

Provisional

**For participants only**

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**International Law Commission**  
**Seventy-sixth session**

**Provisional summary record of the 3711th meeting**

Held at the Palais des Nations, Geneva, on Friday, 9 May 2025, at 10 a.m.

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\* Reissued for technical reasons on 24 June 2025.

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***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  
Ms. Mangklatanakul  
Mr. Mavroyiannis  
Mr. Mingashang  
Mr. Nesi  
Mr. Nguyen  
Ms. Okowa  
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 a.m.*

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

**Ms. Oral** said that the Special Rapporteur's excellent fourth report on general principles of law (A/CN.4/785) was clearly written, well structured and thoughtful and contained a useful synopsis of the views of States in relation to the draft conclusions under discussion. As the Commission was at the second-reading stage, it should refrain from making significant revisions to the text unless there were compelling reasons to do so based on the views expressed by States or other significant developments.

In order to save time, she would focus her comments only on the draft conclusions that had raised concerns or that had been significantly revised by the Special Rapporteur. Concerning draft conclusion 2 on the recognition of general principles of law, she continued to support the use of the term "community of nations" as an alternative to the highly inappropriate, anachronistic term "civilized nations", for the reason cited in paragraph 47 of the Special Rapporteur's report. She would also be open to other alternatives, such as "community of States".

As had been noted by the Special Rapporteur, when it came to the choice of terminology in draft conclusion 2, the key issue was exactly which actors were capable of recognizing a general principle of law for purposes of its formation. In order to clarify exactly which actors were covered by the term "community of nations" – a question raised by both States and members of the Commission – the Special Rapporteur had proposed the addition of three new paragraphs to draft conclusion 2, explaining the role of States, international organizations and other actors, respectively. In her view, the act of "recognition" was principally performed by States, although international organizations, as extensions of States, could also play a role. However, she agreed with the Special Rapporteur's position, as expressed in paragraph 53 of the report, that other non-State actors, which did not and should not play a role in the recognition and formation of general principles, could perhaps play a role in identification. In short, she had no objections to draft conclusion 2 as proposed by the Special Rapporteur, but would also not be opposed to moving the proposed new paragraphs to the commentaries, as suggested by Mr. Nesi.

With regard to draft conclusion 7 and the second category of general principles, namely those formed within the international legal system, on which differing views had been expressed by States and members of the Commission, she wished to reiterate her previous support for the existence of that category. In other words, she was of the opinion that Article 38 (1) (c) of the Statute of the International Court of Justice did not preclude the existence of general principles of law formed within the international legal system. In his report, the Special Rapporteur provided many examples of principles falling within that category, including the principle of the sovereign equality of States.

She agreed with certain States, such as Malaysia and Sierra Leone, with regard to the need to ensure representativeness and diversity when formulating the methodology for the identification of general principles of law formed within the international legal system. She also understood that draft conclusion 7 might pose some challenges. Some States, such as Indonesia, Singapore and the United States of America, had specifically expressed concern at the term "intrinsic" used in that draft conclusion, considering that the term was too vague and could give rise to confusion as to what constituted a general principle of law. That point could perhaps be better explained in the commentaries.

One of the main challenges was how to distinguish general principles of law from rules of customary international law, a concern that had been raised by a wide range of States, such as Belarus, Lebanon and Japan, and that she had also addressed in her statements on the topic at previous sessions. She therefore welcomed the Special Rapporteur's proposal to further clarify the distinction between general principles of law and customary international law, which had different functions and effects. For example, a general principle of law could develop into customary international law but not the reverse. However, in practice, those terms were often used interchangeably.

With regard to draft conclusion 9 on teachings and the connection with the Commission's work on the topic of subsidiary means for the determination of rules of

international law, she agreed with the Special Rapporteur that the specific role of teachings should be addressed in the context of general principles of law. In that context, she welcomed his replacement of the phrase “the most highly qualified publicists” with a clearer formulation and thus supported the revised text of draft conclusion 9.

Concerning draft conclusion 10 on the functions of general principles of law, she supported the Special Rapporteur’s proposal to reverse the order of paragraphs 1 and 2 of the text to address the criticism expressed by some States, including Austria.

With regard to draft conclusion 12 on general principles of law with a limited scope of application, she welcomed the examples given by the Special Rapporteur in the report, which seemed to limit the scope of the conclusion to principles whose nature was not universal. However, as pointed out by Mr. Forteau, the expression “with a limited scope of application” might be confusing, as it could also be taken to refer to the material scope of application of the principle. The Commission should therefore consider both Mr. Forteau’s and Mr. Galindo’s drafting proposals in that connection.

In conclusion, she agreed that all the draft conclusions should be referred to the Drafting Committee.

**Mr. Fathalla** said that he wished to commend the Special Rapporteur’s thorough work on the topic of general principles of law. It should be noted that the draft conclusions did not address the scope of applicability of general principles. While draft conclusion 2 addressed the issue of recognition, it did not address applicability. As that point had also been raised by one State, he believed that the Commission should shed light on the applicability or non-applicability of general principles to international organizations, by defining and clarifying in the commentaries the term “general” in the phrase “general principles of law”. The draft conclusions adequately addressed the delicate matter of hierarchy between the different sources of international law and the gap-filling role of general principles.

Regarding the proposal by the Nordic countries to include examples of general principles in the draft conclusions, he believed that such examples would be more appropriately included in the commentaries. As to the request by the United Kingdom that the Commission should make clear when it was codifying international law, suggesting the progressive development of international law, or even proposing new law, he believed that such a distinction was unnecessary. As he had noted in his statement on the topic of immunity of State officials from foreign criminal jurisdiction, the Commission had a general mandate both to codify and to develop international law, and therefore did not need to identify which part of its mandate was engaged at any given time.

It was regrettable that so few Member States had submitted comments on the draft conclusions (A/CN.4/779), despite the significance of the topic of general principles. Nonetheless, he welcomed the comments made by States in respect of draft conclusion 1 on scope, particularly the view expressed by both the United Kingdom and the United States that the commentaries were clear and did not imply any change to the substance of Article 38 of the Statute of the International Court of Justice.

Regarding draft conclusion 2, some States had commented that the term “community of nations” was ambiguous and would also include international organizations. However, it was clear from the commentary what was meant by that term, which replaced the term “civilized nations” and reflected the fact that, in certain circumstances, international organizations, courts and scholars contributed to the development of general principles in addition to States. As noted by the Special Rapporteur, the expression “community of nations” would not create new terminology, as it was already used in the International Covenant on Civil and Political Rights. As for the proposed new paragraphs to be added to draft conclusion 2, he agreed with Mr. Asada that they could be moved to the commentary.

In draft conclusion 3, the phrase “may be formed” had generated much discussion. He agreed with the important point made by the Nordic countries that the formulation of subparagraphs (a) and (b) on the two categories of general principles – “that are” and “that may be”, respectively – should be aligned. In response to the comments made by several States, the Commission must clarify at the current session how the second category of general principles was distinguishable from customary international law. In paragraph 89 of the

report, the Special Rapporteur mentioned that the distinction between a general principle and a customary rule of international law was based on the method of their identification. However, the fact that *opinio juris* for the purpose of customary international law was very similar to the concept of recognition of general principles made distinguishing between the two sources even more challenging.

With respect to draft conclusion 4 on the identification of general principles of law derived from national legal systems, the Nordic countries had proposed amending the formulation of subparagraph (b), as the current wording, “its transposition to the international legal system”, seemed to invite an empirical assessment rather than a normative evaluation of transposability and left unresolved the question of whether the principle could be transposed to the international legal system. He believed that their proposal to amend the wording to “may be transposable to the international legal system” was a legitimate one, since the transposition of a general principle to the international legal system might not have happened in every case.

With regard to draft conclusion 5, while he understood the comment made by Poland concerning the potential inconsistency between draft conclusions 5 (3) and 8 (2), it was clear from previous discussions in the Commission and from the commentaries that the two provisions together described a two-step process. In his opinion, draft conclusion 5 (3) concerned the identification of the commonality of a principle, while draft conclusion 8 (2) had to do with the subsidiary nature of decisions of courts and tribunals for the determination of such principles. In other words, draft conclusion 5 (3) was the first step and, if a common principle was identified, draft conclusion 8 (2) was the second. He therefore did not believe that the two draft conclusions contradicted each other.

With regard to draft conclusion 6, the United States and the United Kingdom had argued that recognition was not necessarily implicit when the compatibility test was fulfilled. However, the commentary was very clear on that issue and he therefore did not see a need to discuss it further.

Concerning draft conclusion 7, one State had pointed out that the meaning of the term “intrinsic” in paragraph 1 was undefined. In his view, however, the wording of both the draft conclusion and the commentary was sufficiently clear. He did not agree with the view expressed by some States that paragraphs 1 and 2 were contradictory. Taking into account the views expressed in the Commission, his interpretation was that the two paragraphs were complementary. In order to understand the relationship between them, States must refer to the commentary, which outlined the different views on the topic. As mentioned by the Special Rapporteur, the aim of the “without prejudice” clause in paragraph 2 was to allow for future developments regarding general principles of law that might be formed within the international legal system.

Regarding draft conclusion 8, one State had highlighted several factors that must be considered when assessing decisions of national courts; he disagreed with the idea of listing those factors in the text of the draft conclusion, as it was unclear how or by whom they would be assessed. He had no objection, however, to the Special Rapporteur’s proposal to clarify in the commentary that several factors ought to be considered, and agreed that the decisions of high courts should carry more weight for the purposes of that analysis than those of other courts.

He supported the Special Rapporteur’s amended version of draft conclusion 9 on teachings. He also agreed that teachings should include those in both written and unwritten forms, such as audiovisual materials, and therefore supported the Special Rapporteur’s proposal to clarify that point in the commentary.

He believed that the use of the term “mainly” in draft conclusion 10 (1) illustrated the Commission’s intention not to imply the existence of any hierarchical relationship among the three sources of international law. He supported the Special Rapporteur’s proposal to reverse the order of paragraphs 1 and 2 of the draft conclusion in order to give more weight to the normative part.

With regard to draft conclusion 11, the Special Rapporteur noted that the absence of hierarchy aligned with the position taken by the Commission in the context of its work on

the topic of fragmentation of international law. In the light of the concerns raised by some States regarding the apparent contradiction between draft conclusions 10 (2) and 11 (3), the Special Rapporteur proposed further clarifying the distinction between general principles of law and customary international law, as well as the relationship between general principles of law and peremptory norms of general international law (*jus cogens*). In his own view, the distinction between general principles and the fundamental principles of international law mentioned in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations should also be taken into account.

Finally, he believed that the proposed new draft conclusion 12 on general principles of law with a limited scope of application was a positive addition, since it allowed the Commission to cover areas of international law that were still developing. However, the Commission should be mindful that it was at the second-reading stage and should make changes to the text adopted on first reading only when there were compelling reasons to do so. In conclusion, he said that he supported the referral of the draft conclusions to the Drafting Committee.

**Mr. Fife** said that the reaction by States, both in the Sixth Committee and in written comments, to the draft conclusions spoke to the quality of the Special Rapporteur's work and the degree of interest in the topic. He would focus his comments on the issues that had raised concern.

Several States had urged the Commission to make clear which parts of the draft conclusions reflected what was generally accepted as constituting *lex lata*, as opposed to *lex ferenda*, owing to a continued divergence of views among States. In order to provide as much practical and relevant guidance as possible for practitioners, the Commission should strive for clarity, based on a rigorous methodology, when it came to the identification of an independent source of legal obligations on the same level as treaty law and customary law. Several States, including the Nordic countries, had mentioned that the draft conclusions could be enhanced with the inclusion of an overview of general principles recognized as part of *lex lata*. In his view, a non-exhaustive list of examples of recognized general principles would not only enhance the practical value of the Commission's work, but also sharpen its conceptual focus. An appropriate mention in the commentaries would ensure that the list of examples was not misinterpreted as being exhaustive.

Regarding draft conclusion 1, he agreed that the existing formulation offered sufficient framing of the scope of the topic and had generally been well received. There remained, however, a lack of conceptual clarity as to the use of some terms that were key to the topic, and the conceptual blurring of certain distinctions might have contributed to the uncertainty reflected in comments by States. First, the term "principle" could obviously cover a very broad range of phenomena and was regularly invoked in international legal argument without necessarily having anything to do with the meaning attached to it in Article 38 (1) (c). In the broad sense, principles were important ideas extracted by means of analysis; they could be drawn from treaties and customary international law, among other sources. In the law of the sea, for example, specifically in maritime delimitation, a variety of principles had been invoked over the years, including the "principle of equidistance", or the principle of "equidistance/special or relevant circumstances", which denoted a legal concept or method and not an independent source of law. Even the reference to an "equitable solution" in articles 74 and 83 of the United Nations Convention on the Law of the Sea was not to be understood as a reference to equity as an autonomous source of law, but as a goal to be "effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice".

In the case law of the International Court of Justice, including in particular *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, a huge number of principles had been referenced under the umbrella of disputes governed by customary international law. Another example, in international environmental law, was the invocation of the polluter pays principle. Any international legal obligation on the part of a polluter to pay compensation would be sought in treaty law and customary international law as autonomous sources giving rise to binding legal obligations and, as appropriate, with the support of subsidiary means to identify and determine such a rule of law, and not merely as a result of the alleged existence of a general

principle within the meaning of Article 38 (1) (c). Frequent reference to principles such as just and equitable treatment was made in international investment law, despite the fact that it was difficult to identify such principles as distinct from customary norms or principles deriving from the interpretation of the applicable treaty law. Questions had even been raised in doctrine as to their marginal utility in that context.

It would thus be helpful if a sharper distinction could be drawn between general principles as an autonomous source of law within the meaning of Article 38 (1) (c) of the Statute and, on the other hand, the far more frequent use of principles as intellectual scaffolding or resources in legal analysis. Many of the comments by States, or the lack of comments, might reflect a perceived uncertainty about those dividing lines that the Commission's work on the topic did not accurately settle or clarify.

With regard to draft conclusion 2, he agreed that the practice and opinion of international organizations could contribute to the formation of general principles of law. However, a formulation such as "recognition by the community of nations" or "community of States" in no way excluded the opinions and practice of international organizations. The Special Rapporteur's proposal to add three new paragraphs to the draft conclusion was, in his view, unnecessary and might give rise to additional questions and serve only to complicate matters.

Concerning draft conclusion 3, there was little scope for disagreement on the first category of general principles – those derived from national legal systems – as an indisputable basis for objectively identifying a potential source of law. In that connection, he agreed with other members that it would be meaningless to assume that there had to be a kind of unanimity among domestic legal systems. However, accepted general principles, such as those related to equality of arms, the right to a fair trial and estoppel, stemmed from classic situations in the course of legal proceedings before a judiciary, and many legal cultures converged in demanding the application of a principle to avoid a *non liquet* or other problems related to a lack of statutory legislation. There were many other examples in such fields as international criminal law – the principle of proportionality in sentencing, for example – and investment law. What was striking was the gap-filling character of such general principles with regard to the actual conduct of judicial or administrative legal proceedings.

Many States had made critical comments in respect of the second category of general principles – those formed within the international legal system – and opinion was divided on the matter. In his view, valid concerns had been raised, which indicated doubts as to the validity of that second category of general principles and the difficulty in distinguishing them from customary international law. He did not rule out the correctness of the Special Rapporteur's proposition that international law itself, like any other legal system, had the capacity to generate principles specific to it, without the need to borrow from other legal systems. He was intrigued, for example, by the "competence-competence" principle in international law, where, unlike in domestic systems, there might not be any other body to settle certain issues of interpretation. Another question was whether the principle of *pacta sunt servanda* was fundamental conventional law or an independent source of international legal obligations on a par with treaties. He doubted that it was the latter.

In any case, the validity of the general proposition concerning the second category of general principles depended on its recognition by States. The discussion on that issue could indicate a degree of doubt as to whether such a means of norm formation had been generally accepted by States. It was important for that uncertainty to be reflected in the Commission's work. One way to achieve that would be to clarify in the commentary that doubt remained as to whether the second category of principles reflected *lex lata* or instead represented something that was less certain but potentially had merit as a contribution to the progressive development of international law. His observations in relation to draft conclusion 3 also extended to draft conclusion 7 and to other draft conclusions associated with the proposed second category of general principles. Like other members, he favoured a rigorous methodology; the absence of such an approach could deprive practitioners of concrete guidance based on a solid foundation. Consequently, he supported the deletion of paragraph 2 of draft conclusion 7. He would also like to see the inclusion of additional references to key literature that was not mentioned in the commentary.

The temporal aspects of the production of autonomous sources of international law were not limited to the regrettable use of terminology such as “civilized nations”. Legal history demonstrated an early necessity of drawing analogies from domestic private law, for instance, in the development of treaty law and, even earlier, in the crystallization of customary law. It also showed an understandable reliance on natural law or naturalist approaches in the development of norms that had become part of both general and conventional international law, including the Charter of the United Nations. Such processes had been common in the early stages of international law, particularly in 1919 and 1920, when there had been a scarcity of conventional and customary law. As many had pointed out, there had initially been a significant gap. However, in the wake of codification and other important developments in the production of international law, there was currently no shortage of recognized legal tools for countering situations of *non liquet*. Nevertheless, he advised against excluding the second category of general principles, which should be situated within the realm of progressive development.

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

**Ms. Galvão Teles** said that she wished to congratulate the Special Rapporteur for his fourth report, which provided useful guidance to the Commission as it commenced its second reading of the text to be adopted under the topic.

She agreed with the Special Rapporteur that a set of draft conclusions with a bibliography was the most appropriate form for the final outcome of the Commission’s work. She also agreed with and supported the Special Rapporteur’s view that general principles of law should not be understood in a court-centric manner and that no attempt should be made to compile a list of examples of general principles or to include a draft conclusion that provided a definition of the term “general principles of law”. Moreover, she supported the decision to bring the wording of draft conclusion 9 on teachings into line with the equivalent draft conclusion under the topic of subsidiary means and to reverse the order of paragraphs 1 and 2 of draft conclusion 10. Lastly, she agreed that the draft conclusions should not imply that there was a formal or informal hierarchy among the sources listed in Article 38 (1) of the Statute of the International Court of Justice.

Regarding draft conclusion 2, she was open to the Special Rapporteur’s suggestion to maintain the term “community of nations”, as adopted on first reading, even though it had raised some questions among States. However, she hesitated to support his suggestion to add the proposed additional paragraphs. While draft conclusion 2 as adopted on first reading offered limited guidance, she still found it preferable to the Special Rapporteur’s proposal to add three new paragraphs, for several reasons.

The proposed new paragraphs were almost identical to paragraphs 1, 2 and 3 of conclusion 4 of the conclusions on identification of customary international law. That raised two concerns. First, that particular language further blurred the distinction between general principles of law and customary international law, which was a concern raised both by States and by a number of Commission members in relation to draft conclusion 7. Mirroring the language impacted on the ability to distinguish between two distinct sources. Custom and general principles differed in many ways and it was important to avoid blurring the lines between them. Second, those same paragraphs, when used in the context of the Commission’s work on customary international law, related to a quite distinct consideration, namely identifying the existence of a “general practice”, rather than the question of “recognition”.

For those reasons, she would prefer to retain the wording of draft conclusion 2 as adopted on first reading. While further guidance was undoubtedly needed, it should be provided in a manner that did not track wording that had been used for a different purpose in the Commission’s previous work on customary international law. Such guidance could be provided in the commentaries. Paragraph (5) of the commentary to draft conclusion 2 as adopted on first reading already indicated that the use of the term “community of nations” did not mean that only States could contribute to the recognition of general principles of law. The Commission could clarify that point by clearly stating that it was primarily States’ recognition that was needed for a general principle of law to exist, while allowing for international organizations to contribute to that process. It might be useful to further explain

in the commentaries that international organizations' recognition was especially relevant with regard to the second category of general principles, namely those that could be formed within the international legal system.

Some States had indicated that draft conclusion 6 required further clarification. She agreed that it was unclear how "transposition" operated in practice. It was fundamental to the topic at hand to clearly explain the second element in the process of identifying general principles of law derived from national legal systems. The Commission could solve the problem by reformulating the draft conclusion so that it was less a statement of fact and more methodological in nature. Her suggestion would be to reword draft conclusion 6 to read:

To determine the transposition of a principle common to the various legal systems of the world to the international legal system, it is necessary to ascertain:

- (a) its compatibility with the international legal system; or
- (b) the extent to which States have recognized the principle as compatible with the international legal system.

That wording would also ensure that draft conclusion 6 more closely tracked the language used in draft conclusion 5. In addition, the notion of "compatibility" should be further explained in the commentaries.

On draft conclusion 7, she shared the concerns of those States that had pointed out that the Commission's work risked conflating general principles of law and customary international law. The Special Rapporteur clarified that the distinction between the two was methodological in nature. Identifying a rule of custom required an analysis of State practice and *opinio juris*, whereas identifying a general principle formed within the international legal system required an inductive analysis of the international legal framework, including treaty and customary law, and a deductive analysis to ascertain whether the principle was "intrinsic to the international legal system".

However, in practice, those methods seemed indistinguishable. First, when it came to the recognition of a general principle of law formed within the international legal system, the Special Rapporteur noted that it must be "wide and representative, including the different regions of the world". That language was practically analogous to the first element of identification of a customary norm identified by the Commission in 2018, which was that "the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent".

Second, the report did not refer to or explain the steps taken in the inductive and deductive analyses that were supposedly characteristic of general principles. That was highlighted, for example, in paragraphs 142 to 148 of the report, in which the Special Rapporteur relied on the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles) to illustrate the methodology set out in draft conclusion 7 (1). Yet the conclusion that the Nürnberg Principles were considered to be legally binding norms on the basis of "*inter alia*, treaties, other international instruments, and declarations by States" that were later reaffirmed in a General Assembly resolution and the work of the Commission was hard to distinguish from an analysis of State practice and *opinio juris*.

In fact, that specific example created confusion and conflated customary international law and general principles of law by mistaking the Nürnberg Principles for general principles of law, as opposed to principles that could also be referred to as "rules". In paragraph 29 of the report, the Special Rapporteur himself acknowledged that terminological issue.

If it was maintained that there was a methodological difference between general principles of law and customary international law, she had one comment regarding the logical process of such a determination. The current draft conclusion 10 (1), as adopted on first reading, provided that general principles of law were "mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part". Therefore, while there was indeed no hierarchy among the sources listed in Article 38 (1) of the Statute, there was a logical order in their application: according to the Special Rapporteur's methodology, identifying general principles of law entailed an analysis of existing rules included in treaties

and customary international law. That gave the unfortunate impression that the methodology proposed by the Commission was circular: in order to help interpret the lacunae left by treaties and customary international law, reference could be made to principles of international law, which themselves required an analysis of existing rules of international law found in treaties and customary international law.

As many methodological questions remained unanswered, it was important for the Commission to clarify that the distinction between customary international law and general principles of law was not simply methodological. More importantly, customary international law and general principles of law operated and existed at different levels of abstraction or specificity.

In addition, she agreed with those States that had noted that the methods of identifying the different categories of general principles were not distinct enough. The difference essentially came down to ascertaining “compatibility” with the international legal system as a criterion for transposition, as well as their “intrinsic” nature. Both terms required further elaboration. The commentaries, if not the draft conclusions themselves, should set out a clear methodology for ascertaining whether a general principle was “compatible with” and “intrinsic to” the international legal system.

She saw no particularly convincing reason to include the provision set out in draft conclusion 12 in the text of the draft conclusions rather than in the commentaries. In fact, the Special Rapporteur had suggested the addition on the basis of only one comment, received from the European Union, alongside a reference to jurisprudence of the Caribbean Court of Justice. The report offered no analysis of relevant State practice and no State had commented on the existence of subregional or regional “general” principles of law. Much therefore remained unclear, and it was, for example, questionable whether regional principles were indeed “general principles” within the meaning of Article 38 (1) of the Statute. As noted by the Special Rapporteur, members of the Commission had so far expressed differing views in that regard.

She supported the referral of the draft conclusions to the Drafting Committee, taking into account the debate in the plenary.

**Mr. Zagaynov** said that he wished to express his gratitude to the Special Rapporteur for his fourth report on the topic of general principles of law. As in previous reports, the Special Rapporteur had conducted a thorough analysis of various aspects of that complex issue, which had, until recently, been of primarily academic interest. However, once the Commission completed its work, its conclusions were likely to attract the attention of practitioners and be used by them. The Commission had initially set itself the goal of clarifying the nature, scope and functions of general principles of law and the way in which they were to be identified. It was important to exercise particular caution regarding proposals that were contentious or debatable and that did not contribute to achieving that goal.

States continued to show considerable interest in the topic; more than 60 of them had expressed their views after the first reading of the draft conclusions. Nonetheless, certain aspects still gave rise to questions and concerns. Some States had suggested revising or even deleting certain draft conclusions, including some of the most important provisions. The second reading should be used to the fullest extent to analyse and respond to those concerns. One general call that had emerged was to avoid overstating the legal significance of general principles of law in comparison with the other sources of international law. He agreed with that point. The discussions in the Sixth Committee had underscored the importance of terminological aspects of the topic. It was necessary to distinguish between general principles of law as a source of law and general, fundamental or generally recognized principles of international law as highly general rules of conduct as per their content but not an autonomous source of law. The Commission could clarify the relationship between those notions in the commentaries.

With respect to the amendments to draft conclusion 2 on the recognition of general principles of law proposed by the Special Rapporteur in the report, he believed they were intended to respond to the concerns of States by setting the right emphasis. However, he had doubts regarding the proposed new paragraph 3, which stated that recognition by international organizations could in certain cases contribute to the formation of general

principles of law. In his view, that provision did not reflect the opinion of the many delegations that had emphasized the leading role of States in that process. The role of international organizations could be addressed in the commentary.

The question of whether the persistent objector rule was applicable in the context of general principles of law remained unresolved. He wondered whether, in 1920, Advisory Committee of Jurists member Raoul Fernandes had had that rule in mind when he had stated, at the Committee's 15th meeting, that, in the absence of a treaty or custom, the Permanent Court of International Justice should be able to base its decisions "on those principles of international law which, before the dispute, were not rejected by the legal traditions of one of the States concerned in the dispute", as quoted in paragraph 83 of the Special Rapporteur's report. Commenting on a related point, the Special Rapporteur argued that, given the lack of relevant practice and the limited practical significance of the persistent objector rule, it did not merit detailed consideration. However, the issue could be quite significant. For example, some Member States had referred to the principle of the common heritage of mankind in the context of the formation of general principles of law of the so-called second category, particularly in connection with the recent adoption of the Agreement on Marine Biological Diversity of Areas beyond National Jurisdiction. Hypothetically, a State might persistently object to that principle in relation to marine genetic resources. It was unclear what would happen if the principle were to acquire the status of both a general principle of law and a customary norm. If the objector was not bound by the customary norm but still had to observe a general principle of law that was similar in content, the persistent objector rule would be rendered meaningless. In such cases, the exception made for persistent objectors could be extended to the parallel general principle of law, should the possibility of such simultaneous existence be accepted.

Regarding draft conclusion 3, on categories of general principles of law, there was no disagreement among Commission members or States about the first category, consisting of principles derived from national legal systems. However, there was a lack of consensus concerning the second category. As many States had pointed out, the Commission had not provided adequate methods of preventing confusion between such principles and similar norms derived from the other sources of international law, namely treaties and custom. According to some States, simply referring to a concept as a "principle" in legal argumentation did not suffice to establish its status as an autonomous source of law. In most cases, such principles had already assumed the form of treaty or customary norms. In paragraph 89 of the report, the Special Rapporteur suggested that the distinction between general principles of law formed within the international legal system and customary international law was based on the method for their identification. That was like differentiating between influenza and coronavirus disease on the basis of the type of test used. In paragraph 139 of the report, the Special Rapporteur outlined a methodology for identifying general principles of law of the second category, divided into inductive and deductive analysis. The suggested methodology with the inductive and deductive analysis in practice closely resembled the Commission's methodology for identifying customary international law. Many norms of customary international law could also be considered intrinsic to the international legal system, but that did not mean that they were general principles of law within the meaning of Article 38 of the Statute of the International Court of Justice. There were concerns among States that the Commission was interpreting general principles of law as a foundation for binding legal rules to which States had not consented and did not intend to consent. Moreover, there was a risk that such a category might become a back door for introducing international legal norms that could not be established through existing rules for identifying customary law.

He remained unconvinced of the need to retain paragraph 2 of draft conclusion 7, which left open the possibility of an additional category of general principles of law that were formed within the international legal system but were not identifiable by the proposed methodology.

Concerning draft conclusion 6, he did not object to the notion that a principle common to various national systems could be transposed to the international legal system insofar as it was compatible with that system. However, the capacity to be transposed was not sufficient to establish its existence as a general principle of law under Article 38. Many States had

objected to the presumption that compatibility implied recognition by States. There could be no such presumption. Such recognition should be evidenced by the methods listed in paragraph 119 of the report, such as inclusion of references to it in treaties, pleadings before international courts, official statements and diplomatic correspondence. It might be worth considering a proposal made in the Sixth Committee to reformulate the provision to read: “A principle common to the various legal systems of the world may be transposed to the international legal system insofar as it has been recognized as compatible with that system by States.”

Draft conclusions 8 and 9 should not predetermine the outcome of the Commission’s work on subsidiary means for the determination of rules of international law. Several States had raised that point in their written comments. He disagreed with Mr. Jalloh’s suggestion to incorporate those and other provisions from the Commission’s work on subsidiary means, particularly the draft conclusion on teachings, into the current draft conclusions, as they were not directly relevant to the topic of general principles of law, and the project on subsidiary means had not yet been completed.

Regarding draft conclusion 10, the reordering of paragraphs proposed by the Special Rapporteur shifted the emphasis, and he was not convinced that it was justified. However, it was important to retain the reference to the function of filling legal gaps, which was a key feature and the original *raison d’être* of general principles of law.

If the proposed draft conclusion 12, regarding general principles of law with a limited scope of application, was retained in the final text, the commentary should reflect the practice of the Court of the Eurasian Economic Union, which had recognized the principles of proportionality and the right to judicial protection as general principles of law within the Union.

Like other Commission members, he opposed the suggestion to compile a list of general principles of law. In his view, the examples to be included in the commentaries would suffice. He supported the referral of the draft conclusions to the Drafting Committee.

**Mr. Akande** said that he wished to commend the Special Rapporteur for his fourth report on the topic of general principles of law. The topic was a difficult one that required a careful balance between flexibility and rigour. The theoretical underpinnings for finding the right solution to various issues inherent in the topic were not obvious, and every solution led to its own problems. The application of general principles of law as a source of law was less frequent than the application of customary international law and treaties; guidance on a number of points was thus limited. Nonetheless, the Commission was on the right path with regard to both the broad outlines of its work and, to a large extent, the detailed provisions set out in the draft conclusions.

Perhaps the biggest issue of a general nature was whether there were in fact two categories of general principles of law. He agreed with the conclusion reached on first reading that there were indeed two categories. General principles of law were not limited to those derived from national legal systems; they could also be formed within the international legal system. While there had been a degree of ambiguity surrounding the term “general principles of law” in the drafting history of the Statute of the Permanent Court of International Justice, the identification of a category of general principles of law formed within the international legal system was not new and dated back even to that period. Legal scholar Bin Cheng, in his book *General Principles of Law as Applied by International Courts and Tribunals* of 1953, had addressed that very question, noting that: “Some writers consider that the expression refers primarily to general principles of international law and only subsidiarily to principles obtaining in the municipal law of the various States.” There was also evidence that States considered general principles of law to include general principles of international law.

It had rightly been noted that the difficulty lay in distinguishing general principles of law formed within the international legal system from customary international law and ensuring that the rigorous methodology for identifying customary international law was not undermined by a loose methodology for identifying that category of general principles. That difficulty was due to the fact that there had been an evolution, over time, in how customary international law was formed. Modern custom admitted of verbal practice, as the Commission itself had recognized in its work on identification of customary international

law, and did not rely purely on operational or concrete acts. In the case of verbal practice, it was easier to identify the existence of recognition or consent as a matter of customary international law. The question was thus what scope was left for general principles of international law that were recognized by States, often verbally. Despite that problem, it was not for the Commission to legislate away the category of general principles of law formed within the international legal system.

While he supported retaining the two categories of general principles of law, he was of the view that the Commission could improve its work by recognizing differences between the two.

First, recognition operated differently in the two categories. General principles of law derived from national legal systems must be recognized in a national legal system and must be transposed to the international legal system, as described in draft conclusion 6 and the accompanying commentary. It was not a requirement for States to explicitly recognize such principles as principles of international law. However, in the case of general principles of law formed within the international legal system, a more explicit form of State consent was required. That distinction was broadly captured by the text as a whole but could perhaps be brought out more clearly in the commentary.

Second, the relationship between each of those categories, on the one hand, and treaties and customary international law, on the other, was not the same, although draft conclusion 11 suggested otherwise. It seemed right that general principles of law formed within the international legal system were not in a hierarchical relationship with treaties and custom. However, that did not seem to be the case for general principles of law derived from domestic legal systems, which were resorted to in areas that were not explicitly regulated by treaties and custom. Once such areas were regulated by treaties and custom, it was hard to argue that rules derived from treaties and custom would not prevail over general principles of law. He would therefore prefer to see differentiation between the two categories in draft conclusion 11.

Third, at least one State had raised the issue of persistent objection to general principles of law. As he saw it, the principle of consent by States to international legal obligations was itself a general principle of law formed within the international legal system, since it reflected the basic features of that system. Therefore, if a State could demonstrate through persistent objection that it did not consent to a general principle of law formed within the international legal system, it ought not to be bound by that principle. However, the same could not be said of general principles of law derived from national legal systems. Once it was established that a principle was sufficiently widespread across the various legal systems of the world, as set out in draft conclusion 5, the fact that the principle was not established in the legal system of a particular State did not mean that the State was not already bound by that rule. He would be open to including a draft conclusion that dealt with persistent objection along those lines. Otherwise, the matter could be addressed in the commentaries.

He supported the wording of draft conclusion 2, under which it was established that general principles of law must be recognized by the “community of nations”. He had initially been attracted to the idea of referring to the “international community” instead, but that term might be interpreted as including non-State actors. He was not in favour of using the term “community of States”, as it might be regarded as excluding recognition by international organizations, which, in his view, could also play a role in the formation of general principles of law. By including the word “nations”, the Commission also adhered more closely to the language used in Article 38 of the Statute of the International Court of Justice, while removing the anachronistic word “civilized”.

Although he agreed with the substance of the points made in the new paragraphs that the Special Rapporteur had proposed to add to draft conclusion 2, he believed that their content should be included in the commentary and not in the main body of the text. In addition, the fact that general principles of law formed within the international legal system and general principles of law derived from national legal systems were not recognized in the same way should be brought out more clearly in the commentary to draft conclusion 2.

With respect to draft conclusion 7, the challenge facing the Commission was how to distinguish the methodology for identifying general principles of law formed within the

international legal system from the methodology for identifying customary international law and whether to make it more rigorous than what was currently provided in draft conclusion 7 (1) and the accompanying commentary. He was not convinced that the Commission needed to expand on the inductive and deductive processes that were set out in the commentary adopted on first reading. Like other members, he had reservations about paragraph 2 of draft conclusion 7 and would be in favour of its deletion.

He shared the Special Rapporteur's view that there was some State and judicial practice relating to general principles of law that existed only within a regional or subregional legal system and that the possible existence of such principles should not be excluded altogether. However, he had doubts about the wording of draft conclusion 12. It seemed contradictory to refer to "general" principles of law with a "limited" scope of application. To address that linguistic issue and make it clearer that the draft conclusion concerned the application of general principles of law *ratione personae*, he proposed rewording it to read: "The present draft conclusions are without prejudice to the existence of general principles of law that are applicable only to a part of the community of nations."

He would support the referral of the draft conclusions to the Drafting Committee.

**Mr. Ma** said that he wished to express his sincere gratitude to the Special Rapporteur for his outstanding work. The fourth report was comprehensive, clear and reflected a profound understanding of the sources and practices of international law.

He had noted that there was no disagreement about the existence of the first category of general principles of law set out in draft conclusion 3, namely general principles of law that were derived from national legal systems. However, different views had been expressed on the second category, consisting of general principles of law formed within the international legal system. To his mind, it was indeed possible for there to be a category of sources of law within the international legal system that was distinct from treaties and customary international law. Certainly, Article 38 of the Statute of the International Court of Justice did not limit general principles of law to principles derived from the domestic laws of various countries. Ever since the establishment of the principle of sovereign equality in the Charter of the United Nations, the term "civilized nations" in Article 38 had been understood as referring to all sovereign States. It was clear from the legislative history of the Statute that its drafters had not intended to limit general principles of law to the principles of domestic laws. Furthermore, thanks to the continuous enrichment of exchanges and cooperation between countries and the practices of international judicial and arbitral bodies, the international community's demand for international rules was steadily increasing.

The possible formation of principles of international law beyond treaties and customary international law could therefore not be ruled out. However, most of the examples of general principles of law formed within the international legal system that were referred to in the report were closely related to treaties and customary international law and thus fell within the scope of treaties and State practice. It was therefore to be hoped that the Special Rapporteur could provide, in the commentary, more persuasive examples of general principles of law formed within the international legal system.

Regarding the identification of general principles of law in that second category, many States had expressed the opinion that the criterion "intrinsic to the international legal system" in draft conclusion 7 was too general and difficult to identify in practice. It was therefore necessary to clarify that phrase and establish clear criteria for identification. To his mind, a number of criteria must be met: first, the principle must be independent of treaties and customary international law and belong to a distinct category of sources of international law; second, the principle must be recognized by States, widely accepted by the international community and characterized by universality, representativeness and consistency; third, it must reflect an intention by States to create rights and obligations; and fourth, it must be embodied in non-treaty documents such as resolutions of international organizations and non-legally binding international instruments.

States had expressed different views on the functions of general principles of law, which were addressed in draft conclusion 10. As he saw it, those functions were determined by the principles' legal status. Both general principles of law derived from domestic legal systems and those formed within the international legal system were independent sources of

international law at the same level as treaties and customary international law, and their functions were the same: first, they served as a basis for rights and obligations of States; and second, they complemented other rules of international law. He therefore suggested that the order of subparagraphs (a) and (b) of draft conclusion 10 (1) should be reversed.

Draft conclusions 8 and 9, which dealt with decisions of courts and tribunals and teachings as subsidiary means for the determination of general principles of law, actually reiterated the content of Article 38 (1) (d) of the Statute of the International Court of Justice. The draft conclusions should focus on general principles of law and not subsidiary means for the determination of rules of international law, which the Commission was considering as a separate topic. He therefore proposed that draft conclusions 8 and 9 should be placed after draft conclusion 11 on the relationship between general principles of law and treaties and customary international law.

He fully supported the referral of the draft conclusions to the Drafting Committee.

**Mr. Mingashang** said that he wished to associate himself with the compliments and words of support that the Special Rapporteur had received from other members of the Commission. Although general principles of law might appear at first to be a simple subject for international lawyers, the topic before the Commission in fact concerned one of the more complex aspects of the sources of international law. The apparent consensus on the status of “general principles of law” as a source of international law belied the historical and ideological forces behind that term.

Although the Special Rapporteur had not considered it necessary to include a definition of “general principles of law” in the draft conclusions, he had nonetheless drawn attention to the need for caution in the use of terminology. To that end, the Special Rapporteur had provided some clarification of the meaning of the terms “principles” and “general”. In his own view, however, the meaning of those concepts in any given situation generally depended on the vagaries of language and the power of the body wielding them for specific strategic purposes. The Commission should not shy away from attempting to define the conceptual framework within which key concepts such as “principles” and “general” could legitimately be applied. Such an exercise would be time-consuming and would inevitably result in doctrinal disagreements. However, that did not mean that the Commission should not prepare a draft conclusion on the definition of “general principles of law”. Otherwise, it would be in the awkward position of having a draft conclusion entitled “Scope” without explicitly defining what was to be applied within that scope.

His concern was brought into sharper focus by the use of the term “community of nations” in draft conclusions 2 and 7. Crucial questions remained unanswered regarding the qualitative and quantitative composition of the “community of nations” as the supreme entity in charge of validating emerging and/or converging trends. For example, what quantitative threshold needed to be reached in order for a group of countries to form the “community of nations”? What did the Special Rapporteur mean by his reference, in paragraph 48 of the report, to acceptance and recognition “by a very large and representative majority of States”? Could the Commission go so far as to establish, as referred to in paragraph 82, that general principles must have obtained “unanimous or quasi-unanimous support”? He agreed with those States that had called for more clarity on the term “community of nations”.

There was controversy among both States and Commission members regarding the methodology and criteria that had been set out for the identification of general principles of law. In the report, the Special Rapporteur stated that the methodology must be rigorous but also underlined the need for flexibility when formulating the criteria. The Commission must determine the limits of such flexibility to ensure that it did not undermine the legal certainty that must characterize any norm of a legally binding nature.

The use of comparative analyses to determine the existence of a principle common to the various legal systems of the world posed a number of problems, particularly in relation to language. The Special Rapporteur held that an assessment of the various legal systems of the world would necessarily call for consideration of the different languages in which those legal systems might operate. To his mind, however, it was not so simple. The way in which legal concepts were presented in the languages used by countries with a Romano-Germanic legal system, for example, was often different from the way in which they were presented in

Romance or Germanic languages. There were certain Central African countries whose legal systems belonged to the so-called Romano-Germanic family and where Swahili was an official language. However, the term “principles” in Swahili did not necessarily mean the same thing as the term “principles” in a Romance language.

To his mind, draft conclusion 7 (2) was tautological and superfluous. However, draft conclusion 7 (1) raised epistemological and ontological issues that should be discussed further in order to dispel ambiguities surrounding the methodology for identifying general principles of law formed within the international legal system.

The original function of general principles of law was to fill gaps in conventional and customary international law so as to avoid findings of *non liquet* and, in turn, limit the discretionary power of judges. That raised the question as to the extent to which general principles formed within the international legal system could be regarded as intrinsic to it. From an epistemological perspective, it was generally accepted that law was not a predefined set of rules but a dynamic construct, a view reflected in the comments on draft conclusion 7 submitted by Israel and the United States.

Draft conclusion 6 on the determination of transposition to the international legal system seemed likely to generate substantive debate. Concerns had been expressed with regard to the process of transposition and how it would work in practice. In reply, the Special Rapporteur had referred to the Nürnberg Principles, which were presented as an example to illustrate the methodology set out in draft conclusion 7 (1). As noted in paragraph 146 of the report, that assertion was based on the fact that the Commission had decided at its first session that, since the Nürnberg Principles had already been affirmed by the General Assembly, the task entrusted to the Commission was not to express any appreciation of those principles as principles of international law but merely to formulate them. Moreover, according to the Special Rapporteur, the Principles had been implicitly affirmed as general principles of law in the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

However, when considering the example of the Nürnberg Principles, it was essential to bear in mind the composition of the international community at the time and the origin and nature of the precepts behind the laws and customs of war. The unspoken truth was that the sociopolitical environment had been fundamentally Eurocentric and imbued with a tradition drawn from Christianity. That frame of reference in itself failed to meet all the conditions required for any project that was universal in scope. Thus, it was necessary to elucidate the process and psychological mechanisms by which those precepts had, ostensibly at least, become widespread. It was impossible to deny that a process of cultural imperialism and epistemic nationalism had taken place and continued to affect the codification of law.

In the report, the Special Rapporteur made reference to general principles of law that were universally applicable and that required recognition by the community of nations, and also expressed agreement with the view that many general principles of law were universally recognized legal postulates that had sometimes been the product of a long process of formation. Clarification of that position would be useful, particularly since the Special Rapporteur had also acknowledged that the question of whether general principles of law were by definition universally applicable was a complex one.

To his mind, the concept of universality was a Trojan horse by which an anthropological and spiritual perception specific to one part of the world was surreptitiously spread to the whole of human civilization. It was all the more suspect in the light of the ethical ambivalence used by the West to justify moral aberrations that had gone as far as the denial of humanity. It could therefore be concluded that any categorical claim of universality represented, in its own way, a form of symbolic violence.

It was important not to lose sight of the fact that the original sin of Article 38 (1) (c) of the Statute of the International Court of Justice was that it referred to general principles recognized by “civilized nations”. Ethnocentrism continued to affect the conception of modern international law, in which dominant categories of thought still reflected those of a part of the world whose cultural supremacy had been imposed by force.

It was therefore with good reason that Sierra Leone had stressed that general principles of law formed within the international legal system must reflect the diversity and pluralism of the contemporary international law landscape. He was also pleased to see that the Special Rapporteur agreed with Singapore that the recognition required for the identification of general principles law formed within the international legal system must be wide and representative, including the different regions of the world. Whether that condition had been fulfilled remained the major unresolved question in the Commission's work. The Special Rapporteur's task had not been an easy one. However, that had not prevented him from producing a report that was likely to facilitate debate within the Commission and the Drafting Committee with a view to producing a set of useful and intelligible draft conclusions for the benefit of the international legal community.

**Mr. Reinisch** said that he would like to congratulate the Special Rapporteur on his fourth report on general principles of law, which provided an excellent basis on which to complete the Commission's work on the draft conclusions.

He fully shared the view, expressed by many States and endorsed by the Special Rapporteur, that the inclusion of a list of examples of general principles of law in the draft conclusions could raise more issues than it solved. However, in his opinion, it would be helpful to provide more examples of general principles at various points in the commentaries.

He noted the Special Rapporteur's recommendation to retain the term "community of nations" in draft conclusion 2. That language was certainly preferable to the outdated term "civilized nations" used in Article 38 (1) (c) of the Statute of the International Court of Justice. However, by referring to a community of "nations" or "States", the Commission was missing an opportunity to acknowledge the development of public international law and the role played by international organizations. By replacing "community of nations" with "international community", the Commission would send a very clear and correct signal that it was no longer only States that were subjects of international law and formed the international community. He noted that some of the versions of draft conclusion 2 in the different languages already used terms that were very close to "international community", such as "*comunidad internacional*" in the Spanish text. The Special Rapporteur rightly pointed out in his report that general principles of law were primarily recognized by States. However, international organizations, as separate actors in international law, also played a role in recognizing them, and that role was not limited to the conduct of States in such organizations.

The European Union had referred to two treaty provisions for the purpose of demonstrating the role of international organizations in forming general principles of law, namely article 340 of the Treaty on the Functioning of the European Union and article 6 (3) of the Treaty on European Union. Those examples did not fully serve that purpose, however, since they both referred to general principles of law that were derived from the national laws of member States and had thus become binding on the European Union as general principles. For the Commission, it was much more important to determine the extent to which international organizations as actors in their own right could contribute to the formation and recognition of general principles. Evidence in that regard was more likely to be found in the context of dispute settlement in cases where the European Union had recognized a general principle of law.

Regarding draft conclusion 3, he remained sceptical about the relevance of the category of general principles of law formed within the international legal system. Although he was not opposed to that concept in principle, he had always held that it would be useful to offer examples that convincingly demonstrated that general principles could be formed in that way. Some of the examples included in paragraph 84 of the Special Rapporteur's report could equally be considered to constitute principles of customary international law, and it was unclear to what extent they could be separated from that source of international law. Specifically, the duty to make full reparation for any injury caused by an internationally wrongful act did not appear to be a principle derived from or formed within the international legal order. Rather, it seemed to be a typical example of a general principle derived from national law, one which underpinned tort law in basically all legal systems.

With regard to draft conclusion 6, he feared that the issue of “transposition”, which had given rise to substantial debate within the Commission and among States, was still not fully settled. While the title of the draft conclusion suggested that it could be used to determine whether transposition to the international legal order had occurred, the text itself concerned only the possibility of such transposition, which was conditional on compatibility with the international legal system. The question of whether “transposability” or “transposition” was the more appropriate term, which the Commission had previously discussed, remained unresolved.

The issue of compatibility was dealt with rather obliquely despite being a crucial condition for transposing, to the international level, a principle identified as being general in the sense of being widely present in national legal systems. In that regard, specific procedural and institutional arrangements were mentioned in paragraph 116 of the report. The Special Rapporteur had argued, in his second report (A/CN.4/741), that the right of access to courts was a principle that, while found in the domestic law of almost all States, could not be transposed to the international legal system because it would be incompatible with the principle of consent to jurisdiction in international law. That and other examples were better suited to explaining the meaning of “compatibility” for the purpose of transposition to the international legal order.

With regard to draft conclusion 7, the Special Rapporteur rightly noted that many States were still reluctant to accept the controversial category of general principles of law formed within the international legal system. He shared the view that the word “intrinsic” left the provision vague and open to misinterpretation. In particular, the “without prejudice” clause in paragraph 2 could open a Pandora’s box by seemingly dispensing with the criterion of being intrinsic and allowing for the possible existence of other general principles formed within the international legal system without establishing any criteria for their identification. He agreed with those States that had argued in favour of either deleting paragraph 2 or reformulating the draft conclusion as a “without prejudice” clause, which would state: “The current draft conclusions are without prejudice to the identification of general principles of law formed within the international legal system.”

He was not fully convinced by the Special Rapporteur’s assertion that the requirement that a principle should be recognized by the community of nations as intrinsic to the international legal system in itself encompassed the legally binding character of the principle. Moreover, it might not be sufficient to clarify in the commentary, as the Special Rapporteur had proposed, that the “recognition” must be “wide and representative, including the different regions of the world”.

The comparative analysis required under draft conclusion 5 was aimed at determining whether a principle existed in the various legal systems of the world. The principle should not be limited to a few legal systems; it should be in existence on a wide and representative basis. Under draft conclusion 7, however, what had to be determined to identify a general principle formed within the international legal system was not its existence but its recognition, which had to be given by a broad range of States. While that was a plausible argument, it might not be sufficiently clear from the current text of draft conclusion 7, which had no parallel to draft conclusion 5.

The Special Rapporteur’s examples of general principles of law that could be said to have formed within the international legal system were not fully convincing. For instance, it was by no means certain that the “principle of speciality”, which, as the Special Rapporteur noted, the International Court of Justice had identified in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* through an inductive analysis, considering the constituent instruments of international organizations and their objectives in the light of “the necessities of international life”, could be considered to be “intrinsic” to the international legal system. That principle might equally well be considered simply to follow from treaty law, as the constituent treaties of international organizations provided for only such powers as were expressly or implicitly given by the parties. It was not clear that there was any need to resort to what was characterized as a general principle of international law in that context.

With regard to draft conclusion 8 (2), he remained somewhat disappointed by the Commission's treatment of national court decisions as apparently secondary to decisions of international courts and tribunals. As he had consistently stated in the context of other topics relating to the sources of international law, no distinction was made in Article 38 of the Statute of the International Court of Justice between international courts and tribunals and national courts. The sole criterion for determining the value to be attached to the decisions of courts and tribunals should be the quality of their reasoning.

Concerning draft conclusion 9, the fact that the Commission was currently working on subsidiary means for the determination of rules of international law as a separate topic could be seen as casting doubt on the usefulness of including references to decisions of courts and tribunals and teachings. He agreed with the Special Rapporteur that there was merit in including such references and that doing so also followed logically from the tradition set by the Commission in its work on customary international law.

He was hesitant to support the Special Rapporteur's proposal that the current text, which was based on Article 38 of the Statute of the International Court of Justice, should be amended to include language developed in the context of the Commission's work on the topic of subsidiary means for the determination of rules of international law. On the one hand, as work on that topic remained ongoing, the Commission ran the risk of incorporating elements that would ultimately be discarded. On the other, the Commission had held an intensive debate about the criteria to be used for determining the relevance of teachings. Coincidence of views might not be the ultimate criterion, as truth and accuracy were not necessarily subject to a democratic decision-making process. It might be preferable to retain the original text.

He welcomed the proposed reordering of the two constituent paragraphs of draft conclusion 10. It was more logical to address the primary function of general principles of law in paragraph 1 and their gap-filling, secondary function in paragraph 2.

Lastly, he saw intrinsic value in the Special Rapporteur's proposal for a new draft conclusion 12 to recognize that the draft conclusions were without prejudice to the existence of general principles of law with a limited scope of application. In particular, the draft conclusions ultimately adopted by the Commission should not exclude the possibility that general principles of law could form on a regional basis. That said, he agreed with those who had proposed making the words "scope of application" more precise, and the question of whether "scope" was meant in a purely geographical sense could be discussed.

He was confident that the Commission would be able to conclude its work on the topic and fully supported the referral of all the draft conclusions to the Drafting Committee, where, he hoped, the necessary agreement could be found to finalize the text.

**Mr. Ruda Santolaria**, thanking the Special Rapporteur for an excellent fourth report, said that the topic was an important one because, as noted throughout the report, general principles of law constituted an autonomous source of international law.

According to draft conclusion 2, for a general principle of law to exist, it must be recognized by the international community. The term "international community" was used instead of the clearly anachronistic phrase "civilized nations" from Article 38 (1) (c) of the Statute of the International Court of Justice. He agreed with the Special Rapporteur that, while it was primarily recognition by States that contributed to the formation of general principles of law, recognition by international organizations could also contribute to their formation. Unlike peremptory norms of general international law (*jus cogens*), in which context there could be no question of a "regional *jus cogens*", general principles of law with a limited scope of application could indeed be found to exist, as the Special Rapporteur rightly explained. The "without prejudice" clause in draft conclusion 12 covered that possibility.

Regarding draft conclusion 3, he agreed with the Special Rapporteur, as he had at the first-reading stage, that there existed two categories of general principles: those derived from national legal systems and those formed within the international legal system. The principle of sovereign equality was an illustrative example of a principle in the second category. As

noted by the Special Rapporteur, no distinction should be drawn between those categories in terms of their functions and relationship with other rules of international law.

He supported the two-step analysis for identifying general principles of law derived from national legal systems, as set out in draft conclusions 4 and 5, and the Special Rapporteur's view that the determination of the existence of a principle common to the various legal systems of the world required a comparative analysis that must be wide and representative, including different regions of the world. As noted by Brazil, linguistic diversity was another factor that must be taken into account when conducting the comparative analysis necessary to identify general principles derived from national legal systems. He agreed with the Special Rapporteur that general principles of law were an unwritten source of international law, meaning that recognition at the international level was implicit and presumed when certain conditions were met. However, as the Special Rapporteur noted, that presumption was rebuttable, as transposition was not automatic.

Concerning draft conclusion 7, he agreed with Ecuador that principles that were intrinsic to the international legal system were those that "reflected or regulated the basic characteristics of, and were inherent to and essential for the functioning of the system" and with Singapore that recognition by the international community in the context of the second category must be wide and representative, including the different regions of the world. He supported the Special Rapporteur's conclusion that the principle of speciality, which governed international organizations, could be considered to be intrinsic to the international legal system. At the same time, as noted in the report, concrete evidence was required in order to demonstrate that a principle existed and was recognized by the international community as intrinsic to the international legal system.

With regard to draft conclusion 9, the Philippines had made the highly pertinent observation that the term "teachings" included those in both written and unwritten forms, such as lectures and audiovisual materials.

The Holy See had observed that the diverse nature of general principles of law was relevant to draft conclusion 10. It was explained in the report that principles such as the sovereign equality of States had a "constitutional nature" insofar as they underpinned the entire application of international law.

Concerning draft conclusion 11, he agreed with Brazil that there was no hierarchical relationship among the sources of international law and that a general principle of law could exist "in parallel with treaty or customary rules having identical or analogous content".

As noted by the Special Rapporteur, general principles of law within the meaning of Article 38 of the Statute of the International Court of Justice were an autonomous source of international law. They usually played a supplementary role, as they tended to be *lex generalis*, in contrast to treaty or customary rules on the same issue, which operated as *lex specialis* and took precedence over them.

He agreed that the final outcome of the Commission's work on the topic should be a set of draft conclusions, which would be consistent with the Commission's work on the topics of identification of customary international law and peremptory norms of general international law (*jus cogens*), and that all the draft conclusions set forth in the report should be submitted to the Drafting Committee.

**The Chair**, speaking as a member of the Commission, said that the Special Rapporteur was to be commended for the clarity of structure and reasoning of his fourth report and his thorough engagement with the input provided by States.

To adapt Judge Greenwood's comment on equity from his declaration in respect of the 2012 judgment of the International Court of Justice in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, general principles of law were not alchemy. Readers of the Commission's draft conclusions and the commentaries thereto should be able to learn both what general principles of law were and how they related to such terms as "general international law", "principles of international law", "*jus cogens*", "domestic law" and, in particular, "customary international law". Technical precision mattered, as noted in the International Law Association report "The use of domestic law principles in the

development of international law” and in the statements made by Ms. Galvão Teles, Ms. Ridings and Mr. Zagaynov.

Like Mr. Ruda Santolaria, he agreed with the Special Rapporteur’s proposals concerning the final form of the Commission’s work and the recommendations to be made to the General Assembly.

He agreed with the proposal not to amend draft conclusion 1 and with the overall approach taken in that regard, including the emphasis on the utmost importance of being careful with terminology. He also agreed that the word “general” in “general principles of law” referred to their general scope of application rather than to the abstract or specific character of their content. Adjectives such as “vague” and “concrete” could be used to explain the latter antinomy more precisely in the commentary; all norms attached abstractly determined consequences to equally abstractly determined material facts, as Hans Kelsen had explained.

As should be noted in the commentary, another meaning of “general” was the opposite of “special”. In its 2018 judgment in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, the International Court of Justice had rejected the argument that there existed in general international law “a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation” merely because references to legitimate expectations could be found in arbitral awards concerning disputes between a foreign investor and the host State that applied treaty clauses providing for fair and equitable treatment. One reading of the corresponding passage of the judgment was that specialist fields usually did not give rise to general principles of law of the second category.

The Special Rapporteur might wish to add to paragraph (2) of the commentary a reference to the invocation of general principles of law by States before international courts and tribunals, to confirm such principles’ practical relevance. In that context, an interesting additional reference was the discussion of liability for damages caused by provisional measures in the verbatim records of the public sittings held in relation to *Passage through the Great Belt (Finland v. Denmark)*.

With regard to draft conclusion 2, like all other members who had expressed their views on terminology, he welcomed the decision to replace the phrase “civilized nations” and was, like Mr. Sall and several other members, persuaded that “community of nations” was an appropriate alternative.

While he understood the reasons for the Special Rapporteur’s proposal to add three paragraphs to the draft conclusion, he would prefer to retain the first-reading text. The analogy with the Commission’s work on identification of customary international law was not fully persuasive, as the legal issues in the two cases were different. In the context of identification of customary international law, conduct relating to matters of international law had to be known to other States. Conversely, the requirement of “recognition” in Article 38 (1) (c) of the Statute of the International Court of Justice could be satisfied by the existence of domestic rules and be implicit when the compatibility test was fulfilled. Explicit alignment of the Commission’s outputs on the two topics could misleadingly suggest that general principles of law were underpinned by the same dynamic of claims, acknowledgements and assertions by participants that was usual for customary international law, as described in paragraph 55 of the International Court of Justice judgment in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. Mr. Fathalla and Ms. Galvão Teles had made similar points. Such matters were better addressed in the commentary.

He was open to the Special Rapporteur’s proposal for a new draft conclusion 12. As a matter of substance, given the limited practice outside specialized, regional settings and uncertainty about how the general methodology would apply, general principles of law with a limited scope of application might be best addressed not in a “without prejudice” clause but as *lex specialis*, by analogy with the treatment of binding precedent in draft conclusion 7 of the draft conclusions on subsidiary means for the determination of rules of international law, as provisionally adopted by the Drafting Committee. By analogy with conclusion 16 of the Commission’s conclusions on identification of customary international law, “particular principles of law” might be a more precise operative phrase.

The United States and, previously, Israel might have raised the issue of the “persistent objector” to general principles of law with an eye to investment protection law. Investor-State arbitral tribunals had found that States had to act proportionally and had to respect the legitimate expectations of investors. One example from the International Centre for Settlement of Investment Disputes was the 2012 award in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*. In that award, reference was made solely to European domestic approaches to import an obligation of proportionality into fair and equitable treatment. The United States had objected to such arguments in various ways. Moreover, it would indeed be odd, as Mr. Zagaynov had noted, if arguments were held to be ineffective in relation to one source of general international law but not in relation to another. That issue could be addressed either in the commentary or in another “without prejudice” element of draft conclusion 12.

Concerning draft conclusion 3, like Mr. Forteau, he remained agnostic as to the existence of the second category of general principles of law. It could reasonably be argued both that the examples provided by the Special Rapporteur required the existence of that category and that they could be explained by other means. The question continued to be robustly debated. In Chinese scholarship, the rejection of the second category had seemed dominant since the writings of Zheng Duanmu and Tieya Wang in the 1980s and 1990s, but more recent writings, such as those of Guoqiang Luo and Chao Su, suggested a qualified, more favourable reading.

After considerable reflection, he supported the Special Rapporteur’s proposal not to amend draft conclusion 3. If the Commission agreed that international law itself, like any legal system, had the capacity to generate principles specific to it, the suggestion by the Nordic countries and the Kingdom of the Netherlands to harmonize subparagraphs (a) and (b) by using the same verb or no verb at all was worth further consideration.

That said, he encouraged the Special Rapporteur to focus on the strongest version of the argument by locating the second category, to the extent possible, within the international legal order of the United Nations era and citing only authorities of direct relevance.

As noted by several members, some of the examples adduced in support of the second category seemed overstated. For instance, non-intervention was a rule of custom, in the light of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Other examples, such as almost everything related to courts and tribunals and the duty to make reparation for an internationally wrongful act, which, in the *Case concerning the Factory at Chorzów*, was based on the assumptions of domestic tort law (equality of parties, rectification of wrongful violation of private rights, exclusive focus on the relations between the victim and the wrongdoer and irrelevance of considerations external to that relationship), were general principles of law of the first category. Still other examples depended almost entirely on the benefit of hindsight, such as the great weight given, in paragraphs 82 and 83 of the Special Rapporteur’s report, to brief and ambiguous remarks made in the Advisory Committee of Jurists.

It could be mentioned in the commentary that certain general principles of law could be simultaneously shaped by considerations in both categories. For example, in the award of 18 March 2015 in the *Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland*, estoppel was explained both as having a domestic law counterpart and as stemming from the general requirement that States should act in their mutual relations in good faith.

With regard to the first category of general principles of law, he supported the Special Rapporteur’s proposal not to make any amendments to draft conclusions 4 to 6.

In relation to draft conclusion 5, the Special Rapporteur’s correct observation that many general principles of law were universally recognized legal postulates that were sometimes the product of a long process of formation should not be taken as applying to all general principles of law. The national legal systems suitable for the identification of general principles of law could also change rapidly, whether by means of legislative reform and judicial development, accession to or withdrawal from international organizations empowered by delegation to issue legislative acts on a variety of matters, or attainment of independence from alien subjugation.

He was not persuaded of the relevance of the 1970 judgment of the International Court of Justice in *Barcelona Traction, Light and Power Company, Limited*, which was quoted in paragraph (4) of the commentary to draft conclusion 5 and relied upon elsewhere. While the relevant paragraph of that judgment was not a model of clarity, a better reading was that the Court had addressed domestic law by way of a *renvoi* from international law rather than as an ingredient for general principles of law.

In relation to draft conclusion 6, he appreciated the nuance and subtlety with which the parameters of transposition of general principles of law were calibrated in paragraphs 115 to 119 of the report. Further relevant arbitral authorities were cited in the report of the International Law Association, and the award in the *Chagos* arbitration included discussion of the way in which the analogous rules regarding estoppel differed between domestic and international law.

With regard to draft conclusion 7, he was open to the Special Rapporteur's proposal for a narrowly delineated category of general principles of law formed within the international legal system that were distinct from customary international law and determined by a rigorous methodology.

As proposed by Poland, the Commission could align the methodology for identifying principles in the second category with that for identifying principles in the first, as set out in draft conclusions 4 to 6. Issues of approach, methodology and evidence, which were currently addressed in paragraphs (3) and (4) of the commentary to draft conclusion 7, could be moved to a new draft conclusion 7 *bis*. Mr. Forteau had made a similar proposal.

The underlying logic of draft conclusion 7 might be that paragraph 1 addressed principles intrinsic to the international legal system, whereas paragraph 2 addressed those implicit in specialist fields of international law. If that was the case, the former would cover consent to jurisdiction, elementary considerations of humanity, sovereign equality of States and speciality. The latter would include, in the field of human rights and humanitarian law, human dignity; in international criminal law, the Nürnberg Principles; and, in environmental law, the precautionary approach, which was described as "implicit in the very notion of pollution of the marine environment" in paragraph 213 of the 2024 advisory opinion rendered by the International Tribunal for the Law of the Sea in response to the request by the Commission of Small Island States on Climate Change and International Law. The distinction that he was suggesting was analogous to that between communitarianism in generalist settings and in specialist settings in the context of obligations *erga omnes* and *erga omnes partes*, and was also alluded to in *Obligation to Negotiate Access to the Pacific Ocean*.

He was open to Mr. Oyarzábal's suggestion that paragraph 2 could be deleted in the light of the addition of the new draft conclusion 12.

With regard to draft conclusion 11, for practical rather than dogmatic reasons, he partly agreed with the concerns raised by the Russian Federation regarding paragraph 2, to the extent that it provided that a general principle of law could exist in parallel with a rule of the same or similar content in customary international law. If a general principle of law was not sufficiently invoked in State practice, it would not exist in customary international law. However, if sufficient practice and *opinio juris* did emerge, it was not obvious that another source of general international law would "exist" in a meaningful sense in the presence of customary international law. Non-intervention might be an example of a general principle of law entirely overtaken by customary international law.

One solution might be to provide examples of situations of that parallelism, perhaps in the field of human rights law, where progressive developments in domestic law could develop general principles of law beyond the more conservative customary law shaped by direct inter-State interaction, by analogy with the way in which some regional human rights courts took domestic practice into account in the process of treaty interpretation. Another option would be to explain, in the commentary to draft conclusion 11 (3), that "generally accepted techniques" in practice usually led to application of customary international law.

Lastly, the commentaries to draft conclusions 10 and 11 could provide further guidance on the practical operation of their elements in respect of different types of general principles of law, to respond to the suggestions made by various States.

In conclusion, he supported the referral of all the draft conclusions to the Drafting Committee in the light of the debate.

*The meeting rose at 12.55 p.m.*