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Held at the Palais des Nations, Geneva, on Friday, 16 July 2021, at 11 a.m.

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General principles of law (*continued*)

Present:

Chair:	Mr. Tladi (First Vice-Chair)
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	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. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

In the absence of Mr. Hmoud, Mr. Tladi (First Vice-Chair) took the Chair.

The meeting was called to order at 11 a.m.

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

Mr. Rajput, continuing the statement that he had partially delivered at the previous meeting, recalled that, at that meeting, he had highlighted the problems associated with the reliance, in the second report on general principles of law (A/CN.4/741 and Corr.1), on a deductive methodology in the arguments in support of draft conclusion 7, and had emphasized the need for an inductive methodology that would lend clarity to the Commission's work on the topic and would avoid the subjectivity associated with deductive methodologies.

In addition to the example of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles), the Special Rapporteur used the example of the Martens clause to support the argument that general principles of law could be created at the international level. However, the argument based on the Martens clause was also unconvincing, as it appeared to be derived from the content of the clause rather than its legal nature. While the content of the Martens clause certainly referred to the application of general principles, that fact was not sufficient for concluding that the clause itself had the legal character of a general principle of law under Article 38 (1) (*c*) of the Statute of the International Court of Justice.

Paragraph 133 of the report noted that, in a submission related to the Court's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, Nauru had stated that: "The Martens clause seems to require the application of general principles of law." However, that statement did not mean that the Martens clause was itself a general principle; Nauru was simply reflecting on the content of the clause. Moreover, in the advisory opinion, the Court itself did not specifically refer to the clause as a general principle or even as a rule of customary law, but only as part of international humanitarian law. The same was true of the Court's advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. While the Martens clause continued to apply as a treaty rule or, as some might argue, a rule of customary international law, none of the examples cited in the report referred to it as a general principle in itself. Curiously, the example given in paragraph 132 referred to it as being derived from customary international law, and not as a general principle.

He feared that, if the Commission accepted the premise that general principles of law under Article 38 (1) (*c*) were created at the international level, it would cause broader and deeper systemic disruptions in different fields of international law. The polluter pays principle could be used to illustrate that proposition. In paragraphs 135 to 137 of the report, the Special Rapporteur put forward no evidence to show that, normatively, the polluter pays principle was a general principle of international law, other, perhaps, than to surmise that, because the concept was described as a "principle", it might well be one.

It was also important to recall the drafting history of the polluter pays principle. Developing countries had resisted its inclusion, as principle 16, in the Rio Declaration on Environment and Development. They had been reluctant to accept the cost of internationalizing the consequences of the polluter pays principle, fearing that its inclusion would compromise their development strategies, deprive them of their developmental aspirations, impose an additional burden on them and leave them at a disadvantage in relation to the developed world. Although some scholars had attempted to give a higher normative value to the principle, others had taken the view that it was no more than a regional custom in Europe.

If the Special Rapporteur's proposal was accepted, even though the elements of custom were not satisfied, he feared that any principle could become binding on States, even if it was not a treaty norm and without the consent of the States concerned, and with little or sometimes no support from States in general. In that situation, the first and second sources of international law cited in Article 38 (1) of the Statute of the International Court of Justice – namely, treaties and custom – would become redundant. Accordingly, he was not convinced

that the “back-door” introduction of certain principles as binding rules of international law would be appropriate, and he was concerned about the imbalance that it would create with the other sources of international law.

Curiously, the Special Rapporteur did not claim that the principle of common but differentiated responsibilities, which had been alluded to in the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) prior to its emergence in the Rio Declaration, was a general principle under Article 38 even though it had been included in several treaties, the most important of which was the Paris Agreement on climate change. Through a brief comparative review, he had ascertained that 15 multilateral treaties referred to the principle of common but differentiated responsibilities while only 12 referred to the polluter pays principle, yet only the latter principle, not the former, was identified as a general principle by the Special Rapporteur. If the Special Rapporteur agreed with that analysis and declared the principle of common but differentiated responsibilities also to be a general principle of law, the different priorities inherent in the two principles might give rise to conflict. Although it might be suggested that the conflict could possibly be resolved on the basis of the report of the Commission’s Study Group on fragmentation of international law (A/CN.4/L.682), not all conflicts could be so resolved. That was just one example of potential conflict; more would be certain to arise.

Draft conclusion 7 also gave rise to other issues. It implied that all treaties were codifying, which was definitely not the case. When a treaty did codify a norm, that norm was either a peremptory norm of international law, as in the case of the Convention on the Prevention and Punishment of the Crime of Genocide, or else a rule of customary international law, as in the case of articles 15, 74 and 83 of the United Nations Convention on the Law of the Sea, which codified the rules on maritime delimitation. The assumption that all treaties were codifying had a number of pitfalls. The fair and equitable treatment standard, for example, was one of the most controversial standards in international investment law. Some investment tribunals had interpreted it too broadly as a ground for reducing States’ regulatory space, which was used to protect the public interest, the environment and labour standards. If draft conclusion 7 was accepted, fair and equitable treatment could come to be regarded as a general principle under Article 38 because it was referred to frequently in treaties.

Because of the problems associated with the broad interpretation of that standard, several States had removed the corresponding clause from model treaties on bilateral investment such as those of India and the Association of Southeast Asian Nations. If draft conclusion 7 was accepted, the fair and equitable treatment standard would be applicable as a general principle of law and could arguably be binding on States even when it did not appear in an investment treaty, particularly since there was no hierarchy of sources. The Commission should not have a fragmented view of international law; it needed to look at the issues holistically. Draft conclusion 7 might reflect a natural law approach, but it could create serious difficulties in the application and functioning of international law. The fair and equitable treatment standard was just one example; countless other examples could be cited.

It might appear to be a good idea to propose that general principles of law could be formed at the international level as well as at the national level, because there would be more rules as a result and there were relatively few rules of international law compared to rules of domestic law. Unfortunately, however, the result of that noble endeavour would be to blur the distinction between *jus cogens*, treaty rules and norms of customary international law, allowing for arguments to be made that some of the principles of that stature should be treated as general principles, and thus as having lesser value. While there was no doubt that there was no formal hierarchy between the different sources, the drafting history of Article 38 and the application of general principles in practice provided ample evidence that they essentially performed a gap-filling function, to prevent situations of *non liquet*. As Mr. Forteau had mentioned previously, the Commission should not create a situation in which the value of superior norms such as *jus cogens* was reduced. For example, the effect of characterizing the prevention of genocide as a general principle of law, as the Special Rapporteur did in paragraphs 125 and 130 of the report, was to reduce the normative rigour of that principle.

Another question that arose was what would happen in the event of a conflict between a principle recognized in domestic law and a principle recognized at the international level.

General principles formed at the international level contradicted the requirement of recognition that was embedded in Article 38 (1) (*c*), which was rightly considered by the Special Rapporteur in detail in part two, chapter II, of the report. Rewriting the Statute of the International Court of Justice and creating another source of law that competed not just with treaties and custom but also with *jus cogens* was the last thing that the Commission should be doing.

Reliance on so-called principles embedded in the international legal system as a basis for declaring the existence of general principles appeared to be a dubious approach. He had already referred to the error of relying solely on the arguments put forward by Portugal in the *Right of Passage over Indian Territory (Portugal v. India)* case before the International Court of Justice, given that the position of India had been the exact opposite. Reliance on *uti possidetis* was similarly unconvincing, for the reasons given by Mr. Tladi. Specifically, the fact that the International Court of Justice, in *Frontier Dispute (Burkina Faso/Mali)*, had referred to *uti possidetis* as a general principle did not support the conclusion drawn by the Special Rapporteur in paragraph 150 of the report, as the Court had made no reference to Article 38 (1) (*c*) of the Statute.

In conclusion, he said that he was in favour of referring all the draft conclusions to the Drafting Committee, with the exception of draft conclusion 7.

Mr. Reinisch said that the Special Rapporteur's second report was very thorough and provided an impressive overview of the comparative law exercise to be carried out in order to ascertain the existence of principles common to the principal legal systems of the world. He too believed that such principles were not limited to private law, but also extended to the field of public law. The field of investment law demonstrated that a comparative analysis of public law principles, such as legal certainty, proportionality, administrative due process and the protection of vested rights, could be a fruitful line of enquiry.

Owing to time constraints, he would not refer to the identification of general principles of law derived from national legal systems in his statement. Instead, he would submit written comments on that aspect of the topic.

Turning to part two, chapter III, of the report and the corresponding draft conclusion 6, which set forth the circumstances in which a general principle of law was transposed to the international legal system, he said that the current wording of draft conclusion 6 suggested that transposition was a conscious act performed by certain actors. However, as the report explained, transposition rested rather on the question of whether principles derived from national law were objectively capable of being applied in the international arena, in a process that, as the Special Rapporteur acknowledged, did not occur automatically. For instance, the Special Rapporteur referred to a principle's capability "of existing within the broader framework of international law" in paragraph 75, and to principles "capable of operating" in international law in paragraph 73. On that basis, the terms "transposability" and "transposable" might better reflect the idea that such capability was objectively determined.

He shared the concerns raised by some members of the Commission in respect of part two, chapter III (A), entitled "Compatibility with the fundamental principles of international law". Although the rationale underlying the compatibility requirement was cogent and logical in principle, the standard itself was too vague. For a better understanding of what constituted "fundamental principles of international law", it would be helpful to know whether the Special Rapporteur considered some or all of the principles enshrined in the Charter of the United Nations, as reaffirmed in the annex to General Assembly resolution 2625 (XXV), to fall within that category. It would also be helpful to know whether a norm conflict between such "fundamental principles" would necessarily preclude the emergence of a general principle. The statement, in paragraph 75 of the report, that the compatibility test served to ensure that a legal principle was "capable of existing within the broader framework of international law" would suggest that the bar was set higher.

With regard to the second condition for transposition, namely the "adequate application of the principle in the international legal system", he agreed with the Special Rapporteur that the primary aim of that condition was to determine the suitability of a general principle for application in the international legal order, and that the condition therefore

constituted a necessary filter for the transposition of principles derived from national legal systems.

The most innovative and, as Commission members had noted, also the most controversial aspects of the report were contained in part three, entitled “Identification of general principles of law formed within the international legal system”. The report stated that such principles could be identified in three ways. In relation to the case law analysed in that connection, the report highlighted that an important criterion was whether, in a specific case, a norm was identified following a methodology that was distinct. That criterion should be key to the Commission’s approach: the determining factor should be the methodology applied by the judicial body in order to ascertain the existence of a given norm in international law. That methodology might possibly be even more important than the specific terminology used by the judicial body.

That said, he was not fully convinced by the Special Rapporteur’s interpretation of certain cases. The first category of “general principles of law formed within the international legal system” cited in the report consisted of “principles widely recognized in treaties and other international instruments”. The examples cited included principles relevant for international criminal law, namely the Nürnberg Principles and the prohibition of genocide; for international humanitarian law, namely the Martens clause; and for international environmental law, namely the polluter pays principle. However, the report did not offer a single, unified methodology that could be used to explain the purportedly binding nature of those different principles. At a general level, the report affirmed that it was possible to identify such a principle by ascertaining that it had been “widely incorporated into treaties and other international instruments, such as General Assembly resolutions”, yet the only principle cited that was “widely incorporated” in treaties was the polluter pays principle. He noted that, in 2004, which was subsequent to the adoption of all the treaties cited as evidencing the recognition of that principle, the arbitral tribunal in a dispute between France and the Netherlands concerning the Convention on the Protection of the Rhine against Pollution by Chlorides had concluded that the polluter pays principle was not “a part of general international law”.

None of the other principles cited in the report had been “widely recognized in treaties”; rather, they had been included in certain individual instruments of particular importance at the relevant moment in time. Of the principles cited in the report, the prohibition of genocide was incorporated in two instruments and the Nürnberg Principles were incorporated in several, besides being recognized implicitly in various human rights treaties. The Martens clause was included in several treaties and there were indications that it had already been considered of legal relevance in 1948, since it had been incorporated in the 1899 and 1907 Hague Conventions respecting the Laws and Customs of War on Land and the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

As further evidence that the prohibition of genocide constituted a general principle of law, the report referred to the statement of the International Court of Justice, in its advisory opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation”. The Special Rapporteur was correct to point out, in paragraph 130 of the report, that that language was reminiscent of Article 38 (1) (*c*) of the Court’s Statute. It should also be noted that the Court itself had subsequently cited that same passage in its 2007 judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, when considering “the existing requirements of customary international law, a matter emphasized by the Court in 1951”.

More importantly, however, the suggested methodology that consisted of ascertaining “wide recognition in treaties” did not accommodate principles that were widely incorporated in numerous bilateral and multilateral treaties but were clearly not considered part of general international law. That category included various principles incorporated in international investment agreements and in extradition and tax treaties. He would welcome clarification as to whether the Special Rapporteur considered it necessary to take account of the character of the treaties or instruments in which a principle was incorporated in order to distinguish

between different legal effects produced by the wide recognition of certain principles in treaties.

He recalled that the Commission had addressed precisely that point in its work on the topic of international liability. In the third report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/566), Special Rapporteur Rao had stated that: "[A]uthoritative assertions cannot be made convincingly that a principle is part of general international law merely on the basis that it has been adopted repeatedly by States as agreed provisions in texts of treaties. … Even if they are in force, on the face of it and without more, they could at best be treated as mere expressions of bilateral and multilateral accommodation and as such applicable only as between the parties to the treaties concerned. Hence, they cannot be regarded by themselves as giving rise to a general principle of international law." That description of the problem was very apt: "without more", a principle incorporated in various treaties would be simply a treaty commitment repeatedly agreed to by various parties. Further thought was therefore needed in order to determine what the additional elements might be that would allow a principle to be considered to have become relevant for general international law.

One possible argument was that such "principles" could be used to specify how international institutions could exercise the powers entrusted to them. A case in point was the award in the arbitration regarding the delimitation of the Abyei Area between the Government of the Sudan and the Sudan People's Liberation Movement/Army, in which the arbitral tribunal had had to apply "general principles of law and practice". The tribunal had repeatedly derived those general principles – notably, those related to the possibility of partial nullity of decisions and those concerning the inclusion of substantive errors within the standard of review – from decisions of international courts and tribunals, treaties and non-binding documents.

As a second type of principle formed within the international legal system, the second report identified "principles underlying general rules of conventional or customary international law". Having first noted that the recognition of such principles "appears to be inferred from the general acceptance of the rules which they underlie", the Special Rapporteur argued that: "The methodology for their identification is essentially deductive: one must look at specific rules of international law and deduce the principles underlying them." However, the report provided few references to support that argument, citing only the judgment of the International Court of Justice in the *Corfu Channel (United Kingdom v. Albania)* case, the submissions of Indonesia in relation to the Court's advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* and the findings of the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Anto Furundžija*.

In the *Corfu Channel* case, the Court had essentially taken three principles into account: "elementary considerations of humanity", "the principle of the freedom of maritime communication" and "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". The Court had neither clarified the source of those "general and well-recognized principles" nor applied any discernible methodology for ascertaining their existence; it had simply referred to the Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines of 1907, which might be said to enshrine rules that reflected those principles.

Scholarly debate on the source of those principles had been divided ever since. Some of the scholars cited by the Special Rapporteur explicitly supported the conclusions set out in the report, but others took a much more cautious view, stating simply that the principles "could have been derived from the Hague Convention VIII". Other scholars had argued strongly that the Court had applied those principles as customary international law. The Court's own approach suggested that the *Corfu Channel* case had been something of an outlier; that view was supported by its subsequent jurisprudence on "elementary considerations of humanity", in which it referred to "elementary considerations of humanity" not as an autonomous source of legal obligations but as an inherent characteristic of humanitarian rules. Moreover, in its advisory opinions on the *Legality of the Threat or Use of Nuclear Weapons* and on the *Legal Consequences of the Construction of a Wall in the*

Occupied Palestinian Territory, it associated "elementary considerations of humanity" with treaty rules and the explicit assertion of customary norms.

The approach taken by the International Tribunal for the Former Yugoslavia also supported the conclusion that the principle of "elementary considerations of humanity" was reflected in the various rules of international humanitarian law. However, the principle appeared to be considered an interpretative standard rather than an independent source of obligations. In *Prosecutor v. Kupreškić et al*., the Trial Chamber had qualified the role of "elementary considerations of humanity" by clarifying that it had recourse to those "considerations" only as they were exemplified in the Martens clause, which had "become part of customary international law". Furthermore, the Trial Chamber had emphasized that the Martens clause "may not be taken to mean that the 'principles of humanity' and the 'dictates of public conscience' have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice".

Those points called into question whether such principles could be considered to constitute a source of law within the meaning of Article 38 of the Statute of the International Court of Justice. In particular, the assertion in paragraph 145 of the report that such principles could "be applied independently of the relevant rules of conventional or customary international law, and even in the absence of the latter" required closer scrutiny and additional evidence.

The Special Rapporteur identified "principles inherent in the basic features and fundamental requirements of the international legal system" as a third category of principles formed within the international legal system. The report stated that such principles could be inferred from "the fundamental features and requirements" or "the basic features and fundamental requirements" of international law but gave no detail of any specific methodology that might be used to that end. It did, however, cite several principles as falling within that category: the principle of consent to jurisdiction; the principles invoked by the parties in the *Right of Passage* case, which had included the independence and equality of States; the principle of *uti possidetis juris*, as applied by the International Court of Justice in *Frontier Dispute (Burkina Faso/Mali)*; the principles governing the delimitation of maritime boundaries, as applied in the *Fisheries* case between the United Kingdom and Norway; and, lastly, certain principles applied by the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Kupreškić et al*., in its deliberations over the possibility of departing from "an erroneous legal classification of facts by the Prosecutor".

In general, it should be emphasized that such principles were "recognized" by States at an extremely abstract level, if at all. Specifically, the "fundamental features" of the international legal system, such as the notion of sovereignty, were not created by States; rather, they existed in the context of, and followed from, numerous norms of international law.

The decision in *Prosecutor v. Kupreškić et al*. involved the balancing of two requirements: that the fair trial rights of the accused should be safeguarded and that the International Tribunal for the Former Yugoslavia should be able to "exercise all the powers … that are necessary for [it] to fulfil [its] mission efficiently and in the interests of justice". The former requirement resulted from article 21 of the statute of the Tribunal itself, which, in turn, resembled and was based on the fair trial guarantees enshrined in article 14 of the International Covenant on Civil and Political Rights. In interpreting those guarantees, the Trial Chamber had taken account of the "rudimentary state" of international criminal law and had thus departed from what article 14 of the Covenant might require in the domestic context. From his perspective, the Tribunal had not ascertained any general principle within the meaning of Article 38 of the Statute of the International Court of Justice, but had only engaged in acts of interpretation.

The question remained as to whether the second requirement, that the International Tribunal for the Former Yugoslavia should be able to exercise its powers to fulfil its mission to the fullest extent, had the character of a general principle. While that "principle" certainly emanated from positive law, whether it existed independently from and outside the context of the Tribunal's statute was questionable. Moreover, the Trial Chamber's reasoning showed that the requirement in question was clearly secondary, since it gave the Chamber discretion

to ensure the continuation of the proceedings only insofar as there was no discernible risk to the fair trial rights of the accused. The decision in *Prosecutor v. Kupreškić et al*. had thus been described as involving "a declaration of judicial policy deprived of substantial legal content", rather than a general principle of law.

The approach taken by the Special Rapporteur in relation to draft conclusions 8 and 9, namely to follow the example of the Commission's work on customary international law, appeared to be very sensible. However, the teachings of scholars had often been relied upon in order to prove not the existence of general principles of law as such, but rather the widespread recognition of such a principle in national legal systems. For instance, the Iran-United States Claims Tribunal had regularly relied on publications such as the *International Encyclopedia of Comparative Law* for that purpose. That point was likewise illustrated by the examples cited in paragraphs 179 and 180 of the report.

Lastly, he said that he supported the pursuit of work on the topic along the path that had been chosen and endorsed the referral of the draft conclusions to the Drafting Committee.

Ms. Oral said that she wished to extend her appreciation to the Special Rapporteur for his clear and well-structured second report. She fully concurred that the focus of the Commission's work should remain on clarifying, in a practical manner, how to demonstrate the existence of a general principle of law. She further agreed that the criteria for determining the existence of a general principle of law must be strict but not too cumbersome or inflexible, and had noted Mr. Forteau's comments on the need to leave some margin of discretion in that regard.

As had been pointed out in the Special Rapporteur's first report (A/CN.4/732) and in the memorandum by the Secretariat (A/CN.4/742), one of the challenges facing the Commission was the lack of clarity in the terminology used to refer to general principles of law. One especially interesting aspect of the topic was the question of whether or not there were two categories of general principles of law: those derived from national legal systems and those formed within the international legal system. As she had said in her 2019 statement on the first report of the Special Rapporteur, she supported the view that there were two distinct categories of general principles of law.

There was unanimity among States and members of the Commission on the outdated and pejorative nature of the expression "civilized nations". Her initial reaction to the alternative proposed by the Special Rapporteur, "community of nations", had been somewhat hesitant, as that term, despite its use in the International Covenant on Civil and Political Rights, could also be regarded as anachronistic. Although Sir Michael Wood had offered the simpler alternative "States", she found that term to lack the notion of collectivity that was embedded in the word "community". Mr. Saboia had put forward some very compelling reasons as to why the use of "nations" might actually allow for more inclusivity than she had originally thought. She now took a different view and supported the use of the phrase "community of nations". In any event, the Commission's exact understanding of the term should be explained in the commentary.

She had doubts about the appropriateness of the phrase "principal legal systems of the world", for two reasons: first, that term was used only in the statute of the International Law Commission and the Statute of the International Court of Justice; and second, it also dated back to the time of the League of Nations. In interpreting what was meant by the "principal legal systems of the world", it should be borne in mind that the term had been created for the Permanent Court of International Justice by the Advisory Committee of Jurists, in which European systems of law had been disproportionately represented. It was important that the Commission should make visible efforts to adopt a broad and inclusive view of the legal systems of the world, going beyond the traditional civil and common law dichotomy referred to by Ms. Lehto. She saw no reason not to use the phrase "legal systems of the world".

One of the key challenges associated with the topic was how to distinguish general principles of law from rules of customary international law. That question would have a bearing on the Special Rapporteur's future work on the functions of general principles of law and their relationship with other sources of law. She hoped that those points would be dealt with in more detail in the Special Rapporteur's next report.

Turning to the draft conclusions proposed in the second report, she said that the two-step methodology for identifying general principles of law derived from national legal systems, which was proposed in draft conclusion 4, was clear. It was the second step, namely the ascertainment of a principle's transposition to the international legal system, that distinguished a general principle of law under Article 38 (1) (*c*) of the Statute of the International Court of Justice from the other sources of international law. The idea that there must be transposition from the national realm to the international realm was clearly reflected in Article 38 (1) (*c*), which qualified its reference to general principles of law by adding the phrase "recognized by [the community of] nations". The operative element of "recognition" in draft conclusion 4 ensured the "internationalization" of general principles of law derived from national systems for the purpose of serving as a source of international law. She agreed with Mr. Cissé that transposition could be a two-way process. That was particularly true of the second category of general principles of law, those that were formed within the international legal system, some of which could be and had been transposed to national legal systems.

With regard to draft conclusion 5, as the Special Rapporteur had explained, a comparative analysis of national legal systems was required in order to determine the existence of a principle common to the principal legal systems of the world. That analysis should be wide and representative and cover different legal families and regions of the world. Mr. Tladi had correctly noted that, while the analysis should certainly be wide in scope, it did not need to be deep. While she understood that there were some practical issues and erratic practice associated with such comparative study, it should not be discounted. However, the question as to what exactly was meant by "legal families and regions of the world" was an important one. While some members viewed the term "legal families" as being too narrow, in her view it was less formalistic and could allow for the inclusion of a more diverse pool of legal systems, such as those of indigenous and traditional cultures. That point should be made clear in the commentary.

In draft conclusion 6, the Special Rapporteur proposed two elements necessary for the successful transposition of a domestic law principle to the international legal system. Several members had said that they found the reference to "fundamental principles" to be too vague, and it was likely that the determination of what principles were "fundamental" would fall to international courts and tribunals and even to domestic courts. However, she believed that the word "fundamental" should be retained, as it introduced an important threshold and was sufficiently clear for the purposes of the draft conclusions. While she understood the intent behind subparagraph (b), she found that its current wording was unclear and should be reviewed by the Drafting Committee.

With regard to draft conclusion 7 on the identification of general principles of law formed within the international legal system, the report offered many examples of such principles drawn from different areas of law, including international environmental law. One example was the set of principles set out in the 1992 Rio Declaration on Environment and Development, which were often cited in the preambles of international instruments. In her view, that was certainly evidence of recognition by the community of nations. She also fully subscribed to the many excellent points made by Mr. Cissé regarding general principles of law formed within the international legal system. "Formed" did not necessarily mean that the principle in question had originated exclusively from an international process, but that the actual act of formation had taken place in the international realm. The precautionary principle might have had its origins in Germany, but its adoption by States as one of the Rio principles had led to its rise to prominence. More importantly, it had been recognized not only in other international instruments but also in many national laws, European Union law and other regional instruments. The principle of common but differentiated responsibilities was another principle that had originated and had been formed in the international legal system, in both soft law instruments and conventions. It was a core general principle for developing States. The crux of the matter was that, unlike general principles of law derived from national legal systems, those and other principles were not common legal concepts found in national legal systems, but a product of law-making and negotiation processes at the international level. The restriction of general principles of law to a single category comprising those derived from national legal systems would fail to account for the creation and existence of those principles, which had been formed within the international legal system.

Although the principle of estoppel was not part of international environmental law *per se*, it had been referred to as a general principle of law by the arbitral tribunal in the *Chagos Marine Protected Area* arbitration. In the award, the tribunal had stated that "estoppel in international law differs from 'complicated classifications, modalities, species, subspecies and procedural features' of its municipal law counterpart". The tribunal had distinguished "estoppel as it exists in international law" and had gone on to explain how estoppel in international law differed from some forms of estoppel in municipal law. Therefore, what might appear to be a general principle of law derived from national legal systems might actually be an analogous general principle of law formed within the international legal system, with similar but not necessarily identical core functions.

In conclusion, she said that it would be a very odd and indeed paradoxical outcome if the Commission concluded that the authority *par excellence* for laying out the principal sources of international law, namely Article 38 of the Statute of the International Court of Justice, excluded those norms created within the international legal system from the category of general principles. That would be tantamount to saying that the Statute of the Court excluded norms formed within the very legal system that the Statute was intended to serve. She had no comments to make in relation to draft conclusions 8 and 9, and supported the referral of all the draft conclusions to the Drafting Committee.

Mr. Murase said that he wished to thank the Special Rapporteur for his excellent second report. In 2019, members had not had sufficient time to discuss the topic of general principles of law either in the plenary or in the Drafting Committee. He found it regrettable that the Commission had provisionally adopted draft conclusion 1, entitled "Scope", in such haste that no adequate explanation had been given of whether the term "source" referred to formal, material, judicial or other sources. To his mind, the expression "general principles of law as a source of international law" caused confusion, which also permeated the second report.

The Special Rapporteur stated in the report that Article 38 (1) (*c*) of the Statute of the International Court of Justice was the "starting point" for the work of the Commission, but did not indicate how far the Commission was to go beyond or outside that provision or what its destination would be. In addition to International Court of Justice cases, the report referred to decisions of *ad hoc* arbitral tribunals, the International Criminal Court, the International Tribunal for the Former Yugoslavia, the Eritrea-Ethiopia Claims Commission and the European Court of Human Rights, among others, each of which had a different system of applicable laws. Unless a court or tribunal explicitly incorporated Article 38 (1) (*c*) into its own applicable law, he did not see how general principles of law could be integrated into a single set of compatible principles, despite the ostensible similarities between them. However, since the report reaffirmed that it dealt with the identification of general principles of law "in the sense of Article 38, paragraph 1 (*c*)", he would make his comments on the basis of that assumption. Like Mr. Rajput, he believed that the title of the topic should be changed to "General principles of law under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice" in order to avoid confusion.

Article 38 of the Statute set out the law to be applied by the Court. Given that each court or tribunal had its own set of applicable laws, there was no sense in trying to generalize. The purpose of Article 38 (1) of the Statute was not to describe the "sources" of international law, whether formal or material, but to prescribe which law the Court was to apply. The function of the Court was to decide cases in accordance with the applicable law prescribed in Article 38, namely international conventions and customary international law. Those were the formal sources of international law; there was no other form in which international law existed. The Court was supposed to apply those laws in the order enumerated in the provision – first conventions and then customary international law – although that did not imply that there was a hierarchy of norms. General principles of law, which were referred to in subparagraph (*c*), were the third applicable law for the Court. It bore repeating that general principles of law were not a "source" of international law in that context. In 2019, he had expressed the view that general principles of law were those derived from national laws and that they could not be those formed within the international legal system.

The Statute of the International Court of Justice was a treaty like any other and should be understood in accordance with the ordinary, accepted method of treaty interpretation.

Within each article, paragraphs and subparagraphs must be interpreted so as not to overlap or conflict with each other. That was required by the principle of effectiveness in the interpretation of treaties in order to ensure "meaningful" interpretation. The way in which subparagraph (*c*) was interpreted in the report was contrary to that method. Consequently, subparagraph (*c*), as an autonomous applicable law, must be interpreted as containing something different from subparagraphs (*a*) and (*b*), with no overlap or conflict. Thus, it was logical to consider subparagraph (*c*) as referring to domestic law principles, excluding international law principles. That was the only way to interpret subparagraph (*c*) meaningfully in accordance with the effectiveness principle.

He failed to understand why principles incorporated in a convention or in customary international law, which were already covered by subparagraphs (*a*) and (*b*), respectively, should be downgraded to the category of principles referred to in subparagraph (*c*). Assimilating treaty and customary principles into general principles of law would weaken the normative status of treaties and customary international law, which should be avoided by all means. If the language of a treaty provision was ambiguous, reference could be made to the *travaux préparatoires* for that treaty. The Commission knew from the drafting history of Article 38 (3) of the 1920 Statute of the Permanent Court of International Justice that the principles contemplated were domestic law principles, as Mr. Rajput had explained.

In any event, as he had stated in 2019, it was correct for draft conclusion 3 (a) to identify general principles of law as being "derived from national legal systems". However, it was wrong to consider general principles of law to be formed "within the international legal system", as indicated in draft conclusion 3 (b). He therefore did not support draft conclusion 7.

General principles of law were exclusively derived from national legal systems. The reason why subparagraph (*c*) had been inserted in Article 38 (1) of the Statute was well known: as stated in the Special Rapporteur's first report (A/CN.4/732), general principles of law served "to fill gaps in conventional and customary international law, or to avoid findings of a *non liquet*". Avoiding *non liquet* was widely accepted as the function of general principles of law. Filling gaps was the function of the Court, which should be recognized clearly and consciously in the case of general principles of law. The transposition of general principles of law to an applicable law of the Court must be understood as a dynamic process whereby the Court moved national law principles to the level of its applicable law. That function of the Court should be highlighted in the draft conclusions.

If the Commission accepted the broad competence of the Court in applying general principles of law, criteria for their application that were more flexible than those provided for in draft conclusions 4, 5 and 6 could be set. Flexibility was extremely important if general principles of law were to be applied meaningfully. The conditions laid down in draft conclusions 4, 5 and 6 appeared to be too stringent and did not reflect the actual practice of the Court.

He was broadly in agreement with draft conclusion 4, although subparagraph (a), which included the language "common to the principal legal systems of the world", might have to be understood in a flexible manner. While the Court might examine 10 or 20 cases from national legal systems, it would never attempt to examine the legal systems of all States of the world. What was important was to determine whether a given legal institution was common to the contesting parties to a given dispute. Unlike customary international law, general principles of law were essentially dispute-specific and short-lived. Regarding subparagraph (b), "transposition" did not occur unless the Court took concrete steps to that effect. The Court's active role in transposition should be explicitly mentioned in the text. Furthermore, principles were not transposed to "the international legal system" but to a level at which they could be applied to a specific dispute.

With regard to draft conclusion 5, he agreed that, in applying general principles of law, the Court normally carried out some kind of comparison between the national legal systems of the contesting States and other States, even though it might not amount to an elaborate comparative law analysis. In paragraph 1, the words "a comparative analysis" should perhaps be replaced with a more moderate expression such as "a comparative

examination". Paragraphs 2 and 3 should be deleted, since the conditions they laid down were very stringent.

He was not convinced of the need for draft conclusion 6, as the issue of transposition was already dealt with in draft conclusion 4, which was sufficient. As he had already mentioned, draft conclusion 7 should be deleted. While he did not object to draft conclusions 8 and 9, he was unsure as to whether there was really a need for "subsidiary means" of determining general principles of law. If general principles of law were domestic law principles, the Court could prove their existence by examining domestic laws and domestic court cases. Such cases were therefore not a subsidiary means but a direct means for the determination of the principles in question. Thus, those draft conclusions should be moved to the commentaries.

Overall, the second report seemed to imply that general principles of law permeated the whole of international law, which was contrary to the original intention of the drafters of Article 38 (1) (*c*) and to the proper method of treaty interpretation. In place of the Special Rapporteur's "maximalist" approach, he would suggest that the Commission should take a "minimalist" approach by delimiting the content of general principles of law as domestic law principles and the function of general principles of law as nothing more than gap fillers. The Commission might wish to establish a working group to consider the best way to move forward in the work on the topic. He was in favour of referring all the draft conclusions, except draft conclusion 7, to the Drafting Committee.

Mr. Šturma said that the Special Rapporteur's excellent second report on general principles of law was clear, well structured and rich in materials. It was undeniably thought-provoking, although he did not necessarily agree with all the arguments put forward in it.

As he was making his statement at a rather late stage in the plenary debate, he would refrain from commenting on most aspects of the report and on draft conclusions 4, 5, 8 and 9, with regard to which he was in general agreement with the Special Rapporteur. He could see no obstacle to the referral of those draft conclusions to the Drafting Committee.

He also supported the Special Rapporteur's proposal of a two-step analysis for the identification of general principles of law. However, if the existence of a principle common to the principal legal systems of the world was determined through a comparative analysis that was as wide and as representative as possible, he did not see how such a principle could fail to be compatible with fundamental principles or rules of international law, and thus did not see why a requirement to that effect needed to be set out in draft conclusion 6 (a). After all, States were the main law-making subjects in both international and national legal systems. For that reason, if the principle in question really was common to the principal legal systems of the world and capable of being transposed to the international legal system, it could not be incompatible with peremptory or other fundamental norms of international law. Moreover, the concept of "fundamental principles of international law" was unclear.

The major problems that he saw in the report concerned terminology, in particular the different meanings of the word "principle", and draft conclusion 7, including the analysis underlying that draft provision. First, as was clear from the report and the memorandum by the Secretariat, the word "principle" was used very frequently in treaties, other instruments such as resolutions, arbitral and judicial decisions, and doctrine. The availability of such a wide array of materials had both advantages and disadvantages, since the term "principles" was used in various senses, as Ms. Galvão Teles and Ms. Oral had noted. Those materials, including the decisions of courts and tribunals, seemed to leave open a kind of constructive ambiguity as to whether the word "principle" was used with reference to principles of international law or to general principles of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice. For example, the Martens clause, discussed in paragraphs 131 to 134 of the report, contained references both to "the principles of international law derived from established custom", which meant customary international law, and to "the principles of humanity and … the dictates of public conscience", which he understood to mean the incorporation by reference of certain non-legal norms into a treaty. Another example was the polluter pays principle, which was discussed in paragraphs 135 to 137 of the report. Although he did not question that it was probably a general principle of law, he was unsure that it had not existed in the national legal systems of at least some States

prior to its inclusion in several environmental treaties and the 1992 Rio Declaration on Environment and Development.

However, what might not be such a serious problem in the case of a specific principle mentioned in a specific instrument or decision, provided that its content was recognized by States in one of the forms enumerated in Article 38 of the Statute, might well be a problem in the context of the topic under discussion. Since the draft conclusions were aimed at the identification of general principles of law as a formal source of international law, it should be made as clear as possible that other kinds of "principles" were excluded.

In 2019, during the plenary debate on the Special Rapporteur's first report, he had noted that at least five or six different meanings of the word "principle" could be found in doctrine. At a minimum, it was necessary to make a distinction between principles as a category of rules or norms of international law, which were usually more abstract or general, and general principles of law in the sense of a formal source of international law that was distinct from treaty and custom. The former was a matter of the content of a rule of international law and the latter was a matter of its form.

That said, he had serious doubts about the content of draft conclusion 7 (a) and (b). Even though part three of the report provided a valuable analysis of principles recognized in treaties or customary international law, including many examples, such principles continued to take the legal form of treaties or custom and to derive their binding force from those sources, and were not general principles of law, at least in the sense that he had described. Several other members of the Commission seemed to share that view.

He also had doubts regarding draft conclusion 7 (c), which referred to general principles of law that were "inherent in the basic features and fundamental requirements of the international legal system". Although he largely agreed with Mr. Forteau and Mr. Tladi that some of the principles applied by the International Court of Justice and other international courts and tribunals might be the result of a judicial interpretation of rules contained in their statutes or the application of their inherent or implied powers, he did not rule out *a priori* that some such principles might exist.

In conclusion, he said that he was in favour of referring all the draft conclusions to the Drafting Committee, although he still had some doubts and reservations regarding draft conclusion 7.

Mr. Grossman Guiloff, speaking via video link, said that the Special Rapporteur's excellent second report dealt thoughtfully with the question of the identification of general principles of law in the light of Article 38 (1) (*c*) of the Statute of the International Court of Justice.

He would begin with some general comments on the approach taken in the report. First, he wished to reaffirm that the term "civilized nations", which was used in Article 38 (1) (*c*) of the Statute, should no longer be employed in relation to the topic. It was anachronistic and presupposed that only some nations were civilized, which raised issues of superiority that had no place in contemporary international relations. The term might even have already become obsolete by the time of the adoption of the Statute.

In that regard, he appreciated the Special Rapporteur's efforts to find an up-to-date alternative. However, he doubted that the phrase "community of nations" was appropriate, since it implied that the "community" in question was composed only of nations and that other critical actors in the international community, such as international organizations, were excluded. As Belarus had noted in its written comments, "it might be helpful to follow the practice of using the term 'international community'". Mr. Forteau had touched on that point earlier in the debate.

Second, he agreed with the Special Rapporteur's proposed two-step approach for the identification of general principles of law derived from national legal systems, which consisted, first, in determining the existence of a principle common to the principal legal systems of the world and, second, in ascertaining the transposition of that principle to the international legal system. That combined operation served to demonstrate that the requirement of recognition under Article 38 (1) (*c*) of the Statute had been met.

Third, although a definition of general principles of law might be difficult to formulate, such a definition should be set out in an additional draft conclusion in order to clarify the scope of the Commission's work on the topic and the position of general principles of law in the international legal system. A good starting point could be found in paragraph 56 of the report, which noted that a principle "capable of being elevated to a general principle of law forming part of international law" was a legal principle that was "generally regarded as just by the community of nations or as reflecting its collective consciousness, or a principle inherent to any legal system".

At the same time, a definition would help to clarify the distinction between general principles of law and other principles of international law, such as the principles set out in Article 2 of the Charter of the United Nations, which could be thought of as the constitution of the international community, and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. Neither the relationship nor the difference between those two categories of principles was made clear in the report, which was problematic, since it led to circular reasoning.

Fourth, some members of the Commission seemed sceptical about the very existence of the category of general principles of law formed within the international legal system. As he had noted in 2019, in the debate on the Special Rapporteur's first report, the existence of that category of general principles of law was clear from the fact that certain overarching features of the international legal system could be identified. Such principles could provide solutions in situations that had no parallel in domestic systems and would otherwise remain unresolved.

Turning to the draft conclusions proposed in the second report, he said that, with regard to draft conclusion 4, he supported the Special Rapporteur's proposed two-step analytical method for the identification of general principles of law derived from national legal systems. However, he was concerned that the draft conclusion made no reference to the requirement of recognition. That concern could be resolved by establishing a clearer connection between draft conclusion 4 and draft conclusion 2. Indeed, recognition was the essential condition for the existence of a general principle of law.

In his view, the phrase "principal legal systems of the world" was appropriate in the context of the draft conclusions. From a methodological standpoint, grouping national systems into legal families according to their similarities and analysing them by category was simpler than analysing them separately.

With regard to draft conclusion 5, which set out the first step of the analytical method for identifying general principles of law derived from national legal systems, he fully agreed that a comparative analysis of national legal systems was required. As stated in the report, there was a certain presumption that rules and principles were shared across legal families, thus facilitating the identification of a common principle. However, that presumption could not be absolute. As the Special Rapporteur noted, it could not be presumed that all States belonging to a particular legal family shared the same principles; it was thus important to maintain diversity in the process of comparative analysis.

Furthermore, he agreed with the Special Rapporteur that, as stated in draft conclusion 5 (2), "the comparative analysis must be wide and representative, including different legal families and regions of the world". That was the only way to show that a principle was indeed "general", or common to the principal legal systems of the world rather than to a few legal families or a few geographical areas. However, he would appreciate further clarification of the word "wide". He was inclined to agree with Mr. Forteau that the word "representative" alone might suffice. In his view, representativeness, which implied a need to consider regional diversity and different legal cultures, was essential for the recognition of a general principle of law.

The examples of State practice cited in the report, particularly in paragraphs 29 to 46, did not fully reflect that spirit of representativeness. Almost every example included a reference to the United States of America or the United Kingdom or England, while the references to other States were rotated. The examples cited in the report brought up two other questions: what level of acceptance of a principle was required, and from which States was

such acceptance truly required? For instance, as noted in paragraph 47 of the report, the International Court of Justice had held that *actio popularis* could not be considered a general principle of law in the sense of Article 38 (1) (*c*) of the Statute. Interestingly, that principle was fully rejected in the United States, as it violated justiciability doctrines such as the doctrine of standing, but, as the Court had noted, it was a general principle common to many municipal legal systems. Consideration of a diversity of legal systems in the comparative analysis was imperative to avoid an overreliance on the legal systems of certain States. Such diversity would ensure closer alignment with the foundational rule of the sovereign equality of States.

On a related note, it would also be helpful if the Special Rapporteur could clarify the degree to which a principle had to be present in the principal national legal systems in order to be considered a general principle of law under Article 38 (1) (*c*) of the Statute. Did the principle have to be present in the majority of national legal systems, or did a different standard apply, such as presence in a large number and variety of domestic legal systems? The relationship between diversity and representativeness made the comparative analysis of legal families more complex because, as noted in the report, a principle could not be considered to enjoy recognition in the absence of diverse geographical representation. He wished to emphasize the need for multiple levels of diversity, including geographical diversity and diversity among legal systems, and, at the same time, to reiterate the possibility that other actors, such as international organizations, might also have a role to play in establishing recognition.

He welcomed the Special Rapporteur's acknowledgement that, in certain cases, acts of international organizations could be relevant for the purposes of identifying general principles of law derived from national legal systems. With specific reference to the European Union, it was noted in paragraph 72 of the report that, where the rules issued by international organizations were binding on their member States and directly applicable in those States' legal systems, those rules should be taken into account when carrying out the comparative analysis. He agreed that, owing to the special nature of the legal order of the European Union, in which regulations, directives and decisions of tribunals had direct effect in the legal systems of member States, general principles of law could indeed be distilled from those sources as well. However, it was unclear whether any principles so distilled should be categorized as principles derived from national legal systems or as principles formed within the international system, given that the European Union system was supranational and, accordingly, some of them would have a distinctly international character. In his view, such principles could fall into either category, depending on their nature.

Lastly, he agreed with Mr. Valencia-Ospina that, for greater clarity, the draft conclusion should indicate that the sources of national law referred to in paragraph 3 were not exhaustive.

Regarding draft conclusion 6, he fully agreed with the Special Rapporteur that the transposition of general principles of law derived from national legal systems was not automatic. Such principles could not be transposed unless they were appropriate for application in the international system. However, he had some concerns about the language used in the draft conclusion. He found the phrase "is compatible with fundamental principles of international law" slightly confusing. First, to argue that a general principle of law had to be compatible with fundamental principles of international law seemed to amount to circular reasoning, especially since those terms had not been clearly defined. Second, there was an inherent hierarchical conflict between rules of *jus cogens* and general principles of law, since the former included, for example, the prohibition of torture and of the crime of genocide, which had been widely treated as "fundamental rules" of international law. He therefore proposed that the expression "rules of general international law" should be used instead of "fundamental principles of international law" in order to avoid confusion with other sources of international law.

Furthermore, a larger substantive issue in relation to the draft conclusion was highlighted by one of the examples provided in the report. With reference to the *North Sea Continental Shelf* cases, it was noted in paragraph 80 of the report that the International Court of Justice had determined that the principle of the "just and equitable share" could not be considered a general principle of law because it was incompatible with the accepted law of

the continental shelf. In his view, the Court's determination in those cases might be better framed in terms of specificity. His own reading was that the Court had rejected the principle of the "just and equitable share" only in the context of the continental shelf. In other situations, that principle might be a general principle of law. Conflict avoidance rules, such as *lex specialis*, could be used to determine whether the principle would apply in a given situation. Accordingly, he suggested that subparagraph (a) should be amended to read: "it is compatible with 'the rules of general international law' on which, in the international legal system, the positive law regulating the matter is based." His suggested text was much longer, but there was a need to clarify that the key issue was compatibility with the specific rules of international law relevant to the situation at hand.

On a related note, he appreciated the Special Rapporteur's efforts to clarify the distinction between the methodology for the identification of general principles of law and that for the identification of customary international law. However, another way in which those two sources might differ was in terms of their specificity. While no less binding than conventional or customary international law, general principles of law were typically less specific. Therefore, while a particular situation might be covered by conventional and/or customary international law, on the one hand, and by a general principle of law, on the other, rules of conflict avoidance could be used to determine the scope of obligations. For instance, in the field of international humanitarian law, the general principles of humanity and distinction operated alongside the specific rules set out in the Geneva Conventions and, together, they determined the obligations that arose in a given situation.

Regarding draft conclusion 7, he found the methodology applied by the Special Rapporteur to be very useful. Concerning the reference to "other international instruments" in subparagraph (a), it was explained in the report that, for the purposes of ascertaining the existence of a general principle of law within the meaning of Article 38 (1) (*c*) of the Statute, such instruments could include General Assembly resolutions. However, it was unclear what instruments other than resolutions were encompassed by that expression. Further clarification should be provided in the next report, perhaps in the form of a footnote giving an exhaustive list of such instruments. With regard to subparagraph (c), although the report included some examples of the "basic features" and "fundamental requirements" of the international legal system, further clarification of those concepts was necessary. He acknowledged the well-founded concerns that other members of the Commission had expressed regarding the precise requirements that a principle needed to meet in order to qualify as a rule of general international law.

As for draft conclusions 8 and 9, he agreed with the Special Rapporteur that the Commission's approach to subsidiary means for the determination of general principles of law should be similar to its approach to subsidiary means for the identification of customary international law. As Mr. Jalloh had noted earlier in the debate, the Commission needed to ensure consistency across its work on different topics, which were interconnected.

Regarding draft conclusion 9, the Commission should acknowledge the role that international expert bodies could play as a subsidiary means for the determination of rules of law in the context of the topic. In that regard, it was important to acknowledge the reports of the Inter-American Juridical Committee, which had made an important contribution to the identification of the general principles that shaped the Charter of the Organization of American States, in particular its article 3. Those principles had proved to be particularly relevant in fields such as the protection of human rights in new and progressive areas and in cases where a State had experienced a degree of regression in its political and juridical structure and practices.

Turning to the future programme of work, he noted that, in paragraph 10 of the report, the Special Rapporteur expressed the view that the Commission did not need to consider "the complex processes through which general principles of law emerge, change or cease to exist in a systematic manner". It was difficult to understand how the Commission could effectively address the topic, especially the function of general principles of law and their interactions with other sources of international law, without giving further consideration to how general principles of law emerged, changed and ceased to exist. He was thinking in particular of situations in which a general principle of law that might have seemed foundational 200 or even 80 years previously now seemed out of touch with contemporary international law. That

issue was not completely divorced from the concept of “civilized nations”, which, it had been agreed, had no place in the Commission’s work. The reality was that the number of States Members of the United Nations had increased from 51 at the founding of the Organization to 193 at the current time. A failure to acknowledge that general principles of law might have emerged, changed or ceased to exist over that period could inadvertently privilege those that had been shaped by certain States, which would violate the principle of sovereign equality and hinder the development of international law. Important general principles of law could emerge that took precedence over older, outdated principles. It would be useful if the Special Rapporteur could consider those issues in his next report.

The Commission was in a unique position to clarify the question of general principles of law as a source of international law. Its work on the topic could provide useful guidance to States in the future. He supported the referral of all six draft conclusions proposed in the second report to the Drafting Committee.

The meeting rose at 12.45 p.m.