms of recognition. He welcomed the Special Rapporteur’s intention to address the issue of recognition further in the next report.

With respect to draft conclusion 3, he concurred with the Special Rapporteur's assertion that the existence of a principle in a majority of national legal systems alone was not sufficient for that principle to become a general principle of law in the sense of Article 38 (1) (*c*) of the Statute of the International Court of Justice and that such a principle must additionally be transposed to the international legal system. The Special Rapporteur likewise noted that not all principles common to national legal systems were automatically applicable to international law on account of the transposition requirement. Therefore, only those general principles of law that were compatible with the basic characteristics of the international legal system were applicable. The underlying rationale, as set out by the Special Rapporteur, was that "conditions in the international field are sometimes very different from what they are in the domestic".

To his mind, if a general principle of law based on national law was to be applied in a judicial matter at the international level, an international judge must first satisfy himself or herself that the principle was recognized by a sufficient proportion of the major legal systems of the world and that applying the principle in the international sphere would not distort the fundamental concepts underlying its acceptance in domestic systems.

He therefore proposed that draft conclusion 3 should be revised to reflect a transposition requirement. The current wording of the draft conclusion gave the impression that a general principle of law could be ordained solely on the basis of its existence within numerous national legal systems, regardless of whether or not it was truly applicable in an international context. As Mr. Murphy had pointed out, a common example of a general principle of law that, despite being common to a number of national legal systems, was not applicable at the international level was that of prescriptive easements. The situation could be different, however, if a State granted diplomatic protection to a national whose rights might have been violated if prescriptive easement was recognized as a general principle of law. The issue of transposition raised by Mr. Murphy and others was nonetheless important. In sum, he agreed with the Special Rapporteur that, while general principles of law could come from any branch of national law, in order for them to be applicable for adjudicative and other purposes in international forums, they would also need to be "recognized" by States and international organizations as being applicable to international law.

With respect to draft conclusion 3 (*b*), he concurred that general principles of law could be derived from the international legal system and the international community. Other members had made persuasive arguments to that effect on the basis of Article 38 (1) (*c*) of the Statute of the International Court of Justice. The existence of general principles of law formed within the international legal system also responded to the need to identify certain overarching features within that system. They could provide appropriate solutions to situations that did not arise in domestic systems and thus would otherwise be left unresolved. On the other hand, general principles of law formed within the international legal system could also serve to regulate issues on which there was widespread consensus but in respect of which there was little opportunity for the development of State practice. One example could be the principle of freedom of exploration of outer space, including the moon and other celestial bodies. He would appreciate further analysis of the issue by the Special Rapporteur.

With respect to the future programme of work for the topic, he hoped that future reports would provide more information about the Special Rapporteur's view on the element of recognition, based on an assessment of whether principles were applied in "a sufficiently large number of national legal systems". Lastly, he tended to agree with Mr. Aurescu that the Commission should be open to the idea of drawing up an illustrative list of general principles of law. However, doing so would require further discussion among the members. On a personal note, he would appreciate more time to reflect on the issue and to see how States reacted to the idea in the Sixth Committee. Although the preparation of such a list would naturally be a complex task, he was confident that the prospect would not deter the Commission from taking the necessary action. An illustrative list could provide valuable guidance to States and help ensure that the issue was not viewed in an overly restrictive manner, thus enhancing the practical applicability of the principles in question.

By way of conclusion, he said he agreed with the Special Rapporteur that the Commission was uniquely well placed to clarify general principles of law as a source of

international law and that its work on the topic could provide useful guidance to States in the future. He appreciated the Special Rapporteur's expertise in that area and supported the referral of all three draft conclusions to the Drafting Committee.

Mr. Laraba said that he wished to begin by making some general comments about the report, which was excellent and dealt with the main issues raised by the topic. Paragraphs 2 and 3 of the report, which summarized the Sixth Committee's debates on the topic in 2017 and 2018, indicated that delegations had generally welcomed the inclusion of the topic in the Commission's programme of work and had drawn particular attention to three issues: the needs and interests of States; the lack of meaningful practice; and the need to clarify the nature and scope of general principles of law and the methods for identifying them. He agreed that there was a lack of State practice, but hoped that, given the support shown for the Commission's work on the topic, States would respond positively to requests that they should share their experiences regarding general principles of law.

The criticisms that had been levelled, rightly or wrongly, at the manner in which general principles of law had been invoked in arbitral awards aimed at resolving disputes – mainly in the oil industry – in the 1950s, 1960s and 1970s could not be ignored. An illustration of those criticisms could be found in the harsh but well-argued analysis by François Rigaux of the award made by sole arbitrator René-Jean Dupuy in *Texaco/Calasiatic v. Libya*. Also of note were the analyses of Mohammed Bedjaoui in his 2004 general course on public international law at the Hague Academy of International Law. Those analyses had undoubtedly been informed by the positions that Judge Bedjaoui had adopted on the principle of respect for acquired rights during his time as a special rapporteur within the Commission in the 1960s and 1970s, and by the content of the agreements that Algeria had concluded with France at the time of its independence, which had been characterized by *de facto* inequality that had been translated into law. One example worth mentioning in that regard was the bilateral agreement of 29 July 1965 on the establishment of an arbitral tribunal. Pursuant to article 46 (4) of the agreement, the tribunal could turn to general principles of law when applicable texts contained gaps or were silent. Algeria, having sought to renegotiate the agreement, had decided to terminate it unilaterally in February 1971. That decision had been a reaction to the political and legal climate that had prevailed since the signing of the accords on Algerian independence. In any event, since 1971, general principles of law had never again been enshrined in a bilateral treaty concluded by Algeria.

With regard to part one of the Special Rapporteur's report, he recommended the referral of draft conclusion 1 to the Drafting Committee and supported the Special Rapporteur's intention, expressed in paragraph 40, to consider scholarly work on general principles of law "in an integrated and systematic manner".

Concerning part three of the report, he welcomed the analysis contained in paragraphs 77 to 88. The Special Rapporteur demonstrated convincingly that the practice cited in those paragraphs was, as stated in paragraph 89, "the background against which Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice was drafted". The work of Alain Pellet, which was cited in footnotes 113, 138 and 302 of the report, included the observation that, prior to 1920, a sizeable proportion of arbitral awards had contained a reference to general principles of law.

The historical background provided in paragraphs 90 to 109 was helpful because it put into perspective the debates that had taken place within the Advisory Committee of Jurists, the nature of the compromise that the Committee had reached and the need to contextualize the wording and scope of Article 38 of the Statutes of the Permanent Court of International Justice and the International Court of Justice. For example, the composition of the Committee, which was specified in footnote 143, betrayed the objectively limited nature of the debates. Of the 10 Committee members who had drafted the final version of Article 38, 7 had been European.

Debates on the issue had widened and intensified after 1945; the 1960s had been a particularly fruitful time in that regard. Proof of the richness of the debates and the establishment of an indirect dialogue could be found in the *Collected Courses of the Hague Academy of International Law* and in other legal writings. Even a cursory review of those

sources was sufficient to evince the sometimes profound differences of opinion that had existed among the authors who had participated in the debates. In the view of Alain Pellet, those differences made the examination of the authors' positions all the more interesting and useful. In many respects, those positions had echoed the ones adopted by States, and thus had not been arrived at in an abstract way that was removed from reality. Authors such as Max Sørensen, Sir Humphrey Waldock and Grigory Tunkin were mentioned in various footnotes in the report. Also worthy of note were the views of Charles Chaumont and Charles Rousseau. A brief chronological overview of those positions would be useful.

In 1960, Max Sørensen had argued that the general principles of law referred to in Article 38 (1) (*c*) were principles of the domestic law of "civilized nations" but that, in view of their importance, they could also be more than that. Sørensen had taken the view that judges, in particular, should undertake the "formidable" task of looking into the possible existence of general principles of law recognized by civilized nations that could provide a basis for their rulings.

In 1962, Sir Humphrey Waldock had taken a clear position that Article 38 (1) (*c*) referred to principles of the domestic law of civilized nations, drawing in particular on the *travaux préparatoires* of the Advisory Committee of Jurists in arguing that the Committee had unequivocally envisaged the principles in that way, and citing the 1954 advisory opinion of the International Court of Justice on the *Effect of awards of compensation made by the United Nations Administrative Tribunal*.

Grigory Tunkin, in his seminal 1965 work, asserted that principles were formed and developed only by conventional and customary means. Charles Chaumont, in 1970, had pursued an intriguing line of reasoning similar to that adopted by Grigory Tunkin, distinguishing between the "majority view" held, *inter alia*, by Max Sørensen and Sir Humphrey Waldock and the minority view expressed in Grigory Tunkin's writings. Chaumont's opinion was that general principles of law were a "false source of international law" and that views about them were wide-ranging and sometimes based on misunderstandings. Accordingly, Chaumont argued that judges who attempted to draw on general principles of law derived from national legal systems, as recommended by Sir Humphrey Waldock, would face significant obstacles, including the questions of what rule of international law authorized judges to transform domestic law into international law and whether judges merely chose the most appropriate general principle from among those already recognized in international law and, if so, whether it was the comparative consistency of such principles that gave them normative value.

Charles Rousseau's thinking was expounded, in particular, in the first volume of *Droit international public* (Public international law), which had been published in 1971. Rousseau had followed an eclectic line of reasoning, taking the view that the term "general principles of law" denoted both the principles universally accepted in domestic legislation and the general principles of the international legal order and that the distinction between the two was fundamental, although the term "law" without a qualifier clearly encompassed both international and domestic law.

In part three, chapter III (B), of the report, the Special Rapporteur gave a "brief overview" of the practice of the International Court of Justice, the International Criminal Court and a number of other judicial and arbitral bodies and concluded that States and international courts and tribunals had indeed referred to general principles of law, "leaving no doubt" as to their relevance as a source of international law. Notwithstanding the preliminary nature of the Special Rapporteur's first report, the Commission should proceed cautiously in its work on the topic, including when considering general principles of law in international judicial practice.

He shared the views of members who had underlined the unusual nature of the examples given in the report of the practice of the International Court of Justice and the International Criminal Court. The same view could be found in the literature on the case law of the two courts in question. For instance, in the 1962 work cited in footnote 113 of the report, Sir Humphrey Waldock stressed that the most significant finding of a study of the case law of the two courts was that their reliance on principles was comparatively limited. Alain Pellet, in the 1974 work referred to in that same footnote, discussed the

reluctance of the International Court of Justice to apply Article 38 of its Statute, drawing on Hersch Lauterpacht's in-depth analysis of the same Court. The Special Rapporteur himself provided updated information on developments in paragraphs 127 to 131 of the report.

As to the arbitral practice referred to in the report, while it was true that general principles of law were invoked increasingly in international investment law, the formulations used and their intended meanings varied so greatly that it was difficult to rely on them as evidence of such principles. Many of the awards that referred to general principles of law took an axiomatic approach in which a *petitio principii* replaced the demonstration of the existence of a general principle of law that was applicable to the case in question. In other cases, the term "principle" clearly referred to a customary rule, even without so stating explicitly. In still other cases, arbitral awards made no particular effort to identify the principles applied therein. Developments with regard to the sources of law being used, such as reliance on general principles of law in investment arbitration, were increasingly evident in overviews of practice, including those published annually in the *Annuaire français de droit international*.

In part four, chapter I (A), of the report, the Special Rapporteur's statement that general principles of law existed "in most, if not all, domestic legal systems" should be further nuanced. The differences that might exist between the content of a principle in one system and the content of the same principle in another system should not be underestimated. There was great diversity in the references to the term "principles" in States' domestic legal systems. For instance, the formulation used in the Italian and Spanish Civil Codes could not be likened to the one used in a number of Arab States that had been influenced by the Egyptian Civil Code. Mr. Hmoud had made a similar point in that regard.

In paragraphs 146 to 152 of the report, the Special Rapporteur extensively elaborated on what he described as the "relationship" between the terms "principle" and "rule", distinguishing between two different viewpoints. According to the first, principles were considered to embody important values; although Judge Cançado Trindade was its most emblematic proponent, the same view was shared by Max Sørensen, cited in the Special Rapporteur's report, and Pierre-Marie Dupuy. The second perspective, defended notably by Maurice Mendelson, was that there was no difference between the notions of "principle" and "rule". Paragraphs 153 and 154 of the Special Rapporteur's report, which could give rise to some questions, concluded that both perspectives had merit. Other members, including Mr. Park, had also made that observation. In his view, the thesis that general principles of law were fundamental in nature was too doctrinal and abstract. As the Special Rapporteur noted in paragraph 151 of the report, the International Court of Justice and the Commission did not seem to make a clear distinction between "rules" and "principles".

Moreover, States themselves had reinforced the idea that there was no difference between the two terms. In a number of cases, a sort of equivalence between them was apparent. For example, article 6 (2) of the Geneva Convention on the Continental Shelf contained the term "principle of equidistance", not "rule of equidistance", and the special agreements between the parties before the International Court of Justice in the *North Sea Continental Shelf* cases and in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case used the expression "principles and rules" in the main question they addressed to the Court. On a more general note, it was useful to highlight the work of Michel Virally, who had addressed the issue of principles on several occasions. According to Virally, only the term "rule" existed in classic international law, which was averse to the term "principle"; the current tendency to invoke "principles" was attributable to disagreements and conflicting interests among States, since principles were less precise, less specific and more abstract than rules. However, Virally had not addressed the similarities or differences between the two terms.

With regard to the term "civilized nations", in paragraph 177 of the report the Special Rapporteur cited Antonio Cassese, according to whom courts that resorted to "principles common to civilized countries" enunciated principles that were indisputably common to all major Western legal systems. Judge Mohammed Bedjaoui had stated that the term "civilized nations" clearly referred to the most advanced nations and therefore the most powerful. The expression provided no answers to the numerous questions raised under

the topic, such as those concerning the number of States that recognized general principles, the dichotomy between universal and general recognition and the applicability of general principles to States that had not recognized them. In that regard, the courts could play a decisive role. While the debate on the term "nations" had been interesting, he was unsure whether any further consideration should be given to it, for fear that it might unduly delay the Commission's work. With regard to draft conclusion 2, the reference to "States" should be maintained. However, the expression "generally recognized" was ambiguous, insofar as the fact that it referred to domestic legal systems was not clear. He recommended the referral of all the draft conclusions to the Drafting Committee.

The issue of terminology was addressed in paragraphs 254 to 258 of the report. As underlined by the Special Rapporteur, terminology was used imprecisely both in practice and in scholarly writings. However, there was a risk that terminology could continue to pose a problem throughout the Commission's consideration of the topic. Rigour was clearly lacking and clarification was needed. For the purposes of the Commission's work, it was necessary to clear up any uncertainty and to agree upon a set of terms, as the Special Rapporteur proposed. The term "civilized nations" had been unanimously rejected and, in paragraph 258 of the report, the Special Rapporteur stated that it "should be avoided". That much was clear. However, he wished to highlight the veritable trauma that the term's continued enshrinement in Article 38 (1) (*c*) had caused among many States, especially those that had gained independence since 1945. The aversion to that expression had been compounded by certain arbitral awards handed down in the 1950s, 1960s and 1970s, which were few in number but had had a profound impact. That context helped to explain why many of those States had welcomed the topic in the Sixth Committee. It was thus to be hoped that the Commission's clarification of the legal nature of general principles of law, their scope and their identification would help to overcome that trauma and do away with some of the controversy in that regard.

Mr. Huang said that he appreciated the Special Rapporteur's first report on general principles of law and introductory statement. The report was rich in content and clear in structure. It offered a detailed account of the history of the development of general principles of law and relevant practices, and thus laid a solid foundation for the Commission's discussion of the topic. He was especially pleased to see two young Chinese scholars of international law among the Special Rapporteur's research assistants. Thanks to 40 years of reform and opening up, China boasted the largest legal education programme and the largest pool of international law scholars in the world. There were over 600 law schools in China, with over 300,000 undergraduate and graduate students majoring in law. International law was a mandatory course for all law students. The idea of the rule of law had gained great traction and China would henceforth make a greater contribution to the codification and progressive development of international law. The reason he mentioned the rapid development of legal education in China was that he would be referring to research conducted by the Chinese international law community on general principles of law.

As one of the sources of international law, "general principles of law" had attracted much attention and had given rise to controversy in the international law community. Such principles were often considered to be difficult to delineate, as other members had mentioned in their statements. As pointed out by the Special Rapporteur, it would be useful for the Commission to review a variety of academic views on general principles of law; he therefore wished to present the majority views of Chinese scholars on the issue. Most Chinese international law scholars either believed that general principles of law were not an independent source of international law or considered them to be a "secondary source" of a supplementary nature. That was because "recognition" was a requirement that a general principle of law must meet in order to be regarded as a source of international law, and recognition was achieved either expressly in the form of a treaty or implicitly in the form of customary international law. Thus, general principles of law were integrated into treaties and customary international law. That was also his view.

According to most Chinese scholars, the content of general principles of law comprised the legal principles included in the domestic laws of all countries, such as equitable principles and the principles of equality, good faith, compensation of equal value,

presumption of innocence, *nullum crimen sine lege*, *res judicata*, non-retroactivity and estoppel. Some scholars believed that general principles of law were general principles of international law. In his opinion, general principles of law mainly included general principles that had been established in domestic legal systems after a period of evolution and that originated from the legal practice of ancient times. They also included those developed over time within the international legal system.

As for the relationship of general principles of law to treaties and customary international law, some scholars believed that general principles of law were reflected in treaties and customary international law, while others took the view that they were legal principles that were not included in treaties or customary international law but served the purpose of filling gaps in those sources of law. Such arguments bore out the necessity and difficulty of an in-depth examination of the nature, scope and function of general principles of law, as well as the criteria and methodology for their identification. The Special Rapporteur seemed to be aware of that, as shown by the remark, in paragraph 11 of the report, that the current topic was likely to touch upon certain fundamental aspects of the international legal system and that a cautious and rigorous approach was required. The report was balanced and neutral, which he highly appreciated. He hoped that the Special Rapporteur would maintain that tone throughout the project.

Since the report was preliminary and introductory in nature, he wished to make some comments on the basic methodology to be followed under the topic. First, with regard to the method of study, as the Special Rapporteur repeatedly signalled in the report, the starting point for the Commission's work should be Article 38 (1) (*c*) of the Statute of the International Court of Justice. Like most members, he believed that that was correct but that the study should not be limited to that Article. The scope of the Commission's study under the topic was general principles of law as a source of international law. In addition to that provision of the Statute, international jurisprudence and scholarly writings, in particular States' legal practice and recognition by States, should also be included. He had noticed that the Special Rapporteur made several references to a view that was gaining currency – including, it seemed, in the Commission, in the light of conclusion 15 of the conclusions of the work of the Study Group on the fragmentation of international law – namely that general principles of law were a supplementary source of international law in the sense that they served to fill gaps in the international legal system. The statements made by other members seemed to indicate that they held differing views. He, for one, believed that further in-depth study of the question was required before a firm conclusion could be reached and that no prejudgment should be made at the current stage.

Second, he was in favour of approaching the category of general principles of law from both a domestic and an international perspective. The Special Rapporteur argued that general principles of law included principles that were derived from domestic legal systems and those formed within the international legal system, and went on to substantiate that conclusion on the basis of the term's literal meaning, legislative intent and State practice. He agreed with the Special Rapporteur, but wished to take that conclusion a step further and argue for the existence of additional categories of general principles of law from other perspectives, including fundamental principles and procedural principles. The former included general principles of law that reflected advanced concepts that had become the core concepts and legislative guidelines for international law, such as dignity, equality, equity, fairness and justice. The latter comprised legal principles that were meant to ensure the realization of equity and justice, such as *nullum crimen sine lege*, *res judicata*, promissory estoppel and *pacta sunt servanda*. Mr. Valencia-Ospina, in his statement at the 3489th meeting, had made detailed observations on the categorization of general principles of law from the procedural and substantive perspectives; those comments would serve as a valuable reference for the subsequent work of the Special Rapporteur. Nevertheless, the recognition of a legal principle in domestic law by a State did not necessarily signify its acceptance as a general principle of law under international law. In the case of general principles of law derived from domestic legal systems, it was necessary to examine whether there existed *opinio juris* that would allow the general principles to be transposed to international law. In addition, principles from both domestic and international legal systems must meet the fundamental criterion of general acceptance by States.

Third, regarding the three elements that were identified by the Special Rapporteur in paragraph 16 of the report, namely "general principles of law", "recognition" and "civilized nations", he was of the view that the elements of "recognition" and "civilized nations" could be merged, the anachronistic concept of "civilized nations" could be dropped and the phrase "generally recognized by States" could replace "recognized by civilized nations". He generally agreed with the Special Rapporteur's preliminary conclusion that general principles of law were "general" in the sense that their content had a certain degree of abstraction and "fundamental" in the sense that they embodied important values. In his view, the two mutually reinforcing elements of general principles of law formed an interrelated whole: because some legal principles had a general and fundamental character, they were generally recognized by States; at the same time, because some principles were generally recognized by States, they had a general and fundamental character. Therefore, the identification of general principles of law should focus on general recognition by States; that appeared to be the view shared by most members of the Commission. The phrase "generally recognized by States" meant not only that the principles were recognized by a great majority of States, but also, more importantly, that they were recognized by States with different legal systems and legal cultures, so as to reflect the general and fundamental character of the principles in question.

He agreed with the Special Rapporteur that, for a general principle of law to exist, it must be generally recognized by States; he therefore supported draft conclusion 2. In view of the general, fundamental, uncertain, and other characteristics of general principles of law, a strict requirement of recognition by States was necessary. As for the meaning of the phrase "generally recognized by States", he suggested that the stipulation in Article 9 of the Statute of the International Court of Justice, "the representation of the main forms of civilization and of the principal legal systems of the world", might be a useful reference.

He supported the Special Rapporteur's suggestion, in paragraphs 35 to 37 of the report, that the study of the topic should be based primarily on the practice of States, as reflected in domestic laws, rulings of domestic courts and views expressed by States in international courts and tribunals, and secondarily on the practice of international organizations and the decisions of international courts and tribunals. Owing to the nature of general principles of law, in order to ensure that the State practice drawn upon reflected sufficient generality and consistency, the relevant practices and the case law of international organizations, courts and tribunals should be sufficiently representative; controversial practices or judicial decisions should not be used as evidence that a given legal principle constituted a source of international law.

Fourth, he did not think it necessary to address the possible existence of general principles of law with a regional or bilateral scope of application, as proposed by the Special Rapporteur. Article 38 (1) (*c*) of the Statute of the International Court of Justice explicitly provided that general principles of law were those recognized by civilized nations. The words "general" and "nations" indicated that general principles of law as a source of international law should be confined to universally accepted norms and should not include regional principles of law or those existing between certain States. That also meant that even if certain principles of law were recognized regionally or by some States, they were not general principles of law and therefore should not be included in the scope of the topic. In that regard, the debate and the conclusion reached with respect to regional *jus cogens* under the topic "Peremptory norms of general international law (*jus cogens*)" might serve as a useful reference.

Fifth, the Special Rapporteur, in paragraph 39 of the report, put forward five factors to be considered in selecting the relevant materials for identifying general principles of law. According to factors (*c*) and (*d*), in the examination of general principles of law, special attention should be paid to areas where a rule of treaty or customary international law was absent. The Special Rapporteur also made several references to the relationship between general international law and other sources of international law. He shared the view expressed by many other members that the Commission would need to discuss the relationship between general principles of law and other sources of law, namely treaty law, customary international law and fundamental principles of international law. Such types of law were interrelated but distinct from one another.

Sixth, he noted that, in part three of the report, the Special Rapporteur traced the development of general principles of law prior to, during and after their adoption as a source of law by the Permanent Court of International Justice; that analysis would undoubtedly be of great assistance to the Commission in its study of the topic. In the light of the history of general principles of law, three preliminary conclusions could be drawn. First, as there was a certain lag in the formation and development of international law, it was necessary to rely on general principles of law that were common and relatively well developed across legal systems in the settlement of international disputes under specific circumstances. Second, where treaties and customary international law failed to provide clear guidance, general principles of law could play an important supplementary role, as they had, for example, in the proceedings of the Nuremberg and Tokyo military tribunals established after the Second World War. Third, with regard to general principles of law, a balance should be struck between achieving justice and preventing judicial law-making. The formation and application of general principles of law were complex issues that warranted a rigorous, thorough approach by the Commission in its future work on the topic.

In conclusion, he said that he supported the referral of the draft conclusions to the Drafting Committee. He was open-minded as to the form that the outcome of the Commission's work on the topic should take. While, at first glance, a set of draft conclusions seemed advisable, the Commission would need to decide how best to reflect State practice, fully incorporating feedback from States, and how best to clarify legal issues relating to general principles of law.

Mr. Petrič said that listening to his colleagues' statements on the topic had been an enriching experience. He appreciated the Special Rapporteur's excellent report, which raised a number of issues and many questions. The Commission's approach to the topic thus far seemed to have been to focus on Article 38 (1) (*c*) of the Statute of the International Court of Justice. His view was that, on a basic level, general principles of law were principles that were present in practically all national legal systems and that were transferable to international law. He would not waste time addressing the issue of the term "civilized nations", which was outdated. Rather, he wished to remind the Commission of the context in which the Statute had been established. The Statute had been drafted after the First World War in the form of the Statute of the Permanent Court of International Justice, and had been inherited by the International Court of Justice. Its purpose was to help judges, not professors. The first thing that a judge needed to know was which sources he or she should rely upon in order to come to a just decision. The 1920s, when the Statute had been drafted, had been a time of extreme positivism under which only direct expressions of the will of States, either through treaties or through customary international law, had been regarded as "law". However, few treaties had been in force, and the law had to a large extent been undeveloped. Judges had been expected to look to treaties or to customary international law, which in both cases had reflected State practice, but such practice at the time had been meagre. The drafters of the Statute had therefore decided to enable judges to take a step further, reasoning that if certain accepted rules or principles existed in all national legal systems, they should also be available under international law. Thus, Article 38 (1) (*c*) had been established and had made it possible for judges to look to domestic legal systems for rules that were transferable to international law.

However, in the 1960s, a new era had dawned. A considerable body of "soft" international law had been established, and people had begun to talk of the "principles" of international law, as well as environmental law, human rights law, humanitarian law, and so on. Suddenly there had been an abundance of all kinds of principles of international law, and general principles of law and principles of international law had begun to coexist. The relationship between those two sets of principles was the most exciting aspect of the topic. He wished to urge the Special Rapporteur to devote significant attention to that relationship, because the two types of principles were not the same. Principles of international law were international law in their own right and did not need to be "transferred", unlike general principles of law, which needed to be transferred from national to international law.

He had made those comments for a particular reason. In 2017, hundreds of thousands of people – refugees, or perhaps they could be called migrants – had crossed the territory of his country, Slovenia, in order to reach other countries, such as Germany. At

that time, his thoughts had turned to the work of the Commission, particularly its work on the topic "Expulsion of aliens". That work seemed to have been completely forgotten, as had the fact that, at the time, the United Nations had been working on the Global Compact for Safe, Orderly and Regular Migration. During the Commission's discussion of the topic of expulsion of aliens, he had insisted that a clear distinction should be made between legal migrants and undocumented migrants who illegally crossed national borders in large groups. However, that proposal had not been accepted. Instead, legal migrants had been conflated with those who arrived *en masse*. For that reason, the document produced by the Commission, namely the articles on the expulsion of aliens, had proved to be useless. In that connection, he hoped that, as part of the current topic, the Commission would be able to explain clearly the relationship between general principles of law and principles of international law. Having read the first report, he was convinced that the Special Rapporteur would give the issue due consideration.

The Chair, speaking as a member of the Commission, said that he welcomed the Special Rapporteur's well-researched first report, which provided an excellent basis for future work on the topic. He approved of the report's structure and the methodological approach proposed by the Special Rapporteur. Having read with great interest the overview of references to and the use of general principles of law, he also agreed that the starting point for any study of the topic must be Article 38 (1) (*c*) of the Statute of the International Court of Justice.

While he agreed with Mr. Murase that the words "principles" and "sources" could have various meanings, in his view, such terminological considerations were not a cause for concern. Like Sir Michael Wood, he believed that the sources listed in Article 38 (1), subparagraphs (*a*), (*b*) and (*c*), were indeed formal sources of international law or, in other words, the forms in which rules of international law came into existence. The potential problem with the term "principles" was its use in various contexts, with many different meanings. The "general principles" referred to in Article 38 (1) (*c*) had their own distinct meaning. In particular, the term "general principles of law" should not be confused with the term "general principles of international law". Put simply, the former was different from other sources of international law, namely treaties and custom, while the latter was not a separate form. Rather, the term "principles of international law" reflected the general or fundamental character of certain rules originating in custom or in certain treaties, such as the Charter of the United Nations. In other words, the adjective "general" and the term "principles" referred in that context to the general content of some rules rather than to a separate form, or source, of law. General principles of law, however, involved another process whereby legal norms or principles emerged. That idea was adequately reflected in draft conclusion 1, which referred to "general principles of law as a source of international law".

Therefore, he agreed with Mr. Nolte that it was necessary to clearly distinguish between customary international law and general principles of law. In his view, it was not clear whether or not the word "general" indicated the general content of general principles of law. What was most important, however, was the idea that such principles were common to the national legal systems of States or the community of nations.

He agreed with the many other members who had said that the language "recognized by civilized nations" was outdated. The question now was whether the Commission should simply replace the words "civilized nations" with "States" or "international community of States", or retain the idea of "nations". He usually explained the concept by referring to the recognition by all States or a majority of States that represented different forms of civilization and had different legal systems. In his view, in the modern world, nations were organized as States and national legal orders were basically a product of State-centric law-making. However, he acknowledged Mr. Tladi's point that if and to the extent that some internal legal rules were produced by entities other than States, the broader concept might be justified. In that regard, Mr. Nolte's proposal that draft conclusion 2 should be amended to include the language "recognized by the community of nations", taken from article 15 of the International Covenant on Civil and Political Rights, might be a useful alternative.

At the current stage, he had but one concern: the issue of categories of general principles of law and draft conclusion 3 (*b*). While he could easily imagine various general

principles that were derived from national legal systems and transposable to international law, including some principles of legal logic and interpretation, it was not so simple to identify a separate category of general principles of law that had been formed within the international legal system. The reference to the *travaux préparatoires* relating to the Statute of the Permanent Court of International Justice was not sufficient to confirm the existence of such a separate category of general principles. Some of the examples given in the report might be regarded as principles or rules of customary origin. At the same time, he agreed with Ms. Lehto and Mr. Nolte that the Commission would need a more in-depth analysis of the issue before it could take a final decision on draft conclusion 3 (*b*). In some cases, moreover, there was no strict dividing line between national and international law, with some rules or principles operating in both legal orders.

Like a number of other Commission members, he would caution against a hasty adoption of the second category of general principles of law. In particular, it would be risky to adopt a definition that might blur the difference between general principles of law and customary international law. If the Commission agreed on the scope of the topic as set out in draft conclusion 1, which referred indirectly to Article 38 of the Statute of the International Court of Justice, the Commission should not create a category that amounted to a diluted version of custom or a category of custom without the support of practice.

He generally agreed with the Special Rapporteur's outline of the future work to be carried out on the topic. He was not in favour of providing an illustrative list of general principles of law; instead, relevant examples of general principles of law could be included in the commentaries to the draft conclusions. He supported the referral of the draft conclusions to the Drafting Committee, taking into account the views expressed during the Commission's debate, including the proposal that the decision on draft conclusions 2 and 3 should be postponed until a later stage of the Commission's work on the topic.

The meeting rose at 5.05 p.m.