

Provisional

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Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section (trad_sec_eng@un.org).



Present:

Chair: Mr. Paparinskis

Members: Mr. Akande
Mr. Argüello Gómez
Mr. Asada
Mr. Cissé
Mr. Fathalla
Mr. Fife
Mr. Forteau
Mr. Galindo
Ms. Galvão Teles
Mr. Grossman Guiloff
Mr. Jalloh
Mr. Laraba
Mr. Lee
Mr. Ma
Mr. Mavroyiannis
Mr. Mingashang
Mr. Nesi
Mr. Nguyen
Ms. Oral
Ms. Orosan
Mr. Ouazzani Chahdi
Mr. Oyarzábal
Mr. Patel
Mr. Reinisch
Ms. Ridings
Mr. Ruda Santolaria
Mr. Sall
Mr. Savadogo
Mr. Tsend
Mr. Vázquez-Bermúdez
Mr. Zagaynov

Secretariat:

Mr. Pronto Secretary to the Commission

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

General principles of law (agenda item 4) (*continued*) (A/CN.4/779 and A/CN.4/785)

Ms. Orosan said that she wished to recognize the generous effort made by the Special Rapporteur in preparing his fourth report (A/CN.4/785). The report was drafted in an elegant and diplomatic manner and she agreed with his opinion on many issues. There were nonetheless certain points on which her position was nuanced. Generally speaking, most of the difficulties in relation to the topic arose because the draft conclusions did not adequately explain the method of distinguishing between the specific category of general principles of law that constituted a source of international law under Article 38 of the Statute of the International Court of Justice and the general category of general principles of law, which was wider in scope and included the specific category. The Commission's focus and analysis must be limited to the specific category of general principles of law that served as a source of international law.

Regarding draft conclusion 3, she considered that the Commission should exercise greater caution in positing the existence of a second category of general principles of law, namely those "formed within the international legal system". While the first category – that of general principles of law that were derived from national legal systems – was firmly grounded in the traditional understanding of Article 38 (1) (c) of the Statute of the International Court of Justice and enjoyed vast support among Member States, the proposal to recognize the second category had met with significant doubts and objections, in particular concerning the evidentiary basis and the significant risk of overlap with customary international law.

Indeed, there remained insufficient evidence of consistent State practice and *opinio juris* to affirm conclusively that the second category existed and constituted an independent source of law within the meaning of Article 38 (1) (c). The Special Rapporteur's ample references to the jurisprudence of international courts to substantiate the existence of the second category appeared to be incompatible with both his own assertion that general principles of law should not be understood in a court-centric manner and draft conclusion 8, which established that decisions of international courts and tribunals were only a subsidiary means for the determination of general principles of law. Furthermore, the absence of a clear and consistent methodology for distinguishing that category of general principles from international custom suggested that recognition of the second category would constitute progressive development rather than codification, a path that the Commission should diligently avoid in its work on sources of international law.

The relationship between customary international law and general principles of law was already difficult to define; compounding that difficulty with a discussion on the existence and identification of general principles of law formed within the international legal system seriously risked undermining the coherence of international law as a system. Furthermore, a number of examples given by the Special Rapporteur to support his position on the existence of general principles of law formed within the international legal system were in fact expressions of the normative content of fundamental principles of international law such as those referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which were themselves embedded in a treaty (the Charter). It was thus not clear that they were independent sources of legal obligations. Other examples given by the Special Rapporteur had not been sufficiently shown to emanate from the international legal system itself, but instead were reflected in treaty law and/or customary international law.

Draft conclusion 7 generated even more confusion. Paragraph 1 established that the main rule for identifying a general principle of law formed within the international legal system was to ascertain whether the community of nations had recognized the principle as intrinsic to the international legal system. However, paragraph 2 introduced an exception to that rule by acknowledging the possible existence of general principles of law formed within the international legal system that had not been recognized as intrinsic to that system. The fact that a principle could be deemed to qualify as a general principle of law formed within the international legal system without passing the main test for being identified as such proved that the whole category had not yet fully crystallized. To her mind, the methodological

approach set out in draft conclusion 7 could not be relied upon to provide a definitive conclusion as to whether a given principle was a general principle of law, yet such a conclusion required a high degree of legal certitude, given that general principles, once identified, became sources of international law.

Accordingly, she held that the Commission should follow the traditional interpretation of Article 38 (1) (c) that linked general principles of law to domestic legal systems unless there was sufficient evidence of State practice and *opinio juris* to justify going beyond them. She therefore proposed that draft conclusions 3 (b) and 7 should be deleted. If the Commission wished to leave the discussion on general principles of law formed within the international legal system open, it could reformulate draft conclusion 3 to include language to the effect that general principles of law comprised those that were derived from national legal systems, without prejudice to those that might be formed within the international legal system, as suggested by Brazil and the United States of America in their written observations (A/CN.4/779). The “without prejudice” clause would acknowledge that there might be situations where a general principle was formed within the international legal system, even though existing practice was as yet insufficient to support such a conclusion. That amendment would still need to be accompanied by the addition of new language in the commentary to clarify the circumstances in which such a general principle of law might emerge.

In response to comments made by States and regional organizations, the Special Rapporteur had proposed the addition of a new draft conclusion 12 recognizing that there might be another category of general principles of law of a regional nature. However, that had not necessarily been the intention behind those comments. As she saw it, the authors of the comments simply wanted the draft conclusions to recognize the role of international organizations in the formation of general principles of law within the meaning of Article 38 (1) (c), which were universally applicable. Therefore, she did not find it necessary to include draft conclusion 12. Instead, she proposed retaining draft conclusion 2 as adopted on first reading and supplementing the commentary thereto with references to the contributions made by international organizations to the recognition of general principles of law.

She supported the overall structure and methodology adopted by the Special Rapporteur for draft conclusions 4 to 6. While endorsing his recommendations concerning those draft conclusions, however, she wished to propose certain minor amendments to provide greater precision and practical guidance to States.

She supported the two-step analysis for the identification of general principles of law derived from national legal systems, as set out in draft conclusion 4. She also supported the proposal to amend draft conclusion 5 to make it clear that the comparative analysis to determine the existence of a principle common to the various legal systems of the world must cover a broad and representative range of legal systems covering multiple continents and legal traditions, thereby ensuring a truly global assessment. She agreed with the Special Rapporteur that the commentary to draft conclusion 5 should be amended to stipulate that, in the comparative analysis, greater weight must be given to decisions of the highest courts. The commentary should also make it clear that decisions of national courts and doctrine remained subsidiary means for determining the existence of general principles of law and that linguistic diversity must also be taken into account.

She agreed with Mr. Sall that “Determination of transposition to the international legal system” was not an appropriate title for draft conclusion 6. That title suggested that the draft conclusion addressed the factual determination of whether a principle common to national legal systems had been transposed to the international legal system. However, the content of the draft conclusion referred mainly to the nature of the principle itself and its ability to be transposed to the international legal system. The text should be rephrased to ensure consistency and clarify what was required under the second part of the two-step analysis, which consisted of a legal assessment to ascertain the compatibility of a principle derived from domestic legal systems with the international legal system. Compatibility should be defined by clear criteria, namely whether the principle served a similar regulatory function at the international level and whether the necessary conditions existed for applying it in the international context without distorting its essence. It should also be clarified in the commentary that there could be no presumption of transposition or implied transposition. Although no formal act of State recognition should be required for transposition, it would be

helpful to acknowledge that indications of recognition – such as references to the principle in treaties, pleadings before international courts or statements in intergovernmental forums – could sometimes occur. Lastly, it would be useful to affirm explicitly that general principles of law did not require “universal” acceptance, but “broad” acceptance by the international community.

To her mind, no changes to draft conclusions 10 and 11 were needed. She agreed with the Special Rapporteur that Article 38 of the Statute of the International Court of Justice established general principles of law, treaties and customary international law as sources of international law on an equal basis. The lack of formal hierarchy among the three sources was without prejudice to the regulatory functions that each of those sources performed in inter-State relations. Therefore, the fact that a general principle of law could be referred to in situations of *non liquet* or as an interpretative aid in support of treaty law and customary international law did not affect its status as an independent source of international law. Draft conclusion 10 as adopted on first reading thus adequately reflected the functions of general principles of law under Article 38 (1) (c) without undermining their status as a source of international law on an equal basis with the other sources, as specified in draft conclusion 11. She nonetheless saw a need to clarify explicitly in the commentary that general principles of law could coexist alongside treaty and customary rules; that if a conflict arose between a general principle of law and another source of international law, the general techniques of interpretation and conflict resolution, including *lex specialis*, would apply; and that if a conflict arose between a general principle of law and a *jus cogens* norm, the *jus cogens* norm would prevail in accordance with the established hierarchy of peremptory norms. Lastly, for the sake of analytical clarity and to avoid the conflation of sources, she supported the Special Rapporteur’s proposal to further clarify the distinction between general principles of law and customary international law in the commentary.

Ms. Ridings, congratulating the Special Rapporteur on his excellent fourth report, said that it was important to situate general principles of law squarely within the terms of Article 38 (1) of the Statute of the International Court of Justice, which established that the Court was to apply international conventions, customary international law and general principles of law to decide the disputes submitted to it. The term “principle” was often used by practitioners to refer to significant rules set out in treaties, rules of customary international law and general principles of law, *stricto sensu*. It was also sometimes used in the colloquial sense of a notion that was considered to be important as an objective or goal. She therefore supported the Special Rapporteur’s recommendation to include, in the commentary, an express reference to the need for careful attention to terminology. The term “general principles of law” should be used only when it was appropriate to do so after a sound methodological approach had been followed. The Commission, in particular, should be scrupulously clear in the way in which it referred to “principles”.

Given the lack of a clear distinction between general principles of law formed within the international legal system and rules of customary international law, and the fact that a general principle of law could exist in parallel with an analogous rule of customary international law, it would be of considerable use to practitioners for the Commission to differentiate between the two. There should be a clear explanation of the circumstances in which a rule of customary international law could become a general principle of law, including through its recognition as being intrinsic to the international legal system. General principles of law had a status that was independent from any particular treaty regime or customary rule, owing not only to the different methodology by which they were identified but also to their different nature. For that reason, notions such as the persistent objector, which pertained to the identification of customary international law, were not relevant to general principles of law. However, it was important not to use general principles of law formed within the international legal system as a strategic alternative to avoid the requirement of demonstrating *opinio juris* to establish a primary obligation under customary international law. Restraint in the identification of general principles of law through adherence to a robust methodology, including recognition by the community of nations of a general principle as intrinsic to the international legal system, was therefore paramount.

She was not convinced by the rationale behind the proposal to amend draft conclusion 2 by adding three new paragraphs to broaden the extent to which general principles of law

could be recognized by the community of nations. The new paragraphs lacked clarity and were likely to create more difficulties than they solved. While acknowledging that the term “community of nations” was far preferable to the anachronistic “civilized nations” and that it referred primarily to States, she did not share the Special Rapporteur’s view on the extent to which recognition of general principles of law by international organizations and other actors should be specifically mentioned in the draft conclusions. Some States, including Brazil and the United States, had argued that international organizations played no role in the recognition of general principles of law, a perspective that appeared to be derived from the view that the consent of States was required in order for international legal obligations to be established. She saw some merit in that position. Since international organizations by and large carried out functions that were delegated to them by their members, it was the practice of States, acting through international organizations, that was relevant to the formation of general principles of law. The European Union, which had the ability to pass legislation that was binding on its members, was a special case. Despite that, she remained unconvinced of the need to include a specific reference to recognition by international organizations in the draft conclusions. It was nonetheless an important issue and she agreed with Mr. Oyarzábal that it should be addressed in the commentaries.

She supported the Special Rapporteur’s proposal to establish two categories of general principles of law in draft conclusion 3, namely those that were derived from national legal systems and those that might be formed within the international legal system. That approach reflected not only Article 38 (1) (c) but also the development of an integrated system of international law since the adoption of the Statute of the Permanent Court of International Justice.

She supported the Special Rapporteur’s approach to draft conclusions 4, 5 and 6, in particular his methodological approach to the determination of the existence and content of general principles of law derived from national legal systems and their transposition to the international legal system. She shared his view on the need for a wide and representative comparative study of practices from various legal traditions in different regions. In such a study, care should be taken not to give undue weight to a few States or legal systems where it might be easier to ascertain domestic legal practices. After some consideration, she had concluded that the use of the word “transposed” in draft conclusion 6 was appropriate, since it had gained sufficient acceptance in scholarship.

She would welcome further clarification of the meaning of the word “intrinsic” in draft conclusion 7 (1), including conceptual clarification and specific examples illustrating why that was the most appropriate term to use. She would also appreciate further clarification as to the rationale behind the inclusion of the “without prejudice” clause in draft conclusion 7 (2). In paragraph (11) of the commentary to the draft conclusion, it was stated that the clause had been added because some members of the Commission considered that paragraph 1 of the draft conclusion would be too narrow and would not encompass other possible principles that, while not intrinsic to the international legal system, might nonetheless emerge from within it. The commentary did not offer any specific examples, however, and the existence of other general principles formed within the international legal system that were not “intrinsic” to that system remained unclear. Paragraph 2 seemed to water down or undermine the condition set out in paragraph 1 of the draft conclusion. The commentary should provide greater clarity on the matter, including a more detailed analysis of the specific examples of general principles of law mentioned by the Special Rapporteur in his previous reports.

With respect to the new draft conclusion 12, she appreciated the Special Rapporteur’s recognition of the possible existence of regional or subregional general principles of law emanating from, *inter alia*, the Inter-American Court of Human Rights, the African Union or the European Union. She also respected his recognition of the complementarity between the draft conclusions and the outcome of the Commission’s work on identification of customary international law, in which it had affirmed the existence of rules of particular customary international law, whether regional, local or other, that applied only among a limited number of States. However, the phrase “limited scope of application” in draft conclusion 12 was confusing. It was unclear whether that language referred to a scope of application that was limited geographically or temporally or that was limited to a particular field of international

law or even a particular group of international actors. Greater clarity was therefore needed as to the purpose of draft conclusion 12 and how it might interact with the possible scope of draft conclusion 7 (2).

She endorsed the Special Rapporteur's approach to draft conclusions 8 and 9 and supported the rewording of draft conclusion 9 to bring it into line with conclusion 5 of the Commission's draft conclusions on subsidiary means for the determination of rules of international law.

She supported the Special Rapporteur's proposal to reverse the order of the two paragraphs of draft conclusion 10. However, while the Special Rapporteur suggested that paragraph 1, which had become paragraph 2, merely contained a statement of fact, namely that general principles of law were mainly resorted to when other rules of international law did not resolve a particular issue, that paragraph could also be interpreted as implying that general principles of law were to be applied only after it had been established that other rules of international law did not resolve a particular issue in whole or in part. Interpreted in that way, the paragraph would appear to create a *de facto* hierarchy in which, contrary to draft conclusion 11, general principles of law were to be applied only after a lacuna had been found following recourse to relevant treaty or customary rules. She therefore suggested that the paragraph should be examined closely in the Drafting Committee.

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

Mr. Jalloh said that the Special Rapporteur was to be commended for his excellent fourth report on general principles of law. Thanks to the Special Rapporteur's efforts, the Commission was on the cusp of completing its work on an important, classical topic of international law. States had welcomed the Commission's draft conclusions as adopted on first reading, as exemplified by the acknowledgement by Brazil of "the valuable contribution of the Commission in clarifying the identification, determination and functions of general principles of law as a formal source of international legal obligations".

With regard to methodology, he was pleased to note that the approach taken in the report was generally reflective of the Commission's practice at the second-reading stage. It would have been helpful, however, if the Special Rapporteur had made clear early in the report that the practice at that stage was to preserve the structure and substance of the first-reading text, with changes made only for compelling reasons. In accordance with articles 16 (h) and 22 of its statute, the Commission was tasked not with automatically adopting the views of States, but with critically evaluating them to determine whether such compelling reasons existed. Often, States' comments concerned options that the Commission had already decided, after thorough consideration, not to pursue. Sometimes, States made comments that pulled in opposite directions. In such contexts, it was the role of the independent Commission to take on board those views of States that more directly reflected the law and practice.

He appreciated the Special Rapporteur's inclusive approach to State input, which was in line with the Commission's settled practice of examining not only the written comments and observations submitted in response to the first-reading text but also the statements made by States in the Sixth Committee. As he had often noted, there was a geographical imbalance in the State input provided to the Commission, with few submissions received from States in the global South, which nonetheless accounted for nearly 75 per cent of the Members of the United Nations. In the case of the topic under consideration, not a single African country had submitted written comments and observations on the first-reading text. That imbalance reflected the challenges faced by States in the global South in providing such input, owing largely to a lack of capacity and other, more pressing priorities. It was ironic that the Commission's work on general principles of law, which were relevant to all States and the field of international law as a whole, might not reflect the views of the diverse legal traditions and regions of the world.

He fully agreed with the Special Rapporteur that the final outcome of the Commission's work on the topic should be a set of draft conclusions accompanied by commentaries and a bibliography, which would be in line with the approach taken by the Commission in the context of other topics relating to the sources mentioned in Article 38 (1) of the Statute of the International Court of Justice.

He hoped that the General Assembly would follow the three-part recommendation that the Commission would make based on paragraph 204 of the report, namely that it would, first, take note of the draft conclusions on general principles of law and annex them to a resolution; second, commend them to the attention of States and all those who might be called upon to identify and apply such principles; and third, call for the widest possible dissemination of the draft conclusions. In 2018, the General Assembly had taken that approach following the completion of the Commission's conclusions on identification of customary international law, but in 2023, it had not done so in relation to the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*). Many States had already urged the General Assembly to maintain its usual approach of endorsing draft conclusions adopted by the Commission on second reading and annexing them to a resolution.

Turning to the draft conclusions themselves, he said that he generally supported the proposals made by the Special Rapporteur. He would urge the Commission to address the various important concerns raised by States not only through textual amendments but also through updates to the commentary as adopted on first reading.

With regard to draft conclusion 1, only a few States, including India and Poland, had called for a definition of "general principles of law" or clarification of the words "general" or "principle". As most States had supported the Commission's decision not to provide an illustrative list of general principles of law, he agreed with the Special Rapporteur that no such list should be provided and echoed Mr. Galindo's view that such a list would be incomplete and risk inhibiting essential developments. As Sierra Leone had noted in the Sixth Committee in 2019, "such an approach would be unsound in relation to the whole field of international law and could take the Commission many years, if not decades" (A/C.6/74/SR.31).

Concerning draft conclusion 2, he agreed with the Special Rapporteur's statement, in paragraph 48 of the report, that general principles of law should not be confused with peremptory norms of general international law (*jus cogens*), which required acceptance and recognition by the international community of States as a whole. That was particularly significant when it came to the methodology for their identification, as the Commission had explained in its draft conclusions on the latter topic.

With regard to the term "community of nations", it was worth asking whether another formulation might better capture the evolving structure of the international legal order. During previous plenary debates, Commission members had proposed alternatives such as "nations", "States", "major legal systems", "the international community as a whole", "the international community of States" and "the international community". Each carried different normative and institutional implications that merited careful consideration, and some might be acceptable substitutes. Ultimately, however, in the light of the input received from States on the first-reading text, he fully supported the Special Rapporteur's recommendation in that regard.

The term "community of nations" was an inclusive and appropriate formulation that had the additional merit of being language negotiated by States and included in article 15 of the International Covenant on Civil and Political Rights to refer to the content of Article 38 (1) (c) of the Statute of the International Court of Justice. With over 170 States Parties, the Covenant was evidence of the broad acceptance of that term by States and underscored the importance of using modern language that reflected the equality of all States. Moreover, States in the Sixth Committee had endorsed the Commission's decision to reject the outdated phrase "civilized nations" with virtual unanimity, thereby recognizing it as being inconsistent with contemporary values.

He shared the Special Rapporteur's view, as expressed in paragraphs 52 and 55 of the report, that the possible role of international organizations in the formation of general principles of law should not be excluded. While it was recognition by States that mattered most in that regard, other actors, such as non-governmental organizations, could prove to be relevant in the assessment of recognition by the community of nations. He therefore supported the inclusion of the three new paragraphs of draft conclusion 2. While he was open

to the textual suggestions made by members, he was comfortable with the text proposed by the Special Rapporteur.

The addition of the new draft conclusion 12, “General principles of law with a limited scope of application”, did not conflict with the Commission’s previous work on peremptory norms of general international law (*jus cogens*). As members such as Mr. Galindo had argued, regional general principles of law could reflect legal traditions or practices common to a group of States in a specific region and could vary across regions. Peremptory norms, by contrast, were principles of international law that were universally binding and non-derogable, leaving no room for regional variation. Regional recognition of peremptory norms would undermine their inherently universal character, whereas regional general principles of law could play a vital role in shaping the broad contours of the concept.

One example of a provision showing how international organizations could contribute to the emergence of general principles of law could be found in article 31 (1) (d) of the Protocol on the Statute of the African Court of Justice and Human Rights, as amended by the Malabo Protocol, which allowed that Court to have regard to “the general principles of law recognized universally or by African States”. That provision mirrored Article 38 (1) (c) of the Statute of the International Court of Justice and affirmed that principles shared across a region could be relevant in regional adjudication. It signalled an aspiration in the African region to build regional legal traditions responsive to region-specific challenges. The amended Statute of the African Court of Justice and Human Rights envisaged crimes such as the illicit exploitation of natural resources and included culturally contextualized definitions of terrorism; both of those concepts could evolve into regional general principles of law. The potential influence of such regional norms on both regional courts and broader international jurisprudence could be significant.

A second example was the African Union Model National Law on Universal Jurisdiction over International Crimes, which had been adopted by the Executive Council of the African Union and had already been implemented by some States. Terrorism, for instance, was envisaged in the Model National Law as any criminal act that might cause harm to, *inter alia*, cultural heritage. In 2021, Rwanda had noted in the Sixth Committee that it had used the Model National Law as a template to develop legislation that suited its domestic circumstances. Such a law, if it continued to be developed and applied primarily within Africa, could well reflect general principles of law recognized by African States, for the African region, demonstrating how regional legal consensus could be useful in identifying principles of law that were regional in character. Over time, such principles could, if adopted by States in other regions, contribute to the development of general principles of law that were more universal in character. He therefore supported the new draft conclusion 12, subject to further clarification of the expression “limited scope of application”, as urged by several members, including Mr. Forteau and Ms. Ridings.

In their comments on draft conclusion 3, States had generally treated subparagraph (a) as an exercise in codification and subparagraph (b) as one in progressive development. He shared the Special Rapporteur’s wish to avoid that binary characterization. General principles of law had historically operated across both dimensions. As the academic commentator Eirik Bjorge had recently noted, in the article cited in footnote 98 of the Special Rapporteur’s report, it would be unsatisfactory if the Commission adopted a “regressive instrument” in which the character of general principles of law formed within the international legal system was “so at odds with the realities of international life”.

States had generally welcomed the two-step analysis set out in draft conclusion 4 for identifying general principles of law derived from national legal systems, as elaborated in draft conclusions 5 and 6, with some making constructive suggestions. The Nordic countries, for example, had expressed support for the first-reading text as a reflection of *lex lata* but had proposed revising subparagraph (b) to read “may be transposable to the international legal system”, emphasizing the need for a normative evaluation of transposability and applicability. Similarly, the United Kingdom and the United States had appreciated the Commission’s careful and methodical approach to the identification of general principles of law derived from national legal systems. Given the overall positive reception of draft conclusions 4, 5 and 6, while he would not object to minor adjustments to improve the

readability of the text, he fully agreed with the Special Rapporteur that the concerns raised would be more appropriately addressed in the commentaries.

The concerns raised in relation to draft conclusion 7 were thematically the same as those raised in relation to draft conclusion 3. Several States had expressed concerns regarding the category of general principles of law formed within the international legal system, on two main grounds. Some States, including Israel, had noted that the term “intrinsic” in paragraph 1 lacked clarity and could leave the provision open to unintended or overly broad interpretations. Others, including Poland, had recommended deleting paragraph 2, citing structural concerns arising from the “without prejudice” clause contained therein, which, they argued, could create ambiguity about the provision’s legal effect.

In previous years, he had supported the inclusion of the second category of general principles of law on the basis that there was nothing in the text of Article 38 (1) (c) of the Statute of the International Court of Justice to indicate that general principles of law were limited to those derived from national legal systems. However, in the light of the concern expressed by certain States in the Sixth Committee, he had kept an open mind as to whether the merits of that second category should be reconsidered. While he shared some of the concerns expressed by other Commission members, including Mr. Forteau, Mr. Oyarzábal and Mr. Sall, regarding the specific examples provided by the Special Rapporteur, which, in his view, should be further clarified, he believed that the second category should be retained. As noted in footnote 98 of the Special Rapporteur’s report, Judge Anzilotti, who in 1920 had taken part in the drafting of the precursor to Article 38 of the Statute, had taken the view that not only were general principles of law formed within the international legal system included under Article 38 (1) (c), but that the provision referred first and foremost to such principles, giving second place to principles recognized in domestic legal systems. In accordance with article 32 of the Vienna Convention on the Law of Treaties, which stated that recourse could be had to drafting history as a supplementary means of interpretation, that insight provided valuable clarification of the original intent behind Article 38 (1) (c) and supported the continued recognition of general principles formed within the international legal system.

At the same time, as a number of members had noted, the Commission should strive to provide more precise guidance in the commentary to ensure a clearer understanding of the contours of and criteria for inclusion in the second category. In particular, the commentary should be augmented to better explain the examples provided in the first-reading text in terms of the difference between their status as provisions of treaties or rules of customary international law, as covered by Article 38 (1) (a) and (b) of the Statute, respectively, and their status as general principles of law, as covered by Article 38 (1) (c).

With regard to draft conclusions 8 and 9, which concerned subsidiary means for the determination of general principles of law, the comments of States were helpful, showing that the question before the Commission was whether subsidiary means as addressed in those two draft conclusions should be dealt with as part of the topic of general principles or as part of the topic of subsidiary means for the determination of rules of international law.

In that regard, the Special Rapporteur’s account of the input received from States did not reflect the full picture of the comments and observations received. The overlap with the topic of subsidiary means for the determination of rules of international law had caused States to question the necessity of retaining draft conclusions 8 and 9. Poland, for instance, had highlighted the Commission’s inconsistent characterization of the decisions of national courts both as part of “national legal systems” and as a “subsidiary means”, raising concerns about internal coherence. The Nordic countries and the United Kingdom had queried whether the inclusion of draft conclusions 8 and 9 was justified, given the Commission’s ongoing work on subsidiary means, while the United States had emphasized the potential for confusion if the Commission produced divergent guidance under the two topics. The Special Rapporteur, recognizing the need for alignment, had commendably proposed adopting the language of draft conclusion 5 on subsidiary means for the determination of rules of international law.

It was understandable that, in its work on general principles of law, the Commission would adopt the same approach that it had taken in its work on identification of customary international law by including draft conclusions on decisions of courts and tribunals and on

teachings. The Commission had not added the topic of general principles of law to its current programme of work until after the adoption of its draft conclusions on identification of customary international law on second reading in 2018.

Subsequently, in 2022, the Commission had added the topic of subsidiary means for the determination of rules of international law, for which he served as Special Rapporteur, to its current programme of work. By mirroring draft conclusion 5 on that topic in draft conclusion 9 on general principles of law, the Special Rapporteur for the latter topic had followed the Commission's established practice for managing overlapping mandates. The same approach had been taken to address the overlaps between the topics of crimes against humanity and immunity of State officials from foreign criminal jurisdiction and between the topics of peremptory norms of general international law (*jus cogens*) and immunity of State officials from foreign criminal jurisdiction. In those cases, the Commission had chosen to situate the discussion of each specific issue within the topic most directly engaged with the relevant legal questions. In his view, a similar approach might be warranted in the current case: as the Commission was already dealing with subsidiary means for the determination of rules of international law as a distinct topic, there was a strong argument for reserving the related issues for that topic.

His concern was that, while draft conclusion 9 was partly aligned with the Commission's work on subsidiary means, it did not reproduce in full the language of the draft conclusion on teachings provisionally adopted by the Drafting Committee under that topic, which had already garnered support in the Commission and among States in the Sixth Committee. The Special Rapporteur's proposal incorporated only the first sentence of that provision, omitting the important second sentence without explanation. To avoid confusion, there might be merit in either consolidating the treatment of subsidiary means under the dedicated topic or ensuring stronger consistency between the two projects. In either case, given the importance of consistency and the supplementary criteria developed through the Commission's work on the topic of subsidiary means, the Commission should consider adding a second sentence to draft conclusion 9, to read: "In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity."

With regard to draft conclusions 10 and 11, he wished to commend the Special Rapporteur for his work to incorporate the input received from States on the functions of general principles of law and the relationship between general principles of law and customary international law. He fully supported the Special Rapporteur's view that Article 38 (1) (a) to (c) of the Statute of the International Court of Justice should not be interpreted as establishing a hierarchical relationship among the sources of international law. As had been observed by the United States, general principles of law should not be treated as a sort of "custom lite".

He would also respectfully urge the Commission to exercise caution in framing general principles of law solely as "gap-filling" mechanisms. Their identification and application could differ across courts and tribunals, and the limited reliance of the International Court of Justice on Article 38 (1) (c) of its Statute might reflect deliberate judicial restraint, in particular given the historical context and terminology of the provision. As he had argued at previous sessions, and as the Special Rapporteur had noted in previous reports, while general principles of law might play more of a gap-filling role in general international law, in the context of international criminal law, general principles of criminal law derived from national legal systems played a significant role that went well beyond gap-filling.

The Commission had intended to complete its work on the topic at the current session, with the adoption of a decision on a final recommendation for the General Assembly. However, as the Commission would not be able to meet in July, owing to the liquidity crisis facing the United Nations, it would not be able to adopt any commentaries to the draft conclusions at the current session. In any event, he sincerely hoped that good progress could be made in finalizing the draft conclusions in the Drafting Committee. He hoped that the liquidity crisis facing the United Nations would be resolved and that the Commission would have sufficient meeting time in 2026 to complete the second reading of the draft conclusions.

The Commission's renewed engagement with the sources of international law marked a continuation of its long-standing mandate to clarify and develop foundational legal concepts in a manner that served both States and the international legal system at large. As several members had noted, the recentring of general principles, which had often been overlooked, represented a timely and necessary shift. Much of that progress was owed to the tireless work, intellectual leadership and continued dedication of the Special Rapporteur.

The meeting rose at 11.10 a.m.