

## Chapter IX General principles of law

### A. Introduction

202. The Commission, at its seventieth session (2018), decided to include the topic “General principles of law” in its programme of work and appointed Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur.

### B. Consideration of the topic at the present session

203. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/732). In his first report, the Special Rapporteur addressed the scope of the topic and the main issues to be addressed in the course of the work of the Commission. The report also addressed previous work of the Commission related to general principles of law and provided an overview of the development of general principles of law over time, as well as an initial assessment of certain basic aspects of the topic. The Special Rapporteur proposed three draft conclusions. He also made suggestions for the future programme of work on the topic.

204. The Commission considered the report at its 3488th to 3494th meetings, from 23 to 30 July 2019.

205. At its 3494th meeting, on 30 July 2019, the Commission decided to refer draft conclusions 1 to 3, as contained in the Special Rapporteur’s first report, to the Drafting Committee, taking into account the views expressed in the plenary.<sup>1483</sup>

206. At its 3503rd meeting, on 7 August 2019, the Chair of the Drafting Committee presented an interim oral report of the Drafting Committee on draft conclusion 1, provisionally adopted by the Drafting Committee. The report was presented for information only and is available on the website of the Commission.<sup>1484</sup>

207. At its 3507th meeting, on 9 August 2019, the Commission requested the Secretariat to prepare a memorandum surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for its future work on the topic.

#### 1. Introduction by the Special Rapporteur of the first report

208. The Special Rapporteur introduced his report by making some general observations. He noted that general principles of law are an important component of the international legal system and that this source of international law could be usefully clarified by the Commission almost a century after its inclusion in Article 38 of the Statute of the Permanent Court of International Justice.

<sup>1483</sup> The draft conclusions proposed by the Special Rapporteur in his first report read as follows:

**“Draft conclusion 1**

**Scope**

The present draft conclusions concern general principles of law as a source of international law.

**Draft conclusion 2**

**Requirement of recognition**

For a general principle of law to exist, it must be generally recognized by States.

**Draft conclusion 3**

**Categories of general principles of law**

General principles of law comprise those:

- (a) derived from national legal systems;
- (b) formed within the international legal system.”

<sup>1484</sup> <http://legal.un.org/ilc/guide/gfra/shtml>.

209. The Special Rapporteur stressed that, by adopting a cautious and rigorous approach, the Commission could provide guidance to States, international organizations, courts and tribunals, and all those called upon to use general principles of law as a source of international law.

210. The Special Rapporteur noted that reactions by Member States in the Sixth Committee to the inclusion of the topic in the programme of work of the Commission were generally very positive, with only one Member State expressing concern that there was insufficient State practice to study it appropriately. He mentioned that many delegations welcomed the Commission's decision to address the topic, which will complement its work in relation to other sources of international law. He added that several delegations also considered that the Commission may provide an authoritative clarification of the nature, scope and functions of general principles of law, as well as the criteria and methods for their identification. The Special Rapporteur also noted the considerable interest for the topic demonstrated by a study group of the International Law Association and through the various academic publications and events organized on the topic.

211. The Special Rapporteur drew the attention of members of the Commission to the French and Spanish versions of his first report. The Spanish version of the report contains the terminology "principios generales *del* derecho" whilst Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, refers to "principios generales *de* derecho". The French version of the report refers to "principes généraux *du* droit", while the Statute of the Court refers to "principes généraux *de* droit". In his view, these differences were not substantive and the terminology used in the report could be maintained, since these expressions ("*del* derecho" and "*du* droit") have been used in international instruments, such as the Rome Statute of the International Criminal Court, in doctrine and by the Commission itself in its recent work, including in the topic "Identification of customary international law".

212. The Special Rapporteur explained that the first report was preliminary and introductory in nature, and that its main purpose was to lay the foundation of the Commission's work on the topic and to obtain the views of members of the Commission and States in this regard.

213. The Special Rapporteur indicated that the report was divided into five parts: Part One deals with general matters; Part Two deals with the Commission's previous work on the topic; Part Three with the development of the topic over time; Part Four provides an initial assessment of certain basic aspects of the topic, namely the elements and origins of general principles of law; and Part Five sets forth a tentative future programme of work. The report also proposed three draft conclusions.

214. Part One of the report sets forth the scope of the topic and raised four interrelated issues to be considered by the Commission: (i) the legal nature of general principles of law as a source of international law and the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice; (ii) the origins of general principles of law; (iii) the functions of general principles of law and their relationship with other sources of international law; and (iv) the identification of general principles of law. Certain aspects related to methodology were also highlighted, namely how to select relevant materials for the study of the topic in light of the imprecise terminology employed in the literature and in practice (e.g. "principle", "general principle", "general principle of law", "general principle of international law", "fundamental principle of international law"), and a non-exhaustive list of factors to be considered to determine the relevance of materials. The Special Rapporteur further considered that, as in the case of the topic "Identification of customary international law", the examples of general principles of law that may be referred to in the work of the Commission must be illustrative only and contained in the commentaries to the draft conclusions, and that the Commission should not delve into their substance.

215. Part Two of the report addresses the Commission's previous work related to the topic. The Special Rapporteur noted that general principles of law have appeared in the work of the Commission since its early years; that general principles of law seem to have been codified in the context of some topics, such as the law of treaties and responsibility of States for internationally wrongful acts; and that certain aspects of the present topic had

been previously studied or discussed, albeit in general briefly, by the Commission, such as in the topics on fragmentation of international law, and identification of customary international law. He stressed that the previous work of the Commission must be taken into account in an appropriate manner.

216. Part Three of the report, which deals with the development of general principles of law over time, had two main objectives: (i) to provide context to the topic and (ii) to provide relevant materials for the study of general principles of law by members of the Commission. The Special Rapporteur highlighted that section A focused on references to general principles of law in international instruments while section B addressed general principles of law in the case law of international courts and tribunals. The Special Rapporteur stressed that, while section B focused almost exclusively on examples from judicial settlement of disputes, this did not mean that this is the only context in which general principles of law applied. As a source of international law, they apply to the relations between subjects of international law generally. He added that the materials referred to in this section were not exhaustive and that, taking into account the materials available, there was sufficient State and international judicial practice for the Commission to address this topic adequately. The Special Rapporteur also indicated that the first report briefly mentioned practice related to general principles of law of a regional scope and the practice of international administrative tribunals, and indicated that he would welcome the views of members as to whether these should be studied further.

217. Part Four of the report provides first an initial assessment of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, which refers to “the general principles of law recognized by civilized nations”. The Special Rapporteur identified three interrelated elements, namely “general principles of law”, “recognized” and “civilized nations”. Part Four also addressed the question of the origins of general principles of law. The Special Rapporteur stressed that the position of the Commission on this latter question would be decisive as to how the topic would be addressed in the future.

218. The Special Rapporteur raised the question whether “general principles of law” in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice share any characteristics with the “general principles” that exist in national legal systems. He noted that, while it may be said that they share some common features, such as their function of filling gaps, their characteristics are probably to be distinguished due to the structural differences between the international legal system and national legal systems. Another issue that the Special Rapporteur pointed to for consideration by the Commission is the possible distinction between the terms “principle” and “rule” or “norm”. The Special Rapporteur indicated that the doctrine is not unanimous on this matter. He recalled that both the International Court of Justice and the Commission have expressed that the term “principle” refers to a more “general” and “fundamental” norm than other norms of international law. The report preliminarily concludes that, while general principles of law may have a more “general” and “fundamental” character, it cannot be excluded, having regard to existing practice, that there may exist general principles of law which do not have these characteristics. Another issue addressed in Part Four of the report is the relationship between general principles of law and “general international law”. The Special Rapporteur indicated that it is clear that the term “general international law” includes general principles of law, as has been recently reiterated by the Commission in the commentary of the draft conclusions on the identification of customary international law, which implies that they are universally applicable. However, a reference to “general international law” is not to be necessarily understood as a reference to general principles of law. Each case should thus be examined in its context.

219. Part Four of the report also addressed the meaning of the term “recognized” in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. The Special Rapporteur stated that recognition was the essential condition for the existence of a general principle of law, in accordance with the text of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice and the *travaux préparatoires* of the Statute of the Permanent Court of International Justice. The Special Rapporteur indicated that the drafters of the Statute considered that the formal validity of general principles of law would be based on their recognition by “civilized nations”. This recognition would constitute an

objective basis that would address the drafters' concern not to afford to a judge excessive discretion in the determination of the law. This objective could be achieved with the recognition of a principle by States in general, a condition that did not depend on the subjective view of a judge or a particular State. The Special Rapporteur also stressed that the essential condition of recognition of general principles of law differs clearly from the essential conditions for the identification of customary international law, namely a general practice and its acceptance as law (*opinio juris*).

220. As to the term "civilized nations", the Special Rapporteur considered that it should not cause major difficulties for the work of the Commission. He noted that, while this term may have had a particular meaning in the past, it has become anachronistic and should be avoided. Taking into account existing practice and the principle of sovereign equality, this term must be understood as referring to all States of the international community. The Special Rapporteur indicated that this conclusion did not exhaust all the questions that arise regarding whose recognition is required, and that he would welcome the views of members of the Commission on issues that would need to be addressed in a future report, such as the degree of recognition that a general principle of law must have, whether international organizations could also contribute to the formation of general principles of law, and the particular role that international courts and tribunals may play in this matter.

221. Section II of Part Four of the first report deals with the origins of general principles of law and corresponding categories. The Special Rapporteur reiterated that this fundamental issue would determine the work of the Commission in the future. In view of existing practice and literature, the report addresses two categories of general principles of law: those derived from national legal systems and those formed within the international legal system. The Special Rapporteur indicated that other categories have been proposed in doctrine, but that they were somewhat vague, could allow excessive discretion and did not find sufficient support in practice, at least in a clear manner, and therefore were not addressed in the first report.

222. The category of general principles of law derived from national legal systems finds support in the practice prior to the adoption of the Statute of the Permanent Court of International Justice, in the *travaux préparatoires* of the Statute, as well as broadly in current State and international judicial practice. The Special Rapporteur indicated that the identification of principles falling within this category required a two-step analysis: (i) the identification of a principle common to the generality of national legal systems or principal legal systems of the world; and (ii) the determination of whether such principle is applicable in the international legal system (sometimes referred to as "transposition").

223. The second category of general principles refers to general principles of law formed within the international legal system. The Special Rapporteur stressed that nothing in the *travaux préparatoires* of the respective Statutes of the Permanent Court of International Justice and the International Court of Justice, nor their text, suggested that general principles of law are limited to those derived from national legal systems. He recalled that, in the Advisory Committee of Jurists, although there was general agreement among its members that the general principles of law could derive from national legal systems, the possibility that they may have other origins was not excluded. The existence of this category could also be explained on the basis that, if the function of general principles of law is to fill gaps, then it would be logical to have recourse to it, since general principles of law derived from national legal systems may not be sufficient to perform such function. State practice and international jurisprudence, as well as the literature, also support the existence of this category.

224. Finally, with respect to the future work of the Commission, the Special Rapporteur proposed that the second report address the functions of general principles of law and their relationship to other sources of international law, and that the third report be dedicated to the identification of general principles of law. The Special Rapporteur indicated his flexibility on the order in which these aspects of the topic should be addressed and would welcome views of members of the Commission thereon.

## 2. Summary of the debate

### (a) General comments

225. Members welcomed the first report of the Special Rapporteur and noted with appreciation that it was well structured and researched. Members noted its “preliminary and introductory” nature. Some members indicated that their comments were also preliminary until the Commission had an opportunity to progress in its work. It was agreed that a number of issues would need to be further addressed and nuanced in the course of future work on the topic, in particular regarding the scope of the topic, as well as the elements and origins of general principles of law, and their identification.

226. With respect to the terminology to be used in French and Spanish, some members expressed the view that it would be important not to depart from the precise terminology contained in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice in the title of the topic and in the Commission’s documentation.

227. Some members agreed that this topic was relevant not only because general principles of law were essential in the judicial context, but also because they were generally applicable between States. A view was expressed, however, that, while it was important for the Commission to consider the topic, general principles of law within the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice did not play a very important role in practice.

#### (i) *Scope and outcome of the topic*

228. Several members stressed that the scope of the topic refers to general principles of law as a source of international law. A number of members supported limiting the scope of the topic to general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, but not limited to its application by the Court, and in the light of the practice of States and of international courts and tribunals. Some members suggested that the Commission could consider revising the title of the topic to clarify its scope.

229. It was agreed by a number of members that the Commission should not delve into the substance of general principles of law, although it could provide illustrative examples. Some members proposed that an illustrative list of general principles of law be prepared and provided as an annex, while others stressed that this would be an incomplete exercise and could become a distraction from the core issues. Several members considered that illustrative examples of general principles of law could be included in the commentaries together with all relevant materials.

230. Members generally agreed with the issues set forth for consideration by the Commission in the Special Rapporteur’s first report, namely: (i) the legal nature of general principles of law as a source of international law; (ii) the origins of general principles of law; (iii) the functions of general principles of law and their relationship with other sources of international law; and (iv) the identification of general principles of law. Some members, however, expressed doubts as to the proposed order in which these issues would be addressed.

231. With respect to the legal nature of general principles of law as a source of international law, members agreed that Article 38, paragraph 1 (c), of the Statute of the International Court of Justice provided an authoritative statement in this sense, which is moreover corroborated in the practice of States and international courts and tribunals. One member questioned the meaning of the term “source” and whether it included formal sources, material sources, judicial sources, historical sources and literary sources, while other members found the common understanding of this term sufficiently clear for the Commission to advance in its work, which is the form by which a legal rule or principle comes into existence. Several members noted that general principles of law must be afforded autonomy from the other sources. While it was noted that there was no hierarchy among the sources of international law, some members stressed that, in practice, general principles of law played a role of filling gaps. The view was expressed that general principles of law were a secondary source of international law, which played a “subsidiary”

role. Some members indicated, however, that the Commission should avoid describing general principles of law as subsidiary and that the term “supplementary” was a more appropriate description.

232. With respect to the functions of general principles of law and their relationship with other sources of international law, members agreed with the Special Rapporteur that this issue would require careful consideration. Members generally supported the Special Rapporteur’s conclusion that the *travaux préparatoires* of Article 38 of the Statute of the Permanent Court of International Justice suggested that the inclusion of general principles of law as a source of international law was driven by a concern to avoid findings of *non liquet*, and that the purpose of the elements provided in this article was to limit judicial discretion in the determination of international law. Some members indicated that general principles of law could have other possible functions, such as to serve as an interpretative tool, and that they serve as sources of rights and obligations. Some members expressed doubt as to whether the meaning of *non liquet* and its prohibition under international law should be addressed as this fell outside the scope of the topic.

233. Members agreed that the distinction between general principles of law and customary international law would be important for the topic. In particular, some members noted that, if the distinction was not clearly explained, there may be a certain confusion between these two sources of international law. Some suggested that these two sources could be distinguished, for example, by their process of coming into existence and the conditions they must fulfil for doing so. The view was expressed that it may sometimes be difficult to differentiate general principles of law from customary international law. Some members indicated that it would be important for the Commission to examine not only the relationship of general principles of law with treaties and customary international law, but also with equity. Further, it was suggested that general principles of law and principles regulating the various branches of international law should also be examined.

234. Members generally agreed that draft conclusions would be an appropriate form with respect to the outcome of the topic. The view was expressed, however, that draft guidelines or draft articles would be a more appropriate outcome. A view was also expressed that the Commission should remain open and make such determination at a later stage of its work.

(ii) *Methodology*

235. Members generally agreed with the methodology proposed by the Special Rapporteur and reiterated the importance of a cautious approach. Some members indicated that, while the practice of States and the jurisprudence of international courts and tribunals were a good starting point, as proposed by the Special Rapporteur, jurisprudence of national courts, the output of international organizations and the literature would also be relevant. A view was expressed that focus should also be placed on regional entities, such as the Inter-American Juridical Committee and Inter-American Court of Human Rights. The suggestion was made that it would be relevant to examine soft law instruments.

236. According to a view, the Commission should avoid settling theoretical debates and should aim at providing practical solutions. It was also noted that the Commission should be transparent if State practice was insufficient and that it would be challenging to canvas global information relating to this topic to analyse all major legal systems. Members also agreed with the Special Rapporteur regarding the imprecision of the language used in previous work and literature. Some members suggested that a measure of flexibility may be needed by the Commission to accommodate the specificities of the many areas of international law upon which this topic would touch.

(b) **Previous work of the Commission and development of general principles of law over time**

237. Members welcomed the analysis of the historical background provided by the Special Rapporteur. In particular, it was stressed that general principles of law were historically largely derived from national legal systems and Roman law and applicable only when a specific matter was not regulated by other sources of law. Several members noted that the *travaux préparatoires* of the Statute of the Permanent Court of International Justice

should be seen in that context, since at the time of its adoption, international law did not regulate the issues involved in many areas, and general principles of law were intended to provide the judge with an alternative to a finding of *non liquet*. It was noted that the link between general principles of law and the European *ius commune* could have been assessed in the report and that these historical antecedents may assist the Commission in getting a sense of what was meant by general principles of law.

238. Some members noted that caution was required when characterizing the Commission's previous work. In addition, some members questioned the usefulness of reviewing references to general principles of law in specific treaty regimes, while several members supported it. Some members questioned why the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations had not been mentioned in the report.

**(c) Elements of general principles of law**

239. Members generally agreed with the Special Rapporteur's approach of looking separately at the three elements of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Several members highlighted the distinction between "general principles of law" and "general principles of international law" and stressed that their relationship would need to be addressed. Further, a number of members noted that the term "general" and "principles" would need thorough analysis. In this connection, the suggestion of the Special Rapporteur to closely examine the distinction between a "principle" and "norm" or "rule" was supported by several members. Some members supported the Special Rapporteur's explanation regarding the "general" and "fundamental" nature of a principle, although the specific meaning of these terms was questioned. Other members indicated that not all general principles of law necessarily have those characteristics, as mentioned in the report and shown by existing practice.

240. The possibility of addressing "regional" or "bilateral" general principles of law was welcomed by some members, while others expressed doubts as to whether it would be appropriate, and some suggested that it was premature for the Commission to examine this issue at this early stage of its work. In particular, it was stressed that they did not fall within the scope of the topic and it was stated that the term "general" in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice entailed the applicability of general principles of law to "all States", excluding "regional" or "bilateral" general principles of law. Some members suggested that the Commission revert to this issue as its work progresses, in light of further research. Finally, several members were of the view that the term "law" would also merit closer examination, for example to determine whether it encompasses both national and international law.

241. Members generally agreed that the element of "recognition" was essential to the identification of general principles of law and supported the suggestion by the Special Rapporteur to study further this specific requirement in a future report. Members highlighted the delineation between recognition, as a requirement for general principles of law, and acceptance as law, as an element of customary international law. Some members further made clear that they did not view the requirement of "recognition" as similar to the element of "acceptance as law" relevant in the context of customary international law.

242. Further, members generally supported the two-step analysis proposed by the Special Rapporteur regarding recognition with respect to general principles of law derived from national legal systems – (i) the identification of a principle common to a sufficiently large number of national legal systems and (ii) the determination of whether such principle is applicable in the international legal system. Several members agreed that this two-step analysis and each of its elements would have to be examined closely. A number of issues were raised with respect to this matter, such as whether the same recognition would apply to the two categories of general principles of law proposed by the Special Rapporteur; the level or degree of recognition needed, and in particular the meaning of a "sufficiently large majority"; whose recognition is required; the role of States in the transposition stage; the role, if any, of international organizations; and whether the term "transposability" was more accurate than "transposition".

243. Members generally agreed that the term “civilized nations” was inappropriate and outdated and should not be used in the context of the present draft conclusions. Some members supported the Special Rapporteur’s proposal to refer instead to “States”, while others cautioned that this term may not encompass all actors involved in the formation of general principles of law, including international organizations. Some members expressed the view that the term “nations” should be further considered. It was also suggested to use the term “community of nations”, contained in article 15, paragraph 2, of the International Covenant on Civil and Political Rights: “general principles of law recognized by the community of nations”.

**(d) The origins of general principles of law as a source of international law**

244. Several members agreed with the two categories proposed by the Special Rapporteur based on their origins, namely general principles of law derived from national legal systems and general principles of law formed within the international legal system, considering that there was sufficient practice supporting both of them. Some members expressed the view that the difference between general principles of law of a procedural nature and those of substantive nature was important when categorizing general principles of law and should be further considered. While it was indicated that other categories should not be excluded, some members cautioned against the proliferation of categories.

245. Several members suggested, however, that the category of general principles formed within the international legal system should not be considered since there was insufficient State practice to support it. A number of members considered that this category was debatable and that a cautious approach should be taken when considering it, and in establishing its limits. It was noted that an additional challenge would be to delineate the limits of this category, which may lead to excessive and subjective judicial discretion, and could undermine the requirements for the formation of customary international law. It was considered that this category should not be rejected or overly restricted; the main concern would be that the precondition for its formation be sufficiently stringent. Finally, some members expressed the view that a hard distinction should not be drawn between national legal systems and the international legal system when determining the origins of general principles of law, as the latter could be derived indistinctly from either system.

**(e) Comments on the draft conclusions proposed in the first report**

246. A number of drafting proposals were made concerning draft conclusions 1, 2 and 3. Several members suggested that draft conclusions 2 and 3 be held in the Drafting Committee until the Commission has had the opportunity to consider further relevant issues that may have an impact on their formulation.

**(f) Future programme of work**

247. Members generally supported the proposal by the Special Rapporteur to address the functions of general principles of law and their relationship with other sources of law in his second report and the issue of identification of general principles of law in his third report. Some members suggested that the Special Rapporteur may wish to reverse the proposed order and begin with the issue of identification of general principles of international law, and in particular with the threshold for recognition and the criteria for the transposability or transposition of principles common to national legal systems to the international legal system. Some members suggested that the Special Rapporteur propose a definition for general principles of law. It was also suggested that the Special Rapporteur address first the more generally accepted category of general principles of law, namely those derived from national legal systems, before addressing general principles of law formed within the international legal system, and treat both function and recognition together.

**3. Concluding remarks of the Special Rapporteur**

248. The Special Rapporteur welcomed the interest that the topic received among the members of the Commission and noted that the debate had shown that, despite the different points of view on certain complex aspects, there were fundamental points on which there was general consensus. For instance, there was consensus on the issues to be considered by

the Commission, namely: (1) the legal nature of general principles of law as a source of international law; (2) the origins and corresponding categories of general principles of law; (3) the functions of general principles of law and their relationship to other sources of international law (in particular customary international law); and (4) the identification of general principles of law.

249. Further, the Special Rapporteur noted the general consensus on the final outcome of the Commission's work, which should take the form of conclusions accompanied by commentaries, since the purpose of the topic was to clarify various aspects of one of the main sources of international law and such outcome was consistent with the previous work of the Commission.

250. The Special Rapporteur also noted that, although the current title of the topic had not been the subject of any observations by States in the Sixth Committee, members of the Commission had made proposals to modify it. He noted that, in his view, such proposals were not needed and would not accurately reflect the scope of the topic.

251. The Special Rapporteur further noted the general consensus on the scope of the topic and stressed that it would not be necessary for the Commission to have a theoretical debate about the meaning of the term "sources". He added that the Commission has been working on the sources of international law since its creation and that the common understanding of its work is on "formal sources", which refers to the legal process and the form by which a rule or principle comes into existence. The text of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice was clear in that general principles of law constitute a source of international law, distinct from treaties and customary international law, which has been confirmed in the practice of States and of international courts and tribunals. He emphasized that the commentary would clarify that general principles of law were being considered in the context of Article 38, paragraph 1 (c), and that it would therefore not be necessary, at this stage at least, to draft a definition of general principles of law as was suggested by some members.

252. The Special Rapporteur observed that there was general consensus that the starting point for consideration was Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, analysed in the light of the practice of States and the jurisprudence of international courts and tribunals. The Special Rapporteur stated that the concerns raised by some members related to the scarcity of State practice with respect to certain specific aspects of the topic should not impede the progress of this topic. He noted that the written and oral pleadings made by States before international courts and tribunals would be relevant to the extent that a common approach could be identified. Further, the fact that the Commission was considering the topic might encourage States in the Sixth Committee to pronounce themselves on such issues. For the Special Rapporteur, an in-depth analysis of general practice could give indications of how States understand, even implicitly, the more specific aspects of the topic, and that, in any case, the Commission should continue its work with a careful and transparent approach. In this context, the Special Rapporteur highlighted that the inter-American system as well as all relevant practice in other regions should be considered.

253. The Special Rapporteur observed that some members favoured the inclusion of general principles of regional or bilateral scope, while others expressed doubts as to its existence or relevance for the purposes of the present topic. He stressed that such general principles of law should not be discarded at this early stage. The Special Rapporteur also addressed the concerns about the relevance of international instruments, other than the Statute of the International Court of Justice, which seem to refer to general principles of law, such as the Rome Statute of the International Criminal Court. In his view, such instruments should be examined to determine whether or not they are relevant, since there may otherwise be a risk of gaps in the study of the topic. On the practice of international organizations, the Special Rapporteur indicated that its relevance should be further examined.

254. The Special Rapporteur considered that preparing an illustrative list of general principles of law would be impractical, necessarily incomplete and would divert attention away from the central aspects of the topic. The Special Rapporteur noted that specific

examples of general principles of law should be made in the commentaries without taking a position on their substance. Further, the Special Rapporteur expressed his willingness to submit a preliminary bibliography to be annexed in one of his future reports. In addition, the Special Rapporteur noted that the possible role of international courts and tribunals in the formation or identification of general principles of law should be analysed with the understanding that these decisions are a subsidiary means for the determination of rules of law, as provided in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

255. The Special Rapporteur noted that the majority of members supported, at least on a preliminary basis, that general principles of law were supplementary in nature, and that their main function was to fill gaps or lacunae in international law or to avoid *non liquet*. He also referred to the position of other members who consider that, in view of the absence of hierarchy between the sources of international law, priority to treaties and customary international law may be given rather on the basis of the principles of *lex specialis* and *lex posterior*.

256. The Special Rapporteur also noted that there was consensus on the need to consider the relationship between general principles of law and other sources of international law, in particular customary international law. He emphasized the need to carefully and clearly differentiate general principles of law from the other sources, and indicated that future reports would address this issue in a rigorous manner. He stressed that, with regard to the concept of “general international law”, members of the Commission broadly agreed that general principles of law form part of general international law.

257. In addition, the Special Rapporteur observed that for some members there was, or should be, a distinction between “principles” and “norms” or “rules”, and that the majority of members focused on the question of whether the wording “general principles of law” indicates anything about the characteristics, functions, origins or other aspects of this source of international law. He also noted that some members raised questions on whether such principles could be considered as more “general” and “fundamental” than other norms. He also indicated that, for some members, the term “law” may or may not be interpreted as referring to national law and international law. In this context, the Special Rapporteur stressed that, at this stage, it could not be excluded that the term “general principles of law” was simply a term of art used to designate this source of international law, and that, for that reason, there may be no need to provide the specific meaning of each word. He added that this would be clarified, in any event, after studying the identification of general principles of law.

258. The Special Rapporteur stated that the Commission was unanimous in considering that recognition is the essential condition for the existence of general principles of law and that this would be a central aspect of this topic. The degree of recognition required, as well as the specific forms that recognition may take for each of the categories of general principles of law, were issues that needed further consideration. The Special Rapporteur stressed the importance of continuing with a cautious approach and that the criteria for determining the existence of general principles of law must be balanced between flexibility – so their identification would not be an impossible task – and strictness – to avoid the risk of being used as a shortcut to identify rules of international law, which could undermine other sources.

259. The Special Rapporteur observed that there was also consensus that the term “civilized nations” was anachronistic, and should be avoided, considering the principle of sovereign equality of States. The main question remained as to the appropriate alternative term to be used. He agreed with the suggestion made in the debate that possibly the best formulation could be the term “community of nations”, contained in article 15, paragraph 2, of the International Covenant on Civil and Political Rights.

260. The Special Rapporteur stressed that besides the two categories proposed in the first report, which are supported by practice and doctrine, the Commission should avoid an unnecessary proliferation of categories of general principles of law. He also stated that the possible distinction between substantive general principles and procedural general principles did not necessarily fall within the scope of the present topic, and that those two

types of general principles of law, as was suggested in the debate, could have their origin both in national legal systems and in the international legal system.

261. The Special Rapporteur highlighted that members of the Commission unanimously accepted the category of general principles of law derived from national legal systems and that members agreed that the identification of this category should follow a two-step analysis. First, the identification of a principle at the national level and, second, its transposability or transposition to the international level. Such analysis, including how recognition is expressed, the degree of recognition required and the method for identifying this category and would be set forth in a future report. The Special Rapporteur observed that there was less consensus among members on the second category of general principles of law, namely those formed within the international legal system. Several members supported this category of general principles of law, considering that it is based in sufficient practice, while its existence was questioned by some other members. The Special Rapporteur indicated that the latter considered that practice was not sufficient to demonstrate the existence of this category of general principles of law and that the forms of recognition of this second category may be too flexible. The Special Rapporteur noted that these members were nonetheless not entirely excluding the possible existence of this second category, suggesting that the issue should be examined further.

262. The Special Rapporteur indicated that he would take into account the suggestions formulated by members of the Commission to further address the requirement of recognition and the identification of general principles of law in his next report. In addition, the Special Rapporteur underlined that a study from the Secretariat on certain aspects of the present topic would contribute to the Commission's work, as would a questionnaire to be circulated to States requesting information about their practice on general principles of law, in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.