Provisional

For participants only

10 August 2021

Original: English

International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3541st meeting

Held at the Palais des Nations, Geneva, on Thursday, 15 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. 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 Corr.1)

Mr. Saboia said that, as the Special Rapporteur rightly noted in his excellent second report on general principles of law, the Commission should not seek to systematically elucidate the complex process through which general principles of law emerged, changed or ceased to exist, as the purpose of the topic was to provide practical guidance. The formulation "community of nations", which was proposed by the Special Rapporteur as a substitute for the term "civilized nations" used in Article 38 (1) (*c*) of the Statute of the International Court of Justice, was an appropriate one. However, there was merit in Mr. Tladi's observation that a distinction should be drawn between the words "nation" and "State", as there could be nations that did not enjoy statehood and States that were plurinational, such as the Plurinational State of Bolivia. The commentaries should perhaps include a discussion of how principles of law could arise from the traditions and practices of groups of people, such as indigenous peoples, that did not form States but whose ways of life were, to varying degrees, legally recognized in the States where they lived. He agreed with the Special Rapporteur that the distinction between general principles of law derived from national legal systems and general principles of law formed within the international legal system should be maintained, and that the criteria for determining the existence of a general principle of law must be both strict, so as not to provide an easy shortcut for the identification of international norms, and flexible, so as not to make the identification of general principles of law impossible.

After conducting an ample review of international jurisprudence, State practice and doctrine, the Special Rapporteur rightly concluded that a determination of the existence of a principle common to the legal systems of the world – the first step in the process of identifying general principles of law derived from national legal systems – required an analysis that was sufficiently representative of the different legal systems and regions of the world. The commentaries should perhaps address the role of language in such an analysis. For example, the legal traditions of Portuguese-speaking countries reflected aspects of United States constitutional law and continental European civil law, but they also had features that were specific to them. However, United Nations documents rarely made reference to legal material, such as legislation and domestic jurisprudence, from those countries, perhaps owing to the language in which that material was drafted.

Paragraph 83 of the report set out examples of the fundamental principles of law with which a principle had to be compatible in order to be transposed to the international legal system, the determination of such transposition being the second step of the analysis to identify general principles of law derived from national legal systems. Those examples, which included the principle of sovereignty, the notion of territorial sovereignty, the basic concept of continental shelf entitlement and the principles set out in the Declaration on Principles of Friendly Relations and Cooperation among States, clearly showed that the term "fundamental principles" referred to core principles on which the international legal system was founded. The Special Rapporteur rightly argued that a principle must be compatible only with fundamental principles of international law and that, since there is no hierarchy between the sources of law cited in Article 38 (1) (*c*) of the Statute of the International Court of Justice, general rules of conventional and customary international law that were not fundamental could not in themselves prevent the transposition of a principle.

The Special Rapporteur acknowledged the different views expressed in the Commission and in the Sixth Committee on the notion of general principles of law originating within the international legal system, and recognized the importance of basing the Commission's work on "sufficient" practice. Given the imprecise terminology often used, which made it difficult to identify relevant practice, the Special Rapporteur stressed the need for careful examination of each case. He also pointed to the need to avoid blurring the distinction between general principles of law and customary international law.

According to the report, the existence of a principle recognized by the community of nations was to be ascertained by determining whether the principle was widely acknowledged in treaties and other international instruments, underlay general rules of conventional or customary international law, or was inherent in the basic features and fundamental requirements of the international legal system. The Special Rapporteur provided examples

relating to each of those three criteria. As an example of the first criterion, he cited General Assembly resolution 95 (I), affirming the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (the Nürnberg Principles), and its resolution 177 (II), directing the newly created International Law Commission to formulate a draft Code of Crimes against the Peace and Security of Mankind, which had been behind the development of many contemporary rules and principles on accountability for international crimes. The examples given in connection with the second criterion included *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, in which the International Court of Justice had relied on "general and well-recognized principles" in its decision rather than on a treaty. In *Frontier Dispute (Burkina Faso/Republic of Mali)*, cited in connection with the third criterion, the International Court of Justice had unfortunately conflated Spanish-speaking America with South America. The principle of *uti possidetis juris* applied in that case could be more broadly understood if considered from a Brazilian perspective. The principle had been applied as early as the eighteenth century in negotiations over Portuguese and Spanish colonies in South America. Brazil had largely retained the borders delineated in treaties between Portugal and Spain when it became independent and it had continued to apply the principle after its independence in the demarcation of its borders with its neighbours. As noted in the report, in the *Frontier Dispute* case, the Court had also highlighted the differences between the formation of rules of customary international law and the formation of general principles of international law.

He supported the six draft conclusions proposed by the Special Rapporteur and their referral to the Drafting Committee.

Ms. Lehto said that the Special Rapporteur's well-organized and well-documented report provided an excellent basis for the Commission's debate. With respect to part one of the report, she was not convinced that the term "community of nations", which the Special Rapporteur had proposed as an alternative to "civilized nations" – a formulation universally considered anachronistic – was the best option, given that it would seem to exclude international organizations. She agreed with what Mr. Forteau and others had said on that point. The Special Rapporteur's decision to cover both general principles of law derived from national legal systems and those formed within the international system followed logically from the previous debate on the topic, in which the Commission had demonstrated considerable openness to the idea of exploring both categories of principles, although it had expressed two main reservations; the first concerning the distinction between general principles of law, on the one hand, and other sources of international law, particularly customary international law, on the other; and the second concerning the rules of recognition for general principles of law formed within the international legal system. Those reservations had both been addressed in the report. She agreed that a balance needed to be found in the identification of general principles of law: the process must be rigorous but not to the extent that it made such principles unavailable as a source of international law.

The two-step method for the identification of general principles of law derived from national legal systems laid out in draft conclusion 4 reflected the general understanding of the process in both practice and doctrine. The first step of the method could be described as both horizontal, because it reflected the requirement of representativeness, and vertical, because it addressed the generalization and abstraction involved in the identification of a principle common to different national legal systems. Regarding the horizontal aspect, she agreed with the Special Rapporteur that the comparative analysis of national legal systems must cover different legal families and the various regions of the world. That was especially true since courts and tribunals tended to refer to a small set of common and civil law systems, with almost half of such references being to just seven jurisdictions according to a 2018 report of the International Law Association. Practical considerations related to the accessibility of information were insufficient to explain why other legal systems had been systematically ignored. In her view, draft conclusion 4 and its reference to "a principle common to the principal legal systems of the world" adequately captured the generality and representativeness required.

However, what was considered "representative" depended on the context, such as the field of law in question. She therefore supported the proposal by Ms. Galvão Teles to insert the word "sufficiently" before "wide and representative" in draft conclusion 5 (2). She also

agreed with Mr. Valencia-Ospina that a broader formulation should be used in draft conclusion 5 (3) to describe the materials to be used in the comparative analysis, in line with paragraphs 70 to 72 of the report. While she agreed that the practice of international organizations, referred to in paragraph 72, could under certain conditions be taken into account in the identification of general principles of law, she agreed with Mr. Valencia-Ospina that further elaboration would be required if the reference was to be retained. It might be useful to describe the role of general principles of European Union law in the jurisprudence of the Court of Justice of the European Union. Such general principles could be common to all the national legal systems of the European Union countries and compatible with European Union objectives, or they could be specific to the European Union, even if inspired by principles enshrined in certain national legal systems.

Regarding the vertical aspect, according to paragraph 56 of the report, in comparing rules existing in national legal systems, the principle common to the systems had to be extracted or the principle underlying the rules distilled; in other words, what was sought was the essential content of the different domestic legal principles, which was neither their sum nor their lowest common denominator. As pointed out in paragraph 56, the result was a principle that was generally regarded as just by the community of nations, reflected its collective consciousness, or was inherent in any legal system.

The analysis regarding transposition, the second step in the identification of general principles of law derived from national legal systems, was concerned with whether an analogy could be drawn between national and international law. Examples of cases where transposition was impossible – in other words, cases in which widely applied principles of national law were unsuitable for elevation to the international legal system – had been provided both in the report and during the debate. Similarly, there were areas of international interaction, such as maritime delimitation and armed conflict, that had no counterpart at the national level.

While draft conclusion 6 was essential, she shared other Commission members' concerns regarding the unnecessary complications that might result from its wording and the lack of clarity of the phrase "fundamental principles of international law" in subparagraph (a). The introduction of that additional category of principles could also create confusion. Furthermore, the phrase "adequate application" in subparagraph (b) raised questions about what would be considered "adequate". As Mr. Valencia-Ospina had noted, it needed to be explained why the difficulty of applying a principle should preclude the principle from being law. As a general point, it was true that specific features of criminal proceedings distinguished them from inter-State disputes and it could be easier to find analogies between international and national criminal proceedings than between international and municipal law in other contexts. Nevertheless, general principles of law derived from national legal systems had played a particularly important role in international criminal proceedings, providing valuable practice from which to draw conclusions for the topic.

Regarding part three of the report, she agreed with the thoughtful observations made in paragraphs 116 to 118. With respect to section A of part three, chapter II, on principles widely recognized in treaties and other international instruments, she agreed that wide adherence to treaties containing a certain principle could be taken to indicate broad recognition of the principle, but it was less clear whether such adherence indicated recognition of the principle as a general principle of law. Paragraph 122 indicated that the "international instruments" referred to in draft conclusion 7 (a) included General Assembly resolutions. The wording of that subparagraph was perhaps too general and therefore overinclusive. A question also existed as to whether the criterion for recognition contained in draft guideline 7 (a) overlapped with the criterion reflected in draft conclusion 7 (b). It seemed that the Nürnberg Principles and the Martens clause, which were discussed in the report in relation to the first criterion for recognition, could also serve as examples of the second.

The two criteria for recognition outlined in sections B and C, respectively, of part three, chapter II – namely, that a principle should underlie general rules of conventional or customary international law or be inherent in the basic features and fundamental requirements of the international legal system – seemed to better distinguish general principles of law formed within the international legal system and were thus better suited to serve as criteria

for recognition than the one described in section A of the same chapter. Questions had, nevertheless, been raised regarding the meaning of "underlie". For example, Ms. Galvão Teles had asked whether the recognition of "underlying" general principles would make it possible for more to be attributed to treaty rules than what States had agreed to through treaty provisions. However, it was a recognized function of general principles, of any type, to provide coherence and unity for the interpretation of the specific rules derived from them; they had served that purpose in, for example, international human rights law and international environmental law. In terms of treaty interpretation, such underlying principles could shed light on the object and purpose of a treaty or could be available as other "relevant rules" of international law within the meaning of article 31 (3) (c) of the Vienna Convention on the Law of Treaties. An example of what, in her view, could be called an "underlying rule" was the due diligence principle discussed in the *Corfu Channel* case; namely, the "general and well-recognized" principle that it was "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". That was a general formulation of a principle that could be seen to underlie subsequent codifications of due diligence obligations in environmental law, human rights law and the law of armed conflicts, and which had been invoked in a number of different contexts, such as international criminal law and investment arbitration. She saw the statement in paragraph 145 that principles "thus identified can be applied independently of the relevant [often more specific] rules of conventional or customary international law, and even in the absence of the latter" as a default rule. She also saw significant potential in draft conclusion 7 (c) and the category of principles it reflected.

She had no specific comments on part four or draft conclusions 8 and 9. She supported the referral of all the new draft conclusions to the Drafting Committee.

Mr. Hassouna said that he wished to thank the Special Rapporteur for his well-written, well-researched and detailed report. He also wished to thank the secretariat for its comprehensive memorandum, which would greatly facilitate the Special Rapporteur's research. The topic of general principles of law continued to be surrounded by considerable ambiguity and controversy, underlining the highly practical value of any guidance the Commission could provide to States, international organizations, courts and tribunals.

Part one of the report included general observations and described the Special Rapporteur's approach to the topic. In paragraph 2 (a) of his conclusions on the Commission's first debate on the topic, the Special Rapporteur stated that the topic would cover the origins of general principles. However, in paragraph 10, the Special Rapporteur emphasized that the Commission did not need to deal with the processes through which general principles of law emerged, changed or ceased to exist. The Special Rapporteur therefore needed to clarify the extent to which he intended to address the origins of general principles.

The Special Rapporteur also made an observation concerning the term "civilized nations", as employed in Article 38 (1) (*c*) of the Statute of the International Court of Justice in connection with the recognition required in order for a general principle to exist. The term was anachronistic; it was illustrative of the colonial legacy of international law and flagrantly contradicted the principle of legal equality of States. He agreed with the Special Rapporteur that the term "community of nations" was the most appropriate alternative, especially in the light of the wide acceptance of its use in the International Covenant on Civil and Political Rights. The commentary could then explain the distinction between nations and States, and how international organizations might be related to that term. It was worth noting that the United Nations Legal Counsel had used the term "community of nations" in his address to the Commission the previous day. He further agreed with the Special Rapporteur's observation, in paragraph 14, that the distinction between general principles of law derived from national legal systems and general principles of law formed within the international legal system should be maintained in the Commission's work on the topic at hand. In that connection, it would be helpful to clarify the basis on which that distinction was maintained and the different legal effects of both categories. He also agreed with the Special Rapporteur that the criteria for determining the existence of a general principle of law must be both strict and flexible, striking a balance between the two.

In connection with the determination of the existence of a principle common to the principal legal systems of the world, the decisive criterion in ensuring that the requirement of recognition was met, according to paragraph 25 of the report, was that the comparative analysis must be wide and representative so as to reflect those systems. However, in practice, the categories adopted by the Special Rapporteur for the purposes of examining legal families and regions varied considerably and often appeared to be *ad hoc*, although paragraph 52 did contain a tentative suggestion for a possible method of categorization of legal families. In his view, a similar suggestion could be made with respect to a representative selection of geographical regions so as to encourage more systematic adherence to a wide and representative analysis.

With regard to the question of the possible role of international organizations in the formation of general principles of law derived from national legal systems, he supported the view that the practice of international organizations could be relevant for the purposes of identifying a general principle of law in line with the powers conferred on them under their respective constitutive rules.

According to paragraph 75 of the report, for a principle common to the principal legal systems of the world to be elevated to a general principle of law within the meaning of Article 38 (1) (*c*) of the Statute, that principle must be compatible with the fundamental principles of international law. However, the question of what constituted "fundamental principles of international law" was by no means free from controversy. While Article 2 of the Charter of the United Nations was the logical first port of call, it by no means provided an exhaustive summation of all such principles. Moreover, there were numerous principles of international law that were frequently asserted as fundamental but that were not actually so. In addition, there were many fundamental principles that existed only at the regional level. Given the assertion in the report that the identification of general principles was an objective activity, he was of the view that the report should have been more specific with respect to the content of the category of "fundamental principles of international law".

With reference to the methodology by which a general principle of law formed within the international legal system might be identified, paragraph 121 referred to principles that might be inherent in the basic features and fundamental requirements of the international legal system. That assertion seemed to contain a presumption that there was a common view of what constituted the "basic features and fundamental requirements" of the international legal system. The examples cited to support that assertion included cases where the International Court of Justice had never taken a decision on the principle concerned, as well as instances where a relevant principle coexisted as a norm of customary international law or depended on a treaty regime for its existence. In the light of the difficulty in arriving at an "objective" determination of what was "basic" or "fundamental" for the international legal system, it would be desirable to provide examples of such general principles in the commentaries to the draft conclusions.

He generally supported the draft conclusions proposed by the Special Rapporteur. However, in the context of draft conclusion 6, it was essential to clarify the "fundamental principles of international law" and the boundaries between them and "general principles of law".

Concerning draft conclusion 7, it would be appropriate, in his view, to clarify how general principles formed solely by international custom or treaties should be differentiated from those formed solely pursuant to Article 38 (1) (*c*) of the Statute. For instance, according to paragraph 130 of the report, the International Court of Justice had noted that "the principles in question (regarding the condemnation and punishment of the crime of genocide) 'underlie' the Convention [on the Prevention and Punishment of the Crime of Genocide] and are binding on States even in the absence of the Convention". While he agreed with that proposition, it remained unclear how such a statement necessarily implied that the basis was a general principle formed within the international community under Article 38 (1) (*c*) and not international custom, especially given the fact that the Court had stated on several occasions, including in its 2015 judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, that the Convention was "intended to confirm obligations that already existed in customary international law".

In another example, given in paragraph 133, the Special Rapporteur referred to the Martens clause as having been considered by some States as a general principle of law "recognized by the community of nations, not derived from national legal systems". In that regard, the Special Rapporteur referred to a submission made by a single State, Nauru, in the case concerning *Legality of the Threat or Use of Nuclear Weapons*. That was certainly not reflective of wide and representative recognition by the community of States. Besides, in the proceedings in the same case, the International Court of Justice had highlighted the "customary" nature of the Martens clause by recalling that all States were bound by the rules in Protocol I Additional to the Geneva Conventions of 1949, which, when adopted, "were merely the expression of the pre-existing customary law, such as the Martens clause, reaffirmed in the first article" of the Protocol.

Part five of the report, on the future programme of work, mentioned that the Special Rapporteur's next report would deal with the functions of general principles of law and their relationship with other sources of international law. Among those functions, general principles could be used in interpreting other sources of international law. It would be helpful to provide specific examples of those functions. As to the relationship of general principles to other sources of international law, the meaning of "sources of international law", as well as the distinction between "rules" and "principles" should be clarified. Furthermore, the issue of regional "general principles", and whether the concept of universality of "general principles" would be inconsistent with such principles, should also be addressed. In addition, reference should be made to whether general principles or other sources of international law would prevail in cases of conflict between them.

The Commission might consider preparing an illustrative list of general principles of law with examples of national cases submitted by States. In fact, any information on the practice of States in relation to general principles of law would be of real value to the Commission's work on the topic. Regrettably, only four States had submitted comments in that regard. The Commission should therefore once again invite States to provide such information through a questionnaire.

In conclusion, he wished to thank the Special Rapporteur once again for his interesting and excellent second report. He supported sending all the proposed draft conclusions to the Drafting Committee.

Mr. Ouazzani Chahdi said that general principles of law raised many doctrinal controversies but played only a limited role in practice. While it was unclear from the wording of Article 38 (1) (*c*) of the Statute of the International Court of Justice whether they stemmed from national or international law – and there had been lively discussion on that question in the Sixth Committee of the General Assembly – it was agreed by most authors that general principles of law were an independent source of national law, as distinct from international law. He welcomed the explanation in paragraph 10 of the report that the purpose of the topic was to provide practical guidance to all those who might be called upon to apply general principles of law. It was, however, regrettable that only four States had responded to the call for information on national practice.

The term "civilized nations" was obsolete and anachronistic; he agreed with the proposal to replace it with the term "community of nations", which appeared in article 15 (2) of the International Covenant on Civil and Political Rights, and favoured retaining the word "nations".

He agreed with the Special Rapporteur that recognition was an indispensable condition for the existence of a general principle of law; the report might usefully have included a definition of that concept based on the analysis in paragraph 46 of the secretariat's memorandum. In the context of the methodology for the identification of general principles of law derived from national legal systems, it would be helpful to know what precisely was meant by the references to "practice", which could cover legislative, judicial or constitutional practice. Indeed, national constitutions could include norms common to several States, which could thus be considered general principles of law and then transposed into the framework of an international convention. For instance, the Convention on the Rights of the Child included principles such as a child's right to special protection, education and protection of health, which existed in most national constitutions.

The proposals regarding a two-step analysis for general principles of law were interesting, although he was not convinced by the conclusions on foundlings in paragraph 34, based on a case brought before the Supreme Court of the Philippines. He supported the proposal in paragraph 25 that the comparative analysis should be wide and representative and should reflect the "principal legal systems of the world", but questioned the lack of consistency in the use of that expression, which was replaced in paragraphs 50 and 54 by "different legal families and the various regions of the world". A draft conclusion explaining the terms and expressions used, as had been included in previous work of the Commission such as the draft articles on most-favoured-nation clauses, would be useful. Like other members, he wondered about the relevance of international organizations in the formation of general principles of law; clarification should be given, or the organizations concerned specified.

Regarding the compatibility of "general principles of law" with "fundamental principles of international law", he would like to know which fundamental principles of international law were being referred to. Sir Michael Wood had raised that question in respect of draft conclusion 6 (a), the proposed wording of which risked introducing a hierarchy between the two categories of principles, or between sources of international law. It would be preferable to speak of compatibility with "the exigencies of the international order", a phrase that appeared elsewhere in the report.

As noted by the Special Rapporteur in paragraph 121, the methodology for recognition of the general principles of law formed within the international legal system differed from that for recognition of those deriving from national legal systems. Moreover, it was difficult to distinguish the principles formed within the international legal system from the rules of customary international law. The Special Rapporteur, basing his arguments mainly on jurisprudence and treaty law, identified three possible "forms" of recognition of a general principle of law formed within the international legal system. However, his arguments were not convincing and needed to be further developed; he might include, for instance, references to Articles 1 and 2 of the Charter of the United Nations, as well as its Article 74 on good neighbourliness.

The principles mentioned in the report included the polluter-pays principle, which imputed to the polluter costs related to preventing or reducing the pollution for which it was responsible. The rather hasty deduction made in paragraph 137, that the principle was a "general principle of law" within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice, was questionable; the principle did not seem to have attained universal acceptance and there were exceptions to it – in the case of road transport, for example – which reduced the impact of environmental policy. Some authors recognized that the translation of the principle into actual policy was far from meeting the conditions needed to guarantee its maximum effectiveness and considered that it should be applied to all sectors of the economy.

Regarding the proposed draft conclusions, he would have some comments to make on the wording that could be discussed in the Drafting Committee.

Mr. Cissé, after congratulating the Special Rapporteur on his meticulous and well-researched second report, said that a strict reading of Article 38 (1) (*c*) of the Statute of the International Court of Justice supported the interpretation that the concept of general principles of law was not limited to national legal systems, but included a second category of principles – those formed within the international legal system – some of which could be transposed into national legal systems. For instance, the principle of sovereignty of States was also a principle of national law, as all constitutions protected it as a near-sacrosanct principle. Thus situated at the junction of national and international law, it raised the question of which of the two categories it, and other principles, belonged to. Indeed, as the Special Rapporteur had said, several principles of law invoked by States and international tribunals had been formed in the international legal system, rather than in national systems. Their existence was not surprising, given the distinct nature of the international legal system. For example, the principle of common but differentiated responsibilities would have a very limited impact at the national level, as it had its basis in international relations and the functioning of the international legal system, particularly in respect of international environmental law.

His long-held opinion was that the two categories of principles were part of a single whole and could influence each other. For instance, regional organizations could require their member States to respect the primacy of their international community law over national laws in the case of conflict between the two. In Africa, the rules and directives of the West African Economic and Monetary Union were directly applicable in national legal systems, without any need for mandatory constitutional procedures for the ratification of international treaties.

In contrast, in national legal systems, the transposition of international treaties into the national legal order obeyed the constitutional requirements of each State, with regard to, for example, the question of whether it was the executive or the legislative authorities that were competent to ratify a treaty with a view to transposition. However, there was no such process at the international level, so perhaps the International Court of Justice had a role to play in addressing the question of the compatibility of a principle drawn from a national legal system with the fundamental principles of international law. Compatibility could only be determined by examining the content of the principle; draft conclusion 8 appeared to offer some guidance in that respect.

The Commission should therefore be cautious in the wording of the draft conclusions and commentaries thereto, as, despite the impression given in the first and second reports, the division between the two categories of general principles of law, however useful in conceptual terms for understanding them, was not clear-cut. In practice, dividing them into categories could help in developing criteria and techniques for identifying them; it was no surprise that principles developed at the international level could influence national systems, and vice versa.

It was possible that the formation of general principles could develop simultaneously in both national and international systems after having first appeared in one. The precautionary principle, for instance, had emerged at the national level in Germany in the 1970s and had been adopted at the international level in the 1980s through a series of international agreements on protection of the North Sea and then at the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil, in 1992, after which it had been consolidated and affirmed at the international level, while also being developed in national legal systems throughout the world. The development, interpretation and application of the precautionary principle could thus be seen to work in both directions, from international to national and vice versa; it would be erroneous to see it as restricted to a single category. The categories should therefore not be seen as too rigid. But the criterion of transposition proposed in the second report risked complicating the attempt to establish general principles of law as a coherent, structured and unified block, whether formed at the national or the international level.

Regarding the proposed draft conclusions, he noted that the concept of “civilized nations” had been replaced by “community of nations”, which was in line with developments in the world and the new realities of international society. The change was unobjectionable, as the original wording, from the Statute of the International Court of Justice, was outdated and a relic of history. However, language alone could not wipe out the shortcomings of what was still a very conservative legal system. He questioned whether the general principles of law drawn from the two main legal systems – civil, or Romano-Germanic, law and common, or Anglo-Saxon, law – should be the only ones considered worthy of forming general principles of international law. As Antony Anghie and other eminent jurists had pointed out, that imbalance would continue to exist even if the expression “civilized nations” was replaced, as the European roots of international law had not automatically given way to universalism with its general application to all nations. International law was still greatly influenced by the civil law and common law systems, as could be seen in non-European States that used one of those two systems to the detriment of their own legal culture. Non-European legal systems, such as Islamic law or the various customary legal systems of indigenous or African peoples, were rarely mentioned in the discussion of general principles of law; they were, however, still very much alive and were used to resolve many legal issues and social differences.

One of the few instances of a legal opinion that transcended civil law and common law legal systems was the separate opinion of Judge Weeramantry, former vice-president of the International Court of Justice, in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. In

that case, he had provided a systematic and thorough analysis of the principle of sustainable development through a fairly exhaustive consideration of the traditions of peoples of the world in respect of the protection of nature and natural wealth and the environment in general. That example was surely not unique; the commentary to the draft conclusions and the future work of the Special Rapporteur should underline the lack of universalism and inclusion thus far in the discussion and propose practical ways of systematically identifying general principles of law in different States or regions of the world. Non-European legal systems were very present within national legal systems, as could be seen from the use of Islamic law in several Arab States and non-Arab countries such as Pakistan and Indonesia.

The recognition of customary law by countries as varied as Canada and South Africa, and in international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples, showed clearly that general principles of law accepted by those peoples or States must be taken into account. Indeed, with their ancient knowledge, indigenous peoples had influenced negotiations on the adoption of new rules and principles in the field of environmental law, particularly in respect of the protection of nature and natural resources.

Africa, too, was involved in the movement to build a new, more inclusive, international legal order. For instance, while child protection was a subject of modern law, in Africa, the education of a child had always been the responsibility of the whole community, not just the child's parents; guidance and correction could be given by any member of the village or even the national community. It would be an error not to take those legal orders into account in structuring the general principles of the international legal system; not to do so would only perpetuate the *status quo* represented by the anachronistic expression "recognized by civilized nations". In his view, concentrating on the general principles formed within the international legal system could contribute to maintaining the *status quo*. It might be complicated, but, if the aim of the work was to be objective, inclusive and transparent, the means must be found to systematically identify all principles of law found in national legal systems that were applicable or applied in the different regions of the world.

Regarding the wording of the proposed draft conclusions, he agreed with paragraph (a) of draft conclusion 4, but had some reservations with respect to its paragraph (b), as, while the universal or common application of a general principle of law was a condition for its recognition, its transposition into the international legal system alone was not a neutral criterion. That idea raised the question of the worth of a general principle of law that was common to all legal systems but had not been transposed into the international legal order, even as it continued to be applied in national legal orders. Did it lose its status as a general principle of law just because it had not been transposed into international law?

A distinction should be drawn between the application and the transposition of a general principle of law. It could be applied in both national and international law without having been transposed, simply because it was an established principle that was universally recognized in all legal systems. It might be said that such a principle was self-executing and applicable *de facto*. There was therefore no need for any particular measures to be taken for it to be recognized in national and international law. If, however, transposition was to be an essential condition for recognition of a general principle of law under international law, it should be specified which international body or institution – whether the International Court of Justice or another – had that competence. He doubted whether, if a general principle of law had simply been noted, stated or recalled in international treaties or General Assembly resolutions, it could be viewed as having been transposed.

He firmly believed that transposition should not be viewed as functioning in only one direction, from national legal systems to the international level; the principles and rules of international law could also be transposed from the international legal order to national systems. A new draft conclusion 4 (c) could provide for both situations, with the following wording: "if the principle is either applied in national legal systems or transposed into the international legal system" [*si ce principe est soit appliqué dans les systèmes juridiques nationaux, soit transposé dans le système juridique international*].

It must, however, be remembered that a general principle of law could be both international and national, and it was not always easy to differentiate between them. In either

case, it would be for international tribunals, particularly the International Court of Justice, to decide on issues concerning the identification or recognition of general principles of law.

He suggested that draft conclusion 4 (b) could be moved to a new paragraph (c) in draft conclusion 6, on ascertainment of transposition to the international legal system.

Regarding draft conclusion 5, he suggested that the first paragraph could be reworded as a chapeau introducing the other two paragraphs, which would be treated as subparagraphs. It would also be preferable to speak of the "identification" of common principles, rather than the determination of their existence, as they could exist without being identified.

He was uncertain whether the word "ascertainment" in the heading of draft conclusion 6 was appropriate. If it was, that raised the question of who should be ascertaining the transposition. In any case, the questions posed by paragraphs (a) and (b) could only be answered if an international judge, acting in the case of a dispute or providing an advisory opinion, were to decide which general principle of law had become a general principle of international law and which had not. In paragraph (b), the expression "adequate application" was not appropriate; the need for neutrality meant that it should read simply "the conditions exist for its application in the international legal system".

Draft conclusion 7 would be better placed immediately after draft conclusion 5, so that questions related to the determination of general principles of international law were addressed after those concerning the determination of general principles common to the different legal systems. He proposed the following wording for draft conclusion 7 (b): "a principle is based on general rules of conventional or customary international law or international case law" [*que le principe est fondé sur les règles générales du droit international conventionnel, coutumier ou jurisprudentiel*]. The wording of paragraph (c) was unclear and should be amended to read: "a principle is inherent in the international legal system" [*que le principe est inhérent au système juridique international*]. Lastly, paragraphs (a) and (c) expressed the same basic idea, that the principles should be recognized in international law; nothing would be lost by deleting paragraph (a), as paragraph (b) was more comprehensive, particularly if the idea of international case law was added.

In conclusion, he supported sending all the draft conclusions proposed in the report to the Drafting Committee.

Mr. Rajput said that he wished to begin by thanking the Special Rapporteur for his thoroughly researched and thought-provoking second report, and the secretariat for its memorandum, which helped shed light on some underlying issues in practice. He was broadly in agreement with the approach of the Special Rapporteur and with the contents of the report. The exception was part three, on the creation of general principles at the international level, which would be the focus of his remarks.

Firstly, he wished to touch upon a general conceptual point. It was necessary to take care to distinguish between "principles of law", "general international law" and "general principles of law under Article 38 (1) (*c*) of the Statute of the International Court of Justice". There was a tendency to mix the three, as had been pointed out by the secretariat in its memorandum and by Sir Michael Wood in his remarks. The three concepts were separate and must be kept that way so as to avoid all kinds of confusion, some of which appeared to be plaguing the discussion in part three of the Special Rapporteur's report. The differences between the concepts had been alluded to in the 2006 report of the Study Group on fragmentation of international law and in academic writings. As Mr. Forteau had explained, principles of law were maxims of logic and common sense that were applied from time to time to fill gaps. Examples included principles used for treaty interpretation, such as *noscitur a sociis*, *ut res magis valeat quam perat* and *pacta tertiis nec nocent nec prosunt*. Those were not necessarily, and not always, general principles of law under Article 38 (1) (*c*). General international law was often a general and collective reference to all the rules of international law, and was often found in investment treaties, where instead of referring to each source of applicable international law, a general reference was made to all the sources using the phrase "general international law". The 2006 report of the Study Group on fragmentation of international law had elaborated on that distinction. In the topic at hand, the Commission was not working on either of those categories. It was dealing only with general principles of law under Article 38 (1) (*c*), and it was important to make that point clear to the outside world.

The current title of the topic was “general principles of law”, which had the potential to create confusion. To avoid any such confusion, the Commission should add the words “under Article 38 (1) (*c*) of the Statute of the International Court of Justice” to the title.

He wished to make a further general point about the Special Rapporteur’s methodology, which relied on arguments put forward by States before international courts and tribunals. While such arguments undoubtedly represented the views of the States concerned and would contribute towards *opinio juris*, it was equally important to see how other States and the court or tribunal in question had reacted to them. In paragraph 148, for example, the Special Rapporteur referred to the arguments advanced by Portugal about international legal principles embedded in the international legal system in the case concerning the *Right of Passage over Indian Territory (Portugal v. India)*, but those arguments had been explicitly rejected by India. Given that, as noted in paragraph 149 of the report, the Court had not commented on the issue, no conclusions should be drawn.

He broadly agreed with the Special Rapporteur’s analysis of the method proposed for determining the existence of a principle common to the principal legal systems of the world and the grounds for its transposition to international law. He was, therefore, broadly in agreement with draft conclusions 4 to 6, although improvements could undoubtedly be made to them in the Drafting Committee. With regard to draft conclusion 5 (3), the text referred to “assessment of national legislations and decisions of national courts”. In his view, that description was narrow and omitted other practices such as administrative or executive actions, which would be equally relevant for determining the existence of a principle which could be treated as a candidate for qualification as a general principle of law under Article 38 (1) (*c*). In addition, like Mr. Forteau, he was a little uncomfortable with the term “community of nations”, although for slightly different reasons. Over the years, the term “nation” had acquired a certain meaning owing to claims for cessation by entities that might be nations but were not States. The Commission needed to look at the practice of States, but not that of nations, since the latter were not political entities recognized in international law. He therefore preferred the term “community of States”. That formulation had been used in draft conclusion 4 (b) in the topic “Peremptory norms of general international law (*jus cogens*)”, from which inspiration could be drawn.

In his view, part three of the report, which constituted the basis of draft conclusion 7, was the weak link in an otherwise excellent report. In part three, conclusions were often drawn without an explanation of their basis, which posed a methodological problem. The limited reasoning that was provided in the report could be found in paragraph 122, which indicated that general principles of law were those principles that had been widely incorporated into treaties and other international instruments such as the General Assembly resolutions. In addition, in each of the examples used to establish the thesis of creation of general principles at the international level, either conclusions were drawn without detailing how each one of them could be said to be a general principle, or, simply by applying the proposal contained in draft conclusion 7 in reverse order, it was claimed that those principles could satisfy the test and be treated as general principles. A similar point had been made by Mr. Ouazzani Chahdi.

He had the impression that the philosophy behind draft conclusion 7 was based on the distinction between other rules of international law, such as treaty and custom, and norms that constituted the basis of those rules, which were to be treated as general principles of law. That argument sounded similar to that made for the *Grundnorm*. If it was accepted, the Commission would be unravelling the very basis of understanding of sources by placing general principles at the level of *jus cogens*.

He wished to recall the discussion that had taken place within the Advisory Committee of Jurists that had drafted the Statute of the Permanent Court of International Justice, which had eventually become the Statute of the International Court of Justice, particularly with regard to Article 38 (1) (*c*).

The current text was the outcome of proposals by Elihu Root and Lord Phillimore. Mr. Root had proposed that there should be consent of States for any rule to be accepted as a source of law under Article 38 (1) (*c*). Deeming that approach to be far too narrow, Lord Phillimore had proposed that the third source could be based on legal principles developed,

to use his words, *in foro domestico*, meaning at the level of domestic law. In fact, the only discussion about the possibility of creation of general principles at the level of international law had been triggered by the proposal, put forward by five neutral powers and ultimately rejected, that it should be possible to include general principles based on international law. The Committee had concluded that Article 38 (1) (*c*) was essentially an outcome of *in foro domestico*: international law as borrowed from the domestic legal order. Hersch Lauterpacht, in his celebrated work *Private Law Sources and Analogies of International Law*, had relied on that material and concluded quite clearly that general principles of law under Article 38 (1) (*c*) were derived from domestic law through a comparative law process and not from international law. The Special Rapporteur also referred to article 15 (2) of the International Covenant on Civil and Political Rights at one point, but the negotiating history of the Covenant revealed that when States were discussing that provision they had also had in mind domestic law, *in foro domestico*, rather than international law. It was worth noting that the original proposal made by the President of the Advisory Committee, Baron Descamps, had been similar to what was being proposed in draft conclusion 7 and had hinted at the creation of principles at the level of international law. That proposal, "the rules of international law as recognized by the legal conscience of civilized nations", had been roundly defeated. If the Commission decided to revert back to the President's proposal, or another proposal to the same effect, and disagree with the understanding of the Advisory Committee of Jurists, it would be amending or rewriting the Statute of the International Court of Justice and upsetting what had been understood to be settled for more than a century and followed by States as a source of international law.

It seemed that in part three, as in the first report, the Special Rapporteur treated decisions of international courts and tribunals containing a reference to "principles of law", "general principles of law or international law" or "civilized nations" as sufficient to draw the conclusion that they were examples of the creation of general principles under Article 38 (1) (*c*) at the level of international law. On that issue, he wished to apply the wise test proposed by Alain Pellet, who had correctly suggested that although such references existed in several judicial decisions, the courts and tribunals had been careful not to refer to Article 38 (1) (*c*) in any of them because when they had discussed those matters, they had not had in mind Article 38 (1) (*c*), since general principles of international law under that provision were exclusively an outcome of *in foro domestico*. Mr. Pellet's test of methodology would be a good test for the Commission to use to understand whether, when a court or tribunal referred to civilized nations or to general principles, it was indeed referring to general principles of law within the meaning of Article 38 (1) (*c*).

The Special Rapporteur had stated honestly, in paragraphs 138, 145, 166 and 168, that he was employing a "deductive" methodology to arrive at his conclusions. That approach was the exact opposite to the one that had been used by Bin Cheng, who, in the first systematic and seminal work on the topic, had adopted an "inductive" methodology. The problem with a deductive methodology was that a theoretical position was first taken and then conclusions suiting that theoretical framework were adopted. In an inductive methodology, patterns were observed and conclusions drawn from them. The Commission needed to be careful not to introduce a deductive method of using examples, as the Special Rapporteur had done, to support the ultimate conclusion that general principles of law were created at the international level.

He wished to make some observations on the examples used by the Special Rapporteur. Firstly, the Special Rapporteur had relied on the Nürnberg Principles as a general principle of law. That conclusion seemed to have been triggered by the mere presence of the words "principles" or "civilized nations". Therefore, when the Special Rapporteur referred to the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* in paragraph 128, he was ignoring the fact that a holistic reading of the passage he cited showed that it was a reference to the peremptory nature of prevention of genocide and not a general principle of law under Article 38 (1) (*c*). The core elements of the Nürnberg Principles were argued by scholars to be rules of customary international law. If the Special Rapporteur's proposal was accepted, it would reduce those rules to a "gap-filling" function.

He had found the repeated references to and emphasis on General Assembly resolution 95 (I), adopting the Nürnberg Principles, ironic. That resolution had been adopted unanimously by the General Assembly in 1946, when the international community had comprised only 55 States. Needless to say, all those States were civilized, since the rest of the world's peoples had not yet been considered civilized enough to govern themselves. India had been one of the first countries to gain independence, doing so in 1947, one year after the adoption of the resolution. Following decolonization, the rest of the world had been given a voice and had been unequivocal in criticizing the Nürnberg Principles as one-sided victor's justice. He wished to humbly advise the Special Rapporteur to take a close look at the dissenting opinion of Judge Radhabinod Pal, who had served as a judge on the International Military Tribunal for the Far East, to understand the sensitivities and resentment towards the resolution. The use of that example was ironic because, with one hand, the Commission was seeking to remove the term "civilized nations" and, with the other, to perpetuate what had been done under that guise. He would be shocked if the extent to which the Special Rapporteur relied on resolution 95 (I), and the enthusiasm with which he did so, was not seen by scholars from the Third World as the continuation of a colonial mindset, which would be embarrassing for the Commission.

The meeting rose at 1.05 p.m.