Provisional

For participants only

5 August 2022

Original: English

International Law Commission

Seventy-third session (second part)

Provisional summary record of the 3589th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 6 July 2022, at 10 a.m.

Contents

Present:

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

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

General principles of law (agenda item 6) (*continued*) (A/CN.4/753)

Mr. Valencia-Ospina said that the Special Rapporteur, in his third report on general principles of law, delivered on his promise to discuss the remaining aspects of the topic that he had identified in his first two reports.

Draft conclusion 6 dealt with the self-evident proposition that, in order to become a general principle of law, a principle derived from national legal systems should be transposable to the international legal system, in the sense of being capable of operating in that system. The use of the terms "transposition" and "transposability" had generated some confusion within the Commission, but draft conclusion 6 properly recognized that the issue at play was transposability rather than some unspecified means of "transposition". A related difficulty in the report was the semantic overload of the word "recognized", originally found in the Statute of the International Court of Justice, which spoke of "general principles of law recognized by civilized nations". States recognized a principle if it existed in national legal systems or in the international legal system they had created. Any additional requirement for general principles of law associated with the word "recognized" needed ample justification. For example, the transposability requirement could not result from the requirement that States must "recognize" a given principle, because the former was passive, whereas the latter was active. Furthermore, it was still not clear what precisely was meant by the "fundamental principles of international law" referred to in draft conclusion 6.

He continued to support the Special Rapporteur's position regarding the existence of the second category of general principles of law, namely those formed within the international legal system, while heeding the pertinent observations made by colleagues in the current debate, in particular those of Mr. Forteau and Sir Michael Wood. Any legal system had embedded within it certain principles. If those principles were properly identified, they could be described as principles of the system. At the same time, he continued to find the corresponding draft conclusion 7 to be ambiguous, and possibly misleading. He agreed with the Special Rapporteur that there was a need for a thorough discussion of that draft conclusion in the Drafting Committee.

Likewise, the reference in paragraph 31 of the report to a combined process of induction and deduction was far from crystal clear. Induction as a process referred to the derivation of a principle from examples; it did not operate to the exclusion of analysis. Quite to the contrary, a certain amount of analysis was presumed in any exercise of induction. While the first category of general principles of law – those derived from national legal systems – could properly be described as inductive, as it looked to the practice of multiple States, it was not at all evident that the second category was also inductive. If anything, the second category could better be described as deductive, since it involved looking at the international legal system and deducing essential principles from it.

One of his primary concerns with the third report was the analytical inconsistency between draft conclusion 10, which stated that there was no hierarchy between the sources of international law, and draft conclusion 13, which stated that the essential function of general principles of law was to fill gaps in treaties and customary international law. In effect, to state that the essential function of general principles of law was to fill gaps risked downgrading such principles to contexts in which there was no treaty or customary rule. In that case, the equality of the sources of law was merely theoretical: the resultant inequality was demonstrated by the very material considered in the third report.

In the *Case concerning Right of Passage over Indian Territory (Portugal v. India)*, considered in paragraph 42, the International Court of Justice stated that there existed a right of passage for Portugal in respect of private persons, civil officials and goods and therefore found that it did not need to consider the additional argument of Portugal that a general principle would have established the same result. The Court went on to state that custom showed that there did not exist a right of passage for armed forces and that that conclusion would hold regardless of what general principles of law might show.

In the *Russian Indemnity* case mentioned in paragraph 46, the arbitral tribunal explicitly stated that custom, if established, would trump the general principle of law under

consideration. To quote the tribunal: “The general principle of the responsibility of States implies a special responsibility in the matter of delay in the payment of a monetary debt, unless the existence of contrary international custom is established.” A review of the preceding portion of the award suggested that the “international custom” referred to was general international custom rather than custom that was specific to the two States parties to the arbitration.

Further examples could be found in the citations of the Rome Statute by the International Criminal Court, such as those referred to in paragraphs 54 to 57 of the third report. While one might wonder about the appropriateness of those citations – since the statute under consideration by the Commission was the Statute of the International Court of Justice – those examples provided further support for the existence of a hierarchy. In the ruling in the *Katanga* case, for example, the Trial Chamber of the International Criminal Court found that, “in all its decisions, it must ‘in the first place’ apply the relevant provisions of the Statute” and utilize the subsidiary sources of article 21 (1) (b) and (c) only where there was a lacuna. In the *Lubanga* case, the Appeals Chamber of the Court rejected the argument that regulation 55 should not be applied due to a purported inconsistency with general principles of law, finding that since regulation 55 existed, there was no need to refer to general principles.

The aforementioned examples demonstrated how the gap-filling function placed general principles of law hierarchically below treaties and customary international law. The third report tried to explain that by invoking the *lex specialis* principle. The report’s observation on *lex specialis* was certainly pertinent: in many instances of conflict between a general principle and a treaty provision or custom, *lex specialis* could apply. Yet the report went too far when it engaged in an abstract analysis intended to show that treaty provisions and custom would almost always be narrower than a general principle. The analysis failed to point out that treaty provisions and custom could also be very general and that general principles often applied in quite narrow contexts. The question raised in paragraph 97, as to whether general principles of law should be viewed as general law or special law or both, failed to recognize that the assessment of the generality of laws was relative rather than absolute.

The report subsequently changed course in paragraphs 102 and 103 and correctly asserted that the question was improperly posed, but then modified that position in paragraphs 104 and 105 and found that general principles had to be broader than the other two sources of international law. While he did not question the utility of the *lex specialis* principle in the context of the topic before the Commission, draft conclusion 12 was overly broad. It would be better to discuss that principle in the commentary rather than incorporate it into a conclusion.

While the use of general principles of law to fill gaps was a textbook exercise, there was a difference between doing that and using them only to fill gaps. The latter approach cast doubt on the claimed lack of hierarchy between the sources of international law. As the Commission’s own Study Group on fragmentation of international law had stated in its consolidated report, a number of writings had correctly suggested that treaties enjoyed priority over custom and that it could be assumed that customary law had primacy over general principles. According to the Study Group: “Any court or lawyer will first look at treaties, then custom and then the general principles of law for an answer to a normative problem.” Therefore, requiring a gap as a prerequisite for the application of a general principle established a *de facto* hierarchy between the sources of law. The problem might be resolved by stating that gap-filling was only a common or major function of general principles of law, but the Commission might not find it appropriate to state so explicitly.

He wished to highlight the relationship between chapters I and III of part three of the report. Chapter III set out ways in which general principles of law fulfilled their gap-filling function as specified in chapter I. Chapter I discussed the independent basis of rules and the use of general principles of law to interpret other rules of international law, while the examples in chapter III had as their basis lacunae in international law. The third report tersely recognized the relationship between those two chapters in paragraphs 109 and 121. The consequence of that relationship was that the examples given in the report of the application of general principles of law appeared to be focused almost exclusively on filling gaps.

Nevertheless, the third report correctly recalled, in paragraph 72, that general principles of law should not be viewed in a court-centric manner. After all, the primary purpose of law was to guide behaviour, not resolve cases. A focus on gap-filling, however, risked doing precisely that. One would not be thinking of general principles of law unless there was some kind of contentious situation that identified a gap.

He agreed with the Special Rapporteur that general principles of law could coexist with treaty and customary rules. It was, after all, precisely in recognition of conflicts that the Commission had undertaken its fragmentation study. Interestingly, the risk of conflicts between general principles and treaty or customary rules was relatively low because such conflicts would often preclude the identification of general principles.

While he agreed with the general thrust of part three of the report concerning the specific functions of general principles of law, he was rather concerned about the notion of "clarifying certain aspects of customary international law". It was not obvious what an ambiguous customary rule was; or how such a rule was derived. If a customary rule was very broad, it either had so little content as to be useless or was not actually a customary rule. In *Libyan American Oil Company (LIAMCO) v. Libya*, the arbitrator referred to a municipal rule, to United Nations resolutions, to a case from the Permanent Court of International Justice and to a secondary source, and concluded that States were liable to pay compensation in the event of nationalization. It was unclear what source of law was concerned, but the arbitrator did not claim to be clarifying the customary rule to raise the issue of *lucrum cessans*. Quite to the contrary, the award stated that custom diverged on the issue, and conclusively established that there was no customary rule regarding *lucrum cessans*. On that point, the report appeared to enter into murky waters which it might have done well to avoid.

The third report frequently referred to statements made by representatives of States in the course of litigation. Such statements were, by definition, not court or tribunal opinions or teachings of publicists, much less treaties or general principles, and typically did not in themselves constitute customary rules. As far as legal analyses were concerned, in order to be useful, they should be placed within a framework, such as to serve as *opinio juris* in the identification of customary international law.

He supported referring all the draft conclusions in the third report to the Drafting Committee.

Mr. Nguyen said that the report cited a rich variety of cases that helped dispel doubts about the significant practical role played by general principles of law. It also clarified two apparently "vague" questions related to the role of general principles of law as set out in Article 38 1 (*c*) of the Statute of the International Court of Justice. First, their supplemental nature in filling gaps in international law and in preventing situations of *non liquet* did not preclude them from acting as an autonomous source of international law. Second, the report reaffirmed the new trend towards the acceptance of general principles of law that were formed within the international legal system.

The recognition of general principles of law, whether they were derived from national systems or formed within the international legal system, was determined by the needs of the international community. As the International Military Tribunal in Nuremberg had acknowledged: "The law of war is to be found not only in treaties, but in the customs and practices of States, which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts." Indeed, in many cases, treaties did no more than express and define already existing principles in a more accurate fashion. Respect for territorial integrity was a guiding principle of international relations, as enshrined in the Charter of the United Nations, the Declaration on Principles of Friendly Relations and Cooperation among States of 1970, the Definition of Aggression of 1974 and the Final Act of the Conference on Security and Cooperation in Europe of 1975.

He fully agreed with the Special Rapporteur's observation in paragraph 27 that there was "sufficient practice, case law and literature supporting a second category of general principles of law falling within the scope of Article 38, paragraph 1 (*c*)". By comparison with general principles of law derived from national legal systems, there was less practice relating to the second category of general principles of law, those formed within the international legal system, but such practice as did exist was sufficient to support the existence of that

second category. There was not only case law, but also much State practice. The maintenance of the colonial borders at independence enshrined in the Cairo Declaration adopted by the Organization of African Unity in 1964 arose from the need to assure territorial integrity and the stability of borders. In environmental law, acceptance of the precautionary principle in cases where full scientific certainty was lacking and recognition of the prohibition of transboundary pollution were evidence of State practice with respect to the second category of general principles of law. In the law of the sea, the principle of a "common heritage of mankind" was formed from the need to manage seabed resources.

The filling of gaps in international law was a function of all the main sources of international law when a lacuna was identified. Mr. Murase had rightly said that general principles of law did not have a monopoly on filling gaps; treaties and customs played a similar role. Generally speaking there was no hierarchical relationship between the three sources of international law in terms of filling the gaps in international law. However, that function was specially pertinent for general principles of law when existing treaty and customary rules could not regulate a newly emerging legal issue. Therefore, he fully supported the conclusion in paragraph 71 that general principles of law performed a gap-filling role only to the extent that they existed and could be identified.

The third report was consistent with the Commission's view that no hierarchical relationship existed between the main sources of international law set out in Article 38 (1) (*c*) of the Statute of the International Court of Justice. Recognition by the international community put general principles of law on an equal footing with customary and treaty sources as part of a coherent international legal system. Such recognition meant that general principles of law had a binding character even though they might not yet have crystallized into customary or treaty rules. That was why the International Centre for Settlement of Investment Disputes, in *Inceysa v. El Salvador*, had indicated that general principles of law were "an autonomous or direct source of international law". It would be interesting to see if the Special Rapporteur had caried out any further analysis of the hierarchical relationship between principles of law such as humanitarian intervention and the prohibition of the use of force.

He fully agreed with the Special Rapporteur that, as an autonomous or direct source of international law, general principles of law could exist in parallel with identical or similar rules of treaty and customary law. State practice had not expressly proved that observation, but the number of cases that the Special Rapporteur invoked in paragraphs 84 to 94 was convincing.

Regarding the draft conclusions, his only comment concerned the structure of draft conclusion 10. The sequence of sources in Article 38 (1) (*c*) had no hierarchy in legal reasoning, although it might well influence the way the rules were applied in practice. It was clear that there was no hierarchy between treaties, customary international law and general principles of law in filling the gaps in international law. The wording of draft conclusion 10 should therefore be reviewed by the Drafting Committee. He supported referring all the draft conclusions contained in the third report to the Drafting Committee.

Mr. Hassouna said that he would like to thank the Special Rapporteur for preparing such a well-written and well-researched report on an issue that was still surrounded by considerable ambiguity and controversy. The report provided an extremely rich vein of material on the topic and addressed some of the key controversies concerning general principles of law, especially regarding their identification, functions and relationship with other sources of international law.

In part one, the report addressed the issue of transposition. He agreed with the Special Rapporteur's cautious approach of insisting that a process of transposition must take place before a rule gained recognition as a general principle of law at the international level. A rigorous process of transposition was important for a number of reasons. Substantive and procedural rights in domestic systems arose in response to particular rights, obligations and needs of sub-State actors. It would therefore be a mistake to apply such rules to the international sphere without first considering whether those rules were necessary and appropriate for States to apply. Moreover, a rigorous process of transposition should be a protection for the less developed States. The first step in the identification of a general

principle of law was a broad and representative survey of municipal legal systems. However thorough such a survey might be, the practices of less developed States would always tend to be overlooked because their domestic laws might be unclear or still evolving, or the State might not have the resources to adequately codify and disseminate their domestic legal codes. Therefore, a rigorous process of transposition would oblige the adjudicator to exercise caution before importing into the international sphere a rule that was widely, but not universally, subscribed to. He would have liked to see the report establish rigorous criteria for transposability or guidelines for ascertaining transposability beyond requiring that the process should be informal, implicit, rigorous and flexible.

Turning to draft conclusion 6, he considered that the expression "principal legal systems" required further elaboration. He also continued to believe that the term "fundamental principles of international law" was unclear. In addition, he wondered how the practice of non-State actors such as international organizations, non-governmental organizations and other relevant actors could be considered when identifying a general principle of law. Lastly, he supported the suggestion that draft conclusion 6 should be simplified so as to avoid it being overly prescriptive and maintain flexibility in the identification of general principles of law derived from national legal systems.

Part two of the third report dealt with general principles of law formed within the international legal system. While he agreed that such a category of general principles existed, he was of the view that a clearer distinction should be made between it and other sources of international law, in particular customary international law. However, he was concerned that there could be insufficient relevant practice to justify a sound conclusion on the issue. The Special Rapporteur acknowledged that paucity of practice and proposed a unified methodology for the identification of general principles formed within the international system that was primarily inductive, but also deductive where necessary. The methodology had his support, but there was a need to clarify how it might be implemented using concrete examples.

With regard to draft conclusion 7, the term "other international instruments" in paragraph (a) required clarification. Concerning paragraph (b), he agreed that a principle that underlay a treaty or customary rule could be considered to be detached from that rule and not part of it. He also shared the view that the formulation of paragraph (c) was vague and could result in legal uncertainty and subjective interpretations. He supported the Special Rapporteur's view that draft conclusion 7 could be streamlined, taking account of all the suggestions made thus far.

With respect to part three of the third report, on the functions of general principles of law and their relationship to other sources of international law, he agreed with the Special Rapporteur that general principles of law were useful for ensuring coherence and consistency in the international legal system. General principles were valuable for their ability to prevent situations of *non liquet* and to connect the fragmented sources of international law. However, consistency and coherence were not the only values prized by the international legal system; consent and liberty were also key values, in recognition of State sovereignty, as exemplified in *The Case of the S.S. "Lotus"*.

The section of the report that addressed the gap-filling role of general principles of law neatly summarized the literature and arguments that supported such a role. In paragraph 44, the Special Rapporteur cited the 1949 judgment of the International Court of Justice in the case concerning the *Corfu Channel* Case and pointed to "elementary considerations of humanity", which were "even more exacting in peace than in war", as a general principle of law. While he agreed that such a moral principle existed, he was of the view that it could be held out as an example of how general principles of law allowed judges to use their personal moral intuition to rule on cases with a veneer of legal legitimacy.

The example taken from the *Dispute between Argentina and Chile concerning the Beagle Channel*, cited in paragraph 47 of the third report, was too specific to be a general principle of law. In paragraph 71, the Special Rapporteur stated that general principles of law played a gap-filling role "only to the extent that they exist and can be identified". That clarification was important in order to rein in overly creative adjudication.

He agreed with the Special Rapporteur's views on the absence of hierarchy between the sources of international law, the application of the *lex specialis* principle to resolve disputes when any two sources were in conflict, and the possibility of the parallel existence of general principles of law and conventional and customary rules. He also agreed that while treaties and customary rules were usually more specific than general principles of law, under certain circumstances, the *lex specialis* principle might favour the application of a general principle of law over a treaty or customary rule.

The proposition that general principles of law could serve, in certain cases, as an independent basis for the establishment of substantive rights and obligations under international law should be based on clear criteria, so as to allow for the identification of such cases and preserve the rights and obligations of States enshrined in treaties and customary international law.

He agreed that general principles of law also served as a means to interpret and complement other rules of international law and ensure coherence in the international legal system, given their essential gap-filling function. In that regard, the Special Rapporteur cited, in paragraph 140, the statement delivered by the then President of the International Court of Justice, Judge Yusuf, before the Sixth Committee of the United Nations General Assembly in 2019. Contacted recently with regard to the topic at hand, Judge Yusuf had reiterated that general principles had served multiple functions in the work of the Court. The term "principles" had been used by the Court to describe norms derived from international conventions or customary international law, and the use of general principles had enabled the Court to fill gaps in international law whenever there were no conventional or customary rules to draw upon. The Court had primarily referred to general principles which were procedural or evidentiary in nature or which reflected a conception of objective justice. General principles had been cited by the Court in relation to different fields of international law, including, for example, international investment law, human rights law and international environmental law, and could ensure coherence in the international legal system by enshrining values common to the system. In the opinion of Judge Yusuf, the importance of general principles would increase in the future, as courts faced new situations for which no specific legal rules yet existed or which required the application of underlying fundamental values recognized by the international community as a whole.

With regard to the draft conclusions included in the third report, draft conclusion 1 was short and concise; it should be subject to further clarification and elaboration in the commentary. While the question of general principles as a source of international law was the focus of the Commission's work on the current topic, the commentary to draft conclusion 1 should also refer to the other functions of general principles examined in the third report.

Concerning draft conclusion 2, he agreed that "community of nations" was the most appropriate term to employ. It should be explained in the commentary to the draft conclusion that the term "international community of States", which appeared in article 53 of the 1969 Vienna Convention on the Law of Treaties, had not been used because it excluded other relevant actors. The distinction between nations and States could also be explained.

With regard to paragraph 3 of draft conclusion 5, the commentary to the draft conclusion should clarify that the term "national laws" must be interpreted to comprise all the sources of national law of a particular State, not only its legislation and equivalent instruments. The expression "relevant material" should also be explained in the commentary.

Draft conclusion 6 stated that in order for a general principle to be transposed to the international legal system, it must be compatible with the fundamental principles of international law. However, the question of what constituted the fundamental principles of international law was unresolved and by no means free of controversy. That issue should be clearly explained in the commentary to the draft conclusion.

Draft conclusion 10, on the absence of hierarchy between the sources of international law, should be simplified. He wished to suggest the formulation: "There is no hierarchical relationship between general principles of law, treaties and customary international law."

Draft conclusions 13 and 14 both referred to the functions of general principles of law. For the sake of clarity, the two draft conclusions should be merged into one, under the heading “Functions of general principles of law”.

He wished to propose that an additional draft conclusion should be included in the set to provide a non-exhaustive list of general principles of law, similar to the list of peremptory norms of general international law annexed to the draft conclusions on peremptory norms of general international law (*jus cogens*).

The Special Rapporteur stated in paragraph 148 of the third report that the future programme of work for the topic would depend on the progress made by the Commission at its current session and, in particular, on the provisional adoption of a set of draft conclusions with commentaries. While he agreed that the provisional adoption of the draft conclusions should certainly be the Commission’s goal, he was doubtful that it would be possible achieve such an objective in view of the little time remaining in the session.

In the light of the views expressed in the plenary debate, he supported sending all the proposed draft conclusions, including those considered to be controversial by members of the Commission, to the Drafting Committee, which had consistently proved itself capable of finding solutions to controversial issues.

Mr. Jalloh said that he wished to begin by thanking the Special Rapporteur for his thoughtful third report, which had provided the Commission with a strong basis for its plenary debate and, together with his prior reports on the topic, made possible the completion of a first reading of the draft conclusions on general principles as a source of law under Article 38 (1) (*c*) of the Statute of the International Court of Justice. On the point of scope raised by Mr. Murase, although it was correct that Article 38 (1) (*c*) was, in principle, a specific directive only for the Court, it was widely considered to be an authoritative, if somewhat incomplete, statement of all the sources of international law. That meant that it was relevant to other courts and tribunals and to international lawyers seeking to interpret and apply international law. The Special Rapporteur’s focus on Article 38 (1) (*c*) was therefore justified.

With regard to part one of the third report, the Special Rapporteur had fairly summarized the debate surrounding the complex issue of ascertaining a general principle’s transposition to the international legal system, helpfully setting out the disparate positions of Commission members and delegations to the Sixth Committee. It was worth highlighting that, of the States that had submitted comments regarding the issue of transposition during the autumn 2021 debate, 22 had been generally supportive of the Special Rapporteur’s proposed methodology, 4 had postponed offering an opinion until further clarification on the issue, and only 1 State had disputed the methodology. While he noted that some Commission members, such as Mr. Forteau, had interpreted those comments differently, he welcomed the Special Rapporteur’s suggestion, set forth in paragraph 12 of the report, that draft conclusion 6 should be simplified, since it was crucial to avoid an overly prescriptive text and to maintain a degree of flexibility in the identification of general principles of law derived from national legal systems.

In that regard, he agreed that it was for the Drafting Committee, not for the plenary Commission, to discuss the textual alternatives for draft conclusion 6. The Drafting Committee was the right and ultimately better forum in which to resolve the differences of substance that would allow the Commission to reach a consensus in that regard. It was possible that the way forward on draft conclusion 6 was the textual solution proposed by Mr. Murphy in his statement earlier in the session (A/CN.4/SR.3587). It could also be the proposal made by Mr. Tladi at the Commission’s seventy-second session (A/CN.4/SR.3538), referred to in paragraph 16 of the third report, that draft conclusion 6 should simply state that a principle common to the various legal systems of the world must be transposable, and that the criteria for such transposability should be explained in the commentary. Either approach would make sense.

He supported the observations made by the Special Rapporteur in paragraphs 13 and 14 of the third report with regard to the element of recognition, and the reminder, in paragraph 17, that, when addressing the question of transposition, the Commission must always strive to strike a balance between rigour and flexibility. That was the only way to ensure that the

methodology for the identification of general principles of law was based on objective criteria, without making the test so burdensome as to render it useless. In that regard, he agreed with the points made by Mr. Valencia-Ospina regarding transposability and draft conclusion 6.

The controversial notion of general principles of law formed within the international legal system, which was addressed in part two of the third report, had been the subject of considerable debate in the Commission and in the Sixth Committee, as well as in the academic literature. He was among those Commission members who agreed, in whole or in part, with the Special Rapporteur's views on the existence of such a second category of general principles of law. The challenge was now to provide a clear methodology for their identification. He was confident that, with the guidance of the Special Rapporteur and the useful suggestions made by members during the plenary debate, the Commission would be able to clarify how best to clearly distinguish the second category of general principles of law from other sources of law, including customary international law.

As discussed in paragraph 25 of the third report, the Commission still had to address the paucity of practice related to general principles of law formed within the international legal system. The Special Rapporteur had given convincing reasons why, at first sight, it might appear that there was insufficient practice in that regard, especially if one focused, as some colleagues seemed to have done, on the work of the International Court of Justice alone. However, upon further and broader examination of the available evidence, as discussed in the Special Rapporteur's first and second reports, there seemed to be a sufficient basis in practice to support the propositions advanced in draft conclusion 7.

The fact that the International Court of Justice had been generally hesitant to invoke general principles of law, including those that could be said to arise from the international legal system, did not necessarily mean that a second category of general principles of law did not exist at all. It could simply be a reflection of other considerations. From the practical perspective of a judge of the Court, if an issue could be resolved on the basis of a conventional or customary rule, the Court could not be expected, including for reasons of judicial economy, to assess the possible existence of an abstract general principle of law. Moreover, although the Special Rapporteur seemed hesitant to suggest it, there was no reason why the Commission could not make a proposal regarding the second category on the basis of its mandate to contribute to the progressive development of international law, since there was nothing in Article 38 (1) *(c)* to indicate that general principles of law were limited to principles derived from national legal systems.

Overall, he welcomed the idea of a streamlined methodology for the identification of general principles formed within the international legal system, as proposed in draft conclusion 7, which could help to dispel the concerns raised by some Commission members that there was an excessive overlap between the three categories of recognition proposed in the Special Rapporteur's second report. As he understood it, under the updated methodology, first, treaties, customs and other international instruments would be analysed to determine whether they reflected or adopted a general principle of law; then, if the content of the principle must be deduced from existing rules of treaty law or customary international law, the general principle would be determined through a process of deductive reasoning.

At first glance, the new methodology could seem circular. However, it was workable, since, as a first step, the actual existence of a general principle of law that encompassed the issue at hand must be acknowledged; the deductive and comparative process of surmising how that principle had been applied was conducted only if the full contours of that general principle were still unclear, in order to determine its full ramifications. Nonetheless, in the light of the strong concerns about part two of the report expressed by some members, such as Mr. Park and Mr. Forteau, he looked forward to the Special Rapporteur's submission of a revised proposal for draft conclusion 7.

With regard to part three of the third report, he generally agreed with the Special Rapporteur on the role of general principles of law under Article 38 (1) (*c*). General principles of law primarily served to fill lacunae in the international legal system where other sources, such as customary international law or conventional rules, offered no solution. Although, in principle, there was no formal hierarchy between the sources of international law, at a

practical level, it was necessary to apply each subparagraph of Article 38 (1), from (*a*) to (*c*), in order, which could be an argument for the existence of an implicit hierarchy. To paraphrase the separate opinion of Judge Lauterpacht in the C*ase of Certain Norwegian Loans (France v. Norway)*, when international practice on a subject was not sufficiently abundant to permit a confident attempt at generalization, help could justifiably be sought in applicable general principles of law. In that regard, he fully endorsed the points made by Mr. Valencia-Ospina regarding the risk of downgrading the status of general principles of law.

The gap-filling function of general principles of law was supported by the practice of several international institutions. In the *Fisheries Case (United Kingdom v. Norway)*, the International Court of Justice had made early mention of the gap-filling function. That early view of general principles of law as gap-fillers had been further explained by the then President of the Court, Judge Yusuf, in his address to the Sixth Committee of the General Assembly in 2019, in which he had cited the *Fisheries Case* in affirming that the Court had also used general principles of international law to "fill in the gaps" in order to avoid findings of *non liquet* or recourse to the *Lotus* principle of liberty.

Similarly, although it operated with its own distinctive legal basis, as set out in its founding instrument, the International Criminal Court recognized the gap-filling function of general principles of law in article 21 of the Rome Statute, which provided that, where other sources of applicable law did not suffice, the Court could apply general principles of law. Moreover, in the African region, under article 31 of the Protocol on the Statute of the African Court of Justice and Human Rights, which addressed applicable law and was modelled on Article 38 of the Statute of the International Court of Justice, the African Court of Justice could apply general principles of law recognized universally or by African States.

Thus, although it was true that other sources of law could play the same role, the practice of several international courts was to treat gap-filling as the main purpose of general principles of law. Indeed, in some fields of international law, such as international criminal law, the gap-filling role of general principles was particularly prominent. Because the conventional law applicable to international criminal law was somewhat underdeveloped and there was no single code of international crimes or criminal procedure, surveys of general principles of law derived from the work of national courts had often been used to fill gaps in relation to core criminal law concepts, where no custom or treaty rule provided guidance. That explained why, in the current and previous reports of the Special Rapporteur, there were ample references to the case law of the *ad hoc* international criminal tribunals and the International Criminal Court.

There were, of course, occasions where a general principle of law could not fulfil its gap-filling function, because the principle did not pass the two-step analysis. In such cases, one might look to judicial decisions and the teachings of publicists, in accordance with Article 38 (1) (*d*) of the Statute of the International Court of Justice.

He generally concurred with the Special Rapporteur on the issue of *non liquet* and the idea that courts and tribunals should not be the only bodies that relied on the gap-filling abilities of general principles of law; States could also do so. However, he wondered whether, in circumstances other than litigation, it might be too difficult for the parties to establish sufficient common ground to agree on the relevant general principles of law.

With regard to the section of part three that addressed the relationship between general principles of law and the other sources of international law, he agreed with the Special Rapporteur's focus on the three issues identified in paragraph 75, namely the absence of a formal hierarchy between the three sources listed in Article 38 (1), the possibility of the parallel existence of general principles and conventional and customary rules, and the question of the operation of the *lex specialis* principle as opposed to the principle of *lex generalis*. He broadly agreed with the Special Rapporteur's arguments in that regard; however, he harboured serious concerns about the prospect of relegating general principles of law to a subsidiary position in relation to other sources of law, which risked downgrading their status despite the fact that they were an equally important source of law. Moreover, the decision to focus on the *lex specialis* principle as a method of interpreting general principles of law raised the question of what to do about the other rules of interpretation, which was a point that had already been raised by several Commission members.

While gap-filling was the main purpose of general principles of law, they did have other uses, including those identified by the Special Rapporteur in paragraph 39 of the third report. The Commission, as the Special Rapporteur rightly explained, had touched on those issues in the past, and they had also come up in State practice and decisions of the International Court of Justice. He noted with interest the critical observations made by some Commission members in that regard. In some academic writings, it had been suggested that, in the Chinese conception of international law, general principles of law were not even considered to be a source of law. If that claim was true, then he understood why, for some, it was a step too far to suggest that general principles of law could serve as a direct source of rights and obligations.

In any event, he agreed with the Special Rapporteur that general principles of law could be used to interpret or complement other rules. He was also largely in agreement with the Special Rapporteur with regard to the specific function of general principles of law as a means to ensure the coherence of the international legal system, as discussed in paragraphs 139 to 146 of the third report.

With regard to draft conclusions 10 to 14, his only textual suggestion was to amend the language of draft conclusion 10, such that it was not phrased in the negative. The draft conclusion should avoid describing what general principles were not, and should instead describe what they were. Such a change could avert a debate about formal and informal hierarchies of sources. He wished to suggest the wording: "General principles of law, like treaties and customary international law, enjoy the same status as a source of international law."

Some members of the Commission had had difficulty with draft conclusions 11 to 14. His view in that regard was closer to that of Mr. Murphy than to the views of Mr. Forteau, Mr. Park and Mr. Wood, some of whom appeared to object even to the referral of certain proposed draft conclusions to the Drafting Committee. His own opinion was that all the draft conclusions should be referred to the Drafting Committee. As per the Commission's usual practice, it was for the Special Rapporteur and the members of the Drafting Committee to decide how best to proceed in revising, and if necessary, merging or even reformulating or deleting proposed draft conclusions.

With regard to part four of the Special Rapporteur's report, he was generally in agreement with the proposed programme of work.

It would have been helpful if the Special Rapporteur had included in an annex to the report the text of all the draft conclusions, noting which had already been adopted, which were pending in the Drafting Committee and which had yet to be referred to the Drafting Committee. That approach had been used successfully in the fifth report on succession of States in respect of State responsibility and the eighth report on immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur might consider creating an informal document consolidating all the draft conclusions.

He supported the Special Rapporteur's goal of completing the first reading by the end of the current session or at the next session. He also supported his proposal to include a bibliography related to the topic. Although a measure of selectivity was warranted, the bibliography should be broadly inclusive of scholars and practitioners from all regions of the world, writing in different official United Nations languages and, ideally, reflecting views from a variety of the principal legal systems of the world.

Mr. Rajput said that he agreed with the general thrust of the process of transposition as set out in paragraphs 12 to 16 of the Special Rapporteur's very interesting and thought-provoking third report. He also agreed that the process for the identification of general principles of law should not be overly prescriptive, although that would depend on where the principles were formed. If general principles of law were formed in national legal systems, as they had always been understood to be, the methodology should be flexible. However, if the possibility of such principles being created within the international legal system – the second category – was opened, a far more rigorous methodology would be required. In his view, the relatively straightforward question of methodology had been artificially complicated due to the keenness to propose a second category of general principles of law, which contradicted the position of international law.

He welcomed the Special Rapporteur's effort to present the divergent views of members of the Commission and States in the Sixth Committee on the question of the general principles of law formed within the international legal system. However, he tended to agree with the observation cited by Mr. Forteau that the Commission's proposal in that respect constituted an "innovation". Having summarily acknowledged some of the concerns expressed, the Special Rapporteur outlined his preferred approach in paragraph 27. The material presented in the Special Rapporteur's previous reports to support the proposition that general principles of law could be formed within the international legal system had already been severely criticized by Commission members, himself included. To simply disregard those criticisms in the third report seemed disingenuous.

In paragraph 28, the Special Rapporteur relied on statements by members who supported his position that general principles of law could be formed within the international legal system. One of the statements he quoted claimed that if courts and tribunals could extract abstract principles from domestic legal systems, there was no reason that abstract legal principles could not be extracted from the international legal system. That argument was based on the faulty premise that general principles of law drawn from national legal systems were based on abstract legal principles. In fact they were derived from concrete legal principles existing in legal systems across jurisdictions, legal cultures and traditions. For example, *res judicata* was not an abstract principle; certain conditions needed to be in place for it to be applicable in a given case. During the drafting of the Statute of the Permanent Court of International Justice, the idea of general principles being created at the international level had been rejected, as it had been considered that such vague principles would not be acceptable to States.

He had already expressed his concerns about the reliance on the Nuremberg Principles – also cited in paragraph 28 as an example of the creation of general principles of law – at the Commission's seventy-second session. In addition, paragraph 28 contained the incorrect claim that the *travaux préparatoires* and the history of Article 38 (1) (*c*) were far from supporting the argument that general principles of law were formed only in domestic legal systems. At the time of the drafting of the Statute, the original proposal to refer to "rules of international law as recognized by the legal conscience of civilized nations" had been squarely rejected on the ground that it might be misinterpreted to mean that some principles could be formed within the international legal system. Article 38 (1) (*c*) had been intended to cover only principles emanating *in foro domestico*. During the negotiations of the Statute of the International Court of Justice, a similar proposal of general principles of law created at the international level had been proposed by Mexico and rejected. Regrettably, the extensive references he had made to the drafting history of the Statute in his intervention at the seventy-second session had not been taken into account by the Special Rapporteur. If the Commission were to accept the second category of general principles of law, it would be doing nothing less than amending the Statute of the International Court of Justice and unravelling more than one hundred years of history. He was thus unequivocally opposed to the inclusion of the second category.

Regarding the functions of general principles of law, he was broadly in agreement with the concerns raised by other members. In the literature and in separate opinions of judges, the gap-filling function had been attributed to general principles of law in the absence of a treaty or customary rule to resolve a dispute. The reference to "gap-filling" was intended to reflect the subsidiary nature of general principles of law in relation to rules of treaty and customary international law. It would therefore be contradictory to then state that general principles of law were on a par with treaties and custom.

Moreover, general principles of law performed a gap-filling function only in the specific context of dispute resolution to avoid situations of *non liquet*. The reason given by the Special Rapporteur in paragraph 72 for not limiting the role of general principles of law to the context of adjudication was hardly convincing. The Special Rapporteur argued that there was no reason why two States should not be able to invoke a general principle of law to resolve a dispute. However, the outcomes of bilateral negotiations between States were often *quid pro quo* bargains, not a judicial or quasi-judicial exercise where the rules of treaty interpretation or sources of international law were strictly applied. Interestingly, courts and tribunals and scholars had described as superfluous the requirement under articles 74 and 83

of the United Nations Convention on the Law of Sea that agreements on maritime delimitation should be in conformity with Article 38 of the Statute of the International Court of Justice. Therefore, general principles of law did not have a role beyond gap-filling to avoid a situation of *non-liquet* during adjudication.

When it came to the relationship between general principles of law and other sources of international law, he agreed that, in theory, there was no hierarchy between sources. However, in practice, the sources were applied in the order in which they were listed in Article 38 of the Statute: first treaties, followed by custom, and lastly, in the absence of either, general principles of law. Since the general principles were to perform the subsidiary role of gap-filling, they could not and did not in practice have the same status as a treaty or custom. He therefore did not see the utility of draft conclusion 10.

The selective use of *lex specialis* as a basis for general principles of law to control or supersede treaties and customs had already been criticized in the Commission. Draft conclusion 10 created an anomalous situation. If, for example, an applicable treaty defined the principle of *res judicata* more narrowly than the general principle of law of *res judicata* derived from national legal systems, the effect of draft conclusion 10 would be that the elements of *res judicata* as contained in the form of a general principle of law could supersede the elements contained in the treaty if it was established that the general principle of law was *lex specialis*. Draft conclusion 10 could thus transform general principles from their gap-filling function to a hierarchically superior position over treaties and customs. Surely no international court or tribunal would agree to set aside a treaty rule or rule of customary international law because the contents of that rule as a general principle of law were considered *lex specialis*. The proposal contained in draft conclusion 10 risked being derided by academics and practitioners alike, since it did not accord with the principle of *ordre succesif* that regulated the application of sources under Article 38 (1) of the Statute of the International Court of Justice.

The possibility of the parallel existence of sources was of no legal consequence; what mattered was their interaction and interrelationship. In the cases cited as examples in the report, the parties proposing the existence of general principles of law had not proposed that they existed alongside treaties and custom but rather as an alternative source in the absence of a treaty or custom. He therefore considered draft conclusion 11 unnecessary.

In his view, it was not necessary for the Commission to discuss the relationship between general principles of law and other sources of international law. It had not done so in its work on the law of treaties or the identification of customary international law. In any case, the examples cited in the report concerned the relationship between treaties and custom and not general principles of law. He was therefore opposed to draft conclusion 12.

Several members had expressed concerns about having a draft conclusion which declared that general principles of law could constitute an independent basis for rights and obligations, as was proposed in draft conclusion 14 (a). For example, with the principle of *jura novit curia*, there was no question of the creation of a right or obligation; rather, it was a matter of judicial discretion, which a court or tribunal could choose to invoke or not. Similarly, courts and tribunals could take judicial notice of obvious facts without creating any rights or obligations. The piecemeal description of certain principles was not sufficient to formulate a general draft article to the effect that general principles of law could constitute an independent basis for rights and obligations. He therefore considered draft conclusion 14 (a) inappropriate.

He did, however, agree that general principles of law could be used in interpreting a treaty on the basis of article 31 (3) (c) of the Vienna Convention on the Law of Treaties. The reference in that article to “any relevant rules of international law” definitely included general principles of law. There was no basis, however, for extending that interpretative role to customary international law. Indeed, while the Special Rapporteur recognized in the report that the interpretative role of general principles of law under article 31 (3) (c) was well established, he did not suggest that the same role applied with respect to customary international law. Draft conclusion 14 (b) stated not only that general principles of law could serve to interpret other rules of international law but also to “complement” them. He could

agree to the reference to the interpretative role of general principles of law in relation to treaties but nothing more.

He had major reservations about draft conclusion 14 (c), which proposed that general principles of law could serve to ensure the coherence of the international legal system. First, the formulation seemed to suggest that the international legal system was "incoherent" and needed to be made "coherent" by the use of general principles of law. Second, that suggestion seemed to stem from the presumption that the international legal system was a systematic and coherent whole, in other words, a complete system like domestic law, which was far from being the case – such an "Austinian" approach of enforcing completeness of the legal system appropriate for national law but not international law. It must be acknowledged that international law and domestic law were very different in nature. It was interesting to note that the statement made by the then President of the International Court of Justice to the Sixth Committee in 2019, as referenced in paragraph 140 of the report, was being used as a basis to conclude that the Court had used general principles of law to introduce coherence into the international legal system, especially since the Court had never directly stated that it was applying general principles of law under Article 38 (1) (*c*). On rare occasions it had referred to *res judicata*, but without making any reference to Article 38. There was therefore no trend towards recognizing that general principles could perform the function of making the international legal system coherent or complete. References to individual opinions of judges in the following paragraphs of the report were unconvincing and appeared to have been taken out of context. He therefore did not see any value in keeping draft conclusion 14 (c).

There appeared to be some confusion in the methodology used for the preparation of the report and generally in relation to the topic. Judicial decisions and the literature often referred to "principles", "general principles" and "general principles of law". The use of those terms was not sufficient to conclude that there was a reference to general principles of law as a source of international law under Article 38 (1) (*c*) of the Statute of the International Court of Justice. As he had previously stated, several principles were applied to fill gaps in logic or judicial reasoning, but not all of them were or could be general principles of law as a source of international law, and it was important to make that distinction. The Commission should be careful to follow an inductive approach, where it examined material dispassionately in order to draw conclusions and identify principles, rather than a speculative approach. He supported following the helpful proposal made by Sir Michael Wood to change the title of the topic to "General principles of law as a source of international law" in order to provide greater clarity as to what was covered by the topic.

Although he had serious concerns about most of the proposed draft conclusions, with the few exceptions he had mentioned, he would not object to them being sent to the Drafting Committee.

Mr. Reinisch said that the Special Rapporteur's third report focused on a number of very important issues, including the functions and relevance of general principles of law. He agreed with the Special Rapporteur that the question of transposition required further discussion within the Commission, although he remained sceptical about the notion of transposition as set out in draft conclusion 6. He supported the Special Rapporteur's view that transposition was not a formal act, but rather an implicit recognition that a principle was suitable to be applied in the international legal system. Draft conclusion 6 (b), which referred to the conditions for adequate application in the international legal system, could perhaps be reformulated to refer to a principle's "suitability for application" in the international legal system.

Although he had already expressed the view that the reference to compatibility with fundamental principles of international law – the first condition contained in draft conclusion 6 – was vague and unclear, he considered that, as a matter of principle, it was a justified requirement. The proposals to use a formulation such as "fundamental values" or "fundamental rules" of international law might be appropriate.

In part two of the report, the Special Rapporteur dealt with the complex and controversial question of general principles of law formed within the international legal system. The issue itself must be addressed separately from the formulation of the draft conclusions. The Special Rapporteur's suggestion that a close analysis of case law and

practice might be helpful in determining whether that was indeed the case struck him as overly optimistic. While such an analysis might indeed be helpful, to his mind, any perceived "proof" in a specific decision should always be treated with caution, since judicial and arbitral decisions might be ambiguous and unclear in terms of the extent to which they relied on classical concepts of general principles of law formed within national legal systems or, indeed, on principles formed within the international legal system. He agreed with the Special Rapporteur that it was not the Commission's task to invent new sources of international law and that, when examining case law on certain principles, it was "the first occasions of their application" that would be particularly relevant.

However, the Commission should perhaps not put too much emphasis on isolated instances in case law. On the one hand, the Commission should examine whether a particular methodology for identifying general principles of law had wide-ranging support and whether there was broad consensus among adjudicatory bodies that such a methodology could be used. On the other hand, it was not entirely clear whether particular instances in case law – even if they found no support in treaty or custom – must automatically be viewed as falling within the scope of Article 38 (1) (*c*) of the Statute of the International Court of Justice. The Special Rapporteur himself had noted in his report that reference had rarely been made in practice to that article. Even that might be an understatement, since, with the sole exception of *Infinito Gold Ltd. v. Republic of Costa Rica*, there seemed to be no international adjudicative body that had ever made that explicit connection.

It would be useful if the Special Rapporteur could provide examples of the three subcategories of general principles of law formed within the international legal system pursuant to the criteria set out in draft conclusion 7 (a), (b) and (c). While all three subcategories appeared to be feasible, it was difficult to point to specific rules that might demonstrate their existence. As the Special Rapporteur had rightly pointed out in the report, principles widely recognized in treaties and other international instruments must have an independent status from a particular treaty. Similarly, principles underlying a customary international rule must have an equally independent status. To hold a meaningful discussion on whether those subcategories existed, practical examples were necessary. Otherwise, the Commission risked continuing to discuss, on an abstract level, notions that might have different meanings for different members of the Commission.

Regarding the third part of the report, on the functions of general principles of law and their relationship with other sources of international law, he wished to draw attention to the usage of the term "function" in that context. What was discussed under that heading essentially related to the character of general principles of law as a source of norms, insofar as they served "as an independent basis for rights and obligations", or to the relationship between them and norms stemming from other sources, where they served as rules intended to fill gaps, to interpret other norms or to ensure coherence. However, even though those issues were in no way particular to general principles of law, the Commission had never spoken of "functions" in the context of any other sources. It might thus be more appropriate to address that matter under the heading of the "character" of general principles of law and its relationship or interaction with other sources.

The Special Rapporteur had provided an extensive overview of the practice of courts and tribunals that had referred to the gap-filling function of general principles of law. The report defined gap-filling to mean resorting to a general principle of law when a legal issue was not regulated, or not sufficiently regulated, in treaties or custom. However, that definition did not conform to how the notion of "gaps" was understood in legal theory more broadly. There, a "gap" implied that the legal system as a whole was unable to provide an answer to a legal question. Then – and only then – could adjudicative bodies engage in the filling of gaps by various means, going beyond positive law.

If general principles of law were "gap-fillers" in that technical sense, they would, firstly, be limited to that role and thus be unable to serve as an independent basis for rights and obligations. Secondly, they would necessarily have to be subsidiary to other sources, given that gaps could only exist if the law remained indeterminate after the judge had exhausted all "regular" modes of legal reasoning. He believed the Special Rapporteur to be correct in rejecting both of those assertions.

He was therefore led to conclude that, in the report, the term "gap" was used in a non-technical sense, thereby acknowledging that general principles of law might provide answers in cases where legal regulation through other sources was absent. However, that was not specific to general principles of law, since the same was true for every other source. A right or obligation existing on the basis of any source of international law might provide legal solutions in the absence of other norms. Most importantly, the application of general principles of law was not dependent on the existence of a "gap" in international law. Rather, their relationship with conventional and customary law was solely governed on the basis of the *lex specialis–lex generalis* dynamic. It was only the reliance on case law of the International Criminal Court to make more general assertions that was somewhat problematic, since the Rome Statute explicitly provided that general principles of law derived from domestic law were subsidiary to other sources.

In view of the above, it was unclear why a draft conclusion solely and specifically devoted to the purported "gap-filling function" of general principles of law was warranted. The Special Rapporteur had noted in his report that that "function" appeared to be "inherent in this source of international law" while, in the same breath, he acknowledged that all other sources might also "fill a lacuna", as he understood the term. As the report itself appeared to recognize, that assertion followed from the character of the general principles of law typically constituting *lex generalis*. In the absence of a difference between general principles of law and other sources on a conceptual level, the more appropriate place for those discussions might thus be in the commentaries to draft conclusion 12, to ensure that conceptual clarity was retained.

As for the section of the report dealing with the relationship between general principles of law and other sources of international law, he agreed with the Special Rapporteur's conclusions regarding the absence of a hierarchy between treaties, custom and general principles of law, and the possibility of the parallel existence of general principles of law and conventional and customary international rules. Although that possibility might be less frequently proved in practice, it seemed to be an inherent feature of general principles of law. However, he was slightly doubtful about some of the examples provided in the report, particularly *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, where one of the parties referred to the principle of *uti possidetis* as a general principle of law, which seemed questionable. While *uti possidetis* was a well-recognized principle of customary international law, the Roman law principle from which it was derived was not widely known and differed greatly in content from the meaning of *uti possidetis* in customary international law.

He agreed with the Special Rapporteur that, as a rule, a general principle of law would be a *lex generalis vis-à-vis* more specific conventional or customary rules. He wondered, however, whether it was appropriate to mention only the *lex specialis* principle in draft conclusion 12, as, in his view, the relationship of general principles of law with other sources of international law addressing the same subject matter was equally governed by the *lex posterior* principle. Mentioning only the *lex specialis* principle in that draft conclusion could be misinterpreted as casting doubt on the relevance of the *lex posterior* principle in that context.

He also found the current wording of draft conclusion 12 to be problematic. Since a potential conflict would only arise on the level of specific rules or norms and not their source, the draft conclusion might be revised to read: "The relationship of rules stemming from general principles of law with those of other sources of international law addressing the same subject matter is governed by the *lex specialis* principle."

Regarding the section of the report addressing certain specific functions of general principles of law, he concurred with the Special Rapporteur that such principles might function as an independent basis for rights and obligations. In fact, that was arguably an essential feature of general principles of law being recognized as a source of international law, since such principles might embody rights and duties that could be invoked before international courts and tribunals. However, the assertion that the reference to general principles of law in article 15 (2) of the International Covenant on Civil and Political Rights showed that they could "impose a direct obligation on individuals not to commit a given crime" raised the question of what the limiting factor for criminalization under general

principles of law would be, since there were clearly a great number of common crimes that were universally recognized in domestic law that did not constitute international crimes.

He also agreed with the Special Rapporteur's suggestion that general principles of law might serve as a means to interpret and complement other rules of international law. However, he was not certain whether all the examples cited in the report were on point. For instance, in *Golder v. United Kingdom*, the European Court of Human Rights had indeed referred to "general principles of law" as forming part of the "relevant rules of international law applicable in the relations between the parties" within the meaning of article 31 (3) (c) of the Vienna Convention on the Law of Treaties. However, the Court had referred to having a right of access to a court or tribunal "as one of the universally 'recognised' fundamental principles of law". It thus appeared that, in that case, a right of access to a court or tribunal had been referred to more as a fundamental principle of law in the sense of a fundamental right than as a general principle of law. Similarly, the decision of the Appellate Body of the World Trade Organization in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* also referred literally to general principles of international law, but that might in fact be a broader reference to general international law. Those were just two examples that raised the question of whether an international court or tribunal, when referring to general principles of law, actually meant general principles of law in the strict and technical meaning of the phrase.

Concerning the section dealing with general principles of law as a means to ensure the coherence of the international legal system, he considered that that notion might need to be further corroborated. It would be interesting to hear, in particular, whether the Special Rapporteur believed that function to go beyond the role of general principles of law as interpretative tools, and what he meant by the "gap-filling function" of general principles of law in that context. If the former could not be proved, it might not be appropriate to include a specific draft conclusion on that function. He supported sending all the draft conclusions to the Drafting Committee.

Mr. Hmoud said that he wished to thank the Special Rapporteur for his thorough analysis of practice, jurisprudence and doctrine in the various areas of international law relating to general principles of law, as well as the opinions of States, which had allowed a form of consensus on the draft conclusions to be reached. The divergent views expressed by members regarding draft conclusions 10 to 14 were not necessarily an impediment to reaching consensus on a way forward within the Commission.

General principles of law formed within the international legal system remained the core issue, and a source of controversy, and he continued to have serious doubts about whether that category of general principles of law existed. Simply put, there was no practice to corroborate its existence. The Special Rapporteur's thesis on the matter was predicated on scholarly writings or, to put it more bluntly, scholarly activism that was paving the way towards a departure from international law based on State consent. Only a handful of substantive principles could have arguably been formed within the international legal system. Even then, it could be argued that the *uti possidetis* principle had its origins in property laws, in both the civil and common law systems, and that the principle of legal stability originated in national laws, specifically administrative laws. It was debatable whether the Martens Clause was a customary rule, a conventional rule or a general principle of law; concluding that general principles of law might exist "in parallel" with conventional and customary rules did not resolve the issue. The remaining examples were procedural in nature and, even then, they appeared to originate in municipal or national legal systems.

In his capacity as Chair of the Commission at its seventy-second session, he had attended the Sixth Committee in 2021 and listened to States express their views on the category of general principles of law formed within the international legal system. Significant doubts had been raised about that category, and only a small number of States had expressed outright support for it or provided examples of such principles. The fact that some States were open to the possible existence of that category did nothing to remedy the dearth of relevant practice and belief in the legal effects of that category of general principles.

He wished to reiterate that that category of general principles of law should not be used as a means to bypass the conditions for the formation of customary international law.

The Commission should take care not to open the floodgates for the creation of a new category, or source, of international law, whereby claims related to legal obligations could be made on the basis of general principles of law formed within the international legal system, even though no conventional or customary rules existed. He welcomed the assurances provided by the Special Rapporteur in his report that he did not intend to create a new source of international law.

In 2021, significant criticism had been levelled at the deductive methodology for identifying general principles of law formed within the international legal system proposed by the Special Rapporteur in draft conclusion 7. In his third report, he had proposed a unified methodology that was first and foremost inductive and subsidiarily deductive. That methodology was based on language from a statement by one State and one colleague, which had been framed through the writings of one legal scholar identified in the report, who described such principles as a "self-standing source of international law" to support the suggested methodology. He did not agree that the methodology proposed satisfied the test of rigour necessary for the identification of general principles of law. Despite the Special Rapporteur's claim that the draft conclusions did not purport to develop new rules on identification, it seemed that the methodology being proposed might do just that.

It was difficult to find a well-established methodology for identifying general principles of law formed within the international legal system. However, despite his serious doubts about the existence of that category of general principles, he did not wish to rule out that possibility entirely. The Commission might wish to flag the possibility of its existence by adding a "without prejudice" clause, which would close the topic while avoiding a reinterpretation of Article 38 (1) (*c*) of the Statute of the International Court of Justice. He considered that provision to be the basis for the topic at hand, not the starting point.

While Mr. Murphy's drafting proposal for draft conclusion 7, if taken up, might serve to restrict the scope of that category to what might truly be general principles of law formed within the international legal system, the Drafting Committee might not have the time necessary to agree on the related identification process. In any case, the Commission should ensure that general principles of law were created by the subjects of international law and not by individual publicists. It should draw on different legal traditions from different regions to ensure that the whole of humankind was duly represented. Certain States or regions should not have a monopoly simply because they had the resources to develop international law based on their own cultures and traditions. Principles of international law should not be imposed surreptitiously. The words "civilized nations" had been used 100 years previously because colonialist nations were considered to be civilized and their legal principles superior. Thankfully, the world had changed, and all human beings were now considered civilized. His worry was that the concept of "civilized nations" could be brought back through the introduction of general principles of law derived from the international legal system.

He generally agreed with the Special Rapporteur's analysis and conclusions regarding the functions of general principles of law and their relationship with other sources of international law.

General principles of law were a source of obligation for the subjects of international law like any other source, even though some principles did not have legal effect as such. The argument concerning rules and principles was irrelevant and he agreed with the assertion in draft conclusion 14 (a) that general principles of law might serve as an independent basis for rights and obligations. The report provided a solid basis on which to draw such a conclusion, although, as colleagues had mentioned previously, not all general principles of law triggered primary rights and obligations.

There seemed to be consensus among members and States alike about the essential gap-filling role of general principles of law. While treaties and customs could also play such a role, that fact did not negate the essence of general principles of law as conceived by the drafters of the Statute of the Permanent Court of International Justice and applied by courts and tribunals. That proposition was supported by well-established practice. The question then was whether general principles of law must always prevent situations of *non liquet*. He wished to reiterate that, in his opinion, that was not the case, and the Commission should avoid giving that impression. The Special Rapporteur seemed to agree with that conclusion

in paragraph 71 of his report. If a general principle of law was found to exist, it might be resorted to in order to resolve a legal matter when a judge was unable to identify and apply a conventional or customary rule. However, if such a principle did not exist, then the judge should obviously not create a general principle of law to fill the gap. He saw no reason why draft conclusion 13 should not include the word "gap-filling". Not all draft conclusions needed to establish rules.

He was hesitant to take at face value the absence of hierarchy between treaties, customary international law and general principles of law. The historical discussions of the Advisory Committee of Jurists on the matter were not clear-cut and the removal of the words "in the order following" from the draft Statute of the Permanent Court of International Justice reflected the fact that, back then, international law was not developed through conventional and customary rules in the same way as it was in the present day. Contrary to the view of the Special Rapporteur, who maintained that there was no evidence to suggest that certain categories of general principles of law had been excluded from the draft Statute, he believed that hard evidence was needed to prove that the Advisory Committee of Jurists had intended to include a specific category of such principles in the text. In practice, general principles of law were used as gap-fillers only when there was a legal lacuna. That was how courts and tribunals applied such principles. States seemed to accept the interpretation given to the order of the sources of law listed in Article 38 (1) (*c*) of the Statute of the International Court of Justice and its application by courts and tribunals. The order of sources followed the same pattern in the civil law system and had developed along the same lines in the common law system: written law, then custom and traditions, then principles of justice. However, in that connection, due attention should be paid to the conclusions of the work of the Study Group on fragmentation of international law regarding the differences between international law and national legal systems. The inherently general nature of general principles of law and their role as gap-fillers should be taken into account when examining the proposition that there was no hierarchy among the three sources of law.

Regarding the possible parallel existence of general principles of law and conventional and customary rules, he agreed with the Special Rapporteur that what the International Court of Justice stated in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* and in the *Nottebohm Case (Liechtenstein v. Guatemala)* was evidence of the possibility of parallel existence. That conclusion, although ostensibly superfluous, was useful in demonstrating the functions of general principles of law, including interpreting and complementing other rules.

On the operation of the *lex specialis* principle, as he had mentioned earlier, general principles of law were inherently general in nature, whereas conventional and customary rules were specialized. The Special Rapporteur was effectively leaving the door open for general principles of law to be the *lex specialis vis-à-vis* customary law. However, he noted that the report did not provide examples where such principles prevailed over customary rules on the basis of the maxim *lex specialis derogat legi generalis*. The Drafting Committee should refine draft conclusion 12 to reflect the fact that general principles of law were normally the *lex generalis*. A related point had been raised by colleagues in relation to why the Special Rapporteur had not dealt with the *lex posterior* principle in the draft conclusions. He wondered whether a general principle of law formed after a customary rule could supersede such a rule.

Another function of general principles of law with which he fully concurred was that of interpreting and complementing other rules of international law. Those important functions arose from, *inter alia*, article 31 (3) (c) of the Vienna Convention on the Law of Treaties and ensured the harmonization of rules of international law. Again, the report provided a solid case-law basis on which to draw that conclusion.

On the function of general principles of law as a means to ensure the coherence of the international legal system, he was of the view that it was a derivative of the interpretative and harmonization role of general principles of law. While he did not object to including that role in the draft conclusions, he wished to propose merging it with the interpretative role.

He again wished to thank the Special Rapporteur for his excellent report. His criticisms of certain aspects of the Special Rapporteur's approach to the topic reflected his

own views and approach to international law, which did not always necessarily coincide with those of the Special Rapporteur. Yet, the conclusions the Special Rapporteur had reached were solid and defensible.

Lastly, since it was the last time that he would deliver a statement on a topic in plenary, he wished to put on record that it had been an honour and a privilege to have served as a member of the Commission for 15 years and to have chaired its seventy-second session during what had been a difficult period. The Commission should continue to be a beacon for the progressive development and codification of international law. Members should always strive to ensure the relevance of the Commission's work by producing outcomes addressing the concerns of all subjects of international law. States listened to the Commission and responded to its outcomes. The stagnation in the Sixth Committee and the fact that, over the past 20 years, political considerations had hampered the adoption of the Commission's texts should not dissuade it from carrying out its work. Over the same period, members had also witnessed increased enthusiasm for and engagement with the work of the Commission in the Sixth Committee, which should serve as motivation for trying to build more bridges between the two bodies. He was hopeful that some of the Commission's texts would one day be adopted as binding instruments.

The meeting rose at 12.40 p.m.