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Held at the Palais des Nations, Geneva, on Wednesday, 24 July 2019, at 10 a.m.

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Present:

Chair:	Mr. Šturma
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Succession of States in respect of State responsibility (agenda item 6) (*continued*) (A/CN.4/731)

Report of the Drafting Committee (A/CN.4/L.939)

Mr. Hmoud (First Vice-Chair), speaking on behalf of the Chair of the Drafting Committee, said that he wished to draw attention to the report of the Drafting Committee on the topic "Succession of States in respect of State responsibility" (A/CN.4/L.939), which comprised three draft articles that had been provisionally adopted by the Drafting Committee and presented to the Commission for information at the Commission's sixty-ninth and seventieth sessions. He further wished to draw attention to the statements on the topic that had been made by the respective Chairs of the Drafting Committee at those two sessions.

The Chair invited the Commission to adopt the text of the draft articles that had been provisionally adopted by the Drafting Committee.

Draft article 1

Draft article 1 was adopted.

Draft article 2

Mr. Park suggested that, in the French text, the title of draft article 2, "*Expressions employées*" ("Use of terms"), should be brought into line with the language previously used by the Commission, such as "*Termes employés*" or "*Définitions*".

The Chair said that it would be left to the Secretariat to ensure that the title of the draft article was consistent with the Commission's practice.

Draft article 2 was adopted on that understanding.

Draft article 5

Draft article 5 was adopted.

The Chair said he took it that the Commission wished to adopt the report of the Drafting Committee on succession of States in respect of State responsibility, as contained in document A/CN.4/L.939, as a whole, subject to the requisite changes by the Secretariat.

It was so decided.

The Chair said it was his understanding that the Special Rapporteur would prepare commentaries to the draft articles for inclusion in the Commission's report to the General Assembly on the work of its seventy-first session.

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

Mr. Tladi, welcoming the Special Rapporteur's first report on the topic "General principles of law" (A/CN.4/732), said that he agreed with much of the content of the report. Nonetheless, the Commission's first debate on the topic was an opportunity not so much to express firm agreement or disagreement as to highlight issues to which the Special Rapporteur and the Commission should pay attention as the work on the topic proceeded.

The main conclusion of the report seemed to be that there were two categories of general principles: those derived from national legal systems and those formed within the international legal system. In paragraph 18 of the report, the Special Rapporteur correctly noted that the requirement of "recognition" would prove to be central to the Commission's work on the topic. It was therefore important to establish whether "recognition" meant the same thing in respect of both categories. He noted the Special Rapporteur's statement that the issue of recognition would be the subject of more in-depth discussion in future reports.

Paragraphs 21 to 23 of the report indicated that, in addition to the categories of general principles that were described in the report, other categories had been identified in

the literature. He would caution against a proliferation of categories for what was meant to be a single source of international law. Furthermore, the Special Rapporteur, in his introductory statement, had described the additional categories of general principles as "vague" and not sufficiently supported by practice. In any case, it was important to determine whether the general principles of law in those additional categories represented different sources of international law or just general principles of law with different types of content.

With regard to the function of general principles, he wished to make a few exploratory points, which he hoped the Special Rapporteur would consider in future reports. First, he was not convinced that the Commission should address the meaning of *non liquet* and whether it was generally prohibited under international law. To his mind, the question was beyond the scope of the current project.

Second, while he agreed with the Special Rapporteur that the Commission should avoid describing general principles of law as subsidiary and should instead prefer the word "supplementary", the purpose of doing so was not, in his view, merely to avoid confusion, as the word "subsidiary" was used in Article 38 (1) (*d*) of the Statute of the International Court of Justice. There was also a substantive difference between the words "subsidiary" and "supplementary". The former more aptly described materials that were not rules of law in themselves, but rather were materials for facilitating the discovery of legal rules. The latter, on the other hand, conveyed the notion of materials that functioned as an "additional" source, which was more consistent with the idea advanced in the report that general principles served to fill gaps in conventional and customary international law. He hoped that the Special Rapporteur would focus more on such issues when considering the functions of general principles of law in future reports.

He agreed that general principles of law could serve a variety of functions in addition to their supplementary role as "gap-fillers". The report already noted that such principles could serve as interpretative tools or as a means of reinforcing legal reasoning. General principles could also function as interstitial norms that operated between other rules of international law to ensure their coherence and consistency. The Commission would need to analyse the relationship between those different functions, not necessarily with the aim of elaborating specific draft conclusions, but in order to gain a better understanding of the concept of general principles of law.

The Commission would also have to determine whether those functions were particular to general principles of law. After all, rules of customary international law and treaty law could also function as interpretative rules and as interstitial norms. Rules of international law operating as *lex generalis* might serve a supplementary function in relation to *lex specialis* rules. The broader question was whether general principles of law served a different function from other rules of international law. There was likely to be a large degree of convergence regarding the supplementary nature of general principles of law. The Commission would have to consider carefully the question of whether general principles of law served a distinct function beyond that basic difference from other sources of law.

The distinction between general principles of law and customary international law would be an extremely important aspect of the Commission's work on the topic. All the members presumably agreed that there was a clear difference between general principles of law and customary international law; that much was clear from the structure of Article 38 (1) of the Statute of the International Court of Justice. However, determining the precise nature of that difference was more difficult. It could not lie in the content of the rules, since any widespread and general practice, regardless of content, that was accepted as law constituted customary international law, provided that it did not conflict with a peremptory norm. The Commission had not qualified customary international law on the basis of its content. The question of the distinction was especially important in relation to the second category of general principles of law identified by the Special Rapporteur, namely those formed within the international legal system.

The most obvious answer was that the requirements were different. A rule was not considered part of customary international law unless it reflected a general practice that was

accepted as law. One way of distinguishing between customary international law and general principles of law, therefore, might be to state that there was no requirement of practice for general principles. From that perspective, the emphasis would be on the recognition by States of a norm as a general principle. That approach, however, was not without difficulties. For example, it might suggest that general principles were simply rules of customary international law that were not supported by practice. During the first year of its consideration of the topic "Identification of customary international law", the Commission had debated the significance of a number of examples of judicial practice, including the 1986 judgment of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, in which acceptance as law (*opinio juris*) on its own had been put forward as a basis for a determination that a rule had the status of customary international law. For better or for worse, the Commission had concluded that both elements were required. A conclusion that "recognition" of a rule as a rule or principle was sufficient for a general principle of law might imply that where there was acceptance of law without evidence of practice, a principle would be deemed to constitute a general principle of law. In other words, the Commission should consider whether the notion of "general principles of law" within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice offered an easier, or at least alternative, route for the establishment of a norm as a general principle.

The second difficulty in distinguishing between general principles of law and customary international law on the basis of whether or not there was a requirement of practice was that, in many instances, at least in relation to general principles emanating from national legal systems, it was possible to conceive of the presence of such principles in national legal systems as a form of practice. After all, as noted in paragraph 167 of the Special Rapporteur's report, recognition as a requirement was fulfilled when a principle existed within a sufficiently large number of national legal systems. When described in that way, the concept of recognition was similar to the concept of practice as defined in the Commission's conclusions on identification of customary international law, since it pointed to the principle's existence in national law, understood as encompassing legislation, common law (in both its Anglo-American and civil law senses), other case law and, for those systems that recognized it, traditional customary law. General principles of law as a source of law might therefore be described as customary international law minus *opinio juris*, or customary international law based purely on practice. That definition would clearly be distinct from the one that the Commission had adopted in its conclusions on identification of customary international law. The issues concerning the relationship between customary international law and general principles turned on the meaning that was ascribed to "recognition". He looked forward to an in-depth study of the issue in the future reports of the Special Rapporteur.

He largely agreed with the Special Rapporteur's views on the notion of "civilized nations" and did not support the use of the phrase. However, the debate on that point was largely passé, since no reasonable international lawyer in the modern world would seek to exclude Africa, Asia or Latin America from the community of "nations". The fact that, for the purposes of customary international law, the focus remained on Western Europe and the United States of America was more the unfortunate consequence of the greater availability and accessibility of materials from those legal systems than a doctrinal belief in the superiority of those systems. In his view, the more important questions in that regard concerned the notions of "major legal system" and "nations".

Specifically, he wondered whether the term "major legal system", which was used several times in the report, was the new code for the term "civilized nations". Did it refer to the legal systems of "important countries", or simply to legal traditions or families? If, as seemed most likely, it referred to legal traditions, he wondered whether there were States whose legal systems did not fall within the major legal traditions and, if so, whether those systems were to be taken into account.

An even more pertinent question was why the Special Rapporteur had chosen the word "nations" and not "States"; the two were not synonymous. When the drafters of the Statute of the International Court of Justice had wanted to refer to States, they had used that very word; that was the case even in Article 38 (1) of the Statute, where subparagraph (*a*)

referred to the recognition of rules in treaties by "contesting States". It was not sufficient, in his opinion, simply to state that the term "nations" had the same meaning as "States". It was important to explore the question of whether there was any significance to the use of the term "nations". Did it, as suggested in the separate opinion of Vice-President Weeramantry of the International Court of Justice in *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, allude to the Court's representation of the main forms of civilization and the need for the Court to avoid being "monocultural"? Did it therefore call for general principles of law to be sought not only in Western legal systems, but also in traditional systems that might operate within States? Such questions were not unrelated to the previous one of distinguishing between customary international law and general principles of law. The distinction might be construed as flowing principally from the fact that general principles, unlike customary international law, were not linked closely to States. He hoped that the Special Rapporteur would take account of such considerations in future reports.

He was grateful for the description, in the report, of the historical evolution of general principles of law and of Article 38 (1) (*c*) of the Statute of the International Court of Justice. However, the analysis did not explore the linkage between general principles of law and the European *jus commune* arrived at through the reception of Roman law into local laws. *Jus commune*, including the local laws into which the Roman law had been received, had been in force throughout the continent because, as observed by Helmut Coing, it had been considered the law which reason dictated. He himself had written, in 2006, that general principles of law had their roots in the *jus gentium* developed in Roman law to supplement the *jus civile*. The old Roman law (*jus civile*), which had applied to Roman citizens only, had been strict and inflexible. The *jus gentium*, which was flexible and progressive, had eventually superseded the *jus civile*. He did not mean to suggest that general principles of law were those principles of European *jus commune*; such a statement would be anachronistic and contrary to his position that the Commission should search for general principles of law in the cultures of groups other than States. However, such historical antecedents might be helpful in clarifying the meaning of "general principles of law".

Turning to the draft conclusions proposed by the Special Rapporteur, he said that draft conclusion 1, as currently drafted, did not clearly define the scope of the topic. The Drafting Committee should perhaps rework the language to specify that the scope of the topic was the identification of general principles of law and of their functions.

He hoped that the Drafting Committee would not adopt draft conclusions 2 and 3 at the current session, not because he had any substantive concerns, but because he would like the Commission to agree first on a definition of general principles of law. It was from such a definition that the requirements relating to such principles could be distilled. In fact, he would propose that the Drafting Committee should retain the entire text until all the draft conclusions had been adopted; whether or not that was feasible, he hoped that, in the next report, the Special Rapporteur would propose a definition on which to base draft conclusions 2 and 3.

He noted the use of the word "States" in draft conclusion 2, a shift in language with which he was not comfortable. For the reasons advanced earlier, he would appreciate an explanation by the Special Rapporteur regarding the shift from "nations" to "States". He was particularly concerned that such a shift might restrict the inclusive potential of the concept of "nations".

In conclusion, he said that he supported the referral of the proposed draft conclusions to the Drafting Committee.

Mr. Murase said that he welcomed the Special Rapporteur's first report on general principles of law, which was an interesting but difficult topic, as the content and status of such principles had yet to be clearly defined.

Draft conclusion 1 referred to general principles of law as "a source of international law", but the report unfortunately did not provide any explanation of the sources of law. Indeed, the term "sources of law" had many meanings: it could refer to formal sources, material sources, judicial sources, historical sources or literary sources. If it meant a "formal source" in the context of draft conclusion 1, then general principles of law were to

be understood as international law, which took the form of either conventions or customary international law. However, that understanding was contrary to Article 38 (1) (*c*) of the Statute of the International Court of Justice, because subparagraphs (*a*) and (*b*) already provided for conventions and customary international law, and subparagraph (*c*) should not be interpreted as duplicating the content of the previous subparagraphs, in accordance with the rule of "effectiveness" in interpretation. Thus, the Special Rapporteur's assumption, in paragraph 156 of the report, that the "law" in "general principles of law" included international law could not be sustained. To say that general principles of law were a source of international law also contradicted draft conclusion 3 (*a*), which referred to those principles "derived from national legal systems". Any attempt to differentiate general principles of law from customary international law, as Mr. Tladi had just tried to do, was doomed to fail, in his opinion.

Contrary to the static notion of formal sources, material sources dealt with the dynamic process of law-making. Thus, if the term "source" was used in the sense of "material source", draft conclusion 1 might be taken to mean that general principles of law were a means of creating international law. The Special Rapporteur sometimes referred to the gap-filling function of general principles of law, which was precisely an attribute of material sources of law. Such sources were best studied from the perspective of the sociology of law, which dealt with the extralegal forces that created international law.

If the term "source" meant "judicial source", it referred to the applicable law in a particular judicial procedure. Article 38 of the Statute of the International Court of Justice enumerated the types of law applicable in proceedings before the Court. Given that each court or tribunal had its own judicial sources or applicable law, there was clearly no point in trying to define generally applicable judicial sources.

Recalling that, when the Working Group on the long-term programme of work had discussed the title of the topic, Sir Michael Wood had suggested the title "General principles of law as a source of international law", he said that he continued to have the same concerns that he had expressed at that time, for the reasons he had just explained. The Working Group had agreed not to add the phrase "as a source of international law" to the title, and he proposed that the phrase should likewise be deleted from draft conclusion 1.

While the Special Rapporteur stated, in paragraph 15 of the report, that the starting point for the work of the Commission on the topic should be Article 38 (1) (*c*), the question of whether the topic was intended to cover only general principles of law under that Article or whether it would also deal with general principles of law beyond the Statute was left unanswered. Noting that the Special Rapporteur referred to the similarity of article 21 (1) (*b*) of the Rome Statute of the International Criminal Court to Article 38 (1) (*c*) of the Statute of the International Court of Justice and also to other treaty provisions that were not even court statutes, he said that it would be advisable to confine the scope of the current topic to Article 38 (1) (*c*) of the Statute of the International Court of Justice and similar provisions of the statutes of other international courts and tribunals. The competent courts and tribunals played an essential role in elevating domestic principles to the level of general principles of law; it was therefore important that the Commission's work should remain within the sphere of competence of those dispute settlement organs.

Referring to paragraph 25 of the report, he said that avoiding findings of *non liquet* was a widely accepted function of general principles of law, whereas filling gaps in conventional and customary international law seemed to be a more active function than mere avoidance of findings of *non liquet*. Specific examples should be provided in order to clarify how gaps could be filled by general principles of law.

He therefore proposed that draft conclusion 1 should read "The present draft conclusions concern general principles of law as applied by competent international courts and tribunals".

Turning to draft conclusion 2 and the question of what was meant by "a general principle of law", he noted that paragraph 153 of the report indicated that the term referred to norms that had a general and fundamental character, but paragraph 154 stated that some general principles of law might not have that character. He agreed that general principles of

law differed from customary international law in terms of their general character and from *jus cogens* in terms of their fundamental character.

General principles of law could be specific in their application, as shown by the practice of courts and tribunals. For example, in cases brought in the 1950s and 1960s concerning the nationalization of foreign property, courts and tribunals had applied general principles of law relating to private property rights and unjust enrichment. When the institution of private property rights was common to both parties, as it had been in the *Anglo-Iranian Oil Co.* case that had come before the International Court of Justice, courts and tribunals had had no difficulty in applying it as a general principle. At that time, private property rights had not been respected in socialist countries, and had therefore not constituted a general rule but rather a specific rule that had nonetheless been accepted as a "common" rule between the parties to a dispute.

As for the phrase "generally recognized", courts and tribunals must take an active role in recognizing or identifying general principles of law, especially as such principles could help them to avoid findings of *non liquet*. The Special Rapporteur rightly noted that general principles of law came into existence in international law through "transposition" from the national level by a court. It was therefore unclear how that process of transposition could take place if the scope of the topic was expanded to cover general principles of law other than those recognized by the competent courts and tribunals.

He was in favour of including a reference to "civilized nations" in draft conclusion 2. In the nineteenth and early twentieth centuries, that term had signified only those States that had adopted a particular kind of Eurocentric civilization, but since then it had been interpreted as encompassing many types of civilization. The late Professor Yasuaki Onuma had advocated the notion of "transcivilizational" or "multicivilizational" law. Perhaps the idea of a multicivilizational approach could be reflected in the draft conclusion, which might thus read "A general principle of law must be recognized by States as reflected by the plurality of civilized nations of the international community and applied as such by international courts and tribunals".

Moving on to draft conclusion 3, he said that general principles of law could in no way be deemed to be part of international law, since they were referred to in Article 38 (1) (*c*) of the Statute of the International Court of Justice, whereas subparagraphs (*a*) and (*b*) already referred to international law, as embodied in conventions and customary international law. General principles of law therefore consisted only of principles "derived from national legal systems". Principles "formed within the international legal system" were either conventional law or customary law, but not general principles of law.

It might be necessary to clarify which branches of national law could give rise to general principles of law and to decide whether they were restricted to private law and procedural law or could include public law and criminal law, or all domestic law. He agreed with the Special Rapporteur that the matter would require further assessment as the topic progressed, and taking into account the practice of States and the decisions of international courts and tribunals.

It would thus not make sense to state that general principles of law could originate from international law. Subparagraph (*b*) of draft conclusion 3 should therefore be deleted, with the result that the draft conclusion would read "General principles of law comprise those derived from national legal systems".

Regarding the final outcome of the Commission's work on the topic, he was not in favour of "draft conclusions" because he was deeply concerned about the proliferation of conclusions as outputs of the Commission. That term more appropriately described the internal understanding reached by a study group and did not convey any normative connotations to the outside world. The most suitable term would be "draft guidelines", if not "draft articles". The Commission must not forget that, under article 20 of its statute, it was supposed to produce draft articles.

He supported the referral of all the draft conclusions to the Drafting Committee.

Mr. Valencia-Ospina said that the Special Rapporteur's first report provided a firm foundation for fruitful discussions on the topic. In general, he agreed with the Special

Rapporteur's methodological approach and draft conclusions. He welcomed the fact that the report summarized the Commission's previous work on the sources of international law and established appropriate terminology and a realistic workplan. The review of State practice both before and after the adoption of the Statute of the Permanent Court of International Justice was commendable.

The report focused on the requirement of recognition and the categories of general principles of law. Draft conclusion 3 suggested that the main, if not the sole, criterion for differentiating among those principles was their origin; in other words, whether they were derived from national legal systems or formed within the international legal system. However, no mention was made of what he considered to be the most important criterion for categorizing general principles of law: their character as procedural principles or substantive principles. Both categories appeared to have been subsumed within the categories determined by origin. The distinction between procedural and substantive principles had been noted in the separate opinion of Judge Cançado Trindade on the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, which indicated that "while the traditional general principles of law (found *in foro domestico*) disclosed a rather procedural character, the general principles of international law – such as the ones proclaimed in the 1970 Declaration [on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations] – revealed instead a substantive content".

His own position differed from that one, given that general procedural principles could be formed within the international legal system and general substantive principles could be derived from national legal systems. Both categories of principles could be sources of law in accordance with Article 38 of the Statute of the International Court of Justice. Draft conclusion 3 should therefore also reflect the distinction between those two categories, and the Commission should elucidate the sizeable differences between them.

The International Court of Justice had explained the major difference between procedural rules and substantive rules of public international law in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. The dichotomy between general procedural and general substantive principles of law had been a recurrent theme ever since the initial discussions concerning the Statute of the Permanent Court of International Justice, when Lord Phillimore, the United Kingdom member of the Advisory Committee of Jurists, had differentiated between certain principles of procedure and the principle of good faith (*qua* a substantive principle). Similarly, Bin Cheng had drawn a distinction between certain principles that were proper to judicial proceedings and principles that were substantive, such as good faith, self-preservation and international responsibility. Although there might be cases where that distinction was tenuous, as in the case of the principle of consent to jurisdiction, which was both procedural and substantive in nature, the Commission should take account of it in its future work.

It was clear from the case law of the Permanent Court of International Justice that general principles of law had made a considerable contribution to the proceedings of international courts and tribunals, especially in their early days. For example, in order to determine the admissibility of an argument advanced by Poland in the case concerning *Certain German Interests in Polish Upper Silesia*, the Court had referred not only to its Statute and Rules, but also to the general principles of law. Since then, there had been a lengthy tradition of use by courts of those principles to clarify the procedural rules pertinent to judicial practice, first and foremost the principle of competence-competence. Those procedural principles had been vital to the efficient working of international judicial dispute settlement mechanisms. For example, the dissenting opinion of Judge Weeramantry on the advisory opinion of the International Court of Justice on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* referred to "well-accepted universal principles relating to the nature of the judicial process". The International Court of Justice had referred to general, elementary or universal principles of procedural law on various occasions. For example, in its advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court stated that "questions of immunity are … preliminary issues which must be

expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it".

The Special Rapporteur had pinpointed other clear examples in paragraphs 64, 134 and 135 of the report, namely the principles of connection between counter-claims and the main claim, division of costs and expenses, public reading of judicial decisions, equality of arms between parties, *iura novit curia*, estoppel and burden of proof, *inter alia*. In addition, Mr. Rajput had suggested the inclusion of the topic "Evidence before international courts and tribunals" in the Commission's long-term programme of work. It was not for nothing that the syllabus for that topic turned on the Latin maxim *idem est non probari et non esse*.

Although many of those principles were derived from various national legal systems (such as the principle of *res judicata*), others were inherent to the international legal order (such as the principle of consent to jurisdiction). What distinguished the two types of principles from each other was not their source, but whether their purpose was to help international courts and tribunals to determine the procedural rules and rules of evidence that should be applied in a particular case or to determine the merits of the case. According to Kolb, Quintana and Strong, it would be more correct to regard that category of general principles of law as general principles of procedural law. Kotuby and Sobota had sought to update Bin Cheng's work by shedding light on contemporary principles of due process that were applicable to international and transnational disputes. After examining the practice and procedure of the International Court of Justice, Quintana had drawn up a list of general principles of procedural law, which included equality of the parties, proper administration of justice, *non ultra petita*, prohibition of abuse of procedure, *eius est interpretare legem cuius condere, nemo commodum capere potest de injuria sua propria* and the free assessment of evidence by the judge. Kotuby and Sobota added, as principles of international due process, the independence and impartiality of judges, procedural equality of the parties, the right to be heard and the condemnation of fraud and corruption.

Those examples, which should be regarded as merely illustrative, were drawn primarily from the practice and procedure of the International Court of Justice. Notwithstanding some similarities due to the general nature of the judicial function, those principles could differ from the procedural principles governing various sub-regimes of public international law, such as international criminal law, the dispute settlement system of the World Trade Organization and regional human rights courts, particularly in view of the different nature of proceedings under each system.

The report also gave examples of a number of general principles of law of a substantive character. They were based on the practice of States and international courts and tribunals and encompassed the prohibition of unjust enrichment, fair and equitable treatment, good faith in obligations concerning negotiations, *uti possidetis*, the benefit of the most favourable criminal law, the protection of legitimate expectations, *ex injuria jus non oritur*, the polluter pays principle, *aut dedere aut judicare*, certain principles relating to State responsibility, the precautionary principle in environmental law, *lex specialis* and the invalidity of treaties whose object was illegal. Again, that list was merely illustrative, but it demonstrated the significant difference between the two categories of principles. The principles in the second category were not intrinsically linked to the judicial function, but could serve as a supplemental source of interpretation and a guide for the development of international law. They were therefore closely related to the other sources of public international law set forth in Article 38 of the Statute of the International Court of Justice.

In conclusion, he said that it would be wise for the Commission to distinguish not only between general principles of law that were derived from domestic legal systems and those that were formed within the international legal system, but also between those that were procedural and those that were substantive. The future workplan should focus on the special nature of general procedural principles of law, including the similarities and differences between procedural principles in the various judicial sub-regimes of public international law.

He agreed that the three draft conclusions should be referred to the Drafting Committee.

Mr. Hmoud said that he wished to commend the Special Rapporteur for having provided the Commission with a wealth of information on case law and State practice related to general principles of law and on the concepts underlying the development of that source of international law. The report's examination of the drafting history of Article 38 (1) (*c*) of the Statute of the International Court of Justice and Article 38 (3) of the Statute of the Permanent Court of International Justice shed light on the context in which those principles had subsequently been interpreted and implemented. In order to dispel misunderstandings and remove inconsistencies in the application of general principles of law as a source of international law, the Commission should identify and clarify their nature, content and functions and their relationship with other sources of international law. That would not be a simple task, as it would entail reaching conclusions that reconciled the various positions that had been adopted in practice and in jurisprudence. The Commission's pronouncements should not conflict with earlier jurisprudence, but should rectify certain misconceptions about general principles of law. The disparate terms that were used to describe those principles were indicative not only of divergent descriptions of the concept, but also of different interpretations of the principles' functions, content and role as a source of obligations under international law. Some courts, in referring to general principles of international law, either failed to identify the sources thereof or were referring in reality to rules of customary international law.

He therefore agreed with Mr. Murase that it was important to define the topic clearly and to decide whether to remain within the framework of Article 38 (1) (*c*) of the Statute of the International Court of Justice or to look beyond it. If the Commission stated that the scope of the topic of general principles of law as a source of international law was "based" on that Article, it would need to ascertain on what other sources of law an extended scope might be predicated. For that reason, the Commission should clarify that the scope of the topic was confined to Article 38 (1) (*c*), and draft conclusion 1 should therefore read "The present draft conclusions concern general principles of law within the context of Article 38 (1) (*c*) of the Statute of the International Court of Justice". It was important to establish that limit in order to avoid any overlap with other sources of international law or the risk of creating a new source of law.

Of course, the various aspects of the topic, including the nature, scope, elements and functions of general principles of law and their relationship with other sources of law, would have to be studied thoroughly before the relevant conclusions could be drawn. Several questions would have to be answered in connection with the requirement of recognition, such as the meaning of the term and who had the authority to give such recognition. Another issue was whether general principles of law were "gap-fillers" and the implications of that expression. The relationship of general principles of law with customary international law and with the sources of law referred to in Article 38 (1) (*d*) of the Statute would need to be clarified, and the existence of general principles of law of a regional or bilateral character would need to be investigated. Instead of putting forward proposals and theses first, then presenting arguments and evidence in support of them in subsequent reports, the Commission should begin its consideration of the topic by carrying out an in-depth analysis of jurisprudence, practice and literature. He agreed with the Special Rapporteur that the proper outcome of that exercise should consist of draft conclusions. The topic essentially entailed an assessment of general principles of law as a source of existing international law rather than the suggestion of normative rules to regulate the conduct of subjects of international law.

Part two of the report contained extensive citations and references to the Commission's previous work, which, despite shedding light on the various issues underlying general principles of law, also raised a number of questions. That was understandable, considering that the Commission had not had an opportunity to pronounce itself on the nature, elements and functions of general principles of law other than in relation to the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". It was not clear, for instance, whether principles covered by the topic "Formulation of the Nürnberg Principles" were general principles of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice, or had a different source. The report referred *inter alia* to principles "recognized by civilized nations", "principles of municipal law" and "principles of

international law". In the commentaries to its draft articles on the continental shelf and related subjects, the Commission referred simply to "general principles of law". In its work on the topic "Arbitral procedure", the Commission appeared to have concluded that general principles of law were not "judges' law", were those recognized by "civilized nations" and were applicable in the absence of any agreement between the parties, which might indicate the existence of a hierarchy. However, in its work on the draft statute for an international criminal court and the draft Code of Crimes against the Peace and Security of Mankind, the Commission had opened the door to the possibility that general principles of law could not only be derived from national legal systems but could also be formed within the international legal system. The Commission's work on the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law" had emphasized the role of general principles of law as a source of law and in treaty interpretation. The then Chair of the Study Group on fragmentation of international law, Martti Koskenniemi, had argued that general principles of international law fell outside the scope of Article 38 (1) (*c*). According to the Study Group's conclusions, general principles of law were "gap-fillers", but the main sources of international law, including general principles of law, were not in a hierarchical relationship *inter se*. Footnote 89 of the Special Rapporteur's report referred to paragraph 85 of the Study Group's report, which indicated that "any court or lawyer will first look at treaties, then custom and then the general principles of law for an answer to a normative problem". Over the years, the Commission had also provided examples of general principles of law that might be useful for identifying their elements, categories and functions.

The Special Rapporteur provided an excellent analysis of the development of general principles of law over time, from practice prior to the adoption of the Statutes of the Permanent Court of International Justice and the International Court of Justice to the *travaux préparatoires* of the relevant articles of the two Statutes and practice and jurisprudence subsequent to their adoption. The practice prior to the adoption of the Statutes indicated that adjudicative bodies had relied on the principles of equity and justice, but also that general principles of law had essentially been derived from national legal systems and Roman law, and had applied only to matters not regulated by other sources of law. The *travaux préparatoires* of Articles 38 (3) and 38 (1) (*c*) of the Statutes of the Permanent Court of International Justice and the International Court of Justice, respectively, should be viewed in the context of their time, when rules of positive international law had not been as well developed or codified. In many areas, international law had not regulated key issues, and the aim had been to provide an alternative to a finding of *non liquet*. Consequently, there had been an emphasis on the principles of equity and justice in relation to general principles of law, but also on the need to prevent courts and tribunals from acting as legislators of international law. While there was strong evidence that Article 38 (1) (*c*) related to general principles of law derived from national legal systems, evidence other than scholarly writings was mixed as to whether general principles of law formed within the international legal system fell within the scope of the Article. Moreover, the drafters' decision to remove a proposed reference to the order of sources from the chapeau of Article 38 did not mean that general principles of law enjoyed the same standing as positive international law. If a rule of customary international law and a general principle of law coexisted, both were applicable, but if there was a conflict, he did not see how the general principle of law would prevail, unless it developed into a rule of *jus cogens*, in which case it would be superior to any other rule of international law. However, there was no evidence to suggest that a normal general principle of law would not be overruled by a conflicting conventional or customary rule.

Practice and international jurisprudence indicated that general principles of law played a more important role in certain specialized fields of international law, such as international criminal law, investment law and dispute settlement procedures. Furthermore, while general principles of law arising from national legal systems belonged to a recognized category, those derived from the international legal system did not receive the same recognition. In the context of international criminal law, there might be a stronger argument that general principles of law existed within the international order, but that was not the case in other areas. Even in the area of international criminal law, debates on certain issues, especially the interpretation of article 21 (1) (*b*) and (*c*) of the Rome Statute of the

International Criminal Court, showed that general principles of law might not fall within the scope of Article 38 (1) (*c*). Indeed, it could be argued that such general principles of law were, in fact, customary international law rules *per se*.

The case law of the Permanent Court of International Justice and the International Court of Justice contained few references to general principles of law, as noted in paragraphs 129 and 130 of the report. Notably, the International Court of Justice had in the past declined to consider arguments based on general principles of law in cases where the matter at hand was addressed by rules of conventional or customary international law. That should provide evidence of the functions and nature of general principles of law and of their relationship with other sources.

The Special Rapporteur cited several examples of general principles of law that were recognized by international courts and tribunals. Although the content of the principles themselves fell outside the scope of the topic, it would be reasonable for the Special Rapporteur, in future reports, to analyse that content as applied by courts and tribunals. For instance, estoppel was an established national legal principle. Was that a reason for it to be transposed to a general principle of law? When tribunals applied it, did they view it as a reflection of Article 38 (1) (*c*), or something else?

There were few examples of bilateral or regional general principles of law in the report. Consequently, he wondered whether there was a sufficient basis for the inclusion of such concepts in the scope of the topic. So-called "regional general principles of law" might be based on the particular constitutional and legal structure of a given regional organization, which might not provide a basis for clear conclusions that could inform generalized rules on the topic.

He agreed with the Special Rapporteur that the three elements of Article 38 (1) (*c*) should be analysed separately, even though the interrelationship between them might shed light on the content of each one. For example, an analysis of the term "civilized nations" would help to clarify the meaning of "recognition" and vice versa, and both terms could provide guidance as to the categories of general principles of law that fell within the scope of the Article.

The close association between national laws, in particular civil codes, and the concept of general principles of law was evident. That association was reflected in the report through examples of national laws drawn from various regions and legal traditions of the world. The Civil Code of Jordan, like that of other Arab States, was based on civil law, but also on the Ottoman Civil Code of 1876. Article 2 of the Jordanian Civil Code, which contained language similar to that of the Egyptian Civil Code cited in the report in footnote 266, provided that the text of the law was to be applied. Where no text existed, Islamic law applied, then custom and then the principles of justice. Interestingly, the article also established that court judgments played a guiding role in its application, as long as such judgments did not conflict with the aforementioned sources of law or their hierarchy. Thus, the Code placed the principles of justice in fourth place in the hierarchy of application, and allowed courts to interpret the law but not to legislate. Other legal systems cited in the report referred to natural law, general principles of the State's legal system or the principles of equity and justice as sources to be applied where no statutory rules existed. Despite the variety of national sources and the structural differences between them and Article 38 (1) (*c*), they had a similar *raison d'être* and might shed light on the Article's origins and nature.

He appreciated the Special Rapporteur's explanation of the differences between the terms "rule" and "principle", and agreed that principles had a more general, abstract and fundamental character, although they might serve similar legal functions under international law. However, he did not think that principles essentially embodied more fundamental values. Many recognized general principles of law, such as unjust enrichment, estoppel, legitimate expectations and the inadmissibility of evidence in arbitral procedures hardly involved fundamental values, though they did, in his view, reflect the notion of justice. While principles such as the Martens clause might well embody core humanitarian values, the same could not be said of many, if not most, recognized general principles of law. That was assuming, of course, that the Martens clause was a general principle of law and not part

of customary international law. The key point was that the general nature of general principles of law should not be viewed as a constitutive element thereof.

In paragraph 155 of the report, it was stated that the term "general" in Article 38 (1) (*c*) suggested that general principles of law were applicable to "all States". However, it was asserted elsewhere that there existed general principles of law with a regional scope of application. In his opinion, the applicability of Article 38 (1) (*c*) to "all States" excluded regional general principles of law from the scope of the Article. As a result, he did not see how the Commission's work on the topic could deal with general principles of law with a regional or bilateral scope of application and yet remain within the confines of Article 38 (1) (*c*). General principles of law were part of general international law, which meant that they "must have equal force for all members of the international community", as noted by the International Court of Justice in the cases concerning the *North Sea Continental Shelf*. The Commission should delimit its work on the topic on the basis of that universal applicability, and should not go beyond Article 38 (1) (*c*).

After providing examples of various views on the term "law" and on whether it referred only to national law principles or also to principles from the international legal system, the Special Rapporteur rightly stated, in paragraph 158 of the report, that the term needed to be assessed further as the topic progressed.

In paragraph 163, the Special Rapporteur stated that the term "recognized" was closely related to the issue of the identification of general principles of law, which would be addressed in a future report, and that the first report would include only some general remarks concerning recognition. That was the right approach, as the issue of recognition needed to be analysed thoroughly, particularly with regard to the delineation between recognition, as a requirement for general principles of law, and acceptance as law, as an element of customary international law. Such an analysis would help to eliminate the confusion about those two concepts and to ensure the proper classification of the source of a rule; in other words, whether it was a general principle of law, customary international law, or both. Consequently, he believed that the Special Rapporteur should refrain from proposing draft conclusion 2, on the requirement of recognition, until after the issue had been studied further in future reports. Draft conclusion 2 contained two elements, namely "generally recognized" and "by States", that were presumably based on the materials and the preliminary analysis presented in the report. In any case, the Commission should carefully consider the evidence supporting the two proposed elements in order to reach the right conclusions. That was especially true in the light of the assertion in the report that the requirement of recognition might differ depending on the category of a general principle of law; in other words, whether it was derived from national legal systems or had been formed within the international legal order.

In paragraph 167 of the report, it was stated that, according to the literature and practice, the requirement of recognition, in relation to general principles of law derived from national legal systems, was fulfilled when a principle existed within a sufficiently large number of national legal systems. However, he wondered whether that was what the word "recognition" meant, or whether it meant recognition by States under international law. Jurisprudence and the literature suggested that the former definition was the correct one. That would exclude the possibility of recognition of general principles of law formed within the international legal system and cast doubt on that category of principles as a whole. In that regard, he noted footnote 307 of the report, in which the Special Rapporteur quoted a statement by Judge Giorgio Gaja that "giving relevance to State practice when asserting the existence of [principles formed within the international legal system] would bring these principles close to customary rules".

The issue of transposition, or the applicability of general principles derived from national laws in international legal systems, was also relevant. The issue had been raised in a number of decisions of national and international courts and in States' arguments in litigation, which seemed to indicate that it was closely associated with recognition.

The term "civilized nations" in Article 38 (1) (*c*) and its evolution should give context to the requirement of recognition. The term was clearly outdated and had legal and political connotations associated with the history of the emergence of the concept of general

principles of law. However, that history, and developments with regard to the terminology used, indicated that the intended principles were those derived from national legal systems. Naturally, various terms had been used in jurisprudence and in the literature. The question was whether the standard for "recognition" should be recognition by all States, the community of nations, the international community of States as a whole or States generally. According to the report, the drafting history of Article 38 (1) (*c*) suggested that the standard was recognition by all States that composed the international community. However, if that meant that a particular general principle of law had to be present in the legal systems of all States, the standard for recognition would be very hard to meet. The Commission should therefore seek to establish a legally sound but practical description of the scope of recognition. In his view, that balance would be better achieved if the words "recognized by the international community of States" were used instead of the words "generally recognized by States", which currently appeared in draft conclusion 2. He concurred with Mr. Tladi that the word "nations" was broader than "States"; that further strengthened the argument that the Commission should use more powerful language than "generally recognized by States". He hoped that future reports would contain in-depth analyses of the issue that would help the Commission to reach proper conclusions.

There was near-consensus in practice, jurisprudence and the literature that general principles of law that were derived from national legal systems were a source of international law. The materials cited in the report and other materials were indicative of certain characteristics of such principles: they existed in national legal systems, though the extent of their existence or consistency among different systems remained a matter of debate; they were gap-fillers, in the sense that they were relevant when there were no applicable conventional or customary rules; and they required transposition to the international legal system through a process related to recognition, although some scholars might argue otherwise. That process entailed finding common denominators in each such principle among the vast majority of legal systems and identifying adaptations of its content, a matter that, in his view, should also be tackled by the Commission. Such principles bound all subjects of international law, including international organizations, even if they did not participate in the creation or recognition of the principles. Moreover, while general principles of law that were derived from national sources were more present or prominent in some fields of international law than in others, they nonetheless existed in all fields.

The concept of general principles of law formed within the international legal system was debatable and did not find sufficient support in State practice or jurisprudence. The fact that international law did not regulate a certain matter did not mean that general principles of law had to be formed within the international legal order to fill the void. International law remained a permissive law, and gap-fillers were not mandatory. Furthermore, if a judge could not find applicable rules of customary international law, he or she was not obliged to create general principles of law from within the international legal system to fill the void, though procedural rules might be an exception in that regard, as noted by Mr. Valencia-Ospina. The Commission should, as a matter of legal policy, adopt a cautious approach with regard to that category of principles. If it concluded that the category did indeed exist, not simply in the context of certain limited fields of international law but across international law in general, it should define the category precisely. The Commission should also ensure that all elements of that category of principles, including identification, nature and function, were well grounded in international law. The materials cited in part four, chapter II (B), of the report were inconclusive at best with regard to that category and its elements, including the aspect of recognition. He took it, however, that future reports would tackle all the relevant elements.

He agreed with the proposals set out in part five of the report. He was of the opinion that the interpretation of other rules of international law was among the important functions of general principles of law. That interpretative function was highlighted in the literature, but a pronouncement of the Commission on the matter, and especially on the role of general principles of law under article 31 (3) (*c*) of the Vienna Convention on the Law of Treaties, should determine the specific content of such a function. To conclude, he recommended that draft conclusions 1 to 3 should be referred to the Drafting Committee.

Mr. Park said that he appreciated the Special Rapporteur's first report, which provided a historical overview and analysis of general principles of law. The scope of the topic, which complemented the Commission's work on sources of international law, seemed relatively narrow in comparison to that of other topics, but the Commission was confronted with two main obstacles. First, general principles of law had been mentioned directly or indirectly in just a few cases before the Permanent Court of International Justice or the International Court of Justice. Second, in most of the jurisprudence of international courts and tribunals that the Commission would be analysing, the meaning of the expression "general principles of law" was rather obscure. Consequently, in order to clarify the terms used in jurisprudence, the Commission had no choice but to rely more on doctrine and the literature than it did in the context of other topics. Unfortunately, even in scholarly writings, there were many different and conflicting views on substantive aspects of general principles of law. In that regard, Prosper Weil had argued that general principles of law lay at the heart of the doctrinal and jurisprudential controversy over the issue of contracts concluded by States or para-State authorities with foreign private persons. Even when there was a multitude of views, it was always possible to discern a majority and a minority view. In its work on the topic, the Commission should clearly identify the majority view and give reasonable consideration to the minority view.

In that context, most of the five factors enumerated in paragraph 39 of the report seemed useful for deciding whether a certain term could be identified as referring to a general principle of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice. Those factors might serve as tools of interpretation for inferring the appropriate meaning of each term on the basis of the context in which it was employed and of its object and purpose.

He agreed with most of the legal logic applied in the Special Rapporteur's report, except in part four, chapter II (B), entitled "General principles of law formed within the international legal system". The Special Rapporteur's *lato sensu* interpretation of the concept of general principles of law as including principles formed within the international legal system was problematic.

His own understanding of general principles of law as principles that were common to domestic legal orders (*in foro domestico*) and transposable to the international legal order was informed by an analysis of relevant international jurisprudence and the majority view that could be found in French and Korean scholarly literature. In his view, five main attributes of general principles of law could be identified. First, they were a direct and autonomous source of international law. Second, they were common to national legal systems; the procedural or substantive rule in question had to be present in all major systems of law. Third, they were a substitute source of law, in the sense that they were used to fill gaps in customary and conventional law or to avoid findings of *non liquet*. Fourth, they were transposable to the international legal order. However, not all principles common to national legal systems were applicable in the international legal order; only those that were compatible with the basic characteristics of the international order could be transposed. With that in mind, judges in international courts and tribunals played an important role in stripping domestic legal rules of their national peculiarities and in extracting the most general aspects of those rules for the purpose of transposing them to international law. Fifth, general principles of law were a "transitory" and "recessive" source of international law. Their repeated implementation at the international level transformed them into customary norms.

Most of those attributes were based on a *stricto sensu* interpretation of the concept of general principles of law, which was widely accepted. According to article 21 (1) (*c*) of the Rome Statute, the International Criminal Court was to apply "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards".

However, the Special Rapporteur took a different view, as noted in paragraph 253 of the report: "In the view of the Special Rapporteur, the practice […] supports the position that general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of

the International Court of Justice comprise not only general principles of law derived from national legal systems, but also general principles of law formed within the international legal system". That conclusion was dubious, in his view, as he had a different understanding of the historical background and of subsequent jurisprudence relating to general principles of law.

Regarding the historical context, according to the majority view of members of the Advisory Committee of Jurists established in 1920, general principles of law were principles of domestic law in force *in foro domestico*, and international court judges were granted the power only to identify established principles that already existed in national legal orders. As noted by the Special Rapporteur, however, one could not "exclude the possibility that general principles of law may find their origins elsewhere as well". In the same vein, Hugh Thirlway had stated that "according to some views, the principles contemplated by Article 38 (1) (*c*) are not limited to those derived from national law, but include such higher-level principles, fundamental to international law, as *pacta sunt servanda*".

Second, he wished to address the possible disadvantages of the concept *lato sensu* of general principles of law, as opposed to the concept *stricto sensu*. One of the critical disadvantages of the former was that it made the specificity of general principles of law as an autonomous source difficult to recognize, since they could be confused with customary international law or obligations derived from international treaties. Unlike customary international law, general principles of law were not based on State practice accompanied by *opinio juris*, but on specific domestic legal instruments. Furthermore, if fundamental principles of the international legal system were to be inserted into the realm of general principles of law, those principles might have a status equal to or even higher than that of treaties and customary international law. In the light of Mr. Tladi's statement, which had emphasized the distinction between general principles of law and customary international law, he was unsure whether the concept *lato sensu* of general principles of law could be clearly ascertained.

The Special Rapporteur addressed another debatable legal issue to support the concept *lato sensu* of general principles of law. Paragraphs 156 and 232 of the report, referring to an article by J.G. Lammers, stated that it had been suggested in the literature that the "ordinary meaning" of Article 38 (1) (*c*) of the Statute of the International Court of Justice did not exclude the existence of general principles of law arising from the international legal system. However, he found it difficult to agree with that statement, as far as the term "ordinary meaning" was concerned. Article 31 of the Vienna Convention on the Law of Treaties stated that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty. It was difficult to find a word in Article 38 (1) (*c*) that alluded to general principles of law arising from the international legal system. If the ordinary meaning of "civilized nations" now referred simply to all States, the text of Article 38 (1) (*c*) provided no grounds on which to accept the idea that general principles of law could arise from the international legal system.

Third, the court judgments cited in paragraphs 236 to 251 in support of the Special Rapporteur's reasoning used a variety of terms whose meaning was equivocal, including "certain general and well-recognized principles", "principles which are recognized by civilized nations", "general principle", "generally recognized principle of international law" and "general principle of international law". However, an analysis of the context in which each of those terms was used indicated that most of them could be interpreted as referring to customary international law. In particular, the Special Rapporteur considered the dictum "certain general and well-recognized principles" in the International Court of Justice judgment of 9 April 1949 in *Corfu Channel* to be an appeal to the general principles of law contemplated in Article 38 (1) (*c*). However, a recent study had interpreted that dictum as referring not to general principles of law, but to principles that existed under customary law and to a rule extracted by reference to treaty provisions, in particular the Hague Convention respecting the Laws and Customs of War on Land of 1907. In addition, Professor Thirlway had opined that, while mention of a "general principle" could be found in a number of decisions, that formula did not necessarily indicate reference to one of the principles

contemplated by Article 38 (1) (*c*), as a basis of decision independent of the operation of other sources.

Lastly, with regard to the State practice relating to general principles of law that was mentioned in paragraphs 239 and 240, concerning arguments made by Portugal and by Ethiopia and Liberia, respectively, before the International Court of Justice, he noted that in some cases States had indeed invoked general principles of law before the Court, but the Court had decided such cases on a different basis or had found it unnecessary to rule on the applicability of a general principle of law.

On the basis of those considerations, he thought that the current draft conclusion 3, as proposed by the Special Rapporteur, was incorrect because it gave the minority view on the concept of general principles of law the same legal value as the majority view. He therefore wished to suggest that either subparagraph (*b*), which read "formed within the international legal system", should be deleted, or the draft conclusion should be amended to read:

"General principles of international law comprise those:

(*a*) primarily and in most cases, derived from national legal systems;

(*b*) in certain cases, formed within the international legal system."

The reason that the words "in certain cases" should be included in subparagraph (*b*) was that, in some cases, the practice of international organizations might also contribute to the formation of general principles of law. That was not a contradiction of the concept *stricto sensu* of general principles of law, because most of the law of international organizations was based on domestic administrative law.

Turning to other legal issues, he said that the Special Rapporteur discussed several important legal issues in the report, such as the possible role of international organizations in the formation of general principles of law, the use and choice of terms, the distinction between rules and principles, the question of natural law, the question of "general" and "fundamental" character, and general principles of law with a regional scope of application, all of which were important to the full discussion of the topic. He wished to comment on two of those issues, which, in his opinion, required further clarification as the Commission's discussion of the topic progressed, namely the question of natural law and the distinction between principles and rules.

From a theoretical point of view, there were two basic legal positions on the concept of general principles of law. One was grounded in positive law and the other in natural law. Positivists treated general principles of law as a subheading under treaty law and customary international law, and deemed it inappropriate to add anything new to international law unless it reflected the consent of States. In principle, he was of the view that the legal nature of general principles of law was based on positive law, not natural law, because general principles of law were common to and derived from national legal systems. Therefore, general principles of law should not be conflated with natural law. He did not wish to propose that the Commission should dwell on purely theoretical debates, in the light of its discussions on the topic "Peremptory norms of general international law (*jus cogens*)". However, one paragraph in the report appeared to contradict the position he had just described. Paragraph 143 could be misinterpreted as implying that general principles of law were in fact natural law, because it cited domestic laws that referred to natural law but did not include a legal evaluation in that regard. The Special Rapporteur should revisit that paragraph in order to clarify the issue, without falling into a particular school of legal thought. Furthermore, the relationship between "justice", "equity" and general principles of law might need to be clarified. In particular, he wondered whether the principle of equity could be analysed as one aspect of general principles of law. He hoped that the Commission would discuss those questions as part of its consideration of the topic.

There was a debate among legal theorists with regard to the relationship between rules and principles. In paragraph 153, the Special Rapporteur concluded that the distinguishing feature of general principles of law was their "general" and "fundamental" character. That was not helpful, however, because, as noted in paragraph 154, there were general principles of law that could not be categorized as fundamental. In other words,

there could be general principles of law with fundamental or non-fundamental characteristics, or with substantive or procedural characteristics. It was therefore difficult to argue that fundamentality was the prime feature that distinguished principles from rules. Another approach was to consider how States distinguished principles from rules. Article 38 (1) (*c*) specifically referred to "general principles of law recognized by civilized nations". That meant that the way in which States recognized principles in contrast to rules was relevant to the identification of general principles of law. Thus, the Commission might wish to discuss the jurisprudence of domestic courts with a view to distinguishing that difference. If the Commission drew relevant conclusions on that issue, it could contribute to the progressive development of international law by distinguishing principles from rules.

Turning to the draft conclusions proposed in the report, he said that he had no specific comments to make in relation to draft conclusion 1. Draft conclusion 2 was entitled "Requirement of recognition". The Special Rapporteur briefly touched on the question of the word "recognized" in part four, chapter I (B), and announced that the question of the requirement of recognition would be explored at a later stage. It might therefore be logical to make draft conclusion 2 a provision on the definition of general principles of law, rather than on the requirement of recognition. His proposal was that the definition should read "General principles of law are principles common to national legal systems and transposable to international law", or perhaps "transposable to the international legal order". Furthermore, the word "generally", which appeared in draft conclusion 2 in the phrase "generally recognized", did not appear in Article 38 (1) (*c*). The Special Rapporteur should identify clearer criteria in that regard in exploring the question of the requirement of recognition in the future. What was meant by "generally", and what degree of certainty did it imply? States that were parties to a dispute might have different views on whether or not a certain general principle of law met the generality requirement. There should be a useful guiding standard in that regard.

With respect to the possible outcome of the topic, he agreed with the Special Rapporteur that the final outcome should take the form of conclusions accompanied by commentaries, as in the case of the Commission's other topics related to the sources of international law. Although it might be premature, he wished to suggest that the compilation of an illustrative list of general principles of law would help States to use and understand the general principles more precisely. With regard to the future programme of work, the four items mentioned in paragraphs 260 and 261 seemed appropriate. He hoped that those four items would cover and clarify essential questions concerning general principles of law, including their legal nature, criteria, content and legal consequences, traditional and new areas of application that might be closely related to the question of the "fragmentation" of general principles of law, and the possible role of international organizations in the formation of general principles of law. He was in favour of extending the scope of the topic to cover relevant practices of international organizations, for two main reasons. First, the engagement of international organizations in international relations had increased significantly since the 1920s, when the text that had become Article 38 (1) (*c*) had been adopted. Second, general principles of law could be invoked not only in the area of the internal activities of international organizations, but also in their external relations with States, other international organizations or third parties.

Ms. Galvão Teles said that she welcomed the Special Rapporteur's first report, which launched the Commission's work on the only remaining primary source of international law that it had yet to consider. The aim of its work on the current topic was to "provide guidance to States, international organizations, courts and tribunals, and others called upon to deal with general principles of law as a source of international law", as stated in paragraph 10 of the report. Although general principles had attracted significant scholarly attention, studies had mostly focused on the identification and application of principles, while neglecting the theoretical aspects of general principles as a source of law. Therefore, the Commission's work on the topic would be highly innovative and also relevant, as the reaction of States in the Sixth Committee had demonstrated. In the report, the Special Rapporteur set out the four main issues on which he proposed to focus: the legal nature of general principles as a source of international law; the origins of general principles of law; the functions of general principles of law and their relationship with other sources of international law; and the identification of general principles of law. The first

two issues were addressed in the first report, while the third and fourth issues had been left for future consideration.

The discussion of the legal nature of general principles as a source of international law must begin with an analysis of the different elements of Article 38 (1) (*c*) of the Statute of the International Court of Justice. The meaning of the term "general principles of law" was far from self-evident, and merited careful analysis. There was disagreement on the definition of "principle", as well as on the distinction between principles and rules in international law. Guidance could be found in national legal systems, given that most systems included principles as a source of law and provided a definition of the term. However, national definitions could not simply be transposed to international law, since there were structural differences between the international legal system and national legal systems. That meant that the general principles mentioned in Article 38 (1) (*c*) must "have their own unique features", as was stated in the report. The case law of the International Court of Justice was not particularly helpful in that regard, since the Court had not yet clearly established the scope of general principles as a source of law. In fact, in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, the Court had found that the main distinction between rules and principles was that the term "principles" was used to denote rules of international law that were more general or had a more fundamental character, thus conflating the two concepts.

That had helped to create considerable uncertainty about general principles as a source of law and had blurred the distinction between general principles and customary international law. Additionally, States and international courts and tribunals had relied on so-called general principles of law that were not particularly general in scope, thus aggravating the difficulties in defining a boundary. Rules and principles had also been referred to together in the literature, specifically in relation to customary international law or general international law. It was not clear whether authors considered them to be distinct sources when they referred to customary international law as, for example, providing the unitary legal framework of principles and rules by which to ensure coherence in the system as a whole, or when they maintained that the International Court of Justice treated the two terms as synonyms. Nevertheless, the distinction between rules and principles was relevant and should be upheld in international law. General principles must be given autonomy from other sources of international law and a specific scope in the international legal framework. In fact, an analysis of the *travaux préparatoires* of Article 38 of the Statute of the Permanent Court of International Justice made clear that the inclusion of "general principles" as one of the sources to be applied by the Permanent Court had been envisioned as a solution to fill gaps that existed in treaty and customary law and to avoid findings of *non liquet*. A different interpretation would lead to the conclusion that Article 38 (1) (*c*) of the Statute of the International Court of Justice had no *effet utile* and would go against the rules of treaty interpretation.

A number of authors had attempted to define an autonomous legal position for general principles. Robert Kolb distinguished them from rules on the grounds that their legal content was less narrow and defined less precisely than that of rules, while also noting that such principles were not as broad as general political concepts or "vague ideas", yet were general and flexible enough to serve as a basis for dynamic interpretations and substantive development of the law. Similarly, Samantha Besson defined principles as fundamental legal norms that were structurally indeterminate. In Kolb's view, the function of principles went beyond the mere filling of lacunae; they were "norm-sources" that dealt with the adaptation of rules to constitutional necessities, new developments and needs, basic values and justice. Other authors agreed that principles guided the interpretation of other international norms and made explicit certain value choices and interests.

That did not contradict the finding that the term "general rules of international law" could be seen to include both general principles and rules of customary law, as proposed in the report. In that context, "rules" must be understood in a wider sense that encompassed both rules *stricto sensu* and general principles. In fact, every general principle of law was a rule, but not every rule was a principle. That was apparent from the use of the term "rules of law" in the broad sense in Article 38 (1) (*d*) of the Statute of the International Court of

Justice, as noted in paragraph 150 of the report. In her view, the relationship between "rules" and "principles" should not be addressed in the draft conclusions, but rather in the commentary. In particular, the commentary should also clarify that general principles of law as an autonomous source of international law were not to be confused with general or fundamental principles of international law, which could have treaty and customary law as their primary source. Accordingly, the Commission must thoroughly analyse the specific characteristics of general principles of law as a source of law when it looked into the functions of principles and their relationship with other sources, which was the third issue proposed by the Special Rapporteur for the study of the topic.

The second part of Article 38 (1) (*c*) made reference to the recognition of the general principles by civilized nations. The requirement of recognition was closely related to the process for identifying existing principles, which would be addressed by the Commission at a later stage. While the issue had not yet been fully analysed by the Special Rapporteur, she wished to state at the current stage that she did not view the requirement of "recognition" as being similar to that of "accepted as law" (*opinio juris*), which was one of the requirements for the existence of international custom in accordance with Article 38 (1) (*b*) of the Statute. Given that the Statute used different terminology, the Commission could not but attribute different legal meanings to the two expressions and should avoid the temptation to minimize the difference between the two sources of international law. "Recognition" must mean a commonality to the major legal systems, not a general acceptance in the sense of *opinio juris*.

The Special Rapporteur proposed that the term "civilized nations" should be replaced with a mention of recognition by "States". While it was clear that "civilized nations" was a dated term, and there was general agreement that it was no longer applicable, replacing it with a reference only to "States" might not fully encompass all the actors involved in the formation of general principles. In fact, it had been proposed in the literature that the jurisprudence of international courts and tribunals, resolutions of international organizations, and policy statements of international conferences could all contribute to the formation and recognition of general principles. The issue merited a deeper analysis by the Commission, as in the case of the topic "Identification of customary international law", under which the contribution of international organizations and other actors to the "general practice" element had been discussed at length. That point had been highlighted in the Special Rapporteur's introductory remarks. Since a deeper analysis of the requirement had been deferred to future reports, the study of relevant actors that could contribute to the formation of general principles must also be resumed at a later stage. However, the outcome of that analysis might demonstrate that the wording of draft conclusion 2 was too narrow. A reference to recognition "by the international community" could be an alternative that better reflected the relevance of a multitude of actors. With regard to the same draft conclusion, she was unsure whether the title "Requirement of recognition" was appropriate. That issue should be discussed in the Drafting Committee.

There was broad agreement that one of the possible origins of general principles of law, as defined in Article 38 (1) (*c*), was the national legal system of States. As pointed out in the report, that proposition found support in the *travaux préparatoires* of the Statute of the Permanent Court of International Justice, the practice prior to the adoption of that Statute, the recent practice of States, and the decisions of international courts and tribunals. One of the requirements for the identification of a principle that could be considered part of international law seemed to be that it must be recognized by a sufficiently large number of States in their national legal frameworks; in other words, it must be "common to the major legal systems of the world", as stated by the International Tribunal for the Former Yugoslavia; "common to most legal systems", as stated by the Inter-American Court of Human Rights; or "recognized by the community of nations", as provided in the International Covenant on Civil and Political Rights. Additionally, a test of applicability or transposability of a principle from national systems to the framework of international law had to be met. The exact scope of those requirements, which were only briefly addressed in the report, must be assessed by the Commission in its later work on the topic.

Another set of general principles might originate in the international system or international relations themselves. That idea was also largely supported in practice and in

the literature, as demonstrated by the Special Rapporteur. Although the International Court of Justice had referred more often to those principles than to the ones originating in national systems, the process of their formation and their relationship to other sources of international law such as custom were less clear. Accordingly, that relationship must be further clarified in the Commission's work. For that reason, she would reserve her position with regard to the mention, in draft conclusion 3, of general principles "formed within the international legal system" as an autonomous category of general principles of law.

The Special Rapporteur proposed to embark, in his next report, on the study of the functions of general principles of law and their relationship with other sources of international law. Several issues that should be covered by such an analysis had already been identified: the autonomy of general principles as a separate source of law, the distinction between general principles and customary rules, and the role of general principles in the interpretation, development and adaptation of other norms, beyond the mere filling of lacunae. The identification of general principles and the requirements to be met by new principles would be addressed in the third report, which should also cover the question of which actors could be involved in the formation and identification of those principles. Lastly, the Special Rapporteur's proposal that the Commission should produce a set of draft conclusions as the final outcome of its work was particularly appropriate, given the markedly methodological character of the topic. It would also mirror the final outcome of the Commission's work on the identification of rules of customary international law.

The Special Rapporteur's first report provided a thorough review of the Commission's previous work, the literature, the case law of international courts and the practice of States in relation to general principles of law up to the current time. On the basis of that analysis, the Special Rapporteur had formulated some conclusions regarding the autonomy of general principles of law as a source of law and the origin of general principles, which nevertheless might have to be revisited at a later stage. At the same time, the work conducted thus far revealed that there was a shortage of materials that defined and set out the scope and characteristics of that source of law. As a result, the Commission would have to be rigorous in considering existing sources, but also creative in developing concepts that for the moment were still rather obscure. In conclusion, she said that she supported the referral of proposed draft conclusions 1 to 3 to the Drafting Committee, bearing in mind the debate in the plenary Commission.

The meeting rose at 1 p.m.