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International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3538th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 13 July 2021, at 11 a.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Saboia
	Mr. Šturma
	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 11.05 a.m.

General principles of law (agenda item 7) (*continued*) (A/CN.4/741 and A/CN.4/741/Corr.1)

Mr. Tladi said that he wished to thank the Special Rapporteur, Mr. Vázquez-Bermúdez, for his very interesting second report on general principles of law (A/CN.4/741 and Corr.1). Given the importance of the topic, the Commission should take a cautious approach and avoid being overly creative. In other words, it should not create new categories of general principles of law. While he was broadly in agreement with the first category of general principles of law proposed by the Special Rapporteur, namely those derived from national legal systems, he had doubts about the second category, namely those formed within the international legal system. He agreed with the Special Rapporteur that the term "community of nations" should be used instead of "civilized nations", and wished to recall that, at the Commission's seventy-first session, he had suggested that the Special Rapporteur might wish to explore whether there was any significance to the use of the term "nations". The answer to that question could well influence the Commission's analysis of the identification of general principles of law. It appeared that, in the report, the words "States" and "nations" were treated as synonyms. However, to his mind, those words had different meanings. He had hoped that the difference between the two terms would be discussed in the second report. The question could perhaps be addressed in the commentary.

He agreed with the Special Rapporteur that it was well established that general principles of law in the sense of Article 38 (1) (*c*) of the Statute of the International Court of Justice comprised those derived from national legal systems. However, he wished to make a number of observations in relation to part two of the report. First, in paragraph 20, the statement that the two-step analysis necessary to identify such principles was "a combined operation" implied that all the elements were evaluated simultaneously. In practice, it was first necessary to verify that the principle in question existed in the principal legal systems of the world. Only after that had been done did it become possible to ascertain whether the principle could be transposed to the international legal system. Those two steps could not be completed at the same time.

Second, he generally agreed that a comparative analysis of national legal systems was necessary to determine whether a legal principle was in fact a general principle of law. Such an analysis should be broad and representative but not exhaustive, given that general principles of law were broad by nature; not all aspects of such principles needed to be the same across the board. Although that issue was touched upon in the report, he was of the view that it should be addressed more explicitly in the commentary.

Third, in paragraph 26, the Special Rapporteur asserted, on the basis of the *North Sea Continental Shelf* case, that rules of general international law had equal force for all members of the international community and that it followed that such rules must be recognized by those members generally. While he agreed that such rules must be recognized by those members generally, he doubted that their having equal force for all members was in fact the reason.

Fourth, he found the meaning of the final sentence of paragraph 72 to be unclear. While it was correct to say that State rules derived from rules of international organizations should be taken into account in the comparative analysis, he was unsure as to whether rules of international organizations in general should be considered in the same manner. To his mind, that question warranted further analysis by the Special Rapporteur. That issue was also related to his earlier point about the difference between "States" and "nations".

With regard to the transposition of principles to the international legal system, he believed that the approach taken by the Special Rapporteur was needlessly complicated. To his mind, the question was simple: was the principle in question transposable to the international legal system? However, according to the Special Rapporteur, the question had two cumulative elements: whether the principle was compatible with the fundamental principles of international law, on the one hand, and whether the conditions existed for its adequate application in the international legal system, on the other. To justify that approach, the Special Rapporteur referred to several court decisions and to State submissions during

judicial proceedings, but did not refer to any decision requiring both elements to be satisfied cumulatively. If that was the approach being proposed, it would need to be based on evidence that there were indeed two cumulative criteria. The elements identified by the Special Rapporteur might usefully be included in the commentary as examples of transposability.

He had identified a number of other problems in relation to that proposal. First, in paragraph 77, the Special Rapporteur explained how India, in the *Right of Passage over Indian Territory (Portugal v. India)* case, had contested the general principle of law invoked by Portugal on the basis that it would be incompatible with international law, but the quotation provided made no mention of compatibility with fundamental legal principles, only analogy between principles. Second, the report contained several references that concerned the interpretation of treaties, not general principles of law. The quotation, in paragraph 78, from the counter-memorial of Australia in *Certain Phosphate Lands in Nauru (Nauru v. Australia)* was but one example. Third, the reference in paragraph 79 to arguments made by Denmark and the Netherlands in the *North Sea Continental Shelf* cases omitted an important nuance: those arguments were referring to the principles on which the law regulating the matter was based, not to fundamental principles of international law. For all those reasons, he had doubts about the cumulative criteria proposed by the Special Rapporteur.

Turning to part three of the report, on the identification of general principles of law formed within the international legal system, he said that he had initially been surprised to see that he had been identified as a supporter of that category of principles in footnote 177. However, having reviewed his previous statement and the relevant summary record (A/CN.4/SR.3489), he had concluded that the Special Rapporteur was fully justified in ascribing those views to him because his statement had been rather ambiguous. However, that ambiguity could be explained by the fact that, as mentioned in that statement, he had viewed the first report as being of a “preliminary and introductory” and “exploratory” nature. In that statement, he had further explained that, while, intuitively, he agreed with much of what the Special Rapporteur had said, he did not see the Commission’s initial debate on the topic as the time to express firm agreement or disagreement with propositions contained in the report. Rather, he had used the opportunity to highlight issues and nuances that he believed should be given attention by the Special Rapporteur and the Commission as the topic proceeded. Thus, much like the first report, his previous statement had been rather exploratory.

He was very sympathetic to the view of the Special Rapporteur and would like to support the notion of general principles emanating from the international legal system. Yet there were serious challenges that would have to be overcome, and he was not sure whether the second report helped the Commission to overcome them, even though it contained some strong arguments in favour of the category in question. For example, the arguments concerning environmental principles contained in paragraphs 136 and 137 of the report were quite strong. Those arguments provided some explanation for why, in just about every standard textbook on international environmental law, a case was made for the emergence of environmental principles through processes that were somewhat different from those associated with the emergence of international law principles in general. He also found the reference, in paragraph 139, to the *Corfu Channel (United Kingdom v. Albania)* case and the points made in that regard to be convincing on the whole.

However, while those two examples provided some support for that category of general principles, they were insufficient on their own to overcome the challenges related to it. Moreover, both of the examples could probably be explained in terms of the normal rules of customary international law. For example, in the debate on the first report on formation and evidence of customary international law (A/CN.4/663), when the question had been posed as to whether the requirements for customary international law were different in some areas of international law, many members on either side of the debate had referred to principles of international environmental law as examples. It was on that basis that the language of paragraph (6) of the commentary to conclusion 2 of the conclusions on identification of customary international law had been adopted. As members might recall, paragraph (6) began by noting that the same methodology for the identification of customary international law applied in all fields of international law. However, it concluded that “the

application in practice of the basic approach may well take into account the particular circumstances and context in which an alleged rule has arisen and operates".

Similarly, while the quotation from the International Court of Justice judgment in the *Corfu Channel* case referred to general principles, what the Court had actually applied was a general rule of international law and the Court had referred to it as such. The operative rule at play in that judgment was the customary international law rule that a State had an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". His main concern was that it would be possible to apply that reasoning to many, if not all, of the examples provided in the report.

For example, although paragraph 123 included a reference to the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles), it was not clear to him that those principles, at the time of their formulation, had really been regarded as principles of international law. The Commission had referred to them as such because that had been the title of the topic assigned to it by the General Assembly. However, a close inspection of the text showed that the Commission had never taken ownership of the principles and had never regarded them as principles of international law. Indeed, the Commission had explicitly stated that its purpose "was not to express any appreciation of these principles as principles of international law but merely to formulate them".

In paragraph 126, reference was made to a European Court of Human Rights dictum in *Kolk and Kislyiy v. Estonia*. That dictum was interesting because, while it referred to the universal principles that had since been accepted as *jus cogens*, the Court had in fact stated that Estonia had become bound to implement the relevant principles after it had become a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

Similarly, the reference to the Martens clause in paragraph 131 did not support the Special Rapporteur's proposition, at least not unambiguously. The principles of international law referred to in that clause were said to have resulted from "the usages established between civilized nations", a common way of describing customary international law at the time. That point was recognized in paragraph 133 of the report. However, to salvage the broader point, the report then stated that the general principles referred to in Article 38 (1) (*c*) of the Statute of the International Court of Justice were those that arose from the laws of humanity and the requirements of public conscience. The problem with that reasoning was that those concepts – laws of humanity and public conscience – were not synonymous with the international legal system. For example, the law of public conscience was a concept well known in the contract law of many States; contracts that shocked the public conscience were often found to be invalid. Although the concept could be read in the way the Special Rapporteur suggested, that was just one of many possible readings.

The same reasoning could apply to the statement in paragraph 147 concerning consent to jurisdiction. In his view, that was a rule or principle that was firmly established in customary international law and was not necessarily reliant on Article 38 (1) (*c*). As a final example, in paragraph 150, reference was made to the principle of *uti possidetis juris* as a general principle in the *Frontier Dispute (Burkina Faso/Mali)* case. He himself had always read the quoted dictum of the Chamber of the International Court of Justice as an assertion of a customary international law principle.

While his comments on part three of the report might have appeared somewhat negative, that had not been his intention. He was only slightly sceptical and had set out the reasons behind that scepticism. Although he had no intention of blocking any consensus, he would like his position to be taken into account.

With regard to the draft conclusions proposed by the Special Rapporteur, he had no substantive comments to make in relation to draft conclusion 4. While he agreed with the substance of draft conclusion 5, the text could be improved. Draft conclusion 6 should simply state that, in addition to being a principle common to the principal legal systems of the world, the principle in question should also be transposable. The additional requirements should not be specified in the text, but should be referred to in the commentaries as some of the indicators of transposability. Although he harboured some doubts about draft conclusion 7,

he would not oppose its inclusion if there was agreement among members. Lastly, he was in agreement with draft conclusions 8 and 9.

Mr. Valencia-Ospina, in a pre-recorded video statement, said that he wished to thank the Special Rapporteur for his second report, which consistently built upon the contents of the first and cogently analysed the jurisprudence and doctrine concerning the identification of general principles of law. He therefore supported the referral of the six draft conclusions proposed in the second report to the Drafting Committee. Of the three draft conclusions submitted to it in 2019, the Drafting Committee had adopted the first and done no work on the second and third. Draft conclusions 2 and 3 had, therefore, not yet been provisionally adopted by the Committee, much less by the Commission. The Commission should bear that in mind, because the Drafting Committee more often than not made substantive changes to the texts referred to it.

While the report frequently referred to the opinions expressed by States on general principles of law in the course of litigation, the purpose served by the study of those opinions was unclear. If it was to establish customary international law by demonstrating the existence of *opinio juris*, that might helpfully have been stated at the outset. If the study of those State opinions on general principles of law served a different purpose, it would be useful to clarify that point as well.

He agreed that, as stated in draft conclusion 4, general principles of law could be derived from national forums and must be common to the principal legal systems of the world and be transposable to the international legal system. In the determination of whether a principle or rule was common to the principal legal systems, he agreed that there was a presumption that principles and rules were shared within legal families. That was especially true where the principle or rule was a characteristic of a given legal family. However, that presumption disappeared in cases where the principle or rule was not part of the nature or definition of the legal family.

The broad and useful range of materials mentioned in paragraphs 70 and 71 as being relevant for the identification of principles of law in domestic forums could helpfully be reflected in draft conclusion 5 (3), which, as currently drafted, could be read too narrowly. That paragraph might read: “The comparative analysis includes for each State an assessment of the sources of law of that State, such as, if applicable, national legislation, executive orders, and decisions of national courts.”

In paragraph 72, the Special Rapporteur asserted that the practice of international organizations could be relevant for the identification of general principles of law. Apart from the fact that such practice and jurisprudence were scant and were thus unlikely to suffice to persuade a sceptic as to the validity of that assertion, the report did not clarify what purpose the examination of the practice of international organizations was to serve. If international organizations were to serve the exact same purpose as States, it should be acknowledged that no such rule was either expressed or implied in Article 38 of the Statute of the International Court of Justice, which, in paragraph 1 (*c*), demanded in unambiguous terms that the recognition should be only by “civilized nations”, not international organizations. Consequently, such a proposition would require ampler justification.

The idea seemed to be that certain international organizations could issue rules that bound their member States and were directly applicable in those States’ legal systems. In such cases, then, the international organization rule would be part of the domestic rules of each of the member States and would naturally be examined as part of the necessary analysis focused on those member States simply as States, irrespective of their status as members of the organization, which was thus extraneous. Even if the study of the international organization was merely to serve as a shortcut to an analysis of its member States, it would carry the danger of being presumptive, since the assessment of the law of a State should take the State’s entire legal system into account. Furthermore, not all international organizations had the power to issue rules that were binding on their member States. How, then, was one to decide which international organization to take into account in the analysis? For those reasons, some clarification of the content of paragraph 72 would be useful.

The second element for the derivation of general principles of law from national forums, namely their transposability to the international legal system, was a necessary step

of the analysis, since any principle derived from national forums that could not be transposed to the international legal system could not operate there. He wished to make several observations in relation to that second element and draft conclusion 6.

First, it would be helpful to mention, at least in the commentary, that the second element was a natural consequence of transposition from one system to another and was not a characteristic unique to the international context of the target domain. In other words, principles derived from national forums existed within a context, and when they were carried into a different context, the transposition might well be faulty. That applied regardless of the international nature of the context; the transposition might also be faulty if made from one national forum to another. The *North Sea Continental Shelf* case referred to in paragraphs 79 and 80 of the report was a good example. In that case, the International Court of Justice had held that the principle of the "just and equitable share" was not a general principle of law, as it was "foreign to … the basic concept of continental shelf entitlement". The principle of the just and equitable share, however, was one that *ab initio* applied to certain contexts of apportionment that did not include the delimitation of the continental shelf. It was not the international nature of the delimitation of the continental shelf that made the principle inapplicable in that context, but the nature of the continental shelf itself, as the Court had so clearly stated.

Second, the element of transposability to the international legal system was not referred to in the Statute of the International Court of Justice, which was the basis for the Commission's work on the topic. Therefore, the requirement of recognition, derived from the Statute, for the first element of the derivation of general principles of law from national forums was not necessarily a requirement also for the second element, as the Special Rapporteur appeared to assume in paragraphs 21 and 22 of the report. Since that assumption did not play a role in the subsequent analysis set out in the report, there was no need to formulate it.

Third, there was a need for caution in providing examples of the difference between principles of the international legal system that prevented transposition and outright international positive law, such as the principle of sovereign immunity. The importance of the nature of the condition preventing transposition was recognized in paragraph 84, which affirmed that only fundamental principles of international law could preclude transposition. The report did not, however, clearly explain what made a principle fundamental. Since more general rules could give rise to more specific rules, something that both principles and more "fundamental" principles could do as well, the mere fact that a proposed characteristic of the international legal system had given rise to specific rules did not, in itself, make it a fundamental principle.

Fourth, there appeared to be an inconsistency in the claims in paragraphs 83 and 84 that the absence of a principle preventing transposition was a necessity for the formation of a general principle of law, which presupposed that a principle had no operation in international law unless there was no preclusion, and that the principle not yet carried into international law stood on equal footing with treaty law and customary international law. It would be helpful to address that point in a future report on the topic.

Fifth, part two, chapter III (B), of the report suggested that, for transposition to take place, there should be conditions in the international sphere for the adequate application of the principle transposed. While the idea behind that proposition was clear, what was much less clear was why difficulty of application should preclude a principle from being law. The assumption seemed to be that there were cases where a principle derived from national forums would have been a general principle of law but for the difficulty of its application. The problem was that difficulty of application was not a permissible or convincing reason for derogation from law. Perhaps the report was suggesting that there was something fundamental in the nature of the international legal system that would preclude the incorporation into it of the law in question. However, that situation was covered by the first element for transposition already considered in part two, chapter III (A).

With regard to the distinctions between general principles of law derived from national forums and customary international law, which were discussed in part two, chapter IV, there were three distinctions that could usefully be added to those already advanced in

the report. First, customary international law must be accepted *expressis verbis* by States through written law or through clear State action accompanied by *opinio juris*, whereas general principles of law could be implied within legal systems. Second, customary international law was concerned more with action by the executive and legislative branches, whereas general principles of law were typically concerned with the courts and the substantive and procedural rules that were to be interpreted and applied by them. Third, the rules that became customary international law were international in nature, whereas general principles of law derived from national forums could be national or international.

With regard to draft conclusion 7, it was essential to bear in mind from the outset that "general principles of law" were as much an autonomous source of international law as international conventions and international custom, the two other sources mentioned in Article 38 of the Statute of the International Court of Justice, and that, as the report emphasized, there was no hierarchy among those three sources. That said, he supported the propositions, reflected in draft conclusion 7 (b) and (c), that general principles of law could be identified from principles underlying general rules of conventional or customary international law and from principles inherent in the basic features and fundamental requirements of the international legal system. The latter principles were, after all, precisely what was meant by general principles of law inherent in the international legal system. As discussed in the report, and as he had stated at the Commission's seventy-first session, the principle of consent to jurisdiction was a prime example.

He found it more difficult to support the proposition, reflected in draft conclusion 7 (a), that principles widely recognized in treaties and other international instruments were general principles of law. If a principle had been widely recognized in treaties, it could be a conventional obligation binding the parties to the treaties and could, in some cases, be helpful in the identification of customary international law. However, the suggestion that a principle recognized in treaties could bind States that were not parties to those treaties for no other reason than that the principle was mentioned therein constituted a questionable departure from traditional law, to say the least, and the examples of such principles provided in part three, chapter II (A), of the report had failed to convince him otherwise.

In paragraph 125, for instance, none of the assertions made about the Nürnberg Principles demonstrated that they were general principles of law. Paragraph 126 referred to the case of *Kolk and Kislyiy v. Estonia*, heard before the European Court of Human Rights, but, since the legal reasoning underpinning the judicial decision on admissibility handed down in that case had been questioned, it did not provide the most persuasive basis on which to form a considered opinion. More specifically, it was not clear that, in its decision, the Court was stating that the principles concerning crimes against humanity, as recognized by the London Agreement of 1945, had become universally valid after the adoption of the Nürnberg Principles and the formation of the International Military Tribunal, because they had been recognized by the United Nations General Assembly, which was the interpretation that draft conclusion 7 (a) would call for. Rather, the Court appeared to be stating that the principles concerning crimes against humanity had been universally valid at the time of their adoption and that the General Assembly had simply confirmed them: "[T]he Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, *inter alia*, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission."

Paragraph 130 reflected a particular interpretation of the language used by the International Court of Justice in its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. Even if that interpretation was possible, it was not necessary. Other than in its use of the phrase "civilized nations", the Court's statement did not appear to differ from a reference to customary international law. In paragraphs 135 to 137, the report considered the polluter pays principle to be a general principle of law derived from international environmental law. It appeared, however, that the principle could also be analysed from the perspective of draft conclusion 7 (b). For all those reasons, he was not convinced by the examples given in support of draft conclusion 7 (a).

He noted that draft conclusions 8 and 9, on the decisions of courts and tribunals and the teachings of publicists, respectively, were inspired by Article 38 (1) (*d*) of the Statute of the International Court of Justice, in which the expression "determination of rules of law"

was used. They reproduced *mutatis mutandis*, for the reasons given in part four of the report, conclusions 13 and 14 of the Commission's conclusions on identification of customary international law, replacing the phrase "determination of rules of customary international law" with "determination of general principles of law". He was not questioning the validity of the approach taken by the Commission in its work on the identification of customary international law or the Special Rapporteur's view that there was no reason to depart from that approach for the purposes of the topic at hand. However, the terminological and conceptual transposition was explained only tersely, in paragraph 177 of the report, through an interpretation of Article 38 that, in effect, equated "rules" with "principles". The matter called for a more detailed explanation.

In conclusion, he said he felt obligated to point out, in a more leisurely vein, that whereas draft conclusions 8 and 9 still proclaimed the decisions of courts and tribunals and the teachings of publicists to be merely a subsidiary means for the determination of general principles of law, the bulk of the jurisprudence and doctrine on which the second report was based consisted precisely of judicial decisions – in particular decisions handed down by the International Court of Justice and other international courts and tribunals – and the teachings of publicists. He closed by reiterating his sincere appreciation of the Special Rapporteur's work and his support for sending the proposed draft conclusions to the Drafting Committee.

Mr. Forteau, thanking the Special Rapporteur for his second report on the topic, said that the report contained a very substantive and very clear examination of the issues. He also wished to thank the secretariat for its very helpful study on treaties and case law on the topic. Before commenting in detail on specific elements, he wished to make four general observations.

First, he recalled that, when the Commission had considered the Special Rapporteur's first report in 2019, a number of members had questioned whether the title of the topic in French should be "*principes généraux de droit*" or "*principes généraux du droit*"; a similar question had arisen in relation to the Spanish version of the title. Because of that uncertainty, the Drafting Committee had so far adopted only the English version of draft conclusion 1. He did not wish to take a position on the debate at that stage, since the decision should be guided primarily by the purpose and content of the draft conclusions that the Commission ultimately adopted. If the draft conclusions dealt only with principles derived from national legal systems, then the first option should be used in the French version, as it was in Article 38 of the Statute of the International Court of Justice. If, on the other hand, the draft conclusions also covered principles inherent in the international legal order, he would be in favour of using the second option, which was the current formulation of the title. Irrespective of the final choice as to the types of principles that they addressed, the draft conclusions and the related commentary should, at the very least, use the relevant terminology in a rigorous and systematic manner. Unfortunately, that had not been the case in the French version of the Commission's 2019 annual report (A/74/10), and those inconsistencies had generated confusion on the point in question.

Second, he saw a need to clarify what constituted a "principle", as opposed to a "rule" or "norm". In the first report on the topic (A/CN.4/732), the Special Rapporteur indicated that there was no need to assign a particular meaning to the term "principle" and that its scope should not be limited. Ultimately, however, the Commission would have to agree on a definition of the term, because the meaning assigned to it had a bearing on important questions such as the relationship between general principles and customary rules or the "rules of international law" referred to in article 31 (3) (c) of the Vienna Convention on the Law of Treaties. A draft conclusion that specified the scope and meaning of the term "principle" was needed, and it could in particular clarify the difference between the concepts of "principle" and "standard".

Third, noting that the core purpose of the second report was to define the criteria to be used to ascertain the existence of general principles, he said that, in the process of identifying and formulating those criteria, the Commission should bear two additional considerations in mind: the fact that, in practice, general principles were applied on a subsidiary basis only, when no other applicable rule existed; and the fact that they were just principles and not precise, detailed norms. A consequence of those two characteristics was that there should be no risk in adopting flexible formulations for the criteria to be used to

determine general principles. If, on the other hand, the criteria were too rigid, the relevance and function of those principles might be severely diminished.

By way of a final general observation, he wished to express his agreement with some of the Special Rapporteur's methodological observations, including, in particular, the important point made in paragraph 10 of the report. In view of time constraints, his statement would cover only those areas in which he did not necessarily agree with the Special Rapporteur.

Overall, his opinion was that the Special Rapporteur's approach was too strict with regard to the principles derived from national legal systems, and not strict enough with regard to the general principles of law formed within the international legal system.

Focusing first on principles derived from national legal systems, he said he of course agreed that the term "civilized nations" should be abandoned but that he was not entirely convinced by the proposed alternative "community of nations". That expression appeared to exclude the principles that might be derived from the rules of international organizations, particularly regional ones, to which the Special Rapporteur rightly made reference in paragraph 72 of the report. The expression "principal legal systems of the world", in contrast, was in his view entirely appropriate.

In addition, he did not agree with the criteria set forth in draft conclusion 5 (2), which stipulated that any comparative analysis that provided the basis for the identification of a general principle of law should be "wide and representative". Although the Special Rapporteur referred, in paragraph 35, to the existence of "wide-ranging comparative analyses", a closer look at the practice and jurisprudence cited in the report revealed that States and courts never engaged in "wide and representative" analysis. In the examples given, the number of national legal systems consulted was no more than sixty at best. In most cases, no more than twenty national legal systems, and in some cases fewer than ten, were examined. While it was certainly important that a sufficient number of national legal systems should be analysed, the criteria applied in practice appeared to be more flexible than the criteria proposed by the Special Rapporteur. Accordingly, it would be sufficient, in his view, to stipulate that the practice analysed should be "representative".

If a second criterion was to be added, the Commission might consider adopting the one suggested by the International Law Association in 2018, namely that a general principle could be deemed to exist if it was recognized by at least a "significant" number of national legal systems. By way of analogy, in conclusion 8 of the conclusions on identification of customary international law, the adverb "sufficiently" appeared before the adjectives "widespread and representative", thereby lending more flexibility to the criteria. The Special Rapporteur, in his introductory statement, had emphasized that the analysis would depend on the circumstances of each case. Those elements of flexibility should be reflected in draft conclusion 5 (2).

The criterion set forth in draft conclusion 5 (3) was also too strict. Practice showed that the courts often limited themselves to conducting an assessment of national legislation without examining the manner in which it was interpreted in case law. He therefore suggested that, in the phrase "national legislations and decisions of national courts", the word "and" should be changed to "or".

Moreover, he did not see the relevance of the references to comparative law methods in paragraphs 52 to 54. The aim was not to conduct a comparative law analysis *stricto sensu*, with all the methodological constraints that it entailed, but rather, as the International Tribunal for the Former Yugoslavia had stated in its judgment in *Prosecutor v. Anto Furundžija*, to identify the "basic notions" common to all the major legal systems of the world. That wording allowed for a certain margin of discretion.

The report also failed to adequately address what in his view was a key question, namely the accessibility of the relevant national practice. In paragraph 26, the Special Rapporteur stated that the analysis should cover "as many national legal systems as possible", without specifying what was meant by "as many as possible". In particular, there was no indication of the criteria to be used to gauge whether the requirement to analyse a sufficiently broad sample of national practice had been met or could be met by courts and tribunals. In

the *Erdemović* case, cited in paragraph 61 of the report, the International Tribunal for the Former Yugoslavia indicated that it had surveyed "those jurisdictions whose jurisprudence is, as a practical matter, accessible to us". But what exactly was the scope of the "accessibility" criterion in practice? Those questions were fundamental from a practical point of view, yet the Special Rapporteur sidestepped them and instead put forward a presumption that national legal systems belonging to the same legal family adopted the same solutions, and suggested that the teachings of scholars should be relied upon for the identification of general principles. That suggestion seemed reasonable, but it should be reflected in a more transparent manner in the draft conclusions.

With regard to the transposition criteria set forth in draft conclusion 6, while he agreed with the general logic, he shared Mr. Valencia-Ospina's view that the terms used in the draft conclusion should be carefully reviewed, including, in particular, the concept of "fundamental principles", which seemed to him very vague and also perhaps too narrow. He was not convinced that, for the purpose of transposing a general principle in order to apply it within an international organization or before an international court or tribunal, the only requirement was to verify that the principle was compatible with the "fundamental principles" of international law; it might also need to be compatible with more specific and more specialized rules.

An additional factor to be considered in the transposition process was the identity and nature of the subjects of law to whom the principle was addressed. Taking the principle of unjust enrichment as an example, he wondered whether that principle, if transposed to the international legal system, would apply only to relations between individuals or between individuals and States, or whether it would also apply to relations between two States. That issue required further consideration, as it was an important one in practice.

With regard to general principles that might be formed within the international legal system, his concerns were more substantial. As Mr. Tladi and Mr. Valencia-Ospina had noted, and as several other members had observed at the Commission's seventy-first session, the principles covered in the report, and all those habitually categorized as "general principles of international law", were in reality no more than rules of conventional or customary international law.

Although he did not exclude the possibility that certain principles could be formed in the international legal system outside the treaty or customary process, such principles were presumably very rare, and the Special Rapporteur had actually had considerable difficulty in finding convincing examples for inclusion in the second report. The examples given in paragraphs 122 to 145 were examples of customary rules rather than general principles. Moreover, reclassifying possible customary rules as general principles could be risky, as it could reduce their authority and scope. The notion that there were general principles of international law distinct from international custom should therefore be treated with great caution. More specifically, it was important not to confuse principles that constituted an autonomous source of law with principles that constituted a subcategory of treaty or customary norms. Unfortunately, the second report confused those two legally distinct concepts quite frequently.

At first glance, the category of principles that the Special Rapporteur described as being "inherent in the basic features and fundamental requirements of the international legal system" seemed to be more convincing as examples of general principles. However, on closer examination, once again the principles in question appeared to have a basis other than that required for "general principles" that constituted an autonomous source of law. Such principles were established by the courts on the basis of two very specific considerations.

First, in some cases, those principles might be considered "corollaries" of existing treaty or customary rules and, for that reason, should remain attached to those rules. The principle of consent to jurisdiction invoked by the International Court of Justice, for example, should be interpreted in that manner. That principle did not exist in its own right; it flowed from the Court's Statute. Moreover, it did not exist in the same form, and was not applied in the same manner, within the European Court of Human Rights system. The rules on jurisdiction applied by the Dispute Settlement Body of the World Trade Organization also differed from those applicable before the International Court of Justice. There was therefore

a certain risk inherent in decoupling the principle of consent to jurisdiction from its original treaty context. In the alternative, the principle of consent to jurisdiction might be viewed as serving simply as a reminder of the rule established in Article 33 of the Charter of the United Nations, which was of a customary nature. Thus, once again, the possible "general principle" was in fact a rule of conventional and customary law.

In other cases, the principles referred to might more accurately be categorized as judicial techniques, good examples of which were interpretative techniques such as the principle of *in dubio mitius* and the principle of effectiveness. As the Commission had rightly noted in 1966, in paragraphs (3) and (4) of the commentary to article 28 of its draft articles on the law of treaties, such principles were not sources of law *per se*; while jurisprudence was "rich in reference to principles and maxims", for the most part, those principles and maxims were "principles of logic and good sense valuable only as guides". The same could be said of the principle of *lex specialis*, and even the principle of implied powers recalled by the International Court of Justice in the advisory opinion it had issued in 1996 at the request of the World Health Organization. Principles applicable as part of the legal regime of evidence fell within the same category, as did, more broadly, any rules that might be categorized as judicial presumptions. A characteristic common to all those principles was that they were an integral part of legal reasoning and were generally established by international courts either as a tool essential to the exercise of their judicial functions or in exercise of their powers to decide on the organization of proceedings. For those reasons, such principles could hardly be treated as a new autonomous source of law outside the specific context in which they were invoked and applied, namely the judicial framework.

In the light of those observations, he believed that draft conclusion 7 created an unfortunate confusion between the various sources of international law. A clearer and more logical approach would be to begin by explaining, in a separate draft conclusion, the manner in which general principles formed within the international legal system, if they existed, differed from other sources of international law, before proceeding to address the distinction between those principles and related legal categories, such as judicial techniques. Only if an autonomous category of general principles formed within the international legal system was identified would it be necessary to explain how the existence of such principles could be ascertained, if necessary with the help of other sources. If, on the other hand, those two steps were combined into a single draft conclusion, there was a risk that what were in reality no more than customary or conventional principles, or principles inherent in legal reasoning, could be transformed into general principles.

The confusion between sources of law resulting from draft conclusion 7 was also regrettable in that it might be used to transform non-binding sources into binding principles. That situation might arise if, for example, as the Special Rapporteur indicated in paragraph 122 of the report, it was considered sufficient for a principle to have been widely incorporated into General Assembly resolutions in order for it to be recognized as a general principle formed within the international legal system. However, that notion lacked any basis in law and disregarded the Special Rapporteur's warning that "general principles must not be regarded as an easy way to invoke rules of international law". He was particularly sceptical about the conclusion, set forth in paragraphs 145 and 168 of the report, that the existence of a general principle formed within the international legal system could be ascertained purely on the basis of a "deduction exercise". That opened the door to all kinds of subjective assessments, which could in turn give rise to a certain inflation in the identification of new general principles of law. Such an outcome was unlikely to be in the interests of international law and would be at odds with the more rigorous methodology that the Special Rapporteur had been careful to establish for the identification of general principles of law derived from national legal systems.

He therefore took the view that it would be premature to adopt a draft conclusion on general principles of law formed within the international legal system. Accordingly, while he supported the referral of draft conclusions 4, 5, 6, 8 and 9 to the Drafting Committee, he believed that more in-depth reflection was required with regard to draft conclusion 7.

The meeting rose at 12.10 p.m.