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International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3539th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 14 July 2021, at 11 a.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Reinisch
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

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

Mr. Jalloh said that he wished to thank the Special Rapporteur for his excellent second report and the secretariat for its useful memorandum on general principles of law (A/CN.4/742). He had particularly appreciated chapter III of the memorandum, which highlighted the extensive case law of international criminal courts that drew on general principles of law. He had the impression that the memorandum would not only be of great value to the Commission in its work, but also of great interest to scholars and practitioners of international law.

The Special Rapporteur's report dealt with the identification of general principles of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice. In that connection, it touched upon two categories of general principles of law and their corresponding methodologies of identification: those derived from national legal systems and those formed within the international legal system. The report then concluded with a consideration of subsidiary means for the determination of general principles of law.

He agreed with the Special Rapporteur's five general observations, contained in paragraphs 10 to 15 of the report, that took account of the debates in 2019 in the Sixth Committee and the Commission. The starting point of the Commission's work on the topic must be Article 38 of the Statute of the International Court of Justice, which enshrined the sources of international law to be applied by the Court in settling inter-State disputes. He also supported the notion that recognition was the *sine qua non* for the existence of general principles of law, as was manifest in the very phrase "general principles of law recognized by civilized nations" in Article 38 (1) (*c*) of the Statute. In that connection, he was delighted that, in the Commission's previous debate, virtually all members of the Commission had agreed that the term "civilized nations" was an anachronism. Indeed, such a phrase no longer reflected a pluralistic and cosmopolitan international law. Since the Commission could not amend the Statute of the International Court of Justice, the question now was how it should refer to the same concept. Several viable options had been discussed in 2019 and were helpfully highlighted in the report. He supported the Special Rapporteur's proposal that the Commission should instead use the phrase "community of nations", which was already employed to refer to sources of international law in article 15 (2) of the widely accepted International Covenant on Civil and Political Rights.

With regard to the form that the output of the Commission's work on the topic might take, he continued to be in favour of a set of draft conclusions accompanied by commentaries. However, he wished to reiterate the remarks he had made during the debate in 2019, that the Commission should avoid cataloguing existing general principles of law. As the delegation of Sierra Leone had stated during the debate in the Sixth Committee in 2019, "such an approach would be unsound in relation to the whole field of international law and could take the Commission many years, if not decades". He would prefer the Commission to focus on methodological issues clarifying the nature, function and scope of general principles of law. Some of the criticisms of the Special Rapporteur's report that had already been voiced by several Commission members demonstrated the risk that the Commission might face if it lost sight of that point.

He agreed with the Special Rapporteur's assertion, in paragraph 15 of the report, that the criteria for determining the existence of a general principle of law must be flexible enough to ensure that the identification of general principles was not rendered an impossible task, but stringent enough not to be used as an easy shortcut to identifying norms of international law. Nevertheless, a careful balance still needed to be struck, a point that he had hoped to see stressed in the report. That was partly because, in some nascent areas of international law, general principles of law played a critical gap-filling function to avoid a situation of *non liquet*. That was particularly true in relation to the field of international criminal law, to which the Commission had historically made some notable contributions.

In the international criminal tribunals, which had played a crucial role in the development of international criminal law and procedure, there was considerable case law to demonstrate that judges had had to rely on general principles of law to formulate conclusions

on a wide array of topics. One of the many possible examples from the International Tribunal for the Former Yugoslavia was the 1997 Appeals Chamber ruling regarding whether duress could serve as a complete defence to murder as a crime against humanity and a war crime, in *Prosecutor v. Dražen Erdemović*. The importance of general principles of law to the development of international criminal law was confirmed by the numerous references to them in tribunal case law, as acknowledged in paragraph 35 of the report. In fact, general principles were so prevalent in that sphere that it was the only subfield of international law that was the focus of an entire chapter of the secretariat's memorandum. The memorandum referred to the founding instruments of other tribunals, including the Special Court for Sierra Leone, but somehow omitted reference to the latter's equally relevant jurisprudence, even though it was an international court created in part by the United Nations. In any case, the crucial gap-filling role of such courts in the field of international criminal law was now firmly established, in article 21 (1) (c) of the Rome Statute of the International Criminal Court.

With regard to the methodology for the identification of general principles of law derived from national legal systems, as discussed in part two of the report, he generally agreed with the "two-step analysis" advanced by the Special Rapporteur. He had been pleased to note that, in the debate in the Sixth Committee in 2019, States had broadly supported that approach, although it was difficult to draw definitive conclusions as so few States had participated. In any event, although the two-step approach seemed simple, in fact it established a stringent test for the determination of the existence of a general principle of law by, firstly, providing an excellent framework to firmly establish a principle's common recognition by the principal legal systems of the world, and, secondly, assessing the transposability of such principles to international law. He agreed with the Special Rapporteur that the test basically consisted of demonstrating that the general principle concerned was recognized by the principal legal systems, but not necessarily by all, some or select legal systems. He further supported the overarching methodology set out in paragraph 50 of the report, according to which the comparative analysis undertaken must be both wide and representative in the sense of encompassing different legal families and regions of the world.

As the Special Rapporteur had explained, the requirement that a principle must be generally recognized in national systems was supported by States and international courts and tribunals. The secretariat's memorandum also confirmed that. However, as Mr. Tladi, Mr. Valencia-Ospina and Mr. Forteau had already mentioned during the debate, some of the examples cited in the report were not entirely convincing. He therefore shared some of the scepticism expressed by those members, especially with regard to the citations of the pleadings of States before certain international courts.

With respect to paragraph 52, he, like Mr. Forteau, was sceptical about the Special Rapporteur's invocation of comparative law and the idea of "legal families" for the purpose of conducting an analysis of national legal systems. There were three reasons for his scepticism. Firstly, as the report conceded, that approach was not necessarily reflected in practice. Secondly, and equally importantly, not only was the classification of the world into legal families, often through the dominant paradigms of common law versus civil law, in decline in the field of comparative law itself, but also the traditional taxonomies referred to in the report were not sufficiently inclusive, since they seemed to either exclude or marginalize entire legal families. Thirdly, speaking as a former student of H. Patrick Glenn – one of the leading comparativists of his generation and author of the seminal work *Legal Traditions of the World* – he did not find the basis for the Special Rapporteur's choice of which comparativist classification to follow to be entirely clear. In particular, it was unclear how, in such taxonomies, the legal systems and traditions of Africans and indigenous, aboriginal and other peoples were accommodated and where African customary law was included in those legal families. Indeed, as had been noted by the International Law Association, a comparative study of national legal systems from different "legal families" must also necessarily account for geographical representativeness. That issue should be carefully addressed in the commentary.

Turning to paragraph 54 of the report, he said that, with regard to the commonality of a rule in various legal systems, he fully supported the formulation proposed by the Special Rapporteur of "principles common to the principal legal systems of the world". However, he was unsure whether it was accurate to describe as "empirical" the assessment to determine

the existence of common principles. It seemed to him that what the courts did was rather selective and qualified by the topic under consideration and the available case law.

At the same time, however the assessment was described, it should not be only loosely representative or based solely on easily accessible materials. For instance, the decisions of national courts and tribunals, and some national legislation, were not always easy to find in developing countries, while language and translation issues might also pose challenges. Having worked in chambers at the International Criminal Tribunal for Rwanda and carried out comparative criminal law research to help draft judgments and opinions of the court, he knew that such practical problems were real and understandable. At the same time, he was of the firm belief that where there was a will, there was a way. Such practical challenges could in most cases be overcome, and the Commission, in its draft conclusions and commentaries, should take the firm position that judicial interpreters of general principles of law must exert every effort to ensure that their assessment was truly representative of a truly universal body of international law. To do otherwise would be to risk undermining both the acceptance and the legitimacy of such principles as a credible source of law under Article 38 (1) of the Statute of the International Court of Justice. Far too often, in the practice of some international courts, the surveys of national legal systems seemed to merely pay lip service to the law and jurisprudence of certain regions of the world.

Like Mr. Valencia-Ospina, and for the same reasons, he was not fully convinced that the practice of international organizations could be directly relevant for the purpose of identifying a general principle of law. It was, however, possible that the practice could be relevant, especially in the first step of the two-step test. Indeed, as he had said in 2019, in certain circumstances the practice of international organizations could be considered relevant to the current topic. However, the relevance of such practice would depend on what specific powers such organizations enjoyed under their respective constitutive rules and how the general principles reflected in their practice had been derived. For example, under the Constitutive Act of the African Union, member States were required to implement decisions of the Union in their domestic systems. Furthermore, subregional bodies such as the Economic Community of West African States might have the power, in both their political and legal organs, to take decisions that were binding on their members. To borrow from the rules and practices of international organizations, however, one would have to proceed with caution; for example, where the legal bodies of such institutions had adopted model rules, those rules would, presumably, have been reflected first in the different principal legal systems in their respective regions. In the end, since it was not always easy in practice to identify general principles drawn from national legal systems, a review of the rules and practices of regional bodies that truly reflected general principles from a given region could perhaps complement, but not replace, a comprehensive survey of national legal systems in efforts to determine the existence of a more universal general principle of law.

As to the second step of the two-step analysis for the identification of general principles, namely, the ascertainment of whether a principle common to the principal legal systems of the world could be transposed to the international legal system, he generally agreed with the Special Rapporteur's analysis in part two, chapter III, of the report. In particular, he concurred with the two conditions proposed in paragraph 74 of the report, namely, that the principle must be compatible with fundamental principles of international law and that the conditions must exist for the adequate application of the principle in the international legal system. Regarding the "compatibility test" referred to in paragraph 75, he wished to stress just how vital it was. After all, it was possible to have rules that applied and worked well within municipal legal systems but were entirely inappropriate for the international legal system. The centralized nature of national systems was obviously a feature that distinguished them from the international legal order, where there were no centralized legislative, executive or judicial bodies. Therefore great care should be taken not to import ideas and principles that did not fit into the scheme of international law, which, by its nature, had its own separate logic. In the context of international criminal law, that point had been well made by States parties to the Rome Statute when they had adopted article 21 (1) (c), as well as by the late Italian jurist Antonio Cassese in his dissenting opinion in *Prosecutor v. Dražen Erdemović*.

He would appreciate clarification of one of the criteria for compatibility set out in paragraph 75 of the report, namely, whether a legal principle was "recognized by the community of nations as just". A careful reading of paragraph 83 and preceding paragraphs seemed to suggest that, while the Special Rapporteur spoke about the "just" criterion, all the examples he gave appeared to discuss the applicability rather than the compatibility of the domestic rules cited.

He was generally in agreement with the content of paragraphs 85 to 96 of the report, which dealt with the transposition of principles common to the principal legal systems into the international legal system. He agreed with the Special Rapporteur's analysis regarding the evidence that would confirm transposition, as well as the conclusions in paragraph 106 of the report.

To conclude his remarks on part two of the report, he wished to stress the utility of the first step of the two-step analysis, namely, determining the existence of a principle common to the principal legal systems of the world. That first step was essential to the determination of a general principle of law. The second step, namely, ascertaining the transposition of a principle to the international legal order, was the defining methodological element for distinguishing between customary international law and general principles of law derived from national legal systems.

Turning to part three of the report, he noted that, while the category of general principles of law derived from national legal systems had received near-unanimous support in the Commission during the plenary debate in 2019, support for the category of general principles of law formed within the international legal system had been less forthcoming. Some members were supportive, some had concluded that there remained some uncertainty regarding its validity, and others had taken the view that there was no basis for the existence of such a category. Similarly, while most States in the Sixth Committee had generally agreed that such a category of general principles of law existed under Article 38 (1) (*c*) of the Statute of the International Court of Justice, some States still had doubts and others continued to question the category's existence altogether. He supported the position taken by the Special Rapporteur in paragraph 116 of the report, where he highlighted some of the difficulties the Commission still needed to confront: the lack of sufficient practice; the lack of clarity on whether it was a general principle of law or a rule of conventional or customary law that was being invoked or applied; and the overlap between the two categories of general principles of law. Overall, he supported the methodology the Special Rapporteur proposed in paragraph 121 for identifying general principles of law formed within the international legal system.

To his mind, the entirety of the discussion on specific general principles widely recognized in treaties and other international instruments, such as the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (the Nürnberg Principles), the Martens clause or the polluter-pays principle, harkened back to the discussion on whether the topic should be focused on the method of identification of general principles of law rather than on attempting to catalogue the list of general principles of law widely accepted by States. Whatever the case, although he could fully support the conclusion in paragraph 145 of the report, he believed that the Commission should proceed with caution.

With respect to part four of the report, on subsidiary means for the determination of general principles of law, while he noted that there was a proposal to examine Article 38 (1) (*d*) of the Statute of the International Court of Justice as a separate topic, he could support the Special Rapporteur's preference for following the general approach taken by the Commission in its conclusions on identification of customary international law. It illustrated the interconnectedness of the Commission's work on different topics and the need for consistency in that regard.

On the understanding that general principles of law constituted one of three categories of "rules of law" under Article 38 of the Statute, it could be inferred with some certainty that paragraph 1 (*d*) of that provision applied to general principles just as it did to conventional and customary law. In his view, judicial decisions were particularly important in that regard. The teachings of scholars, and even groups of scholars formed into expert bodies, could also serve as a useful, albeit subsidiary, means for the determination of general principles of law

under certain circumstances. The commentaries to the conclusions on identification of customary international law, adopted in 2018, could provide some useful qualifiers in that respect.

With regard to the draft conclusions set out in the report, he was broadly in agreement with the Special Rapporteur's excellent proposals. While he would have preferred to have each draft conclusion presented in the relevant chapter of the report, he had found it useful to have them reproduced in full in the annex. Since the Drafting Committee was a place to discuss and resolve not only issues of language, but also important points of substance, he reserved his specific drafting suggestions for that forum. He was open to some of the proposals already made during the debate by members of the Commission, especially those relating to draft conclusions 5, 6 and 7. He fully supported sending all the draft conclusions proposed by the Special Rapporteur in his report to the Drafting Committee.

He wished to reiterate a point he had made in passing on other topics, namely, that, owing to time constraints, the Drafting Committee would likely again end up focusing on the previous year's proposals for the topic instead of the new proposals. Since substantial items were increasingly being carried over from one year to the next for almost all topics, the Commission might wish to consider addressing that issue from a more systemic perspective in the near future.

The Commission's latest foray into the sources of international law had provided it with an excellent opportunity to fulfil its classical mandate in a fashion that would be useful to States and to the international legal system in general. General principles of law, long ignored, were now rightly at the centre of the Commission's discussions. The credit for that should go, in large part, to the Special Rapporteur.

Mr. Nguyen, speaking via video link, said that he wished to thank the Special Rapporteur for his report, and the secretariat for its very useful memorandum. Generally speaking, the Special Rapporteur had used a simple comparative analysis to clarify how to identify and distinguish general principles of law either derived from national legal systems or formed within the international legal system.

He had no strong objections to replacing the term "civilized nations" with "community of nations", as proposed by the Special Rapporteur. However, for the sake of consistency in the work of the Commission, he wished to suggest that the term "international community" should be used instead. The term "community of nations" could be understood to exclude the participation of international organizations, territorial units, non-governmental organizations, individuals and other legal entities in the process of forming international law. Whichever term was chosen, it should be made clear that it was not intended to mean "all nations". As Mr. Tladi and Mr. Forteau had mentioned, the recognition of a principle as a general principle required recognition not by all nations, but simply by a majority of nations representing all legal systems and regions of the world. For instance, *uti possidetis juris* had become a general principle of law owing to its recognition by States as being "logically connected with the phenomenon of the obtaining of independence, wherever it occurs", according to the judgment of the International Court of Justice in *Frontier Dispute (Burkina Faso/Republic of Mali)*.

He fully agreed with the Special Rapporteur on the two-step analysis for the identification of general principles of law derived from national legal systems. That methodology made it easier to distinguish general principles of law from customary international law. The recognition required then played a double role in the two-step analysis, in both the identification of general principles of law derived from national legal systems and in the transposition of those principles to the international legal system. In the first stage, general recognition demonstrated the acceptance of a general principle as common to different legal systems in a variety of regions of the world. In the second stage, the recognition of the content of the principle was a condition for its transposition to international law. The two-step approach could be analysed thoroughly by examining State practice, the work of international courts and tribunals, and the literature. In part two of the report, on the identification of general principles of law derived from national legal systems, the Special Rapporteur should perhaps have included more decisions of national courts from different

regions of the world to determine the existence of general principles of law in the international context.

The recognition of general principles of law derived from national legal systems required a careful comparative analysis of national legal systems to find the consistent and common elements of the rule in question. He supported the Special Rapporteur's conclusion, in paragraph 69, that "if rules across national legal systems are fundamentally different, a general principle of law cannot be deemed to exist". A comparative analysis could help determine whether a principle was common to national legal systems. Such a principle would be general and universal, and would reflect the common fundamental values of national legal systems and have significant application within those systems. However, while a particular principle needed to be common to national legal systems, that was not sufficient for its automatic application in the international legal system. General principles of law derived from national legal systems were bridges connecting the two distinct legal systems, national and international. They constituted a unique source of principles suitable for transposition from one legal system to another and brought the two systems together by finding legal notions common to both. The conditions required for successful transposition were, firstly, the compatibility of the common principle derived from national legal systems with the international legal system where it was necessary to fill a gap left by the absence of other principal sources of international law, and, secondly, the acceptance, on the part of the subjects of the international legal system, of its application. The recognition of a principle was based on the international community's belief that a fundamental value of the international legal order was reflected in the principle. The transposition to the international plane of principles common to national legal systems must take into account the specificities of the international legal order. Transposition therefore involved three steps: compatibility, circumstances that required it, and acceptance of fundamental value.

Draft conclusion 6 provided that a principle must be compatible with fundamental principles of international law. In the *North Sea Continental Shelf* cases heard by the International Court of Justice, the customary notion of territorial sovereignty had been used for the comparative test of the principle of just and equitable share. General principles of law could reflect conventional and customary notions even though there was no hierarchy among the sources of international law listed in Article 38 (1) of the Statute of the International Court of Justice. The wording of draft conclusion 6 must therefore reflect that situation and the relationship between the sources of international law. A principle common to the national legal systems could be elevated to the international legal system only if it was compatible with the fundamental principles and values of the international order, not merely with some of its principles. In his view, replacing the term "fundamental principles" with "fundamental principles and values shared by the international community" or "fundamental principles and standards shared by the international community" would avoid any misunderstanding. Draft conclusion 3 of the topic "Peremptory norms of general international law (*jus cogens*)", as contained in document A/74/10, provided that the reflection and protection of "fundamental values" was one of the conditions for the identification of peremptory norms of general international law. In the case concerning *Siderman de Blake v. the Republic of Argentina*, the United States Court of Appeals, Ninth Circuit, had stated that *jus cogens* was "derived from values taken to be fundamental by the international community". Even the Special Rapporteur, in paragraph 146 of the report, referred to the term "fundamental requirements of the international legal system", which had the same meaning as "fundamental values".

Transposition was not a simple "copying [of] national law principles for use in international relations", as noted by the Special Rapporteur in paragraph 96 of the report. Those principles could be unanimously accepted, reshaped or even rejected by State practice or treaties. Compatibility constituted a precondition for transposition, but the latter happened only when the circumstance required it. A principle common to national legal systems would be borrowed only in the absence of conventional and customary rules on the disputed matter. It must have scope of application in all regions of the world, and it must contain the common elements of both national and international legal systems. Lastly, it should obtain the legal conviction of States that the principle could properly serve its purpose in international law, without misinterpretation, distortions or possible abuses. In contrast with conventional and customary rules that were created within the international legal system, general principles of law were identified only where it was necessary to fill a gap left by the absence of

conventional and customary rules. *Uti possidetis juris* was accepted in connection with decolonization processes. The polluter-pays principle had been leveraged to adapt environmental protections and sustainable development. In other words, the international legal system provided conditions for the emergence of a general principle of law derived from national legal systems. In the next step, transposition was complete only when the principle common to national legal systems was accepted as a general principle of law by recognition through State practice. The emergence of a general principle of law derived from national legal systems could be confirmed by treaties, actions or omissions of concerned States, as well as the work of international tribunals and courts in various fields of international law. According to Antonios Tzanakopoulos, a principle that was universally accepted by international tribunals or courts might connote the existence of a general principle of law. In brief, recognition of the content of the principle was considered evidence confirming that a principle common to the principal legal systems of the world had been transposed to the international legal system. In other words, the completion of the transposition process signified acceptance of *erga omnes* obligations arising from the related principle.

With regard to the distinction between the methodology for the identification of general principles of law derived from national legal systems and the methodology for the identification of customary international law, he did not doubt the Special Rapporteur's conclusion that the distinction was clear and no confusion should exist between the two sources. Principles were general, abstract and flexible, while customary norms were uniform and firm. The formation of principles derived from the international community, while customary norms were based on State practice. The two-step approach for the identification of customary international law relied on recognition and acceptance, while the two-step approach for the identification of general principles of law consisted of recognition and transposition, the latter term being understood in the sense of recognition of the content of the principle as being common to the principal legal systems of the world. Acceptance must be based on the legal conviction of States, while transposition must pass the comparative test and meet the conditions of the international system. Some general principles of law could give rise to customary norms. Others could be derived from general recognition by the international community.

In 2019, in his statement on the Special Rapporteur's first report, he, like most members of the Commission, had generally supported the idea that, depending on the preconditions for their formation, the category of "general principles formed within the international legal system" could be conceived as a form of general principles under Article 38 of the Statute of the International Court of Justice. Therefore, before such principles were identified through the methodology proposed by the Special Rapporteur in draft conclusion 7, it was necessary to clarify those preconditions. In his view, there were two such preconditions. The first was the appearance of a specific matter of international law that required regulation. The second was the non-existence of relevant general principles of law derived from national legal systems. The function of general principles of law was to fill the gaps in conventional and customary norms. It was clear that the Nürnberg Principles, for example, constituted "principles of international law" formed within the international legal system, since they had not been derived from national legal systems. In the law of the sea, the principle that the land dominated the sea had been formulated to meet a specific need of the international legal system. That principle did not originate in national legal systems. It was supported by State practice and had been identified by the International Court of Justice in the *North Sea Continental Shelf* cases. Its existence satisfied the two preconditions that he had mentioned. The principle that the land dominated the sea had been incorporated into the United Nations Convention on the Law of the Sea and other international instruments and had been established in jurisprudence. The *Fisheries case* between Norway and the United Kingdom, which was mentioned in paragraph 153 of the report, was also relevant in that regard. The principle that a State had permanent sovereignty over its natural resources had developed within the international legal system. Another example was the precautionary principle in the context of protection of the environment, which had been set out in the 1992 Rio Declaration on Environment and Development and had subsequently begun to be incorporated into treaties, thereby giving rise to treaty-based obligations.

The field of land delimitation offered an example of the third way in which general principles of law falling under the second category – those formed within the international legal system – could be identified, namely, by ascertaining that they were inherent in the basic features and fundamental requirements of the international legal system. In that field, there was a trend towards taking into account non-legal factors, such as historical, cultural, and religious considerations, resource utilization, collective self-determination and archaeological evidence, with a view to improving the living conditions of local people. In its judgment in *Frontier Dispute (Burkina Faso/Niger)*, the International Court of Justice had noted that the requirement concerning access to water resources of all the people living in the riparian villages was better met by a frontier situated in the river than on one bank or the other. In its judgment in the case concerning the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia v. Thailand) *(Cambodia v. Thailand)*, the Court had emphasized the importance of ensuring access to heritage sites. In that context, the "principle of humanity" was forming as a notion that could be adapted to changing sociocultural circumstances. The same conclusion could be drawn in relation to the development of new general principles of international law in areas such as environmental protection, humanitarian law and cyberspace.

The draft conclusions proposed in the second report were compact and adequately reflected the general understanding of Article 38 (1) (*c*) of the Statute of the International Court of Justice. He had some minor suggestions. He proposed adding the words "and values" after "fundamental principles" in draft conclusion 6. Those words were important in the context of the formation of general principles of law that were inherent in the basic features and fundamental requirements of the international legal system. With regard to draft conclusion 7 (a), he supported the comments made by Mr. Valencia-Ospina and Mr. Forteau; the draft conclusion should be reconsidered. If a principle was widely recognized in treaties, States would refer to the treaties and not to the principle. In some cases, general principles could be formed within the international legal system if so required by a specific matter of international law, in the absence of relevant conventional or customary norms and relevant general principles of law derived from national legal systems.

In conclusion, he supported referring all six draft conclusions to the Drafting Committee.

Sir Michael Wood said that, as the debate so far had shown, the Special Rapporteur's second report on general principles of law was both thoughtful and thought-provoking. Like the first report, it was well researched and clearly drafted. Of course, the quality of the report made it easier to identify the areas that might not be fully convincing, and it was on those areas that he would focus.

From the secretariat's memorandum, which to some extent made up for the limited written contributions from States, two points stood out. The first was the haphazard use of terminology. Given how treaties were negotiated and drafted, it should come as no surprise that not much could always be gathered from their specific wording. Moreover, the terminology used by writers on the topic was particularly confusing. As the Special Rapporteur had noted in his oral introduction of the report, the use of each term had to be examined on a case-by-case basis. One of the most confusing terms was "general principles of international law", but even that could be explained, in certain contexts, as a reference to "general principles of law" within the scope of Article 38 (1) (*c*) of the Statute of the International Court of Justice, which were themselves rules of law and hence could be described as "the general principles of international law". But that was not how the term usually seemed to be employed.

The second was the fact that well over half of the memorandum was devoted to the decisions of international criminal courts and tribunals. It should be borne in mind that criminal law and procedure constituted a very specific field. For a number of reasons, the decisions of international criminal courts needed to be approached with caution in relation to the topic.

So far, four States had provided written contributions in response to the Commission's carefully formulated request for information. Such input was important for the Commission's

work. That request would probably need to be reiterated in 2021, and, individually, the members of the Commission should encourage their own States to respond.

Article 38 (1) of the Statute listed "the general principles of law recognized by civilized nations" as a distinct, third source of international law. In his interim oral report on the topic in 2019, the Chair of the Drafting Committee had stated that: "It was … agreed by Members of the Drafting Committee that the term 'general principles of law' was to be understood in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, taking into account the practice of States as well as the jurisprudence of international courts and tribunals."

Turning to the second report itself, he said that he found himself in broad agreement with most of what other members of the Commission, in particular Mr. Tladi and Mr. Forteau, had said so far during the debate. Like them, he was yet to be convinced about a possible second category of general principles of law, namely, those formed within the international legal system. However, with regard to Mr. Forteau's comments regarding the French text of Article 38 (1) (*c*) of the Statute, he remained strongly of the view that it would be wrong and unnecessary for the Commission to depart from the text of the Statute in that regard. Whatever the conclusion ultimately drawn about the existence of a second category, the language of the Statute was general enough to cover a second category. Were that not the case, and were the Commission nevertheless to propose a second category, it would be proposing some fourth source of international law not listed in Article 38. That had never been the intention. Maintaining the French expression "*principes généraux de droit*" would thus be wholly without prejudice to the existence of a second category.

The introduction to the second report began with a concise and accurate account of the history of the topic. He broadly agreed with the conclusions that the Special Rapporteur had drawn following the debate in 2019, as recalled in paragraph 2 of the report, subject to a couple of remarks. With regard to conclusion (b), he believed that it was agreed that the Commission should also have regard to national judicial decisions, though with all due caution. He agreed with conclusion (c) that there was widespread agreement that recognition was essential, since it was expressly mentioned in Article 38 (1) (*c*). However, there was a need for greater clarity in that regard. What was being recognized was not simply that a general principle existed but also that it had been transposed into the international legal system or was otherwise recognized as part of international law. A particularly difficult question was that of how to ascertain such recognition, especially in the case of any second category of general principles. As for conclusion (d), the Commission clearly needed to choose a replacement for the anachronistic term "civilized nations". However, it needed to do so with care. He continued to believe that the problem with that expression also applied to the word "nations". Unlike "States", "nations" was not a term of art in international law. It was used around the world with many different meanings, often with political rather than legal significance. In his view, the Commission should not be referring to "the community of nations", which was the term found throughout the second report. He was not convinced by Mr. Tladi's comments in that regard. In addition, the introduction of the notion of "community" seemed to be out of place and to change the meaning of Article 38 (1) (*c*) somewhat. He would suggest something simpler, such as "recognized by States".

Part one of the report offered a few general and well-balanced observations, with which he was in basic agreement. He was also in broad agreement with part two and corresponding draft conclusions 4, 5 and 6, which concerned the identification of general principles of law derived from national legal systems, and with the terms of draft conclusions 4 and 5. However, he had a number of comments, especially on draft conclusion 6.

He agreed with the Special Rapporteur that a good way to describe the generality of a general principle of law was to say that it was "common to the principal legal systems of the world", as was done in draft conclusion 4 (a).

With regard to paragraph 72 of the report, he tended to agree with the Special Rapporteur that, in today's world, the contribution of international organizations could not be ignored, especially in the case of an organization such as the European Union, which established rules of law that took effect within national legal systems.

Pleadings before international courts and tribunals were a source of State practice that was relied upon extensively both in the report and in the written contribution received from Australia. Pleadings did indeed offer one of the few ways of finding out what States thought about the matter. However, it was doubtful that the Commission should attach too much weight to the precise formulations used by States in pleadings, which were often written by lawyers hired to put forward the most convincing arguments possible with a view to winning the case. He was suggesting not that such practice should be ignored but that it should not be given undue weight.

The Special Rapporteur's first report had dealt with references to general principles of law in specific treaty regimes. In 2019, he had cautioned that practice and case law under such regimes were unlikely to prove to be of any great relevance. Fairly extensive reference was made to the decisions of international criminal courts and tribunals in the second report and in the secretariat's memorandum. Such decisions, which tended to relate mainly to procedural law, were adopted in a very specific context. International criminal law was based largely on specific treaty provisions and had its own special procedural and fair trial requirements, its own way of reasoning and judges who often had little background in general international law. Further, international criminal courts and tribunals rarely had the benefit of hearing arguments by States. Therefore, while the decisions of such courts and tribunals might offer valuable guidance, the extent to which general conclusions could be drawn from them might be limited.

But his main doubts about part two arose in connection with part two, chapter III, on the ascertainment of transposition, and the corresponding draft conclusion 6. His doubts were twofold, each relating to one of the two conditions set out in that draft conclusion. First, he agreed with the comments made by members at the previous meeting regarding draft conclusion 6 (a). He found the notion of compatibility with "fundamental principles of international law" in that subparagraph too vague to be workable. From the report, it was difficult to see what, objectively, would make a principle "compatible" or not. Compatibility and incompatibility were notoriously difficult concepts. More seriously, he understood neither what was meant by "principles" in the context of draft conclusion 6 nor what made a principle "fundamental". In that regard, the explanation provided in paragraph 83 of the report was hardly convincing. In that paragraph, the Special Rapporteur relied on the pleadings of Denmark and the Netherlands in the *North Sea Continental Shelf* cases, referring to a list of so-called "principles", including – remarkably – "the principle of sovereignty". By invoking "the principle of sovereignty", whatever that was, it would surely be possible to block any principle of international law. He did not agree with Mr. Nguyen that adding a reference to the values of the international community would increase the certainty or workability of the condition.

It might be necessary to demonstrate that a proposed "general principle of law" was capable of operating at the level of international law, as seemed to be said at the end of paragraph 83 of the report, but it was far from obvious what such demonstration, which was in any case addressed in the following section of the report and in draft conclusion 6 (b), had to do with any so-called "fundamental principles of international law". For example, the principle that one should drive on a particular side of the road – which, he would imagine, applied in most countries – might be common to all legal systems but clearly could not operate at the level of international law. The first sentence of paragraph 84 of the report seemed to compound the problem.

Second, with reference to draft conclusion 6 (b), the report dealt with "conditions for the adequate application" of general principles of law in the international legal system. The case law discussed in that regard was interesting but, again, came mostly from international criminal courts and tribunals. The Special Rapporteur seemed to be raising questions on two levels. First, were the domestic law principles at all applicable in international law? Second, if they applied in principle, could they be applied in an "adequate" manner? That second aspect seemed questionable; the notion of "adequate" application was imprecise, subjective and, in his view, unnecessary. In that context, Mr. Valencia-Ospina had asked why difficulty of application should mean that a provision could not be a rule of law.

The Special Rapporteur went on to address "evidence confirming transposition". In fact, the only "evidence" mentioned seemed to be references in treaties and other

international instruments, which hardly seemed to constitute sufficient "evidence" to confirm that a general principle had been transposed. In short, the Commission needed to give further thought to what was needed to show that a principle had been transposed.

He now turned to the most intriguing part of the report, part three, and corresponding draft conclusion 7. The Special Rapporteur sought to make the case for a category of general principles of law "formed within the international legal system". In his statement on the Special Rapporteur's first report, in 2019, he had said that he was yet to be convinced that general principles of law could be derived solely from "within the international legal system". The second report had not dispelled his doubts. In paragraph 169 of the report, the Special Rapporteur, relying on a passage from the judgment of the International Court of Justice on preliminary objections in *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, stated that: "At least some of these principles [general principles of law] appear as norms of a broad character that do not necessarily imply any specific obligation to act in a manner which protects their general thrust." If that was correct, one might wonder whether such norms were rules of law at all.

In 2019, the members of the Commission and States had been divided on the question of a second category, and a range of views had been expressed, including views reflecting intermediate positions on the question. The debate at the current session had shown that the Commission remained divided. It would be interesting to see how States reacted in 2021, in the light of the second report. He remained at the sceptical end of the spectrum. Nevertheless, he proceeded on the assumption that the Commission's task was to see whether there was a second category of general principles of law and, if so, how it came into being. He would therefore offer a few thoughts on the Special Rapporteur's proposals in the second report.

First, the formulation "formed within the international legal system" contrasted oddly with that used for the first category, namely "derived from national legal systems". The expression "formed within" gave the impression that the formation was something spontaneous. He was not sure that it captured what the Commission was trying to say. He would have expected to see something more objective, which could be demonstrated by reasoning and argument. It might be better to use language such as "inherent in the international legal system", which would be similar to that used in draft conclusion 7 (c).

In paragraphs 116 to 119 of the report, the Special Rapporteur responded to some of the concerns that had been raised about a second category. Particularly welcome was his conclusion, in paragraph 120, that "general principles of law formed within the international legal system and rules of customary international law must be clearly distinguished. This issue arises in relation to the concern that the criteria for the identification of general principles of law falling under the second category must be sufficiently stringent, and that these general principles must not be regarded as an easy way to invoke rules of international law."

The question was whether the Special Rapporteur had succeeded in that aim. Rightly taking recognition by States to be the starting point also for any second category, the Special Rapporteur proposed three separate "forms" in which general principles in the second category might be recognized, listing them in draft conclusion 7. They were perhaps to be seen as subcategories, since each was quite distinct. While he admired the Special Rapporteur's ingenuity, he did not believe that those three "forms" were sufficient in themselves or indeed based on practice. They did not seem to come close to providing the sufficiently stringent criteria that were needed, as the Special Rapporteur himself accepted, if the law was to be predictable and certain. He believed that a good deal more thought was needed if the Commission was to endorse and adequately describe any second category.

The first "form" of recognition proposed by the Special Rapporteur, in draft conclusion 7 (a), concerned principles "widely recognized in treaties and other international instruments". Three examples were given: the Nürnberg Principles; the Martens clause, with its reference to "the laws of humanity and the requirements of the public conscience"; and certain general principles of international environmental law.

He doubted that those who had adopted the treaties and instruments in question had thought that they had thereby been recognizing rules of general international law within the scope of Article 38 (1) (*c*) of the Statute. That certainly did not appear from the texts cited in

the report. Was the Special Rapporteur suggesting that a principle needed only to be included in a widely accepted treaty, or in a General Assembly resolution, to become a general principle of law? For example, were all the "principles" in the United Nations Convention on the Law of the Sea general principles of law simply because the Convention had been widely accepted? If so, it would hardly be necessary, any longer, to consider the relationship between treaties and rules of customary international law, which the Commission had addressed as recently as 2018. In that regard, he agreed with the comments made by other members, including Mr. Forteau.

In paragraphs 159 to 165 of the report, the Special Rapporteur sought to distinguish the role that he envisaged for treaties and resolutions in relation to general principles of law from their role in relation to rules of customary international law. The Special Rapporteur's main point seemed to be that, in the case of general principles of law, there was no need to find either general practice or *opinio juris*. That was hardly a comforting explanation.

If inclusion in widely accepted treaties and other international instruments was considered sufficient to amount to recognition of a general principle of law, there might even be a chilling effect on the future negotiation of such treaties and instruments.

The second "form" of recognition proposed by the Special Rapporteur, in draft conclusion 7 (b), concerned a principle that "underlies general rules of conventional or customary international law". That suggestion immediately raised questions. What did it mean to say that a principle "underlies" a general rule of conventional or customary international law? What relationship did "underlies" imply? Was the underlying principle something that was found outside the treaty or customary rule? And what was meant by "general rules" in that context? He did not find any solid basis in the invocation of supposedly deductive reasoning in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, in the pleadings of one particular State in the *Legality of the Threat or Use of Nuclear Weapons* advisory proceedings or in the conclusions drawn from the remarks of the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Anto Furundžija*. Whether taken individually or cumulatively, those seemed to be weak grounds on which to base that "form" of recognition and the wording proposed in draft conclusion 7 (b). The Special Rapporteur's quite convoluted description of his envisaged deductive process in paragraph 145 of the report tended to reveal that weakness.

The third "form" of recognition proposed by the Special Rapporteur, in draft conclusion 7 (c), concerned principles "inherent in the basic features and fundamental requirements of the international legal system". That indeed pointed to a possible basis for a second category of general principles of law, although the notions of the "basic features" and the "fundamental requirements" of the international legal system were far from clear. Indeed, they would seem to point to entirely subjective appreciations. Those terms seemed to be derived from an isolated dictum of the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Kupreškić et al*. But who was to "ascertain" that a principle was "inherent in the basic features and fundamental requirements of the international legal system" and how was such ascertainment to be done? Paragraph 7 (c) might be clearer if those terms were omitted.

In short, he remained unconvinced about a second category of general principles of law. But without prejudice to his position, he was ready to examine the three elements of proposed draft conclusion 7, and their specific wording, in the Drafting Committee.

He could be much briefer on part four, on subsidiary means for the determination of general principles of law, in which the Special Rapporteur proposed draft conclusions 8 and 9. He agreed with what was said in paragraphs 172 to 177, although he did not necessarily agree with some of the assessments in paragraphs 178 to 180. He also agreed with the terms of draft conclusions 8 and 9.

The Special Rapporteur's indications for future work seemed eminently sensible.

He would be happy to see all the draft conclusions proposed in the second report referred to the Drafting Committee. While draft conclusions 6 and 7, especially subparagraphs (a) and (b) of draft conclusion 7, did raise quite serious questions, he was hopeful that good progress could be made in the Drafting Committee.

Ms. Galvão Teles said that the first step of the two-step process for the identification of general principles of law derived from national legal systems, as proposed by the Special Rapporteur in his second report, involved conducting a comparative analysis of national legal systems in order to extract common legal principles. While it would certainly not be practicable or desirable to consult all existing legal systems in order to determine the existence of a general principle, it was important to emphasize that, in order to be representative, any comparative analysis must include a variety of legal systems that represented both the main legal families and the different regions. Although a case-by-case analysis would always be warranted, it would certainly be useful for the Commission to give some guidance on the matter.

In its work on the topic "Identification of customary international law", the Commission had had to consider a similar difficulty: that of qualifying the level of widespread and general practice required for the identification of a rule of international customary law. Noting that the various expressions used by the International Court of Justice did not define the "exact quantum and quality of practice" required, the Special Rapporteur for that topic had proposed that the word "sufficiently" could be used to provide further guidance. Accordingly, draft conclusion 8 (1) of those draft conclusions, as adopted, read: "The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent." A similar approach could be adopted for the current draft conclusions. In her view, the word "sufficiently" should thus be incorporated into draft conclusion 5 (2) in order to ensure that the criteria for identifying general principles of law struck the necessary balance between strictness and flexibility.

In relation to the second step in the process of identifying general principles of law derived from national legal systems, the "transposition" referred to in draft conclusion 6, the Special Rapporteur suggested that the general principles in question must be compatible with the fundamental principles of international law. At no point, however, was a clear definition of "fundamental principles of international law" provided. Given that both terms referred to "principles" in different ways, she believed that greater clarity was required.

The Commission faced an especially challenging task when it came to the second category of general principles proposed by the Special Rapporteur – general principles of law formed within the international legal system. Whereas State practice, judicial and arbitral precedents and the *travaux préparatoires* of the statutes of the Permanent Court of International Justice and of the International Court of Justice seemed to quite easily accept the category of principles derived from national legal systems, there was more uncertainty surrounding principles formed within the international legal system. Nevertheless, the view that general principles of law also encompassed principles that developed directly in the international legal system had gained support in the literature and in case law and therefore merited thorough consideration by the Commission, even though many members, herself included, had previously expressed some scepticism on that point.

Proponents of that view argued that such principles could be identified through a process of deduction from existing international conventional and customary rules and could then be applied to other situations that did not fall within the original scope of those rules. The *Corfu Channel* case was often cited in support of that interpretation. In that case, the International Court of Justice had explicitly referred to three "general and well-recognized principles" – elementary considerations of humanity, the principle of the freedom of maritime communication, and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States – as the basis for its determination that Albania had an obligation to notify the existence of a minefield in its territorial waters. Those seemed to be principles originating directly in the international legal order, rather than derived from national laws. However, it was necessary to discuss whether such principles were considered rules of customary international law or whether they derived from a different source – general principles of law – which was not evident.

General principles of law formed within the international legal system could, however, be seen as a sign of the increasing maturity and growing complexity of international law, which was coming to depend less on gap-filling sources derived from domestic law. As suggested by the report of the Study Group on the fragmentation of international law, general principles of law played an important role as instruments for ensuring the systematicity of

international law. The importance of general principles of law for the whole structure of international law therefore invested the work of the Commission on that topic with enduring importance.

Another challenge was the frequent use of a plethora of different expressions that appeared almost synonymous at first glance but that might, in fact, have different legal meanings. Examples included the expressions "general principles of law", "general principles of international law", "principles of law", "principles of international law" and "fundamental principles of international law". The Commission must clarify which expressions referred to general principles of law specifically as a source of international law, in accordance with the scope of the topic.

The secretariat's memorandum on the topic provided a comprehensive picture of international practice, which showed that States and international courts and tribunals had frequently used the term "principles" when dealing with "inherently international" subjects. There were thus clearly general principles of law that did not derive from national legal systems and that were instead independently formed within the international legal system. The case law of international criminal tribunals and article 21 of the Rome Statute of the International Criminal Court also supported that presumption, both because they made express reference to principles of international criminal law and international law in general and because they differentiated such principles from those common to domestic legal systems. The Commission's work on the topic could make an important contribution in terms of providing greater clarity as to the exact scope, content and means for the identification of principles originating directly in the international legal system. However, as other members had already noted, the Commission must proceed with caution.

Regarding the relationship between general principles of law and other sources of international law, the Commission must be careful not to excessively broaden the former category and must maintain a clear distinction from the other formal sources, particularly customary international law. As noted in the memorandum, the use of qualifiers pointing to the international character of certain principles was not always a compelling sign that they had originated at the international level. Moreover, the use of the term "principles" had in some cases seemed to refer to norms arising from conventional or customary international law rather than to a different and separate source of law. To assist in the task of distinguishing general principles of law from other sources, it was essential to take into account the legal nature and function of principles in a legal system. Unlike rules, principles were open-ended legal premises that often did not contain specific legal obligations for their addressees and could perform systemic and gap-filling functions. The Special Rapporteur alluded to that distinction in his second report and mentioned that it would be addressed in greater detail in a future report. Indeed, further study of that aspect was essential.

The spirit of cautiousness and conceptual rigour reflected in both the secretariat's memorandum and the Special Rapporteur's reports must continue to guide the work of the Commission. As she had stated previously, general principles of law as an autonomous source of international law must be clearly distinguished from general or fundamental principles of international law, which could have treaty and customary law as their primary source. General principles of law might, but did not necessarily, give rise to fundamental principles of international law. As the Special Rapporteur had noted in his first report, "it cannot be excluded … that some general principles of law may not have a 'general' and 'fundamental' character". That was notably the case for principles dealing with international procedural matters and specific areas of international law, such as international humanitarian and environmental law.

The Special Rapporteur identified three processes through which general principles of law could develop within the international legal system: they could be widely recognized in treaties and other international instruments; they could underlie general rules of conventional or customary international law; or they could be inherent in the basic features and fundamental requirements of the international legal system. Concerning the first process, while the applicability of principles contained in international treaties to State parties did not present any difficulties, it was clear that in such cases the source of international law was treaty law, not general principles. The question that the Commission should address, therefore, was whether and how such norms deriving from treaties could become applicable

as general principles of law to the international community as a whole, including to non-parties. The process through which those principles could attain "wide and representative" recognition by the community of States – the essential condition for the existence of a general principle – must be clarified.

The second process – the identification of a principle underlying general rules of conventional or customary international law – seemed to share many similarities with the first and therefore involved similar difficulties in terms of how to assert the recognition of such principles. Furthermore, both the first and second processes gave rise to a question related to treaty interpretation. It was still not clear how the identification of principles recognized by treaties or underlying them was an exercise distinct from giving meaning to the treaty rules in question, especially in relation to means of interpretation dealing with object and purpose and *effet utile*. The deductive methodology proposed by the Special Rapporteur might thus have the unintended effect of circumventing the accepted rules of treaty interpretation. It might similarly allow interpreters to attribute to States, in the form of "recognized" or "underlying" general principles, more than what they had agreed to through treaty provisions.

The process through which general principles of law could be identified in relation to other sources of international law should be described in a uniform manner. The identification of the content of such a principle might or might not require an exercise of deduction, depending on whether the relevant treaty provision contained a principle or whether the content of the principle must be deduced from existing rules of treaty law or customary international law. In any case, the process for establishing recognition should be the same in both cases identified by the Special Rapporteur in subparagraphs (a) and (b) of draft conclusion 7. Given that the exact terms of that process of recognition were still absent from the draft conclusions proposed in the second report, they must be further elaborated upon.

The third process identified by the Special Rapporteur pertained to those principles that were inherent in the basic features and fundamental requirements of the international legal system. Those principles largely stemmed from the founding characteristics of the international order, namely State sovereignty, equality between States and fundamental considerations of humanity. It was necessary to clarify, however, whether the expression "basic features and fundamental requirements" was synonymous with "fundamental principles of international law". If not, a clearer definition was warranted. That category of general principles must not be overly broad and must be clearly distinguished from existing rules of customary international law or it would risk becoming a shortcut for identifying customary norms where general practice had not yet emerged.

In conclusion, although there were still many aspects that needed to be clarified in the draft conclusions and their future commentaries, she supported sending draft conclusions 4 to 9 to the Drafting Committee, taking into account the debate in the plenary.

Mr. Park said that the Special Rapporteur's second report was well structured and based on relevant State practice and international and national jurisprudence. Concerning the Special Rapporteur's proposal to replace the term "civilized nations" with "community of nations", he considered the latter term to be somewhat narrow, as it covered neither the practice of international organizations nor private entities, especially in relation to rules on international investment.

The draft conclusions proposed by the Special Rapporteur contained a number of ambiguous and abstract expressions, such as "wide and representative" and "legal families" in draft conclusion 5 (2), "fundamental principles" in draft conclusion 6 (a), "widely recognized" in draft conclusion 7 (a) and "basic features and fundamental requirements" in draft conclusion 7 (c). Such terms might cause uncertainty when it came to the application and interpretation of the draft conclusions.

As the Special Rapporteur introduced two different categories of general principles of law, there were two different types of "recognition." For the first category – general principles of law derived from national legal systems – recognition must be wide and representative and reflect a common understanding of the community of nations. For the second category – general principles of law formed within the international legal system – there were three forms of recognition that could coexist in some cases.

Concerning the hierarchical order between general principles of law on the one hand and treaty and customary international law on the other, the second half of paragraph 145 was unclear; was it intended to mean that a general principle of law could be applied independently of the existence of treaties or customary international law? In his statement on the first report on the topic at the seventy-first session, he had identified the five main attributes of general principles of law, the fifth being that they were a "transitory" and "recessive" source of international law. To his mind, general principles of law could therefore not be considered to enjoy the same dominant legal status as international treaties or customary international law when it came to their application. In 1920, the Advisory Committee had not proposed a formal hierarchy in the draft statute of the Permanent Court of International Justice, but today the general principles of law referred to in Article 38 (1) (*c*) of the Statute of the International Court of Justice were secondary to treaties and custom in terms of practical relevance. Consequently, when a conflict occurred between general principles of law and a relevant treaty provision or customary international law, priority should be given to the latter.

With regard to the transitory characteristic of general principles of law, it was well recognized that repeated implementation of such principles could convert them into customary norms when certain conditions were met. However, in his view, the statement in paragraph 152 of the report that there appeared to be nothing preventing a norm from being both a general principle of law and a rule of customary international law at the same time was incorrect. When a general principle of law had evolved into customary international law over time and with two constituent elements of customary international law, it could no longer be considered a general principle of law.

Turning to the draft conclusions themselves, he said that, as draft conclusions 4, 5 and 6 all related to general principles of law derived from national legal systems, they could be considered together. The Special Rapporteur suggested that it was necessary to conduct a comparative analysis of national legal systems to find whether a principle was common to the principal legal systems and had therefore been recognized by the community of nations. He welcomed that approach and agreed with the Special Rapporteur's conclusion in paragraph 50 of the report, as reflected in draft conclusion 5 (2).

Concerning essential terms and expressions, the Special Rapporteur seemed to consider the qualifiers "wide" and "representative" together as a single concept in draft conclusion 5 (2). However, if "wide" was taken to mean that the comparative analysis should involve as many countries as possible, and "representative" to mean that different legal families should be represented, "wide" and "representative" could be conflicting or contradictory concepts. The concept of "legal families" might also be problematic. If "legal families" referred to different legal cultures, a cautious approach should be taken.

The term "comparative analysis" was used in the three paragraphs of draft conclusion 5; in his view, only paragraph 1 should be retained and the other two deleted. The comparative analysis could be explained in more detail in the commentary. Comparative analysis was a very delicate process; even though a similar or identical legal principle might be found widely, the result of its application might be different depending on the national legal system. For example, the principle of "prohibition of unjust enrichment" was found in the principal legal systems, but it could not easily be concluded that it was a common principle in the global legal system because it would have to be applied similarly in similar contexts. Regarding the titles of draft conclusions 5 and 6, he was not convinced that the terms "determination" and "ascertainment", respectively, were necessary.

With regard to draft conclusion 7, at the seventy-first session, he had expressed scepticism about the existence of the second category of general principles of law – those formed within the international legal system. Unfortunately, he was still unconvinced by the explanation in paragraphs 114–117 of the second report and the concrete examples given by the Special Rapporteur to support the argument that there was sufficient State practice in respect of that category of principles.

The Special Rapporteur had already mentioned the *Corfu Channel* case in his first report, arguing that the dictum "certain general and well-recognized principles" was an appeal to the general principles of law contemplated in article 38 (1) (*c*) of the Statute of the

International Court of Justice. However, as he had pointed out to the Special Rapporteur at the time, 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 the international conventions in which it appeared, the principle of consent to jurisdiction was a straightforward right and obligation and its scope was limited to the International Court of Justice. The Special Rapporteur explained that the principle of consent to jurisdiction was derived from the principle of equal sovereignty and was a general principle of law inherent in the international legal system. From that perspective, it might be asked whether the various principles resulting from the foundation of the international legal system of sovereignty all fell into that category. The examples presented by the Special Rapporteur appeared to have already been confirmed in treaties, customary international law and various international documents. The principle of consent to jurisdiction and *uti possidetis juris* had already been confirmed in a number of treaties and had thus become part of customary international law.

The Special Rapporteur insisted that the Nürnberg Principles had been recognized by the community of nations as general principles of law formed within the international legal system. However, in his view, the passage of the European Court of Human Rights cited in paragraph 126 referred to the criminal law principle of *nullum crimen, nulla poena sine praevia lege poenali.* It did not refer to general principles of law derived from the international legal order, but to a general principle of law common to domestic law.

Finally, there were differing views as to whether the polluter-pays principle should be treated as a rigid rule of universal application. For example, in the arbitral award in the *Rhine Chlorides Arbitration concerning the Auditing of Accounts (The Netherlands v. France)*, the Permanent Court of Arbitration had found: “that this principle features in several international instruments, bilateral as well as multilateral, and that it operates at various levels of effectiveness. Without denying its importance in treaty law, the Tribunal does not view this principle as being a part of general international law.”

With regard to draft conclusion 8, greater importance should be attached to the role of international and national courts. The application of general principles of law had been a constant practice of international courts and tribunals and brought latent rules of law to light. He was therefore not sure whether it was appropriate to repeat verbatim draft conclusion 13 of the draft conclusions on identification of customary international law in the current project. Furthermore, the distinction between international courts and national courts, which appeared in draft conclusion 8 (2), did not fall within the scope of the topic.

The meeting rose at 1.05 p.m.