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International Law Commission

Seventy-third session (second part)

Provisional summary record of the 3591st meeting

Held at the Palais des Nations, Geneva, on Friday, 8 July 2022, at 10 a.m.

Contents

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Present:

Chair:	Mr. Tladi
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	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
	Sir Michael Wood
	Mr. Zagaynov

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)

Ms. Galvão Teles said that her statement would focus on three aspects of the Special Rapporteur's excellent third report (A/CN.4/753), namely the requirement of recognition of general principles of law, their gap-filling role, and the relationship between general principles and other sources of law, in particular customary international law.

With regard to the requirement of recognition, at its seventy-second session, the Commission had generally agreed that in order to identify a general principle of law, it was necessary to carry out a two-step analysis to ascertain, first, whether the principle was common to the various legal systems of the world and, second, whether it had been transposed to the international legal system. In the third report, the Special Rapporteur clarified that the two-step approach was a "combined operation" aimed at demonstrating that a general principle of law had been recognized within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice. Accordingly, he understood that the recognition of a general principle of law, as a requirement for its existence, needed to take place at both the national and international level. It was not sufficient for a given principle to exist across national legal systems; some form of recognition that a principle common to the various legal systems of the world was capable of application at the international level was also necessary.

She supported the Special Rapporteur's position in that regard. There were certain principles that, despite being common to most legal systems of the world, could not be transposed to international law because of differences between the domestic legal system and the international legal system. A clear-cut example was the national legal principle according to which parties to any dispute should have access to judicial remedies; in international law, the opposite principle of consent to jurisdiction prevailed. It was also possible that a principle might be applicable under international law subject to some adaptation. For example, in its judgment in *Prosecutor v. Zejnil Delalic, Zdravko Mucic, also known as "Pavo", Hazim Delic and Esad Landzo, also known as "Zenga"*, the International Tribunal for the Former Yugoslavia had stated that the principle of legality was applicable under international law provided that due account was taken of certain features of the international legal system, including "the nature of international law; the absence of international legislative policies and standards; … and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States".

The question of how to ascertain whether a general principle of law had been transposed was still to be answered. She supported the basic premise proposed by the Special Rapporteur that general principles were identified through a non-formalized process; it would be incompatible with the flexible and non-written nature of general principles of law to require a formal and express act of transposition by States or other actors. However, the Commission must still provide some guidance as to how the requirement of transposition was fulfilled, in a manner that conserved the flexibility of general principles of law and maintained their independence from other sources. In that regard, it was important to distinguish the concept of recognition in the context of general principles of law from the requirement of "acceptance as law" in the context of the identification of customary rules. The former did not refer to the opinion of States, but rather to their recognition that a given principle was compatible with the international legal system.

She looked forward to reviewing the Special Rapporteur's proposed new formulation of draft conclusion 6 in the Drafting Committee. His proposal to simplify the draft conclusion should be supported, particularly if the simplified text provided for a single transposition requirement instead of two. The difference between the two requirements set forth in the current version of draft conclusion 6 was unclear; moreover, the fact that a given principle was difficult to apply did not necessarily mean that it was incompatible with the nature of international law. Draft conclusion 6 should set forth a simple requirement to the effect that, in order to be recognized as a general principle of international law, a principle common to the various legal systems of the world must be compatible with the "fundamental nature", or the "fundamental characteristics" or "basic characteristics", of the international legal system, or simply with "international law" or "international law and internationally recognized norms and standards", following the formulation used in the Rome Statute of the International

Criminal Court. The commentary could then further specify what aspects of the international legal system might determine that a principle was not compatible with international law, including examples of principles that had been transposed and others that were incompatible with international law.

Turning to the section of the third report that addressed the gap-filling role of general principles of law, she said that general principles of law had first been introduced in the Statute of the Permanent Court of International Justice as an auxiliary source of law that was presumed to act as a gap-filler in the absence of treaty or customary rules applicable to a given situation. In that sense, their most basic function was to avoid situations of *non liquet*, in which an international court or tribunal could not deliver a decision on a matter in a dispute because neither the relevant treaty or treaties nor customary international law regulated it. That had been clear to the Advisory Committee of Jurists. While she did not disagree with those considerations, the gap-filling function attributed to general principles must be carefully considered in the light of the specificities of the international legal system that distinguished it from national legal systems, particularly the fact that the former was a much less complete legal system.

A finding that there was no law, whether positive or negative, governing a certain issue – and, therefore, that the court would have to declare a situation of *non liquet* if it could not rely on general principles of law – must be distinguished from a finding that a claim before an international court or tribunal was not supported by a positive rule of law. The latter case would amount to a decision that the right claimed did not exist, with the consequence that the respondent had won the case. That idea was expressed in the often-cited findings of the Permanent Court of International Justice in *The Case of the S.S. "Lotus"*, in which the Court had determined that "restrictions upon the independence of States cannot … be presumed". Similarly, in its 1970 judgment in *Barcelona Traction, Light and Power Company, Limited*, the International Court of Justice had found that there was no rule of customary international law that awarded a right to reparation to any State other than the State of the company, thereby rejecting the possible application of considerations of equity.

Those decisions differed from the section of the *Barcelona Traction* judgment cited by the Special Rapporteur in the third report, in which the Court had found that the application of general principles derived from municipal law was appropriate since international law did not address the specific issues of the rights and relationship between the corporate entity and shareholders. They were equally distinct from the finding of the International Tribunal for the Former Yugoslavia in its 1996 sentencing judgment in the case of *Prosecutor v. Dražen Erdemović*, in which the Trial Chamber had determined that, since the question of the length of imprisonment for crimes against humanity was not regulated by the Tribunal's statute or Rules of Procedure and Evidence, the Trial Chamber must resort to general principles of law.

It had also been noted that the problem of the identification of lacunae in international law seemed to have been raised more frequently in relation to customary law than in relation to treaty law. In the *Haya de la Torre Case*, for example, the International Court of Justice had found that the Havana Convention on Asylum of 20 February 1928 did not give a complete answer to the question of how asylum could be terminated, which it left to the parties to resolve. The Court had not foreseen a role for general principles of law in that case.

The third report highlighted that general principles of law performed a gap-filling role only to the extent that they existed and could be identified; it was not possible to completely eliminate situations of *non liquet* in international law. While that was an important idea, it was equally important to highlight that general principles of law were only called upon to perform a gap-filling role in cases where there was an absence of relevant treaty law or customary international law and where regulation was necessary for the correct functioning of international law – where a gap in applicable international rules would effectively lead to a situation of *non liquet* before a court or tribunal.

Accordingly, draft conclusion 13 should mention the relationship between the gap-filling function of general principles of law and the avoidance of situations of *non liquet*. It could read, for example: "The essential function of general principles of law is to fill gaps that may exist in treaties and customary international law and to prevent situations of *non*

liquet before international courts and tribunals." The commentary to the draft conclusion should clarify, to the extent possible, the distinction between circumstances in which a right or position claimed simply did not exist in international law and circumstances in which there was no law on the matter in question and regulation was necessary, highlighting the fact that a gap existed only in the latter case.

With regard to the relationship between general principles of law and other sources of international law, the Special Rapporteur's conclusion that general principles could exist in parallel with rules of treaty and customary international law that had identical or analogous content was understandable in terms of the relationship between general principles and treaty law. A general principle of law could be codified, fully or in part, in a conventional instrument and yet maintain its distinct existence and applicability, serving to interpret or complement the treaty provision or to reinforce legal reasoning. However, the proposition that general principles of law could coexist with customary international law rules with similar or even overlapping content did not hold up. Such a conclusion ran the risk of blurring the distinction between general principles of law and customary international law, especially since the processes for the formation and identification of general principles of law and customary international law were both non-formalized and often overlapped. Both the identification of rules of customary international law and the determination of the existence of principles common to the various legal systems of the world entailed an assessment of national laws, decisions of national courts and other relevant materials. Moreover, customary international law could be used as a source in the ascertainment of a general principle of law.

General principles of law were, by definition, fundamental, in that they contributed to the axiological foundations and justification of the legal order, and indeterminate, as they applied to all situations covered by the legal order, rather than only to specific subjects and legal relations. A distinctive characteristic of customary international law was that it must be of a norm-creating character; in other words, it must be possible to derive a behaviour to be adopted by the parties from a customary rule. Consequently, she did not agree with the premise that the distinction between a rule of customary international law and a general principle of law depended on the process through which it had been formed, in accordance with the distinct rules of recognition of each source. The existence of practice that conformed with a general principle of law could not transform that principle into a rule of customary international law. Rather, it demonstrated recognition of the general principle by States or other actors and could, if all requirements were met, lead to the formation of rules of customary international law that detailed how the principle applied to specific situations and grant customary status to certain rights or obligations that, previously, could only be derived from general principles of law.

Draft conclusion 11 should therefore be revised to better reflect that distinction and could be simplified by stating that "general principles of law may exist in parallel with treaty and customary international law" or that "general principles of law may exist in parallel with treaty and customary international law governing the same subjects". The way in which the relationship between general principles and treaty law differed from the relationship between general principles and customary international law could then be explained in the commentary.

With regard to draft conclusions 6, 10, 12, 13 and 14, some legal concepts and terms which were used in the third report and which could be useful in defining and conceptualizing the core term "general principles of law" should be clarified. For example, what was the relationship between general principles of law and the "fundamental principles of international law" referred to in draft conclusion 6? Other relevant terms that should be clarified included "general international law" and "general principles of international law".

As Mr. Murphy, Mr. Valencia-Ospina and others had pointed out, there was tension between draft conclusions 10 and 13. The current emphasis on the gap-filling role of general principles of law as "essential" placed the emphasis on their secondary and supplementary role, suggesting an implicit or informal hierarchy, regardless of the existence of "subordination" – a concept that the Special Rapporteur invoked in paragraph 82. One way to resolve that tension would be to examine whether the word "essential" was necessary and useful.

She agreed that draft conclusions 13 and 14 could be combined. Irrespective of the appropriateness of the description of "essential" functions as opposed to "specific" functions, draft conclusions 13 and 14 did not make adequately clear that the function of interpreting and complementing other rules of international law was in fact part of the gap-filling function, as suggested in paragraph 122, nor did they reflect the Special Rapporteur's view, as expressed in paragraph 139, that the systemic function was a consequence of the gap-filling function. Given the interrelatedness of the functions identified, it would be appropriate to discuss them together.

Lastly, as many Commission members had already pointed out, there was a need to re-examine draft conclusion 12. The current draft singled out the *lex specialis* principle as the most important principle that governed the relationship between general principles of law and other sources of international law. However, that relationship was also governed by other principles, rules and norms, such as the *lex posterior* principle. The draft conclusion should be modified accordingly or deleted, and the subjacent idea should be explained in the commentary.

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

Ms. Oral said that she wished to thank the Special Rapporteur for his well-structured and clearly written third report. She shared the Special Rapporteur's view that the Commission's point of departure in the current topic was Article 38 (1) (*c*) of the Statute of the International Court of Justice. However, the Commission's work was not limited to the confines of the Statute. Focusing solely on Article 38 (1) (*c*) would result in nothing more than a restatement of the findings of the Court in that regard. She wished to recall that the Commission's work on the topic "Peremptory norms of general international law (*jus cogens*)" had started with the 1969 Vienna Convention on the Law of Treaties but was not limited to it. With the current topic, the Commission had an opportunity to capture important developments in international law with regard to the understanding, application and use of general principles of law by States, courts and tribunals and other relevant actors, including international organizations. For that reason, proper adherence to clear methodology was key.

The Special Rapporteur revisited the views expressed by Commission members on the issue of transposition and draft conclusion 6 at the seventy-second session, as well as statements made by States in the Sixth Committee in 2021. A good number of States had made insightful comments, and, overall, there was support for the work of the Commission and the approach taken by the Special Rapporteur on the topic thus far. As emphasized by the Special Rapporteur, the question of the transposition of general principles should be based on objective criteria that allowed for some flexibility. She agreed with the suggestion in paragraph 12 of the report that draft conclusion 6 should be simplified.

She supported the Special Rapporteur's view that there was a need to include a transposition requirement to reflect the element of recognition by the international community. While Article 38 of the Statute of the International Court of Justice did not expressly allude to a transposition requirement, such a requirement was implicit. On that point, she concurred with the Special Rapporteur that the mere existence of a general principle of law across different domestic jurisdictions did not suffice to meet the requirements of Article 38 (1) and that there must be an additional element of recognition. Transposition to the international level must have occurred through a process of recognition by the international community of nations.

The Special Rapporteur had provided several examples of general principles formed within the international legal system. While relevant practice was limited, it was sufficient for such principles to be recognized as a second category of general principles of law. For example, in the *Case concerning the Factory at Chorzów*, the Permanent Court of International Justice had found that "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form" and that "a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals … is that reparation must, as far as possible, wipe out all the consequences of the illegal act". While the Court had not used the term "general principle of law", the principle of reparation, as espoused by the Court, was an autonomous principle that stood apart from treaty law and customary international law. It was expressly derived from

State practice and the decisions of arbitration tribunals. In fact, the principle might have been used for a gap-filling purpose, since the Court had applied it in the absence of an express provision on reparation in the relevant convention.

She fully appreciated that there were differing views on the existence of a second category of general principles of law. The Special Rapporteur had clearly summarized the three broad categories of the views of States on the issue. While some States were clearly against the inclusion of the second category, the majority were more nuanced in their views. One key concern of States, as expressed by, for example, Germany, Japan and New Zealand, was that the Commission should identify the criteria that would distinguish the second category of general principles of law from customary international law. Nonetheless, it was important that, overall, most States, while cautious, were open to the notion of a second category, so long as the Commission addressed their concerns either through commentaries or in the draft conclusions themselves. She wished to note, however, that there could be an overlap between general principles derived from national legal systems and general principles formed within the international legal system.

She agreed with the Special Rapporteur's view, as expressed in paragraph 29 of the third report, that the challenge for the Commission was to explain, in a clear manner, the methodology for the identification of general principles of law formed within the international system. She had full faith that the Drafting Committee would be able to find an appropriate methodology and text to address the concerns raised, while recognizing the existence of such a second category of general principles.

The importance of addressing the functions of general principles of law had also been highlighted by several States in the Sixth Committee, as reflected in paragraph 36. Most delegations had referred to the role of general principles of law as gap-fillers or to their function of preventing situations of *non liquet*. Some States had mentioned the systemic function of general principles of law in the international legal system. Given the interest of States in the question of the functions of general principles, the Commission should support the Special Rapporteur in his endeavour to carefully delineate those functions.

Draft conclusion 10 addressed the absence of hierarchy between the sources of international law, which was an accepted principle of international law. During the drafting of Article 38, the suggestion of a hierarchical order had been rejected. Nonetheless, while there was no hierarchical order between the three sources in principle, there could be such a hierarchy in their application in practice. Mr. Murphy had provided some examples in that regard, notably with reference to norms of *jus cogens*. Moreover, it was clear that if there was a treaty between the parties, that treaty would be applied before any potentially applicable general principles of law. She doubted whether draft conclusion 10 was truly necessary and useful.

The Special Rapporteur had based draft conclusion 11 principally on case law concerning parallelism between treaties and customary international law, which he had extended by analogy to general principles of law. In paragraph 85, he explained that his reasoning was that, since no hierarchy existed between treaties, custom and general principles of law, there was no reason to depart from the reasoning of the International Court of Justice with regard to the possibility of the parallel existence of general principles of law and rules of international law originating from the other two sources. The Special Rapporteur had provided a number of examples of case law in which general principles of law had been recognized as existing separately from other sources. The examples given in paragraphs 86 to 92 supported the Special Rapporteur's proposition in respect of draft conclusion 11.

Perhaps draft conclusion 11 could be redrafted in order to clarify its objective, which, as she understood it, was to underscore that general principles of law were not simply transitory in nature and that the subsequent emergence of a rule of customary international law or the codification of the general principle did not extinguish that general principle, which continued to exist as a separate source of law, in accordance with the position taken by the Special Rapporteur in paragraph 83 of the report.

With regard to draft conclusion 12, the issue of the relationship between general principles of law and the *lex specialis* principle was interesting. However, to rely principally on the Commission's work on the fragmentation of international law, without additional

evidence of State practice or case law, risked laying a shaky foundation for the draft conclusion.

Draft Conclusion 13 addressed the gap-filling function of general principles of law. She had no problem with the term "gap-filling", which was clear enough. The essential function of general principles of law was to fill gaps in treaty law and customary international law. However, she wondered whether draft conclusion 13 should not have been placed in the current position of draft conclusion 10, given that the gap-filling function was recognized as the most common and widespread function of general principles of law.

Moreover, she was concerned that draft conclusion 13 was too concise. It lacked context, specifically with regard to the type of gaps to which it referred and the circumstances under which such gaps could appear, other than in customary international law or treaty law. For example, it should be clarified whether the gaps in question arose when there was no applicable customary international law or treaty law or whether they appeared in the context of the application of existing customary international law or treaties. The draft conclusion was very general, whereas in paragraph 110 of the report the Special Rapporteur identified specific gap-filling roles that were widely accepted.

Draft conclusion 14 (a) stated that general principles of law could serve as an independent basis for rights and obligations. That function was secondary to the principal gap-filling function referred to in draft conclusion 13. However, some States had warned the Commission that it must be careful not to use general principles as a shortcut around treaties or customary international law. She took the point made by Mr. Murphy with regard to the principle of good faith, which did not give rise to new rights and obligations. The Commission must be able to clarify the nature of rights and obligations that were based on general principles of law from the nature of rights and obligations created by treaties or customary international law.

The examples provided by the Special Rapporteur, such as the principle of estoppel as discussed in paragraph 115, were relevant. Especially interesting was the example of *Frontier Dispute (Burkina Faso/Republic of Mali)* and the principle of *uti possidetis*. In that case, the parties had also been in agreement with regard to the application of the "principle of the intangibility of frontiers inherited from colonization", which could also be added to the list of general principles of law derived from the international legal system. In the judgment in that case, the International Court of Justice had stated that: "There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*." However, the Court appeared to have used the terms "principle" and "rule" interchangeably.

Further examples were the principles of free consent and good faith and the *pacta sunt servanda* rule, all of which were universally recognized principles of law. However, it would be necessary to explain the nature of rights and obligations based on general principles of law and how they differed from the other sources of international law.

She recommended that the Commission should refer all the draft conclusions to the Drafting Committee.

Ms. Lehto said that she wished to thank the Special Rapporteur for his excellent third report, which had given the Commission much food for thought. Regarding the discussion of transposition and transposability in part one, she agreed with the considerations put forward in paragraphs 12 to 14 and welcomed the suggestion to simplify the wording of draft conclusion 6. It would be for the Drafting Committee to decide how best to do so, but she considered the wording proposed by Mr. Murphy to be a good starting point.

Regarding part two of the report, on general principles of law formed within the international legal system, as she had previously stated, that second category of general principles of law was an important part of the topic, and the Commission needed to fully explore the methods for the identification of those principles. She had no doubt that the Drafting Committee would be able to agree on a consolidated version of draft conclusion 7, taking into account paragraphs 31 to 33 of the report.

She agreed with the statement in paragraph 27 that there was sufficient practice, case law and literature supporting that second category of general principles of law. As well as the practice discussed in the Special Rapporteur's three reports and the practice highlighted by other Commission members, reference could also be made to a recent study by Marija Dordesca on the jurisprudence of the International Court of Justice and its predecessor, the Permanent Court of International Justice, which listed no fewer than 156 general principles ascertained by the two courts in decisions and orders handed down between 1922 and 2018.

Regarding the statement by the then President of the International Court of Justice, Judge Yusuf, to the Sixth Committee in 2019, cited in paragraph 140 of the report, it was important to note that he had specifically mentioned three categories of general principles that the Court had applied: principles that were inherent in any legal system, such as good faith; general principles of international law, such as sovereign equality and the non-use of force; and general principles derived from domestic legal systems, which mainly dealt with procedural law. He had concluded that general principles had proved effective in helping the Court to address structural problems of law-making in international society and to promote coherence within the international legal system. Even though the Court rarely expressly referred to general principles of law within the meaning of Article 38 – because of the anachronistic reference to "civilized nations" – there were many instances in which it was obvious that that was the intention.

Although the International Court of Justice had made use of general principles derived from national legal systems, it had done so less frequently than international criminal tribunals and arbitral tribunals. For instance, in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, the Court had applied the "attorney-client privilege" rule, which protected the confidentiality of communication between clients and their legal counsel and had its origin in common law jurisdictions. Quite notably, however, it had not drawn on a comparative analysis of domestic rules in that respect but had instead based that rule on the principle of sovereign equality of States.

Regarding the functions of general principles addressed in part three, she, like others, would like to know whether all general principles were supposed to perform the same functions. Some scholars divided general principles into substantive, procedural and interpretative general principles. Substantive general principles provided an independent basis for rights and obligations, while interpretative principles served to interpret and complement other rules of international law. Procedural principles mainly related to the procedure before an international court or tribunal. She did not wish to suggest that general principles should be divided into different categories according to their function in the context of the draft conclusions, but perhaps some clarification could be provided in the commentaries.

A central question concerned the gap-filling role of general principles of law, which, according to paragraph 39, could be "regarded as the essential function of general principles of law and defined their basic role in the international legal system". Gap-filling was obviously a recognized function of general principles: in the absence of a specific regulation or rule of customary international law, general principles of law provided a source of applicable international law. As the International Law Association had noted with respect to the principle that it was every State's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States, that broad principle of due diligence could be viewed as a default standard that was triggered if no more specific elaboration of due diligence or stricter standard was in existence. In that sense, the gap-filling function was closely related to general principles of law serving as an independent basis for rights and obligations.

Regarding the relationship of general principles of law with other sources of international law, the first issue concerned the absence of hierarchy between the different sources. As Bin Cheng had stated in his seminal work of 1953, *General Principles of Law as Applied by International Courts and Tribunals*, general principles could be seen as hierarchically superior to custom and treaties given that they "furnish the juridical basis of treaties and customs and govern their interpretation and application". At the same time, "being supplementary in nature and performing a gap-filling function", as they were described in paragraph 24 of the Special Rapporteur's report, general principles could be seen

as a secondary source. Both views could be defended, and there were valid counter-arguments to both, which showed that the relationship between general principles of law and other sources of international law could not be usefully described in terms of a hierarchy. The question could also be raised as to whether a draft conclusion on the absence of a hierarchy, which the Special Rapporteur described as "uncontroversial", was necessary. If so, the Drafting Committee could discuss its formulation. She noted that Mr. Jalloh had already made a drafting proposal in that regard for draft conclusion 10.

Further on the same question, she agreed with the conclusion in paragraph 93 concerning the possible parallel existence of general principles of law with other rules of international law that had an identical content.

With regard to the role of *lex specialis* in governing the relationship between general principles of law and other sources of international law, she agreed that *lex specialis* was relevant to the relationship but there were also other tools that could be used. If there was no conflict of norms, for instance between a general principle and its more specific applications, the question arose as to whether rules and techniques for dealing with conflicts of norms were needed. In such situations, *lex specialis* should be understood in the sense of concurrent application, with the general law remaining in the background, complementing the specific rules and informing their interpretation and application.

The relationship between general principles of law and customary international law also raised other questions, such as how the existence of a general principle should be taken into account in the assessment of evidence of State practice for the purposes of identifying a customary rule. Reference could be made in that regard to the separate opinion of Judge Donoghue in the joined cases *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, in which she referred to the "fundamental parameters of the international legal order" and "basic characteristics of inter-State relations" such as territorial sovereignty and sovereign equality, and underlined their role in situations "where evidence of State practice and *opinio juris* is incomplete or inconsistent". Similarly, Gerald Fitzmaurice had referred to "the importance of general principles, particularly so for such a subject as international law, where practice is far from uniform, and where there may be considerable areas of doubt or controversy as to what the correct rule is, or ought to be".

Regarding the specific functions of general principles of law, she agreed that such functions, especially that of ensuring the coherence of the international legal system, should not be seen as secondary or additional. The existence of a gap should not be a prerequisite for the application of general principles, which performed a major function in the interpretation and application of existing rules and in providing coherence across the different fields of international law.

She supported sending all the proposed draft conclusions to the Drafting Committee for consideration in the light of the current debate.

Mr. Petrič said that, in his well-documented report, the Special Rapporteur had endeavoured to present the views of Commission members and States in the Sixth Committee and the literature concerning general principles of law. He would concentrate his comments on the aspect of the topic that had proven controversial among members of the Commission and States – namely, whether it could be safely claimed that there was a set of general principles of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice that originated in the international legal system. In his view, that was the crucial question in the debate. If agreement could be reached on that point, it would be much easier to discuss other important matters raised in proposed draft conclusions 10 to 14.

Following the debate on the topic at the seventy-second session of the Commission, he had conducted his own research to better acquaint himself with the concept of general principles of law, many of which played an important role in filling gaps, enabling the international legal system to function properly and allowing international courts to avoid situations of *non liquet*. It was clear from the *travaux préparatoires* of the Statute of the Permanent Court of International Justice that the general principles of law stipulated in Article 38 (1) (*c*) were the principles which existed *in foro domestico* and were common to all existing national legal systems, and which could function as a subsidiary means to regulate

and resolve certain matters in the international community when no appropriate treaty or customary rule of international law existed.

In paragraph 143 of the report, the Special Rapporteur cited one author who described general principles of law as "those principles without which no legal system can function at all" and another who stated that they "promote inter-systemic coherence by bridging the gap between international law and domestic legal systems". Those had been the intended functions of general principles of law at the time of drafting of Article 38 and they remained the same to the present day.

If a second category of general principles of law was to be established, it should be done on the basis of State practice. However, he had found little, if any, State practice to prove that there was an established second category of general principles of law formed within the international legal system that were not at the same time principles of customary international law or treaty law. In international law, the textual interpretation of a norm was of particular importance. Thus, it was clear from Article 38 (1) that general principles of law existed *in foro domestico*. There was nothing in Article 38 to indicate that the drafters had had in mind the existence of any other general principles of law. The idea of general principles of law other than those found *in foro domestico* had in fact been clearly rejected at the time. States had lived with that understanding of Article 38 (1) (*c*) without difficulty since then, and there had been no initiatives by States to amend or differently interpret that provision. The question therefore arose as to whether it was really the task of the Commission to innovatively interpret Article 38, one of the pillars of the existing international legal order.

It must be recalled that general principles of law were general not because they were formulated in a general way but because they were generally accepted in all legal systems. Principles such as *pacta sunt servanda* and *ex injuria jus non oritur* and procedural principles such as the presumption of innocence and *nulla poena sine lege*, which were now also used in international criminal jurisdictions, existed de facto in all legal systems, as they were simply the result of the development of human society and constituted common values in national and international legal systems.

If the Commission intended to introduce the second category of general principles of law emerging from the international legal system – and he was not strictly opposed to that idea – it should proceed slowly and cautiously. In the current debate, virtually all the principles that had been suggested as belonging to the second category – such as *uti possidetis* and the prohibition of the use of force – were in fact all based on international treaty rules or rules of customary international law. The general principles of law emerging from the international legal system that were not part of international treaty or customary law would be rare and their function at best unclear.

The question also arose as to who would establish and identify the general principles of law emerging from the international legal system and how. It was mentioned in the literature that general principles of law emerging from the international legal system should reflect the practice and resolutions of international organizations. Would that mean that a legally binding general principle of law with *erga omnes* effects could be created by resolutions of the United Nations General Assembly, for example, even though they were political rather than legal instruments?

At the seventy-first session of the Commission, it had been suggested in the Drafting Committee that the part of the topic dealing with the second category of general principles of law, as reflected in draft conclusions 3 and 7, should be left open. Again at the current session, Mr. Hmoud had suggested leaving the door open to the existence of a second category by adding a "without prejudice" clause on such a possibility. He supported that proposal, which would mean that the question of the second category of general principles of law could be revisited by the Commission in its new composition in the next quinquennium if deemed necessary.

He did not believe that it would be possible to arrive at an acceptable consensus concerning the inclusion of the second category of general principles of law at the current stage. If that question was set aside, as proposed by Mr. Hmoud, the discussion of the other draft conclusions in the Drafting Committee would be facilitated, as their formulation

depended to a large extent on whether the Commission had in mind the general principles of law as originally understood under Article 38 or also the second category.

Although he had some reservations concerning draft conclusions 10 to 14 and agreed with others that some of them might not be necessary, he believed they should be dealt with in the Drafting Committee.

Mr. Cissé said that he wished to congratulate the Special Rapporteur on his well-written and informative third report on general principles of law. He agreed that a more in-depth study of general principles of law as the third primary source of international law was needed. Although general principles of law were mentioned in Article 38 (1) (*c*) of the Statute of the International Court of Justice, they were not defined as such. Nevertheless, they had the same legal scope as international custom and international treaties, insofar as Article 38 of the Statute did not establish a hierarchy between the primary sources of international law.

In his third report, the Special Rapporteur recalled some of the functions of general principles of law, including interpreting other rules of international law, filling legal lacunae and analysing the reasoning behind decisions taken by national and international courts. His efforts to define the scope and limits of that fundamental source of international law were timely, particularly in view of the differing opinions of scholars and international judges on the identification, assessment and applicability of general principles of law. Although such principles were used by judges to fill gaps in international law, they were still considered by some authors as a "subsidiary" source in that regard. In the present day, only exceptional use had been made of such principles in case law, as States preferred to rely on other, more consensual sources to support their legal positions.

In international law, general principles were usually divided into two categories: first, principles deemed to have been formed within the international legal system, in other words, general principles of international law that governed relations between States; and, second, principles common to national legal systems. However, there was currently no consensus on the process and methodology for identifying and assessing general principles of law. Agreement would need to be reached on any future methodology to ensure greater stability in their use.

Unlike some members of the Commission, he believed that both categories of general principles of law existed. In his view, the text of Article 38 (1) (*c*) of the Statute of the International Court of Justice, the *travaux préparatoires* and the historical background to that provision did not mean to distinguish between the two categories. Thus, he found the argument put forward by some authors that only general principles of law derived from national legal systems should be retained for the purposes of Article 38 (1) (*c*) to be somewhat excessive. The general nature of the text left room for a liberal interpretation of the concept of "general principles of law".

Moreover, as the Special Rapporteur had pointed out in his report, several principles of law invoked by States and international tribunals were principles that had been unquestionably formed within the international legal system and had not therefore arisen from national legal systems. The existence of that category of principles of law was hardly surprising, since the singular nature of the international legal system, the international community and the community of States was bound to result in the creation of the principles of law necessary for the proper functioning of international law. Such principles, by their very nature, could not be derived from national legal systems. For example, the principle of common but differentiated responsibilities in environmental law had no equivalent in domestic law, since it had its origins in international relations and was aimed at the proper functioning of the international legal system, specifically international environmental law. It was the result of the progressive development of international environmental law, which had started at the United Nations Conference on the Human Environment held in Stockholm in 1972 and continued at the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992.

The two categories of general principles of law were not watertight, but identifying the two categories was a useful conceptual and theoretical exercise that could help to clarify the meaning and scope of those principles. It was important to recognize that they often coexisted in national and international legal systems and influenced each other. It was

therefore possible that a general principle of law, after it had first appeared in international or domestic law, could then develop indistinctly in both legal systems. An excellent example of that was the precautionary principle in environmental law, which had emerged in Germany in the 1970s and had subsequently been adopted at the international level, first in the 1980s through a series of international agreements on the protection of the North Sea, before being enshrined at the United Nations Conference on Environment and Development in Rio de Janeiro in 1992. Subsequently, the precautionary principle had been further consolidated at the international level while being further developed in national legal systems around the world. The development, interpretation and implementation of the precautionary principle, which had unquestionably become a general principle of law, should therefore be seen simultaneously from the standpoint of both the international and national legal systems. To restrict general principles of law to one category or the other would be a mistake.

A second example was the principle of equity, which also existed in both the international and national legal systems. It had been used extensively and consistently by the International Court of Justice and arbitration tribunals in relation to the law of the sea, and more specifically in the delimitation of maritime boundaries between coastal States with opposite or adjacent coasts. When it had become clear that articles 74 and 83 of the United Nations Convention on the Law of the Sea, on the delimitation of the exclusive economic zone and the continental shelf between such States, did not offer States or international courts binding treaty-based delimitation methods, it was the principle of equity that had enabled the courts to resolve maritime delimitation disputes, with the most recent decision having been taken in 2021 in *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*. The international courts' use of the principle had allowed gaps in the United Nations Convention on the Law of the Sea to be filled and maritime delimitation disputes between States to be settled, which had led to it becoming the fundamental norm in matters of maritime delimitation. Whatever the parties to a dispute might think, the delimitation method decided by the international courts was the one that those courts considered to be the most equitable and that would become *res judicata*.

The judgment in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* stated that: "Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it." The case law of the International Court of Justice had also helped to clarify certain other issues related to the law of the sea, such as the nationality of ships or the protection of the marine environment. For example, the requirement that a "genuine connection" should exist in order for a nationality to be attributed to a ship under the United Nations Convention on the Law of the Sea had been strongly influenced by the Court's judgment in the *Nottebohm Case (Liechtenstein v. Guatemala)* in 1955. In that decision, the Court had stated that, when a State wished to exercise diplomatic protection in respect of one of its nationals, nationality should be the legal reflection of a factual, "genuine" connection between the individual and the State. While, in practice, the application of the "genuine connection" requirement in respect of the nationality of ships had not always been widely observed, the requirement for the existence of a "genuine link" had been incorporated into article 91 of the United Nations Convention on the Law of the Sea.

A third example was the principle of State sovereignty and its corollary, the principle of State consent. Although the former was seen as a general principle of international law, it was also a principle of domestic law, since all the world's constitutions protected it in its twofold – national and international – dimension. That general principle of law therefore straddled both the domestic and international legal systems, which, in several areas of international law, influenced and constrained each other.

To his mind, those three examples made it difficult to conceive of general principles of law as being confined to the sphere of national law, either in theory or in practice. He did not believe that Article 38 (1) (*c*) of the Statute of the International Court of Justice meant to distinguish between the two categories of general principles of law; he subscribed to the maxim "Where the law does not distinguish, neither should we distinguish".

Regarding draft conclusion 10, the absence of hierarchy between the sources of international law was well established by Article 38 (1) (*c*) of the Statute of the International Court of Justice. While the three sources were on an equal footing, each had its own particular functions. The fact that general principles of law were listed after international custom and

international conventions in that article did not imply that one source of international law was superior or inferior to the others.

As for draft conclusion 11, he did not think it appropriate to include a stand-alone draft conclusion on the possibility of general principles of law existing in parallel with similar treaty and customary rules. That draft conclusion could be incorporated into draft conclusion 10.

Concerning draft conclusion 12, the established absence of hierarchy between the sources of international law raised the legitimate question of whether the *lex specialis* principle would not be a roundabout way of establishing such a hierarchy, since it would involve a general principle of law perceived as *lex specialis* taking precedence over an international treaty or custom. He wondered in which specific circumstances the *lex specialis* principle would apply instead of an international treaty or custom. As a precautionary measure, the Commission might perhaps consider examining that principle in the commentaries to the draft conclusions.

Draft conclusions 13 and 14 could, in his view, be merged, since they dealt with the same subject matter, namely, the functions of general principles of law. Moreover, the distinction drawn between the essential and specific functions of general principles of law struck him as inappropriate, since it could make the exercise of defining such principles much more complex. He likewise failed to see how general principles of law could serve as an independent basis for rights and obligations. Clarification of that point might usefully be included in the commentaries. As for draft conclusion 14 (c), which listed ensuring the coherence of the international legal system as a specific function of general principles of law, he believed that the coherence of the international legal system went far beyond the functions of general principles of law. Priority should be given to ensuring coherence between the sources of international law, rules and international legal principles and standards, not coherence of the international legal system as such. He strongly recommended that all the draft conclusions should be referred to the Drafting Committee.

Ms. Escobar Hernández said that she wished to thank the Special Rapporteur for his clear and rich third report, which, she understood, would be the final report on general principles of law before the draft conclusions were adopted on first reading.

Turning to the first and second parts of the report, she said that she was likewise grateful to the Special Rapporteur for his additional reflections on the issues of transposition to the international legal system, the existence of general principles of law formed within the international legal system and the basis of rules specific to the international legal system. She particularly appreciated how he had taken into account the opinions of Commission members and States when attempting to address their concerns. She also welcomed his openness to considering those concerns in the Drafting Committee, especially those regarding the criteria for identifying the second category of principles set out in draft conclusion 6.

It was, however, difficult for her to assess the Special Rapporteur's new approach, since he had, understandably, made no new proposals in respect of draft conclusions 6 and 7, except to unify the criteria for identifying general principles of law. Her views on the above issues remained unchanged from the previous session, particularly her firm belief that general principles of international law formed on the basis of rules of international law did exist, even though they might be difficult to identify and few in number. Without going further into those substantive issues, she would simply voice her support for the Special Rapporteur's new approach to simplifying draft conclusions 6 and 7. In any case, she would reserve her position until the two draft conclusions had been taken up by the Drafting Committee.

Regarding the third part of the report, she wished to thank the Special Rapporteur for taking up the issue of the relationship of general principles of law with other sources of international law. Although the Special Rapporteur had addressed the issue in the context of the functions of general principles of law, she would analyse it separately, as she considered it to warrant autonomous treatment and because the two issues had been dealt with separately in draft conclusions 10 to 12 and in draft conclusions 13 and 14, respectively.

Although the question of assessing the relationship between rules in the international legal system had not been addressed in similar work by the Commission, she would not, in

principle, object to its inclusion in the draft conclusions on general principles of law, since the assessment of those principles' relationship with other rules of international law, in particular rules of general international law, was essential for establishing their autonomy. However, it seemed to her that the issue of the relationship of general principles of law with other sources of international law had not been fully addressed in the third report, as it examined the issue only in relation to treaties and custom. While the Special Rapporteur's reasons for taking that approach were understandable, such a reductionist approach did not strike her as appropriate, especially since the identification of general principles of law when they were principles formed on the basis of rules of international law was closely related to the law of international organizations.

Likewise, the question of the relationship between general principles of law and treaties and custom might be better addressed elsewhere in the draft conclusions. In her view, the question of the relationship between rules in the international legal system always arose after the existence of a rule had been established and, for that reason, should only be addressed once the elements defining each category of rule, the criteria that could be used to establish its existence and the functions that the category of rule in question fulfilled in international law had been assessed. If the draft conclusions in question were to be retained, and she believed they should be, they might be included at the end of the text.

She largely agreed with many of the comments already made by colleagues on draft conclusions 10 to 12 and, since those draft conclusions ostensibly served the same purpose, wished to suggest merging them and finding alternative wording that did not include the term "hierarchy", which could give rise to misinterpretations. The general expression "other sources of international law" used in draft conclusion 12 should also be retained for the substantive reasons she had outlined previously.

While she agreed with the spirit of draft conclusion 11, the Special Rapporteur might wish to consider including a more generic reference to the rules of international law with which general principles of law coexisted. In any event, that issue could be addressed within the Drafting Committee. The Drafting Committee's deliberations on the issue of the relationship between general principles of law and other sources of international law should take account of the fact that defining the relationship between rules was different to defining the criteria for identifying principles.

Identifying the functions of general principles of international law was, in her view, a precondition for establishing the nature of those rules. She was grateful to the Special Rapporteur for the interesting and rich analysis of practice contained in the report. It clearly set out the essential function of general principles of law in the international legal system, namely, to fill gaps in it, which she considered to be the *raison d'être* of general principles of law and to be applicable in respect of both domestic and international law. She fully supported the Special Rapporteur's approach to that issue, which clearly showed that general principles of law constituted a nomogenetic method whereby a new legal rule could be produced by means of a special inductive-deductive procedure based on the analysis of pre-existing rules and that operated only in the absence of other specific rules that would allow a dispute to be resolved. She noted with particular interest the reference in the report to article 21 of the Rome Statute of the International Criminal Court, which, perhaps surprisingly, did not alter the model established in Article 38 (1) (*c*) of the Statute of the International Court of Justice, but made it explicit in the context of a specific normative system. It was evident from a reading of article 21 that general principles of law were considered a gap-filling mechanism. The reference in article 21 (c) to the fact that general principles of law derived from national legal systems should not be inconsistent with the Statute and with international law and internationally recognized norms and standards could, in her view, help to address the issue of transposition.

The main purpose of the gap-filling function of general principles of law was to help settle disputes and to avert situations of *non liquet*. Therefore, while she did not totally disagree with the assertion made in paragraph 72 of the report that general principles of law could fill gaps in contexts other than international adjudication, she believed that that assertion should be qualified by a reference to the direct use of general principles of law by States in their mutual relations. While she had no doubts about direct application in cases where a general principle of law already existed, she was uncertain about whether States

could be the agents that carried out the nomogenetic procedure that led to the formation of a general principle of law. Or, at the very least, she was unsure about whether they could do so without other agents intervening.

Lastly, she considered that the gap-filling function of general principles of law necessarily included the creation of new rights and obligations, irrespective of whether the principles were procedural or substantive. She had found the examples provided by the Special Rapporteur in that regard to be most interesting. She did not believe that the creation of rights and obligations was, in fact, a specific function of general principles of law but an ordinary function performed by all sources of international law.

The same applied in respect of the function of interpreting and supplementing other rules in the international legal system and that of ensuring the coherence of the international legal system. Those functions were inherent in any legal rule and, in her view, related more closely to the question of the relationship between rules than to that of identifying the elements that made it possible to define the steps involved in the nomogenetic procedure known as general principles of law.

For all those reasons, she believed that draft conclusion 14 should be revised and perhaps merged with draft conclusion 13, without prejudice to any specific references that might be made to that issue in the commentaries. In any event, the Drafting Committee was best placed to oversee that task.

Lastly, she had no objection to the future work plan proposed by the Special Rapporteur and recommended the referral of all the draft conclusions to the Drafting Committee, on the understanding that, as always, it would address the proposals made in the report together with the comments and suggestions that had been made in plenary.

Mr. Zagaynov said that the Special Rapporteur had produced an interesting and informative third report that took account of the discussions in the Commission and the Sixth Committee.

While the lack of a formal hierarchy among the sources of international law had led some Commission members to doubt whether general principles of law were in fact a source of international law, arguments in favour of an informal hierarchy existed in the doctrine and in the Commission's own output, including the report of the Study Group on fragmentation of international law. The Special Rapporteur's conclusion, in paragraph 41, that the supplementary nature of general principles of law meant that they might be resorted to when a legal issue was not regulated, or not sufficiently regulated, in treaties and custom, did seem to signify the presence of an informal hierarchy. For that reason, although draft conclusion 10 might be formally correct, it sent the reader a signal that was not completely accurate in respect of the place, role and significance of general principles of law in comparison with treaties and customary law. Draft conclusion 10 was unnecessary. However, if it was to be retained, it should perhaps speak of the absence of a formal hierarchy and refer to the supplementary and subsidiary significance of general principles of law.

As for the parallel existence of general principles of law and other sources of international law, there was no foundation for the Special Rapporteur's claim, in paragraph 83, that the view that general principles of law were a transitory source, or that they ceased to exist when they became customary or treaty law, was mistaken. The view that general principles of law were transitory merited attention, since it could be found in the doctrine, above all that relating to the formation of rules of customary law on the basis of general principles of law. Such a rule could evolve and change over the course of decades or even centuries. In other words, the original general principle of law might differ from the contents of the rule of customary law based on it.

It was debatable whether a general principle of law could be applied independently. For example, if the principle that a fundamental change of circumstances was deemed to be a general principle of law that derived from civil law, its content would have to be determined from a comparative analysis of national legal systems. It was questionable whether such an analysis would produce the same result if its content was to be established from existing rules of customary international law, or if the Vienna Convention on the Law of Treaties was applied. There had been substantial developments in international law on that matter and

views on the possibility of applying that principle to international treaties had changed. The advantages of an approach positing the parallel existence of a general principle of law and a rule of customary law with a different content were not obvious. Yet draft conclusion 11 provided for that very possibility. Reference to the fact that general principles of law might exist in parallel with treaty and customary rules with identical or analogous content, together with the assertion that there was no hierarchy between them, might encourage the use of general principles of law in place of treaty or customary rules, which would hardly be desirable. In that context, a general principle of law could be regarded as part of the historical background, a source which had gone into the formation of a rule of customary law. However, it was the latter which established the scope and content of the corresponding rights and obligations of States.

There was currently no basis for a broad interpretation of the function of general principles of law. The situation was completely different from that which had prevailed at the beginning of the twentieth century, when many norms had not yet been embodied in rules of customary and treaty law. The Special Rapporteur had rightly focused on the role of general principles of law in filling gaps in international law to prevent situations of *non liquet* without allotting judges a rule-making function. However, not every lacuna could be filled in that way. It was possible to contemplate the use of general principles of law for the purpose of applying and supplementing other rules of international law and also to ensure coherence in international law. However, it should be noted that, when the Commission had analysed other sources of law, it had not distinguished between their separate functions. Perhaps it would make sense to reflect those considerations in the commentary.

With regard to transposition to the international legal system and recognition, the Special Rapporteur was right in saying that State recognition was the key factor in ensuring the application of general principles of law. However, according to the Special Rapporteur, the recognition applied to the fact that a principle common to the various legal systems of the world was capable of application at the international level. That wording was indicative of a potential rather than an established transposition of a general principle of law in international law. Any rule had to rest on the express will of States; the Commission's studies had shown that that requirement applied without exception to sources of law such as international treaties or rules of customary international law. There was no reason to make an exception for general principles of law. It would be wrong to confine a compatibility test to fundamental principles of law. It should be used for all applicable international law. There was no point in referring to a principle existing in national legal systems if it was inconsistent with the applicable rules of international law, even if they did not comprise fundamental principles.

The members' concerns about the existence of general principles of law formed within the international legal system remained; he hoped that they would be dispelled in the Drafting Committee.

Mr. Gómez-Robledo said, with reference to draft conclusion 2, that although the phrase "community of nations as a whole" had been rejected by the Drafting Committee, it reflected more accurately two essential aspects of the general principles of law, namely that they must be norms that were both necessary and universal. The terminology chosen at the previous session of the Commission did not cover those two aspects. In fact, it would be better to refer to the "international community as a whole" in order to encompass general principles of law recognized by international organizations as well as by States and nations. The Commission should heed the words of Judge Cançado Trindade, who had held that general principles of law were principles that "[conferred] to the legal order (both national and international) its ineluctable axiological dimension", insofar as they embodied "important or fundamental values". If general principles of law were to apply generally in relations between subjects of international law, which were not restricted to States, judges could have recourse to what the European Communities, in an oral submission to the World Trade Organization's Appellate Body regarding "EC-Measures concerning meat and meat products", had called the "interaction between international law, national law and the dictates of reason, common sense or moral considerations". That approach would deal with many of the dilemmas confronting the Commission in the Special Rapporteur's third report.

As paragraph 17 of the report indicated, the transposition of general principles of law recognized at the national level to the international level required careful consideration.

Although a cumbersome, onerous recognition process should be avoided, it was vital to ensure that a given general principle of law was of relevance to the international legal order. Some rules, such as that of due diligence, which had been embodied and developed in various branches of international law such as environmental and human rights law, applied only to obligations between States and to States' obligations to individuals. The Special Rapporteur was right in pointing to the need for some flexibility when deriving a general principle of law from a national or international source. General principles of law expressed the dynamic interaction between the national and the international systems. One fed the other and they were mutually reinforcing. Useful criteria for the recognition of a general principle of law were its *effet utile* on the body of law in which it was incorporated, its application in default of any other, and its coverage of all aspects of the subject matter it purported to regulate. General principles of law could be regarded as a reserve, or repository, of rules that existed alongside other rules of international law which it complemented, or as an independent basis for rights and obligations.

At the Commission's previous session, he had urged it to avoid drawing too close an analogy between the criteria for identifying the existence of rules of customary international law and those for recognizing general principles of law. While the guideline proposed by the Special Rapporteur was the right one, he wondered whether the Commission should not give some thought to drawing up a non-exhaustive list of general principles of law that were recognized by the international community as a whole, since that would make for a better understanding of that source of international law. The solution which had been found for dealing with peremptory norms of international law (*jus cogens*) could be used in the current context and would make it plain that general principles of law stemmed from both national and international law and continued to develop within those sources.

The Special Rapporteur drew a rigorous distinction between the methodology for identifying customary international law and that for recognizing general principles of law, while avoiding any comparisons that might have a reductionist effect on those principles. However, a rule of customary international law might be coterminous with a rule that contained a general principle of law, even if they had different sources and forms of recognition and therefore constituted equal and independent sources of international law.

He agreed with the Special Rapporteur that one of the functions of general principles of law was to offer a means to interpret and complement other rules of law. Draft conclusion 13 embodied that function in that it indicated that the essential function of such principles was to fill possible gaps in treaties and customary international law. However, it ignored the subsidiary function played by general principles of law in situations where a rule rested on a given principle of law which was its foundation and *raison d'être*, an example of which was the Martens Clause. The latter had first appeared in the preamble to the Hague Convention II with respect to the Laws and Customs of War on Land of 1899 and later, in a more modern interpretation, in article 1 (2) of the 1977 Protocol I Additional to the Geneva Conventions of 1949. Irrespective of the combat situation and the technological advances of the arms industry, combatants had an obligation to act in accordance with the principles of humanity and, where those did not suffice, in accordance with the dictates of public conscience. In the *Corfu Channel Case*, the International Court of Justice had spoken of "elementary considerations of humanity". Even in the absence of specific rules on the conduct of hostilities, the Martens Clause set the limits of what was permissible in armed conflict.

He realized that for English-speakers the word "subsidiary" meant something different to the idea he had just conveyed, possibly owing to the expression "subsidiary means" in Article 38 (1) (*d*) of the Statute of the International Court of Justice, which was rendered correctly in French as "*moyen auxiliaire*" and in Spanish as "*medio auxiliar*". The term "subsidiary" in the context of general principles of law could be understood to mean the standards to which reference must be made not so much as gap-fillers but as standards that shaped the aim and purpose of the rule and gave it its *effet utile*, in that they "reveal the values which inspire the whole legal order", in the words of Judge Cançado Trindade cited in paragraph 141 of the report. He wondered whether, in the final analysis, the function of ensuring the coherence of the international legal system did not have a reductionist effect. If the view was taken that its sole effect was to ensure the coherence of that system, that would conflict with the idea that general principles of law formed an independent basis of rights and

obligations. In any case, draft conclusion 13 should be revised to take those considerations into account.

The third report had not considered the relationship, if there was one, between general principles of law and *jus cogens* norms. He trusted that the fourth report would address that matter. He was in favour of referring all the draft conclusions to the Drafting Committee.

The Chair, speaking as a member of the Commission, said that, as he had stated at the seventy-second session of the Commission, he considered that the Special Rapporteur had adopted a needlessly complicated approach with regard to the transposition of principles to the international legal system. To him, the question was simple: was the principle in question transposable to the international legal system? It was not only a question of flexibility; there were several substantive problems with the approach taken in draft conclusion 6. He was therefore pleased to see that, in paragraph 12, the Special Rapporteur had agreed that draft conclusion 6 could be simplified: the Commission would undoubtedly be able to find better wording.

As he had also said at the previous session, he believed intuitively in the notion of general principles emanating from the international legal system. However, he was unsure if there was sufficient material to support that viewpoint. Moreover, it was very difficult to explain the differences between the principles and the rules of customary international law. One solution might be to revise draft conclusion 6 so that it was non-prescriptive and left the door open to the possibility that general principles of law were not definitive and could evolve.

With regard to the functions of general principles of law, he was doubtful about the categorization of their functions in chapter III of part three of the report. With reference to paragraph 37, unlike some members, he understood the position of the Special Rapporteur in that he saw no contradiction between the gap-filling role of those principles and the absence of a hierarchy among treaties, customary international law and general principles of law. In 2019, the Special Rapporteur had drawn a distinction between the "supplementary" nature of a general principle of law as a source – where the appropriate word would have been "subsidiary" – and the question of a hierarchy of sources, The former adjective referred to function, the latter to priority and therefore hierarchy. However, that position might be seen as so nuanced as to be making distinctions that did not really exist. For that reason, it might be better, as some members had suggested, to avoid the rather theoretical question of the relationship between general principles of law and other sources of international law and to provide only a very general description of the role that those principles might play in respect of other sources – in other words, their "function".

He agreed with those members who thought that it would be best not to have any pretension to comprehensiveness or exclusiveness when addressing the question of functions. He was attracted to the approach proposed by Sir Michael Wood. Of course, while it would be up to the Drafting Committee to consider the language, all the complications that stemmed from the many issues raised by members, including the difficulties of dealing in isolation with the question of *lex specialis*, could probably be avoided by specifying in general terms what the various functions of general principles of law might be.

Some members had made much of the fact that Article 38 (1) of the Statute of the International Court of Justice was not a list of sources but rather a directive to the Court telling it what sources it must apply. However, since it had been accepted that that article spelled out the sources of international law, it would be strange to suggest otherwise now. Of course, other *lex specialis* instruments could provide different lists, but the fact remained that, generally speaking, it was Article 38 (1) that set out the sources of international law. It was inconceivable that the pre-eminent court of international law would be directed to apply materials that were not sources of international law or to exclude materials that were sources thereof. In short, the issues raised by some members were much ado about not very much. The Special Rapporteur could therefore rest assured that he was on safe ground. Personally, he was happy to refer all the draft conclusions to the Drafting Committee.

He agreed with the Special Rapporteur that the Commission's work on the topic should be concluded on the basis of the third report, at its seventy-fourth session if possible,

and he hoped that the Commission would work towards a speedy adoption of the draft conclusions on first reading.

The meeting rose at 12.30 p.m.