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Held at the Palais des Nations, Geneva, on Friday, 26 July 2019, at 10 a.m.

Contents

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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
	Ms. Oral
	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.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair said that he wished to draw attention to the revised programme of work for the last two weeks of the second part of the session, which had been agreed upon by the enlarged Bureau.

Ms. Escobar Hernández said that the revised programme that had just been distributed to members was different from the one that had been agreed upon the previous day by the enlarged Bureau. She therefore wished to know why the meeting of the Drafting Committee for the topic "Immunity of State officials from foreign criminal jurisdiction" had been moved from the afternoon of 29 July to the morning of 30 July.

The Chair said that, after an extensive discussion concerning the division of time between plenary meetings and Drafting Committee meetings, it had been decided that the Drafting Committee's time should be equally divided between the topics "Immunity of State officials from foreign criminal jurisdiction" and "General principles of law". The Special Rapporteur on the latter topic very much hoped that the plenary debate on that topic could be finished at the afternoon meeting of 29 July.

Ms. Escobar Hernández said that, although in principle she did not object to the altered timetable if it enabled the Commission to pursue its consideration of the topic "General principles of law", she considered that the decisions of the enlarged Bureau must be respected. The change in the programme of work had not been decided upon by the enlarged Bureau and she had not been consulted on the matter.

Mr. Vázquez-Bermúdez said that, in his capacity as Special Rapporteur for the topic "General principles of law", he appreciated the flexibility shown by Ms. Escobar Hernández. It was important to make substantive progress on both topics. As he recalled, no firm decision had been taken by the enlarged Bureau, which had left it to the Chair to decide how best to apportion the Drafting Committee's time.

The Chair said he took it that the Commission wished to adopt the revised programme of work for the two weeks in question, as proposed.

It was so decided.

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

Mr. Jalloh said that, while he mostly agreed with the views expressed by the Special Rapporteur in the excellent first report on general principles of law (A/CN.4/732), he wished to make five general observations.

First, as the report suggested, the starting point of the Commission's deliberations must be Article 38 of the Statute of the International Court of Justice. Although it was sometimes criticized in the literature as being outdated or incomplete, it enshrined the sources of international law to be applied by the Court in settling inter-State disputes. The Commission had played an important role in clarifying the sources of law listed in Article 38 (*a*) and (*b*). As the law of treaties and customary international law were fairly well settled, the decision to consider general principles of law was timely, especially since, as the representative of Slovakia in the Sixth Committee had noted at the seventy-second session of the General Assembly (A/C.6/72/SR.19), general principles of law were an essential complement to primary sources of international law, but had not yet been given much attention by the Commission. The Commission's work on that subject would undoubtedly provide useful guidance for States, international organizations, courts and tribunals, academics and all those who might have to address the sometimes enigmatic issue of general principles of law as a source of international law.

Second, the Special Rapporteur had been right to emphasize the methodological nature of the topic. The Commission's aim should be to clarify the nature, scope and functions of general principles of law and the means of identifying them; it should not attempt to catalogue existing general principles of law. He therefore welcomed the indication in paragraph 41 of the report that any examples would be purely illustrative.

Third, the report confirmed that there were as many approaches to the methodology for identifying general principles of law as there were scholars. Two main schools of thought seemed particularly worthy of attention. Oppenheim, Lauterpacht, Grapin, Schlesinger, Herczegh, McNair and Jenks supported a comparative approach based on domestic law, whereas Brownlie and Guggenheim advocated a hybrid approach. The Study Group on fragmentation of international law had noted in its report (A/CN.4/L.682) that general international law could refer to principles of international law proper and to analogies from domestic laws, especially principles of legal process. Although it would be wise to keep an open mind in that connection, he fully endorsed the Special Rapporteur's choice of a hybrid approach, since it would be more in line with the Commission's previous work.

Fourth, as far as scope was concerned, he generally concurred with the Special Rapporteur that, when studying the legal nature of general principles of law as a source of international law, the Commission should seek to explain three concepts: the meanings of "general", "principles" and "law", while bearing in mind their combined effect; the notion of "recognition" and what it entailed; and the term "civilized nations". It should also investigate the origins and functions of general principles of law and their relationship with other sources, especially customary international law. Above all, the Commission should endeavour to determine the method for identifying general principles of law. To that end, it should pursue the two-step approach proposed by the Special Rapporteur: it should first identify a principle that was common to a majority of national legal systems, and then determine whether and how that principle could be applied in the international legal system, which was structurally different. As a number of members had noted, general principles of law played an important role in certain fields of international law, such as international criminal law and investment law. It was therefore axiomatic that the Commission should adopt a cautious, rigorous and flexible approach in order to accommodate the specificities of the many areas of international law that would be covered by the topic.

Fifth, with regard to the outcome of the topic, although he sympathized with Mr. Murase's preference for draft articles, he agreed with the Special Rapporteur that, as in the case of the topics "Identification of customary international law" and "Peremptory norms of general international law (*jus cogens*)", which were also methodological in nature, the outcome should take the form of draft conclusions. To further emphasize its methodological nature and align it more closely with its sister topic "Identification of customary international law", the title of the topic should be changed to "Identification of general principles of law". Such a modification of the title would also make it absolutely plain that the Commission had no intention of addressing the substance of general principles of law.

In examining the current topic, the Commission would be considering the third of the key sources of international law referred to in Article 38 (1) (*a*) to (*c*) of the Statute of the International Court of Justice. Although some delegations in the Sixth Committee were of the opinion that the Commission would thereby be completing its work on sources, he wondered whether it might not also wish to look into the "subsidiary means for the determination of rules of law" to which subparagraph (*d*) referred, namely "judicial decisions and the teachings of the most highly qualified publicists of the various nations". Although the subject matter of subparagraphs (*c*) and (*d*) might well overlap and the sources of international law might interact and influence each other, addressing the category of sources referred to in subparagraph (*d*) in such a tangential way might not do full justice to its importance as a distinct, albeit subsidiary, means for the determination of international law. He therefore planned to submit a proposal for a new topic that would help the Commission to complete its work in that respect. He would welcome members' feedback on that proposal.

He had found part two of the report, which reviewed the wide range of the Commission's previous work, to be fascinating reading, especially the paragraphs dealing with the distinction between rules and principles and their respective normative content. That exercise usefully illustrated the challenge inherent in the identification of general principles of law and showed why the Commission might wish to retain a healthy measure of flexibility.

Turning to part three of the report and the four conclusions that the Special Rapporteur had drawn from the drafting history of Article 38 (3) of the Statute of the Permanent Court of International Justice and Article 38 (1) (*c*) of the Statute of the International Court of Justice, he said that he was unsure whether the Commission should try to decide whether, when the drafters had drawn up the provisions on general principles of law, they had created a new source of law or codified an existing source. While he accepted the argument that they were trying to fill gaps and avoid findings of *non liquet*, he, like Mr. Tladi, was uncertain whether addressing the precise meaning of *non liquet* fell within the scope of the topic. Any attempt to arrive at a definition might blur the distinction between a methodological study and a substantive consideration of general principles of law. It might therefore be wise for the Commission to reserve its position on that matter and possibly to return to that essentially academic debate at a later stage.

He could broadly agree with the four conclusions outlined in paragraphs 108 and 109. As for the possibility of deriving general principles of law from principles found *in foro domestico*, it should be noted that Elihu Root, the proponent of the final version of Article 38 (3) of the Statute of the Permanent Court of International Justice, had rejected that possibility on the grounds that domestic principles were applied differently in different States. At the same time, the Commission should examine the arguments made by other members of the Advisory Committee of Jurists, such as Phillimore, Loder and de Lapradelle. Of course, caution would be required, as consideration of those arguments could reopen the debate between naturalism and positivism and their place in shaping the way in which general principles and their status in international law were understood.

He particularly appreciated the Special Rapporteur's discussion of the Rome Statute of the International Criminal Court because general principles derived from national legal systems around the world were playing a crucial role in the development of international criminal law, and indeed article 21 of the Rome Statute specifically addressed the issue of applicable law. When that provision had been drafted, one delegation had proposed that, in developing principles of law, the Court should conduct and take into account a survey of the national laws of States representing the major legal systems of the world. Since he agreed with the proposition in paragraph 120 that "State and judicial practice support the position that general principles of law may be derived from national legal systems", he concurred that article 21 (1) (*b*) and (*c*) of the Rome Statute had a unique relationship with Article 38 (1) (*c*) of the Statute of the International Court of Justice. Of course, it was necessary to be mindful of the case law of the International Criminal Court and to ensure that the Commission's interpretation did not conflict with that of the judges of the Court.

Further support for the Special Rapporteur's argument could be found in the 28 June 2012 decision of the Special Court for Sierra Leone in *The Independent Prosecutor v. Hassan Papa Bangura et al.*, which acknowledged that, under rule 72 *bis* (iii) of the Rules of Procedure and Evidence, the laws to be applied by the Special Court included "general principles of law derived from national laws of legal systems of the world, including … the national laws of the Republic of Sierra Leone". It was, however, vital to keep in mind the fact that the treatment of general principles in the jurisprudence of ad hoc tribunals such as the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone might be more closely aligned with Article 38 (1) of the Statute of the International Court of Justice than with article 21 of the Rome Statute.

In the *Mavrommatis Palestine Concessions* case before the Permanent Court of International Justice, the dissenting opinion of Judge Moore was instructive, in that it held that the requirement that a court should have jurisdiction before it could act was one of the principles common to all legal systems. Legal writers likewise considered that the case of the *S.S. "Lotus"* provided instruction on how to ascertain whether a general principle existed.

While the International Court of Justice appeared to have applied general principles of law in a number of judgments and advisory opinions, it also, as Cherif Bassiouni noted in "A Functional Approach to 'General Principles of International Law'", "frequently failed to articulate the method or process by which to identify the existence" of a general principle under Article 38 (1) (*c*). However, that was not a fault on the Court's part, since the issue of

general principles tended to arise in the context of specific inter-State disputes that might already be resolvable under treaties or customary law. For that reason, the Court's case law might not be very helpful and the Commission should approach it with caution. He would have welcomed an example of a case in which the Court had rejected arguments based on general principles of law, or had simply considered that, since rules of conventional or customary international law addressed the situation at hand, there was no need for it to determine the existence of a general principle of law. Regarding the reference, in paragraph 210 of the report, to the Court's 1962 judgment in the case concerning the *Temple of Preah Vihear (Cambodia v. Thailand)*, he noted that the judgment did not in fact refer to the principle of preclusion, but merely stated that silence on the part of one who could and should have spoken was held to mean consent ("*Qui tacet consentire videtur si loqui debuisset ac potuisset*"). The dissenting opinion of Judge Spender mentioned the principle of preclusion and criticized the judgment for treating that principle as a "formless … maxim".

He agreed with the Special Rapporteur that references to general principles of law by international courts and tribunals demonstrated the relevance of such principles in the international legal order. He would add that those references also demonstrated the principles' status as an equally important source of law that could be used by States and courts alike.

He also agreed with the statement, in part four of the report, that the essential elements of general principles of law were set out in Article 38 (1) (*c*) of the Statute of the International Court of Justice. Accordingly, the term "general principles of law", the requirement of recognition, and the term "civilized nations" must be examined. The Commission must further explain how general such principles must be, identify their source and determine by whom they were to be "recognized". It was plain that "general" was not synonymous with "universal", because general principles of law found in civil and common law systems might be subject to different interpretations in those systems, or might not be found in other systems. He agreed with the statement in paragraph 153 regarding the meaning of "general", but that qualifier should also be understood to refer to a principle with a wide scope of application that could be found in different legal systems of States.

The Special Rapporteur rightly noted that the relationship between the terms "principle" and "rule" had attracted great attention. In that connection, he agreed with Mr. Aurescu that a principle was not in itself a rule, but was something that underlay a rule. The notion of "law" could encompass rules derived from national legal systems, but also other rules stemming from international law. However, he drew attention to the caution expressed in the dissenting opinion of Judge Tanaka on the 1966 judgment in *South West Africa (Ethiopia v. South Africa)*, to the effect that analogies drawn from municipal law, public law, constitutional and administrative law, private law, commercial law, substantive law and procedural law should not be made mechanically, by importing private law institutions lock, stock and barrel, ready-made and fully equipped with a set of rules. Judge Tanaka had further taken the view that underlying or guiding principles must not be limited to statutory provisions and institutions of national laws, but must be extended to the fundamental concepts of each branch of law as well to law in general insofar as those could be considered as "recognized by civilized nations".

While he agreed with the Special Rapporteur's thoughtful analysis in paragraphs 163 to 174 and the conclusion drawn in paragraph 175, the requirement of recognition should not be understood to mean a general practice accepted as law. The requirement of recognition must be deemed to be fulfilled when that practice could be found in a sufficiently large number of legal systems of the world, including African customary law, although the precise form that recognition should take would depend on the category of the general principle of law in question. The term "civilized nations" was anachronistic. For three centuries, it had formed the intellectual justification for a so-called "civilizing mission", but in reality it had underpinned the depredations of ruthless colonialism and the domination, by a handful of States in a small geographical area, of the States and peoples of the rest of the world.

The work of international lawyers from the so-called "third world", such as Antony Anghie, Upendra Baxi, James Gathii and Obiora Okafor, had played a seminal role in

highlighting the need to decolonize international law. In the classic 2005 treatise *Imperialism, Sovereignty and the Making of International Law*, Anghie argued that when the word "civilized" had been used to describe a people, nation or State, it had been understood by reference to its opposite, "uncivilized". The "civilized", or those endowed with civilization, had been recognized as proper subjects of international law, while the "uncivilized", or those lacking civilization, had been left outside international law. As Carl Schmitt had explained, "civilization" had been understood to be synonymous with European civilization.

It was not surprising that, as the process of decolonization had progressed, the term "civilized" had disappeared from modern legal instruments. One of the last references to "civilized nations" in a treaty could be found in article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the States members of the Council of Europe in 1950. Since then, the drafters of numerous international instruments had done away with the anachronistic term, referring instead to either "general principles of law" or "general principles of law recognized by the community of nations". In his view, the term "civilized" in Article 38 (1) (*c*) of the Statute of the International Court of Justice was unnecessary and superfluous – as French jurist Albert de Lapradelle had rightly but unsuccessfully argued during the drafting of the precursor to that provision – since the very concept of law implied civilization, and all modern-day States and peoples of the world were civilized. As suggested by Georg Schwarzenberger, the Commission had three options: to not give any meaning to the "embarrassing adjective", to use sociological knowledge to explain it, or to accept the works of others, such as historians, to explain it. His preference was to explain the term in the commentaries and, thereafter, to abandon it. That approach would be consistent with the views expressed by the Special Rapporteur and virtually all the other members of the Commission who had made statements on the topic.

The deliberations that had led to the adoption of Article 38 (1) (*c*) showed that the word "nation" was used to mean "people", rather than "State". It was unclear why Article 38 (1) (*c*) required the recognition of general principles by "nations", whereas Article 38 (1) (*a*) referred to the recognition of treaty rules by "States". As pointed out by Mr. Tladi, the two words were not synonymous. Mr. Valencia-Ospina had cited the separate opinion of Judge Christopher Weeramantry in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. Moreover, Judge Sergei Krylov, in a dissenting opinion on the advisory proceedings concerning *Reparation for injuries suffered in the service of the United Nations*, had excluded the word "civilized" when referring to general principles because it introduced an element of discrimination.

He agreed with the Special Rapporteur's assertions in paragraph 22 of the report regarding the two categories of general principles of law that appeared to stand out in Article 38 (1) (*c*). In paragraph 23, the Special Rapporteur referred to other categories of general principles of law found in the literature, such as principles "intrinsic to the idea of law and basic to all legal systems". Clarification as to what made such categories distinct from those listed in paragraph 22 would be appreciated. If a principle was basic to all legal systems, it was considered a general principle of law.

Turning to the proposed draft conclusions, he said that draft conclusion 1 could be clearer and more direct. To that end, he proposed that it should read "The present draft conclusions concern the way in which the existence and content of general principles of law are to be determined". That wording was aligned with that of conclusion 1 of the conclusions on identification of customary international law.

He agreed with the members who had suggested that the proposition set out in draft conclusion 2 should be fleshed out; that would require a more comprehensive analysis of the requirement of recognition. The views expressed by Mr. Murase and Mr. Park were interesting in that regard.

Draft conclusion 3 dealt with the core of the topic and should be carefully discussed in the Drafting Committee, bearing in mind that the Commission might need to revisit it at a later stage, depending on how much progress it made on the topic.

In paragraphs 259 to 261 of the report, the Special Rapporteur proposed that future reports should delve deeper into general principles of law and how they related to other

sources of international law. He supported that proposal and hoped that the Special Rapporteur would clarify the status of general principles as gap-fillers, rather than as an autonomous source of law.

He supported the referral of all the draft conclusions to the Drafting Committee. Like Mr. Tladi and Sir Michael Wood, and provided that the Special Rapporteur agreed, he believed that draft conclusions 2 and 3 should remain within the Drafting Committee until 2020, as more in-depth study was required in order to ensure that the language therein was precise.

Mr. Aurescu said that the Special Rapporteur's excellent first report, interesting and comprehensive introductory statement and outreach efforts in relation to the topic were to be commended. The comments made by delegations during the debates in the Sixth Committee in 2017 and 2018, which were outlined in the introductory part of the report, demonstrated that there was general support for the Commission's work on the topic.

He agreed with the Special Rapporteur's proposal, in paragraph 10, that the Commission should "clarify various aspects of general principles of law … in a pragmatic way based on current law and practice", and with the assertion, in paragraph 11, that "the practice of States and international courts and tribunals is sometimes described as unclear or ambiguous", which meant that "a cautious and rigorous approach" was required. The report was characterized by such an approach, which he welcomed in principle, but that caution should not prevent the Commission from drawing conclusions where it could.

He generally agreed that the Commission's consideration of the topic should focus on the issues listed by the Special Rapporteur. For example, he agreed with the point made in paragraph 18 that "the requirement of 'recognition' is … perhaps at the heart of the work of the Commission on the topic" and that the issues to be clarified included "the different forms that recognition may take, which materials are relevant when establishing that recognition exists and how to weigh them, and to what extent such recognition is required". Before turning to the other issues, the Commission should clarify the extent to which recognition was required. However, the very first issue to be examined was whether general principles of law were indeed a source of international law, and, if so, what kind of source. That issue was not analysed in the report. In his view, general principles of law were a source of international law of a specific kind.

While the Commission must inevitably begin by analysing Article 38 (1) of the Statute of the International Court of Justice, it should not lose sight of the fact that, as was clear from the *travaux préparatoires* presented in the report, that Article had not been drafted for the theoretical purpose of identifying the sources of international law. It was not exhaustive, as unilateral acts or declarations had been left out, even though they were a source of international law that was referred to by the Court in its case law. The Article had been drafted only in order to provide pragmatic guidance to the Court on what norms to apply, and what to do in the absence of norms, when it considered the disputes brought before it.

From that perspective, it would be very helpful to examine "the functions of general principles of law and their relationship with other sources of international law, in particular treaties and custom", as proposed in paragraph 24 of the report. In that connection, he tended to support the "widely held view", to quote from paragraph 25, that general principles of law were "a supplementary source of international law in the sense that they serve to fill gaps in conventional and customary international law, or to avoid findings of a *non liquet*", and, as mentioned in paragraph 26, that they were "a tool to reinforce legal reasoning".

Consequently, it was important for the Commission to examine the relationship of general principles of law not only with treaty and custom but also with equity, which, like general principles of law, was used by international courts and tribunals to resolve disputes and involved aspects related to or derived from ethics in international relations. As noted in paragraph 52 of the report, the Commission had previously referred to equity as a "general principle".

He would have expected the Special Rapporteur to examine, or at least mention, the need for an analysis, in the context of the topic at hand, of the nature of the principles that the Commission adopted in its work on various topics.

Last but not least, there was no reference in the report to the need for a comparative analysis of general principles of law and the fundamental principles of international law enshrined in the Charter of the United Nations and in many other documents, notably General Assembly resolution 2625 (XXV) and the Helsinki Final Act of 1975. There were only three secondary references, in paragraphs 182, 186 and 258, to the fundamental principle of sovereign equality of States. Similarly, there was no reference to the need for a comparative analysis of general principles of law and the principles regulating the various branches of international law. He was of the view that all those principles formed a system of principles of international law and that the relationship between them could not be neglected.

Although he agreed with the assertion in paragraph 41 that "the Commission should not address the substance of general principles of law", he would like to hear the Special Rapporteur's view on the possibility of drawing up an illustrative list of general principles of law, as the Commission had done in the case of *jus cogens*.

He agreed with the view expressed in paragraph 27 that general principles of law were distinct from treaties and custom. In paragraph 32, the Special Rapporteur suggested that the Commission could "clarify the role of judicial decisions and teachings as 'subsidiary means' … in the identification of general principles of law" and address "views that the decisions of international courts and tribunals are not only an aid in the identification of general principles of law, but play also a substantive role in the formation of this source of international law". While that would be an interesting avenue to explore, he feared that it could take the Commission's discussions beyond the scope of the topic.

In paragraph 33, it was suggested that the Commission might wish to examine the issue of regional or even bilateral general principles of law. He had reservations about the existence of such principles. Pending the consideration of the issue in a future report, his view was that any conclusion as to whether regional or bilateral general principles of law existed would depend mainly on the meaning that the Commission gave to the term "general" and on its decision about the degree of recognition that was needed in order for a general principle of law to be accepted as such.

Particularly useful, in his view, were the sections of the report devoted to the Commission's previous consideration of general principles of law; practice prior to the adoption of the Statute of the Permanent Court of International Justice; the *travaux préparatoires* relating to Article 38 of the Statute; and practice following the adoption of the Statutes of the Permanent Court of International Justice and the International Court of Justice.

In paragraph 108, the Special Rapporteur stated that the inclusion of "general principles of law" in Article 38 of the Statute "seems to have been partly driven by a concern that the Court may decline to exercise its jurisdiction and find a *non liquet*", which meant that general principles had been viewed from the very beginning as a supplementary source of international law. In paragraph 109, the Special Rapporteur asserted that "there is no formal hierarchy between the different sources of international law listed in the provision", which was a conclusion that seemed to have been inferred from the fact that a reference to an order of sources had been deleted from the chapeau of Article 38. That appeared to contradict the idea that general principles had been included in the Statute in order to provide the Court with a means of filling gaps in conventional and customary international law or avoiding findings of *non liquet*.

He agreed with the substance of the assertion that there was no formal hierarchy among the sources of international law listed in Article 38, or even among sources that were not listed, apart from "judicial decisions and the teachings of the most highly qualified publicists of the various nations", which were auxiliary sources. However, that conclusion could not be deduced from the fact that the final text of Article 38 contained no mention of an order, because an order was still present. The provision had been drafted solely for the pragmatic purpose of helping the Court to settle disputes. The easiest approach to that task

was to search first for treaty norms and then, in the absence of such norms, to attempt to find customary norms, which was a more complicated task, and, failing that, to turn to general principles. In article 21 (1) of the Rome Statute of the International Criminal Court, the existence of an order was mentioned explicitly. Nevertheless, the lack of a formal hierarchy among the main sources of international law did not mean that their functions, the degree to which they were used and the scope of the matters to which they applied were not different in practice.

He welcomed the overview of international judicial practice relating to general principles of law that was provided in the report. In paragraph 139, the Special Rapporteur stated that the overview showed that, "since the adoption of the Statute of the Permanent Court of International Justice in 1920, States and international courts and tribunals have referred to this source of international law on several occasions and in different contexts, leaving no doubt as to its relevance for the international legal order". Without questioning the relevance of general principles of law for the international legal order, he found that conclusion to be at odds with the assertion in paragraph 127 that "the International Court of Justice and its predecessor appear to have clearly referred to general principles of law … in only a few cases", and with paragraph 128, in which the Special Rapporteur listed cases where the Permanent Court of International Justice had rejected the application of general principles of law.

The issue of the differences between the words "principle" and "rule" was first broached in paragraph 146 of the report; it should perhaps have been addressed at the beginning. He shared the view expressed in that paragraph that "by a principle, or general principle, as opposed to a rule, even a general rule, of law is meant chiefly something which is not itself a rule, but which underlies a rule". That view was highly abstract and had an axiological dimension, as emphasized in paragraph 148.

By way of a conclusion, in paragraph 153, the Special Rapporteur suggested that the term "general principles of law" referred to "norms that have a 'general' and 'fundamental' character. They are 'general' in the sense that their content has a certain degree of abstraction, and 'fundamental' in the sense that they underlie specific rules or embody important values". He could agree with the bulk of that definition, but not all of it. First, it was circular, since it explained that "general" principles were "general". Second, he did not agree that principles were "norms". Rather, he agreed that they "underlie specific rules or embody important values". The remaining elements of the definition were acceptable, including the reference to a "fundamental" character, provided that there was no confusion with fundamental principles of international law.

On the issue of "recognition", he fully agreed with the view expressed in paragraph 165 that recognition was "the essential condition for the existence of a general principle of law as a source of international law". He also agreed, in principle, with the assertion in paragraph 171 that "recognition may need to be established in a different manner" depending on what type of general principle of law was to be recognized. Furthermore, it was clear that the term "civilized nations" was obsolete.

He also agreed with the idea implicit in paragraph 183, namely that recognition should be widely representative. However, he did not fully understand why the Special Rapporteur considered, or appeared to consider, that the requirement for recognition to be widely representative applied only to general principles of law derived from national systems. The matter should be clarified and elaborated on in future reports, especially in the light of the high degree of caution exercised by the Special Rapporteur in paragraph 187 when listing issues related to recognition that needed to be tackled in future reports.

The section of the report devoted to general principles derived from national legal systems was very interesting. In paragraph 230, the Special Rapporteur concluded that "one of the categories of general principles of law within the scope of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice is general principles of law derived from the national legal systems of States, to the extent that principles common to a majority of those legal systems can be identified". Although he agreed, he considered that, bearing in mind all the practice examined in the report, the conclusion should be completed with the

words “and to the extent that those principles are suitable for application at the level of international law”.

The section of the report dealing with general principles formed within the international legal system was equally interesting, but there was no conclusion regarding the issue of recognition, which would, according to paragraph 253, be addressed in a future report.

Turning to the proposed draft conclusions, he said that he had no reservations, in principle, about draft conclusion 1. At the same time, the report did not address the key issue of whether general principles of law were a source of international law, and dealt only tangentially with the question of what kind of source they were, without drawing any conclusions. Under the circumstances, he believed that draft conclusion 1 could be modified, in line with the title of the topic, to read “The present draft conclusions concern general principles of law”. That could be done on the understanding that the Commission would revisit the draft conclusion after the issues that he had mentioned had been tackled in a future report, which might make it possible to add the words “as a source of international law” in the form that the Drafting Committee deemed appropriate.

He had no reservations, in principle, about the substance of draft conclusion 2, but in his view the text was also premature. Many aspects of the issue of recognition, including the degree of recognition required and the possible difference between the two categories of general principles with regard to the parameters of recognition, had not yet been analysed in depth by the Special Rapporteur. In that context, the word “generally” in the phrase “generally recognized by States” was not grounded in the research outlined in the report; the word “general” in the phrase “general principles of law” also had to be clarified. The reference to “States” could perhaps be complemented with references to other actors that might participate in the formation of general principles of law.

In the light of those considerations, he was of the opinion that the draft conclusion should be either considered at a later stage or rephrased to read “Recognition is an essential condition for the existence of a general principle of law”. The understanding, in the latter case, would be that the Commission would revisit the issue once the aspects he had raised had been considered in a future report. He had no remarks concerning draft conclusion 3.

Taking into account his comments and proposals, he was in favour of referring the draft conclusions to the Drafting Committee.

Mr. Nguyen said that he wished to join other members in thanking the Special Rapporteur for the excellent first report and interesting oral presentation thereof. The report contained references to an abundance of State practice, jurisprudence, domestic court judgments, doctrine and literature, and illustrated the great efforts made by the Commission to fill gaps in the study of the main sources of international law. It followed shortly after the completion or near-completion of the Commission’s work on the topics “Identification of customary international law”, “Provisional application of treaties” and “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”. In other words, the Commission had covered almost all aspects of Article 38 (1) of the Statute of the International Court of Justice since the adoption of the Vienna Convention on the Law of Treaties in 1969. The report contained a comprehensive account of the development and implementation of Article 38 (1) (*c*), both before and after the adoption of the Statutes of the Permanent Court of International Justice and the International Court of Justice. It also gave the Commission an opportunity to pronounce itself on the use of terms such as “principles”, “general principles”, “general principles of law” and “general principles of international law”, which were often employed in an inconsistent and confusing manner.

The issues that the Special Rapporteur proposed for consideration by the Commission were the same as those raised during the debate on the topic within the Working Group on the long-term programme of work and in the working paper prepared by the Secretariat in 2016 (A/CN.4/679/Add.1). The list of issues was not exhaustive and could be extended. In the report, the Special Rapporteur focused on the functions of general principles of law and on the relationship between those principles and other sources of international law, in particular conventional and customary norms. While it was true that general principles of law and norms of customary international law were distinct and should

not be confused, as noted by the Special Rapporteur in paragraph 28 of the report, those two sources interacted with and complemented each other. The possibility that two general principles of law on the same issue could conflict with one another also deserved special attention. Conflict could exist between, for example, humanitarian principles and the principle of sovereignty; the responsibility to protect and the principle of non-interference in domestic affairs; or military intervention for humanitarian reasons and the prohibition of the use of force. What rule should be applied to resolve such a conflict: *lex specialis*, *lex posterior*, or a different rule? Another question concerned the capacity of general principles of law to change. Could they be modified or replaced, or could they serve as a basis for *jus cogens* norms of international law?

In part two of the report, the Special Rapporteur cited references to humanitarian and economic law and discussed the topics "Identification of customary international law" and "Peremptory norms of general international law (*jus cogens*)", owing to their close relationship with the topic under consideration. However, the Commission's work on several other topics had also touched on general principles of law, including the rule of continuous nationality and the general rule of non-succession, in connection with "Succession of States in respect of State responsibility", and the principle of full reparation, in connection with "Protection of the environment in relation to armed conflicts".

In part three of the report, on the development of general principles of law over time, various references to general principles of law were invoked in the context of treaties and international judicial practice. He wondered why the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) had not been included, despite the fact that the Special Rapporteur recommended, in paragraph 20, that the Commission should consider the role of international organizations in the formation of general principles of law as a source of international law. In future work, the practice of international organizations should be considered relevant for the purposes of the current topic. On that point, he shared the views of Ms. Galvão Teles and Mr. Park, who had stated that the jurisprudence of international courts and tribunals, the resolutions of international organizations, and the policy statements of international conferences could all contribute to the formation and recognition of general principles of law. Those principles were invoked by States and international organizations in their mutual interactions. That question was related to the scope of the topic, which some colleagues wanted to limit to Article 38 (1) (*c*) of the Statute of the International Court of Justice in order to avoid further complexity. If the scope was thus limited, however, the title of the topic would have to be changed to "General principles of law as a source of international law under Article 38 (1) (*c*)", and general principles of law that went beyond the scope of that Article would need to be considered under a separate topic. If the majority of members wished to limit the scope of the topic in that manner, the question of legal principles in general, beyond the scope of the Article, should be addressed in the next report and in the commentary.

In paragraph 16 of the report, the Special Rapporteur separated Article 38 (1) (*c*) into three parts. Other authors had identified four elements in the provision, namely "general", "principles", "recognized" and "civilized nations". Before considering the first element, "general principles of law", the Special Rapporteur highlighted the term "principle" and its relationship with the term "rule", as well as the association of the term "general" with the term "principle". He agreed with the Special Rapporteur that the term "general principles of law" in Article 38 (1) (*c*) had been interpreted on various occasions, either as a whole or word by word. The main requirement was to identify an interpretation that reflected the intention of the drafters of the provision.

The term "general" could mean "not unique". While there was consensus that general principles of law were derived from domestic legal systems, the term "general" in Article 38 (1) (*c*) did not preclude the existence of general principles in the international legal system. However, he agreed with Sir Michael Wood that there was little, if any, practice in that regard. Likewise, the term "general" could not be interpreted as ruling out the existence of "general principles" in a regional context. In fact, the emergence of general principles in domestic legal systems could imply that they existed in the regional context.

For example, *uti possidetis* was a principle that had emerged in the context of the independence of American, Asian and African States. It derived from Roman law and had become a regional principle before it had been recognized as a general principle of international law. "General" reflected the fundamental and basic values of the legal system. It could mean "not special", but "general principles" necessitated a tailored approach that depended on each special circumstance. The same general principle could prevail in one case but not in another.

General principles of law prevailed in the absence of customary law rules or agreements between States. While rules stipulated guidelines that must be adhered to, "general principles" suggested solutions that could apply to multiple situations. The omission of the adjective "national" or "international" before the word "law" showed that the drafters of Article 38 (1) (*c*) had intended to imply that general principles could arise from national legal systems or from within the international legal system as a source of international law. In other words, the origin of general principles of law had a dual character. The challenge was how to distinguish between criteria or standards for the recognition of general principles of law derived from national legal systems and criteria or standards for the recognition of those formed within the international legal system. On that point, he agreed with Mr. Valencia Ospina, Mr. Hmoud and Mr. Murphy. General principles of law derived from national legal systems were more easily recognized than those formed within the international legal system, given that the distinction between general principles of law and customary law rules was blurred. General principles of law were rarely formed within the international legal system because some of them could be elevated to form rules of customary international law. The Special Rapporteur's comparative survey of practice, jurisprudence and literature, as well as the debates in the Commission, would help to clarify the term "general principles of law".

The order of the provisions in Article 38 (1) should be analysed along with other elements in order to clarify the legal status of general principles of law and the extent to which they were recognized. Article 38 (1) did not mention a hierarchy among the three sources listed in subparagraphs (*a*), (*b)* and (*c*), and State practice, jurisprudence and literature indicated that they were equal, independent and autonomous. The chapeau of Article 38 (1) stated only that the Court should apply the three sources in adjudicating on disputes. It did not give any legislative power to the Court. In terms of application, conventional norms took precedence because their text was more precise than that of customary rules or general principles of law. Customary rules and general principles of law needed to be identified or transposed before they could be applied. Of course, it was not necessary to apply the sources in the order in which they appeared in Article 38 (1). However, the fact that the interpretation of conventional norms was easier than the identification of abstract customary rules or general principles of law affected the process of application. General principles of law were an autonomous source of law, not a subsidiary or substitute source. Regarding them as a supplementary or additional source would be contrary to the spirit of Article 38 (1) (*c*), since the authors of Article 38 had devoted a separate subparagraph to each source. Mr. Rajput had raised the same point the previous day, when he had stated that general principles of law as a source of international law under Article 38 (1) (*c*) occupied the same level as treaties and custom.

Difficulty of identification also affected the criteria for the existence of each source of international law. Acceptance was needed in the case of customary rules, while recognition was connected to general principles of law. Peremptory norms of general international law required both acceptance and recognition. The meaning of each term should be clarified in each case. In proposed draft conclusion 8 on the topic "Peremptory norms of general international law (*jus cogens*)", the Special Rapporteur for that topic, Mr. Tladi, pointed to the distinction between the requirement of acceptance and recognition as a criterion for *jus cogens* norms and the requirement of recognition for the purposes of general principles of law within the meaning of Article 38 (1) (*c*). Acceptance, in the case of customary rules, must be evidenced by general State practice and *opinio juris*, and the combination of acceptance and recognition elevated certain customary rules to the level of *jus cogens*. In its debates on the draft articles on the law of treaties and, more recently, on the fourth report on peremptory norms of general international law (*jus cogens*), the Commission had seemed inclined to conclude that acceptance and recognition by a large

majority of States was sufficient for the identification of a norm of *jus cogens*. While acceptance was closely linked to the practice of States, recognition could be inferred from the practice of a limited number of States representing all major systems of law, and therefore did not require the practice and *opinio juris* of a large majority of States. In the case of *jus cogens* norms, the key factor was acceptance and recognition by a very large majority of States; in the case of general principles of law, it was recognition by "civilized nations". Irrespective of the political implications, the drafters' use of the term "civilized nations" implied that a limited number of nations representing the principal legal systems of the world was sufficient to represent civilization. The term "civilized nations" was now inappropriate in the light of the fundamental principle of the equality of sovereign States, as the Special Rapporteur mentioned in the report's introduction.

The structure of Article 38 (1) (*c*) could be explained in the commentaries. Specifically, the commentaries could indicate that the criteria for the recognition of the existence of a general principle of law did not require recognition by all States, but only by a very large majority of the international community representing the main forms of civilization and the principal legal systems of the world. In practice, *uti possidetis* had been recognized as a general principle of law by American, Asian and African countries and nations before it had been accepted by European States.

The draft conclusions proposed by the Special Rapporteur were short and sufficiently reflected the common understanding of Article 38 (1) (*c*). He had no objections to draft conclusion 1. With regard to draft conclusion 2, he had a minor suggestion. In order to stress that the existence of a general principle was independent and objective, and given that recognition was the evidence that proved the existence of a general principle, the phrase "recognized by a very large majority of the international community" was more suitable than "recognized by States". Moreover, it opened the door to the possibility of recognition through international organizations. Concerning draft conclusion 3, he supported Mr. Park's suggestion that subparagraph (*b*) should be amended to read "General principles of law comprise those [that] [i]n certain cases [are] formed within the international legal system". With regard to the future programme of work, he fully agreed with other members that the Commission should focus on the functions of general principles of law and their relationship with other sources of international law. The question of the relationship among general principles *inter se* should also be considered. He supported the referral of all three draft conclusions to the Drafting Committee.

The meeting was suspended at 11.35 a.m. and resumed at noon.

Mr. Saboia said that the Special Rapporteur's first report on general principles of law was well researched and well documented, and its precision and clarity laid a firm foundation for the further development of an important topic. As stated in the introduction, the report was preliminary and introductory in nature and was intended to enable the Commission to open the debate and chart a course for the work ahead. In the Sixth Committee, several delegations had welcomed the inclusion of the topic in the Commission's programme of work and had expressed the view that the examination of general principles of law as a source of international law would be a fitting complement to the Commission's previous work with regard to the other sources of international law.

As some authors had noted, interest in general principles of law had recently increased, possibly as a result of the fragmentation of international law and the development of new areas of law where more gaps were to be found, such as international criminal law and the establishment of international criminal courts and tribunals. In part one, chapter I, the Special Rapporteur defined the scope and proposed outcome of the topic, rightly indicating that the Commission was in a position to clarify various aspects of general principles of law in a pragmatic way, based on current law and practice. The purpose should be to provide guidance to States, international organizations, courts and tribunals, and all those called upon to use general principles of law as a source of international law. With regard to the proposed outcome, he found that draft conclusions were appropriate. He took note of the suggestion that the Commission should address four main issues: first, the legal nature of general principles of law; second, the origins of general principles of law; third, the functions of general principles of law and their relationship with other sources of international law; and fourth, the identification of general

principles of law. Draft conclusion 1, entitled “Scope”, was presented in paragraph 34 and was uncontroversial, or at least had seemed so to him before he had listened to the statements made by other members.

Chapter II of part one dealt with the important issue of methodology. He shared the Special Rapporteur’s view, as presented in paragraphs 35 to 37, on the bases on which the Commission should conduct its work. As in the case of other topics of a similar nature, the relevant sources for the conduct of research were the practice of States and international organizations, the jurisprudence of international courts and tribunals, and the writings of legal scholars. As pointed out in paragraph 38, the choice of materials for the study was made more difficult by the fact that different expressions were used, in practice and in the literature, to designate categories of norms that could be viewed as general principles of law. In paragraph 39, the Special Rapporteur rightly proposed some rigorous objective criteria for identifying pertinent materials that would serve the purposes of the study. In paragraph 41, the Special Rapporteur appropriately proposed that examples of general principles of law should be referred to during the examination of the topic in an illustrative manner, without a discussion of their substance.

Part two contained an extensive survey of the Commission’s previous work on general principles of law, covering both general references and the treatment of specific issues. The survey, which was set out in paragraphs 46 to 64, eloquently demonstrated the role played by general principles of law in most of the topics on which the Commission had worked, including the formulation of the Nürnberg Principles, the law of treaties, responsibility of States for internationally wrongful acts, and the fragmentation of international law.

Part three included an analysis of the development of general principles of law over time and the relevance of that historical background. It started with a survey of the rich practice of the nineteenth and early twentieth centuries, prior to the establishment of the Permanent Court of International Justice. As stated in paragraph 78 of the report, many treaties concluded for the settlement of disputes during that time period contained broad applicable law provisions that included concepts such as the “law of nations”, “principles of international law” and “equity”. The Hague Conferences of 1899 and 1907 and the instruments and arbitral tribunals that had been established in consequence provided for recourse to rules and principles derived from sources other than treaties and custom. Regarding the report’s references to the Convention relative to the Creation of an International Prize Court, he wished to provide some historical context concerning that proposed convention, which had never entered into force. First, it should be recalled that one of the reasons for the failure of the proposed Prize Court was that its composition would have been based on military power and disregarded the principle of the sovereign equality of States. Second, footnote 115 of the report illustrated the extraordinary power that would have been given to the judges, who would have been called upon to simply “create the law”. Discussions on the margin of discretion to be afforded to judges appeared throughout the history of the establishment of the institutions that had led to the founding of the Permanent Court of International Justice. Another notable creation of the period was the Martens clause, whose continued relevance had been emphasized in the context of other topics currently being considered by the Commission. The importance of such prior practice was captured in the conclusion set out in paragraph 89, where the Special Rapporteur stressed its considerable relevance to the process that had led to Article 38 (3) of the Statute of the Permanent Court of International Justice.

Chapter II of part three covered the drafting history of Article 38 (3) of the Statute of the Permanent Court and the identical provision in the Statute of the International Court of Justice. The fact that such a text had survived the test of time, wars and other political events was remarkable and attested to the careful and wise manner in which the members of the Advisory Committee of Jurists had proceeded in drafting the Statute of the Permanent Court. He was pleased that two prominent Brazilian jurists, Raul Fernandes and Clóvis Beviláqua, had taken part in that founding moment. According to Fernandes, as quoted in paragraph 101 of the report, what was true and legitimate in national affairs, for reasons founded in logic and not in the arbitrary exercise of sovereignty, could not be false and illegal in international affairs, where, moreover, legislation was lacking and customary law

was being formed very slowly, so that the practical necessity of recognizing the application of such principles was much greater.

Part four addressed the elements and origins of general principles of law. In chapter I (A), a detailed discussion of the meaning of the expression "general principle of law" was presented. A comparison between the terms "rule" and "principle" led to the tentative conclusion that the word "principle" in Article 38 (1) (*c*) of the Statute of the International Court of Justice was meant to refer to a norm that had a general and fundamental character. However, that assertion was put to the test by divergent views and realities that made clear-cut conclusions difficult to reach, at least until the issue had been examined further. The word "general", in itself, was understood as encompassing all branches of law. The study also indicated that general principles of law included both those derived from the domestic legal systems of many States and those that had developed in international law. The provisional conclusions of that analysis were set out in paragraph 162.

Section B addressed the requirement of "recognition", which was to be further developed, together with the issues of identification and origin. Recognition by States was an essential requirement for determining the existence of a general principle of law. As indicated in paragraph 166, the rationale behind that requirement was the need to avoid giving judges too much latitude in establishing the applicable law or even the power to legislate. The existence of such recognition had to be based on an objective analysis. That conclusion was, in effect, clearly established in the legislative history of Article 38 (3) of the Statute of the Permanent Court of International Justice. The way in which that process took place might vary according to the category of general principles of law in question. In particular, those general principles of law that might be formed within the international legal system required a different process of assessment to determine whether they met the test of recognition.

The use of the expression "civilized nations" to designate those States whose recognition was required was examined in the report. The nearly unanimous view was that the expression was an outdated relic of the past that should be replaced with words that reflected the sovereign equality of States. In paragraph 186 of the report, the Special Rapporteur proposed what seemed to be a desirable solution, namely to use the expression "general principles of law recognized by States". Taking into account the safeguards in paragraph 187, which reserved certain matters regarding recognition for future reports, draft conclusion 2 was acceptable. Although he endorsed *prima facie* the Special Rapporteur's proposal, he was sensitive to the concerns expressed by Mr. Tladi and other colleagues that the outright replacement of "civilized nations" with "States" could lead to the loss of some additional reference to other creative origins of general principles of law. The concept of the international community, which deserved particular attention in the context of the topic of *jus cogens* norms, was one such element.

Chapter II of part four addressed the origins of general principles of law. The Special Rapporteur identified the most commonly accepted categories of general principles of law, namely those that originated from national legal systems and those that were formed within the international legal system, while indicating that a deeper examination of the forms that the recognition of principles in those two categories could take would be left for a future report.

After extensively surveying the case law of the International Court of Justice and other courts and tribunals, including national courts, the Special Rapporteur, in paragraph 223 of the report, listed some of the expressions used to designate general principles of law that were derived from national legal systems, such as "great majority of the municipal legal systems of the world". It was important to note that the identification of such principles required the examination of their adaptability to the international legal system. A process of transposition might be necessary in order to avoid distortions, in view of the differences between national legal systems and the international legal order.

During the Commission's debate on the topic at the current session, some members had argued against the existence of the second category of general principles of law, namely those that were formed within the international legal system. The existence of that category was, however, solidly corroborated by the Special Rapporteur's extensive and

careful research. Paragraphs 236 to 252 of the report demonstrated how the case law of the International Court of Justice and other international courts relied on principles belonging to international law. Therefore, he was in favour of maintaining the two categories proposed by the Special Rapporteur in draft conclusion 3.

Lastly, he supported the content of part four, chapter III, on terminology, and part five, on the future programme of work on the topic. He supported the referral of the draft conclusions to the Drafting Committee.

Mr. Reinisch said that he welcomed the Special Rapporteur's first report, which provided a solid foundation for the Commission's subsequent work on the topic. As indicated in the report, there were a number of issues concerning the relationship of general principles of law with other sources of international law that required clarification. In particular, the report stated that it was widely held, in the literature, that general principles of law were a supplementary source of international law, given that they filled gaps left by conventional and customary law, thereby preventing findings of *non liquet*.

However, contemporary judicial practice seemed to view general principles as being on the same footing as other sources of law. Thus, international courts and tribunals had dealt with conflicts of norms on the basis of *lex specialis* and *lex posterior*. While in practice that often meant that other sources were given priority over general principles of law, that reflected the general normative content of such principles rather than a presumption that they had a supplementary or subsidiary role. Regarding the relationship between a bilateral customary norm and a general principle of law, the International Court of Justice had held, in the case concerning the *Right of Passage over Indian Territory*, that "such a particular practice must prevail over any general rules", thus viewing the relationship through the lens of *lex specialis*. That position on the equal rank of general principles of law and other sources of international law was also in line with the drafting history and wording of Article 38 (1) of the Statute of the International Court of Justice and with the conclusion of the Study Group on fragmentation of international law that "the rules and principles of international law are not in a hierarchical relationship to each other. Nor are the different sources (treaty, custom, general principles of law) ranked in any general order of priority."

Notwithstanding the indication that regional general principles of law would be covered in the Special Rapporteur's third report, he wished to comment briefly on the subject. In support of the proposition that general principles of law with such limited application existed, the report made reference to certain treaties of regional organizations, namely the Treaty on the Functioning of the European Union, the African Charter on Human and Peoples' Rights, and the rules of procedure of the Economic Court of the Commonwealth of Independent States. As further support, the report cited the practice of the European Court of Justice in applying "general principles of Community law". Unlike Mr. Murphy and Mr. Hmoud, he did not doubt that the potential existence of general principles of law at the regional level fell within the scope of the topic. After all, the Commission had also considered the possibility of regional custom in its work on the topic "Identification of customary international law". Given that all the examples he had cited related to regional organizations, it was not clear whether they involved general principles with a regional scope of application or simply principles that were applicable only to specialized subfields of international law, such as the legal order of the European Union, whose members were all in a specific region. In order for a true regional general principle of law to exist, it would also have to apply between the States of a particular region outside the context of regional organizations. There appeared to be no practice to support such an assertion, although it could not be excluded outright. Even though the domestic systems of the parties in the case concerning *Certain Property (Liechtenstein v. Germany)* were very similar, Liechtenstein had relied on the principle of unjust enrichment not as a "bilateral" or "regional" principle, but as a principle of law that was recognized throughout the world. The Special Rapporteur might wish to take those points into consideration in subsequent reports.

Regarding the examples in the report that had been drawn from international judicial practice, he said that it was not entirely clear how the Special Rapporteur had come to the conclusion, as set out in paragraph 135 of the report, that the Inter-American Court of

Human Rights considered that the principle of "equality before the law, equal protection before the law and non-discrimination" was a general principle of law which, moreover, constituted a peremptory norm of general international law (*jus cogens*). Indeed, the Court did not mention the term "general principles of law" in the relevant passage, but rather referred to "general international law" when asserting that "the fundamental principle of equality and non-discrimination forms part of general international law". In fact, the Court had been of the view that the principle of equality and non-discrimination belonged to *jus cogens*, "because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws". As to Mr. Murphy's assertion that the Court's claim of *jus cogens* status for the principle of equality before the law was contentious, the Court's statement could also be read as indicating that it viewed that principle as having become part of general international law as custom.

The discussion of the term "principle", as distinguished from "rule", in part four, chapter I, of the report had merit. While he agreed with Ms. Galvão Teles and Mr. Rajput that every general principle of law was a rule, but not every rule was a principle, it seemed that general principles of law, as applied in international practice, were not necessarily "principles" in the sense of general, underlying rationales as described by legal theory. Thus, he concurred with the Special Rapporteur's view that general principles of law had been invoked by States and applied by international judicial bodies with varying degrees of specificity. Regarding the phrase "civilized nations", he agreed with the Special Rapporteur's suggestion, in paragraph 185 of the report, that a distinction between "civilized" and "uncivilized" nations could not be maintained and that reference merely to "States" was therefore preferable. Moreover, as noted by Werner Schroeder, any distinction between civilized and uncivilized nations would be incompatible with Article 2 (1) of the Charter of the United Nations, which set out the principle of the equality of all States and did not allow discrimination against any members of the international community.

Regarding the methodology set out in part four, chapter I (A), he supported the adoption of a two-step methodology under which the extent to which a principle was recognized in domestic legal systems was determined first and the principle was then adapted or transposed at the international level. An example of that second step could be found in the judgment on the *North Sea Continental Shelf* cases, in which the International Court of Justice had held that the doctrine of the just and equitable share, alleged by Germany to be a general principle of law, was "foreign to, and inconsistent with, the basic concept of continental shelf entitlement". That implied that general principles could not contradict the existing international legal framework. In that connection, he looked forward to the Special Rapporteur's future report on the identification of general principles of law.

He supported the clear distinction made by the Special Rapporteur between "general principles of law derived from national legal systems" and "general principles of law formed within the international legal system". However, as the term "general principles of international law" had been used to denote a number of different things, it was important, at the outset, to determine the specific meaning ascribed to that term by States, courts and scholars. In particular, there was a question as to whether the use of the term implied some claim to "normativity" that went beyond the sources of international law recognized in Article 38 (1) of the Statute of the International Court of Justice and the practice of the Court. Insofar as the Commission's work was to focus on clarifying the theory of sources, instances that involved such a claim were particularly pertinent. In contrast, cases in which the term was used in a descriptive fashion should be clearly distinguished by the Commission, since they appeared to be much less relevant to its work. He wished to highlight a few examples in which the term had considerably different meanings.

First, the term "general principles of international law" had sometimes been used interchangeably with "general principles of law" derived from national legal systems. In its counter-memorial in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia*), Australia contended that the mere fact that a form of legal professional privilege existed in many domestic legal systems was not sufficient to generate a new general principle of international law. Similarly, scholars often referred to general principles of international law in connection with principles that had their origin in domestic law.

Second, the term was used in other contexts to refer to general international law, as an umbrella term for rules of customary international law and general principles of law. For instance, the applicable law clauses of several bilateral investment treaties allowed tribunals to apply "general principles of international law" alongside the domestic law of the host State and applicable treaty law. While those provisions did not refer to customary international law, tribunals had interpreted the term "general principles of international law" as encompassing both custom and general principles.

Third, fundamental principles of conventional or customary law had sometimes been referred to as "general principles of international law". That was particularly true of the principles of the Charter of the United Nations, which were reaffirmed in the Declaration on Friendly Relations contained in General Assembly resolution 2625 (XXV). In a recent judgment of the International Court of Justice, the principles of sovereign equality and territorial integrity of States and the principle of non-intervention, which were mentioned in article 4 of the United Nations Convention against Transnational Organized Crime, were described as "general principles of international law". More generally, the term "principles of international law" was often used to refer to customary norms, instead of implying a specific reliance on Article 38 (1) of the Statute of the Court.

It was quite clear that the Commission should not rely on any of those uses in drawing conclusions on whether general principles that were formed within the international legal system qualified as one of the sources of international law identified in Article 38 of the Statute of the International Court of Justice. Rather, the Commission should critically assess the matter. The report referred to the principle of *uti possidetis* in the context of general principles of international law, taking as its basis the judgment of the International Court of Justice in *Frontier Dispute (Burkina Faso/Republic of Mali)*, in which the Court held that the principle of *uti possidetis* was "a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs". That approach had been reiterated in opinion No. 3 of the Arbitration Commission of the International Conference on the Former Yugoslavia (Badinter Commission), which was also mentioned in the Special Rapporteur's report. While at least one scholar had taken the view that the judgment in *Frontier Dispute* referred to general principles of law, it appeared more likely that the Court had relied on the principle of *uti possidetis* as a customary norm. In particular, the judgment pointed to the acceptance of the principle in State practice and *opinio juris*. Furthermore, most scholarly opinions ascribed a customary international law status to the principle of *uti possidetis*.

Even though the International Court of Justice appeared to consider *uti possidetis* to be a general principle, the qualification "general" seemed to refer to the territorial scope of the principle rather than its source. In the judgment in *Frontier Dispute*, the Court repeatedly emphasized that *uti possidetis* was not a regional principle, but a rule of general scope that was not "limited in its impact to the African continent as it had previously been to Spanish America".

The Special Rapporteur's report further relied on the Slovenian Constitutional Court's position that *uti possidetis* was a "generally recognized principle of international law". That specific wording, however, was derived from article 8 of the Slovenian Constitution, according to which laws and regulations must comply with generally accepted principles of international law. According to the Slovenian Constitutional Court, the term encompassed, in particular, the rules of customary international law and the general principles of law recognized by civilized nations. Therefore, it was not clear that that Court's decisions should be seen as supporting the concept of general principles of international law as a distinct source.

Nevertheless, there was some limited practice regarding the category of "general principles of international law" or "general principles of law formed within the international legal system" as a separate source with normative content, and thus as a source that was additional to the traditional catalogue of sources. However, the two methodologies proposed for ascertaining the existence of such principles should be examined separately. The first methodology, as set out in the report, concerned principles that emerged through a process of deduction or abstraction from existing rules of conventional and customary international law. Such "general principles of international law"

had been accepted in the practice of the International Tribunal for the Former Yugoslavia. In the case concerning *Prosecutor v. Zoran Kupreškić et al.*, the Court's Trial Chamber had held that it could rely on "general principles of international criminal law, whenever they can be distilled by dint of construction, generalisation or logical inference"; it had then gone on to examine regional human rights treaties and the jurisprudence of the respective treaty bodies. Similarly, in the International Court of Justice case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Serbia and Montenegro had argued that there was a principle that "an international court may consider or reconsider the issue of jurisdiction at any stage of the proceedings" on the basis of "certain international conventions and the rules of other international tribunals". However, the Court had rejected the existence of such a general principle that would apply to the Court, given that its own Statute was clear in that regard. Thus, there was still much room for debate. In any event, while that type of general principle of international law seemed to go beyond the conventional and customary law from which it apparently was derived, scholars did not regard such principles as a separate source of international law.

The other proposed methodology for identifying general principles of international law relied on evidence of the consensus of States as expressed through acts of international organizations or similar instruments, such as resolutions of the General Assembly. The focus on States' recognition of principles at the international level necessarily raised a question as to their relationship to customary international law. In particular, he was unconvinced that evidence of *opinio juris* alone was sufficient to create international law, which it would, for example in the case of General Assembly resolutions, if consensus and acceptance were regarded as relevant actions.

The notion of general principles of international law as a separate and distinct source was not clearly supported by judicial practice or statements by States. Regrettably, the practice discussed in the report did not shed much light on the issue.

Many Commission members had expressed doubts as to whether general principles of law formed within the international legal system were a source of international law as contemplated by Article 38 of the Statute of the International Court of Justice; Mr. Park had gone so far as to propose significant amendments to draft conclusion 3. Such views demonstrated that the issue of general principles of law formed within the international legal system warranted further intense scrutiny.

While he agreed that the production of an illustrative list of general principles of law, as proposed by Mr. Park, would be useful to States, he feared that compiling such a list might prove to be an impossible task, given the vast number of general principles of law. He thus agreed with other members who had opined that examples of specific general principles of law should be confined to the commentary. Moreover, such an approach would be consistent with the one adopted by the Commission in its work on the topic of identification of customary international law, in which it had refrained from listing rules of customary international law and had concentrated instead on identifying their characteristics.

In conclusion, he said that he supported the Special Rapporteur's continued work on the topic and the referral of the proposed draft conclusions to the Drafting Committee.

Mr. Grossman Guiloff said that he would appreciate clarification of Mr. Reinisch's statement regarding the various terms used to refer to general principles of law. Was Mr. Reinisch's position that even if a State or a judicial body used language other than "general principles of law", that State or body might nevertheless be invoking or applying just such a principle? It seemed to him that context was indeed just as important as terminology.

Mr. Reinisch said that the diverse language used to refer to general principles derived from national law and general principles of international law certainly added to the complexity of the topic. He agreed with Mr. Grossman Guiloff that it was not only the terminology that mattered, but the context and the concept referred to. Regarding the finding of the Inter-American Court of Human Rights, in its advisory opinion on the *Juridical Condition and Rights of Undocumented Migrants*, that the principle of equality and non-discrimination was a general principle of law and, moreover, constituted a

peremptory norm of general international law (*jus cogens*), his impression was that the Court used the phrase "general principle of law" to refer to an underlying, fundamental rule that had become customary. Whether the principle of equality and non-discrimination had in fact become a *jus cogens* norm was, of course, arguable. In any case, he had not found any serious engagement with the question of whether that principle was a "general principle of law" in the sense of the Commission's debate on the topic.

The meeting rose at 1 p.m.