Chapter VIII
General principles of law

A. Introduction

90. 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. The General Assembly, in paragraph 7 of its resolution 73/265 of 22 December 2018, subsequently took note of the decision of the Commission to include the topic in its programme of work.

91. At its seventy-first session (2019), the Commission considered the Special Rapporteur's first report (A/CN.4/732), which set out his approach to the topic's scope and outcome, as well as the main issues to be addressed in the course of the Commission's work. Following the debate in plenary, the Commission decided to refer draft conclusions 1 to 3, as contained in the Special Rapporteur's first report, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee regarding draft conclusion 1, provisionally adopted by the Committee in English only, which was presented to the Commission for information.[1186]

92. Also at its seventy-first session, 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.

93. At its seventy-second session (2021), the Commission considered the Special Rapporteur's second report (A/CN.4/741 and Corr.1), in which the Special Rapporteur addressed the identification of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. The Commission also had before it the memorandum it had requested from the Secretariat (A/CN.4/742) at its seventy-first session. Following the debate in plenary, the Commission decided to refer draft conclusions 4 to 9, as presented in the second report, to the Drafting Committee. The Commission provisionally adopted draft conclusions 1, 2 and 4, together with commentaries, and took note of draft conclusion 5, as contained in the report of the Drafting Committee.[1187]

B. Consideration of the topic at the present session

94. At the present session, the Commission considered the Special Rapporteur's third report (A/CN.4/753), in which the Special Rapporteur discussed the issue of transposition (Part One), general principles of law formed within the international legal system (Part Two), and the functions of general principles of law and their relationship with other sources of international law (Part Three). The Special Rapporteur proposed five draft conclusions. He also made suggestions for the future programme of work on the topic (Part Four).

95. At its 3585th meeting, on 1 June 2022, the Commission provisionally adopted draft conclusion 5, which had been provisionally adopted by the Drafting Committee at the seventy-second session (see sect C.1 below).

96. The Commission considered the Special Rapporteur's third report at its 3587th to 3592nd meetings, from 4 to 12 July 2022. At its 3592nd meeting, on 12 July 2022, the Commission decided to refer draft conclusions 10 to 14, as contained in the third report, to the Drafting Committee, taking into account the views expressed in the plenary debate.[1188]

[1186] The interim report of the Chair of the Drafting Committee is available under the analytical guide to the work of the International Law Commission: http://legal.un.org/ilc/guide/1_15.shtml.

[1187] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 169–172 and 238–239. See also A/CN.4/L.955 and Add.1.

[1188] The draft conclusions proposed by the Special Rapporteur in his third report read as follows:

97. At its 3605th meeting, on 29 July 2022, the Commission considered the report of the Drafting Committee (A/CN.4/L.971) on the consolidated text of draft conclusions 1 to 11, provisionally adopted by the Committee.[1189] At the present session, the Committee

Draft conclusion 10
Absence of hierarchy between the sources of international law

General principles of law are not in a hierarchical relationship with treaties and customary international law.

Draft conclusion 11
Parallel existence

General principles of law may exist in parallel with treaty and customary rules with identical or analogous content.

Draft conclusion 12
Lex specialis *principle*

The relationship of general principles of law with rules of the other sources of international law addressing the same subject matter is governed by the *lex specialis* principle.

Draft conclusion 13
Gap-filling

The essential function of general principles of law is to fill gaps that may exist in treaties and customary international law.

Draft conclusion 14
Specific functions of general principles of law

General principles of law may serve, *inter alia*:

(*a*) as an independent basis for rights and obligations;

(*b*) to interpret and complement other rules of international law;

(*c*) to ensure the coherence of the international legal system.

[1189] **Draft conclusion 1**
Scope

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

Draft conclusion 2
Recognition

For a general principle of law to exist, it must be recognized by the community of nations.

Draft conclusion 3
Categories of general principles of law

General principles of law comprise those:

(*a*) that are derived from national legal systems;

(*b*) that may be formed within the international legal system.

Draft conclusion 4
Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

(*a*) the existence of a principle common to the various legal systems of the world; and

(*b*) its transposition to the international legal system.

Draft conclusion 5
Determination of the existence of a principle common to the various legal systems of the world

1. To determine the existence of a principle common to the various legal systems of the world, a comparative analysis of national legal systems is required.

2. The comparative analysis must be wide and representative, including the different regions of the world.

3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.

provisionally adopted draft conclusions 3, 6, 7, 8, 9, 10 and 11. At its 3605th meeting, on 29 July 2022, the Commission provisionally adopted draft conclusions 3 and 7 (see sect. C.1 below), and took note of draft conclusions 6, 8, 9, 10 and 11. At its 3605th to 3612th meetings, from 29 July to 5 August 2022, the Commission adopted the commentaries to draft conclusions 3, 5 and 7, provisionally adopted at the present session (see sect. C.2 below).

1. Introduction by the Special Rapporteur of the third report

98. The Special Rapporteur stated that the third report addressed the functions of general principles of law in the sense of Article 38 paragraph 1 (*c*), of the Statute of the International Court of Justice and the relationship between general principles of law and the other sources of international law contained in Article 38, namely, treaties and customary international law. He also explained that the third report re-examined certain aspects related to the identification of general principles in light of the debate held in the Commission at its seventy-second session and in the Sixth Committee at its seventy-sixth session (2021).

Draft conclusion 6
Determination of transposition to the international legal system

A principle common to the various legal systems of the world may be transposed to the international legal system in so far as it is compatible with that system.

Draft conclusion 7
Identification of general principles of law formed within the international legal system

1. To determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognised the principle as intrinsic to the international legal system.

2. Paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system.

Draft conclusion 8
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of general principles of law are a subsidiary means for the determination of such principles.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of general principles of law, as a subsidiary means for the determination of such principles.

Draft conclusion 9
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of general principles of law.

Draft conclusion 10
Functions of general principles of law

1. General principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part.

2. General principles of law contribute to the coherence of the international legal system. They may serve, *inter alia*:

(*a*) to interpret and complement other rules of international law;

(*b*) as a basis for primary rights and obligations, as well as a basis for secondary and procedural rules.

Draft conclusion 11
Relationship between general principles of law and treaties and customary international law

1. General principles of law, as a source of international law, are not in a hierarchical relationship with treaties and customary international law.

2. A general principle of law may exist in parallel with a rule of the same or similar content in a treaty or customary international law.

3. Any conflict between a general principle of law and a rule in a treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law.

99. The Special Rapporteur explained that Part One of the third report further analysed the issue of transposition of general principles of law derived from national legal systems to the international legal system. The purpose of Part One was to address questions that had been raised by members of the Commission and States in the Sixth Committee, in particular regarding draft conclusion 6 proposed in the Special Rapporteur's second report. The Special Rapporteur first agreed with those who had suggested that draft conclusion 6 could be simplified to avoid being overly prescriptive. Moreover, he emphasized that for recognition to occur, in the sense of Article 38 paragraph 1 (*c*), of the Statute of the International Court of Justice, it was not sufficient for a principle to be recognized *in foro domestico*; rather, recognition of its applicability in the international legal system was also necessary due to differences between national legal systems and the international legal system. He further explained that a formal act of recognition was not required and that recognition in the context of transposition essentially occurred implicitly. He noted that determining the compatibility of the principle with the international legal system was necessary.

100. Part Two summarized the differing views expressed in relation to the second category of general principles of law reflected in draft conclusion 7, namely general principles of law formed within the international legal system, and clarified certain matters regarding the methodology for their identification. The Special Rapporteur reiterated that there was sufficient practice and doctrine to substantiate a draft conclusion on the second category, while acknowledging that caution was required, especially in view of concerns raised that this category should not be confused with customary international law. He emphasized that the main challenge consisted in formulating a clear and precise methodology for the identification of general principles of law formed within the international legal system.

101. The Special Rapporteur stated that Part Three addressed the functions of general principles of law and their relationship with other sources of international law, in particular treaties and customary international law. Following the discussion in Part Three, five draft conclusions were proposed in his third report.

102. Section I of Part Three dealt with the essential function of general principles of law of filling gaps that might exist in conventional and customary international law. The Special Rapporteur explained that a general principle of law could only fill a gap to the extent that the existence of said principle could be determined following the methodology for its identification. He highlighted that such function was widely recognized in practice and doctrine and that the report was careful not to suggest that there was a hierarchy between the three sources of international law (treaties, customary international law, and general principles of law), but, rather, that this relationship should be understood in light of the principle of *lex specialis*. On the question of *non liquet*, the Special Rapporteur clarified that it was not necessary for the Commission to delve into the matter as (*a*) the analysis of the gap-filling function of general principles of law already answered the question of *non liquet*, and (*b*) the question of *non liquet* was applicable only in the judicial context and general principles of law, as a source of international law, were not limited to such perspective.

103. Section II of Part Three addressed three key issues regarding the relationship between general principles of law, treaties and customary international law: (*a*) the absence of hierarchy between the sources of international law; (*b*) the possibility of parallel existence of general principles of law and other norms of international law with identical or analogous content; and (*c*) the operation of the *lex specialis* principle within the context of general principles of law. The Special Rapporteur underlined that practice showed that general principles of law could indeed exist in parallel with treaties and customary international law with an identical or analogous content, and that the applicability and specificity of such principles were not affected by such parallel existence. Additionally, he explained that the *lex specialis* principle was analysed in light of the work of the Commission on fragmentation of international law, concluding that general principles of law may normally be considered as the "general law" in relation to other norms of international law owing to the way in which they emerge.

104. Section III of Part Three of the report covered specific functions of general principles of law. The Special Rapporteur noted that said functions were not necessarily exclusive to general principles of law and needed to be understood in light of their essential gap-filling role. The Special Rapporteur concluded by summarizing the specific functions that general

principles of law could serve, as identified in the third report: (*a*) as an independent basis for rights and obligations; (*b*) as a means to interpret and complement other rules of international law; and (*c*) as a means to ensure the coherence and consistency of the international legal system.

2. Summary of the debate

(a) General comments

105. Members generally welcomed the third report of the Special Rapporteur. Appreciation for its rigour and legal logic was expressed. Several members noted the importance of the topic. Some members expressed concerns regarding the scope of the topic, the terminology employed in the third report, and the examples of State practice to support certain propositions therein.

106. Several members reiterated that Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice was widely considered as an authoritative statement on the sources of international law, and that the point of departure of the work of the Commission was general principles of law in the sense of Article 38 as a source of international law. In that connection, some members suggested changing the title of the topic to "General principles of law as a source of international law". It was suggested that, even though the point of departure of the work of the Commission was Article 38, paragraph 1 (*c*), the Commission should not be limited to the confines of the Statute in its debate and conclusions. The view was expressed that Article 38, paragraph 1 (*c*), was a provision relating to the applicable law of the International Court of Justice, rather than a specification of the sources of international law. In that regard, it was stated that the analysis of the jurisprudence of arbitral tribunals or international criminal tribunals, each one with its own applicable law, was irrelevant in a report addressing general principles of law within the meaning of Article 38, paragraph 1 (*c*).

107. Differing views were expressed regarding the nature of general principles of law as a primary source of international law. Several members agreed that general principles of law were a primary and independent source, while others expressed doubts. The need to draw a clear distinction between general principles of law and judicial techniques or maxims, as well as between principles with normative scope and principles without normative scope, was emphasized.

108. A concern was raised regarding a perceived overreliance in the third report on judicial decisions and individual commentators rather than on State practice. It was highlighted that the recognition of general principles of law was incumbent upon States. In respect of general principles of law formed within the international legal system, States could manifest such recognition either in the express form of treaty provisions or in the unwritten form of customary international law. A view was expressed that if gap-filling, where no treaty or customary international law rule applied, was an essential function of general principles of law, then finding evidence of State recognition of the general principle of law in question would be challenging.

109. Some members suggested adding to the draft conclusions a non-exhaustive list of general principles of law, similar to draft conclusion 23 of the topic "Peremptory norms of general international law (*jus cogens*)". A view was expressed that the main objective of the work on the topic should be the identification and confirmation of the specific content of general principles of law, even if it was in the form of an indicative list.

110. Several members reiterated their concerns regarding terminology; it was noted that several distinct terms, such as "general international law", "general principles of international law" and "fundamental principles of international law" were often used interchangeably in practice and in teachings, with some members calling for a proper definition and distinction between them.

(b) Draft conclusion 6

111. With respect to draft conclusion 6 (ascertainment of transposition to the international legal system), as proposed in the second report of the Special Rapporteur, some members

reiterated their support for the two-step approach (existence in national legal systems and transposition) proposed by the Special Rapporteur, while the notion of transposition itself was questioned by others. Several members supported implicit transposition rather than an express, active or formal act of transposition. It was stated that recognition was fundamentally the "existence" in national legal systems, while transposition was mainly an issue of applicability of general principles of law on a case-by-case basis. Agreement was expressed with the Special Rapporteur's position that the requirement of recognition was pertinent to both the existence of the principle across national legal systems and its transposition, while it was stated that recognition should not play a role in determining whether a principle is transposable. A concern was raised that the notion of transposability could override the will of States in a key aspect of the process of recognition of general principles of law and be used as an excuse to ascertain the transposition of general principles of law by special arrangements between States or by controversial judicial decisions.

112. Several members expressed their support for the notion of compatibility or suitability as a defining element of transposition to the international legal system. Doubts were expressed on the use of the term "fundamental principles of international law" in draft conclusion 6 and, in that regard, drafting suggestions were made. It was suggested that article 21 of the Rome Statute of the International Criminal Court could constitute good guidance on the issue of transposition. While several members argued that transposition implied compatibility or suitability with essential elements of the international legal system, a view was expressed that compatibility had to extend to all applicable international law. A suggestion to include the notion of *opinio juris* in the process of recognition was also made.

113. A number of members suggested simplifying draft conclusion 6, in order to favour flexibility in the identification of general principles of law derived from national legal systems, while maintaining certain rigour in the process. Some members emphasized that the Commission should aim at ensuring a text that avoided creating the impression that transposition was either automatic or that it required a formal act. While flexibility and a non-formalized process was supported, further guidance on the requirements of transposition was sought. In that connection, drafting suggestions were made to draft conclusion 6.

(c) Draft conclusion 7

114. Draft conclusion 7 (identification of general principles of law formed within the international legal system) was provisionally adopted by the Commission with commentaries at the present session. Accordingly, following the practice of the Commission, the summary of the debate of this draft conclusion is not included in the present report.

(d) Draft conclusions 10 to 12

115. Several members expressed support for draft conclusions 10 (absence of hierarchy between the sources of international law), 11 (parallel existence), and 12 (*lex specialis* principle), while others expressed hesitation, questioning their usefulness or necessity. Some members commended the efforts by the Special Rapporteur to define relevant dimensions of general principles of law. A view was expressed that draft conclusions on the issue of relationship between sources should not be included in the work of the Commission.

116. Regarding draft conclusion 10, while some members agreed with the third report that the absence of a hierarchy between sources of international law was well supported in the practice of States and scholarly writings, others questioned this approach. According to the members who questioned the approach, even if in theory there was no hierarchy between sources, in practice there was an informal hierarchy between the sources listed in Article 38 of the Statute of the International Court of Justice, which were applied *en ordre successif*. In that connection, it was stated that general principles of law did not in practice have the same status as a treaty or a rule of customary international law. Several members suggested that there was a tension between draft conclusion 10 and draft conclusion 13 (gap-filling), in the sense that a gap-filling function placed general principles of law below treaties and customary international law. A view was expressed that general principles of law were a subsidiary source of international law.

117. Concerns were raised that draft conclusion 10 did not address the relationship of general principles of law with peremptory norms of general international law (*jus cogens*), or the relationship between general principles of law and the law of international organizations. Several drafting suggestions were made for draft conclusion 10, including, *inter alia*, simplifying the text, merging draft conclusion 10 with draft conclusions 11 and 12, or omitting the word "hierarchy". Some members also suggested moving draft conclusions 10 to 12 after draft conclusions 13 and 14 (specific functions of general principles of law). A drafting suggestion was made to specify that draft conclusions 10, 11 and 12 only applied to existing general principles of law.

118. Several members expressed support for draft conclusion 11 as correctly reflecting the possibility of the parallel existence of general principles of law and rules of treaty law and/or rules of customary international law. In that regard, the jurisprudence outlined in the third report to support such proposition was emphasized. Other members considered the provision unnecessary or of limited practical applicability. It was suggested that the content of draft conclusion 11 could be dealt with in the commentary and that the discussion on parallel existence was not relevant to the topic since the Commission was not engaged in a general discussion on sources. The view was expressed that general principles of law could not coexist with rules of customary international law of similar or identical content since the processes for the formation and identification of general principles of law and customary international law would often overlap.

119. Several drafting suggestions were made for draft conclusion 11, in addition to the suggestion to merge draft conclusions 10 and 11. A suggestion to reconsider the reference to the sources of international law with which general principles of law may coexist was also made.

120. Draft conclusion 12 was supported by some members, who considered that *lex specialis* was a principle that may be applicable to resolve conflicts between rules derived from general principles of law on the one hand, and rules of treaty law and customary international law on the other hand. Others questioned whether the provision was needed, as it appeared that its content could be discussed in the commentary. Several members expressed doubts regarding the sole focus on the *lex specialis* principle in the third report and, consequently, in the draft conclusion, when other methods for deconflicting sources could also be relevant and applicable, such as the *lex posteriori* principle. Reconsideration of the focus on the *lex specialis* principle was called for. The view was expressed that general principles of law were *lex generalis* in nature. Some members suggested that there was a tension between draft conclusions 12 and 13, from the perspective of *lex specialis* playing no role if the essential function of general principles was that of gap-filling. It was noted that the analysis contained in the third report and draft conclusion 12 relied mainly on the work of the Commission on fragmentation of international law, when it should also rely on State practice and jurisprudence. Drafting suggestions were made to explicitly mention the *lex generalis* nature of general principles of law in the draft conclusion, as well as to reformulate the draft conclusion so it clarified that *lex specialis* applied as a method of deconflicting norms or rules stemming from general principles of law and other sources of international law addressing the same subject matter.

(e) Draft conclusions 13 and 14

121. Some members commended the Special Rapporteur for addressing an essential dimension of general principles of law and recalled that the importance of addressing the functions of general principles of law had been highlighted by several States in the Sixth Committee. Other members raised doubts concerning the relevance or usefulness of drafting conclusions on the functions performed by general principles of law, an undertaking which constituted a novelty in the Commission's work on the sources of international law. It was highlighted that it was not obvious that the functions listed in draft conclusions 13 and 14 were the only functions of general principles of law, or the most important ones.

122. Regarding draft conclusion 13, several members agreed that the essential function of general principles of law was to fill the *lacunae* left in the international legal system where the other sources offered no solution. Some members stated that general principles of law did not have a monopoly on filling gaps, since treaties and customary international law could

also play a similar role. In that connection, the view was expressed that not every gap could be filled with general principles of law. It was also stated that gap-filling did not constitute the main role of general principles of law because they performed a major function in the interpretation and application of existing rules and in providing coherence to the international legal system. While some members supported the use of the term "gap-filling", others considered it ambiguous and misleading.

123. It was emphasized that general principles of law only performed a gap-filling role to the extent that they existed and were recognized. The need to carefully consider the gap-filling function in light of the specificities of the international legal system was mentioned. Some members considered that the third report overestimated the role played by general principles of law in filling gaps. Others noted that the gap-filling function was performed in the context of dispute settlement to avoid situations of *non liquet*. In that connection, a drafting suggestion was made to include the context (dispute settlement) and the objective (preventing a situation of *non liquet*) in the text of the draft conclusion. It was suggested that the existence of a gap should not be a prerequisite to the application of general principles of law, since they performed other important functions in the international legal system. Some members expressed their opposition to the distinction between essential and specific functions developed in the third report. A concern was raised that the third report did not explain how the gap-filling role would apply if the Commission came to the conclusion that two different categories of general principles of law (i.e., those derived from national legal systems and those formed within the international legal system) existed.

124. A number of drafting suggestions were made. Several members suggested merging draft conclusions 13 and 14, in order to avoid the distinction between essential and specific functions. Other suggestions consisted in replacing the term "essential function" with the term "general function", or the term "function" with "character".

125. With respect to draft conclusion 14, some members supported it in substantive terms, agreeing that it correctly identified a number of the functions that general principles of law may serve in the international legal system. Other members, however, questioned whether the functions identified in the provision were exhaustive and raised concerns regarding the characterizations employed therein. Some members queried the description of the functions as "specific", since the functions listed in the draft conclusion were not specific to general principles of law, but rather functions common to all sources of international law. Doubts were also expressed whether draft conclusion 14 was necessary and whether the Commission needed to delve into the functions of general principles of law in the context of the topic.

126. Differing views were expressed regarding general principles of law serving as an independent basis for rights and obligations, as provided for in subparagraph (*a*) of draft conclusion 14. Several members expressed support for subparagraph (*a*), arguing that being an independent basis for rights and obligations was the fundamental function of any source of law, and that this function was closely related to the gap-filling function. Other members opposed this proposition, stating, *inter alia*, that it lacked empirical support, it conflicted with the gap-filling function, and it could unduly encourage reliance on abstract general principles of law to claim rights that did not exist under treaties or customary international law. Further elaboration on the requirements for the existence of rights and obligations on the basis of general principles of law was requested.

127. While support was expressed for subparagraph (*b*) of draft conclusion 14 on the interpretative and complementary function of general principles of law to other rules of international law, some members considered that the subparagraph lacked sufficient support in practice.

128. Several members supported subparagraph (*c*) of draft conclusion 14 on the function of general principles of law to ensure the coherence of the international legal system, while others stated that general principles of law did not fulfil such function, since the notion of international law being a systematic and coherent system was not accurate. More corroboration regarding this function was called for. A drafting suggestion was made to merge subparagraphs (*b*) and (*c*).

(f) Future programme of work

129. Some members supported the proposal by the Special Rapporteur for the Commission to conclude first reading on the topic at its seventy-third session, while others highlighted that this might not be possible due to the lack of time during the second part of the session. In that connection, the complexity of the topic and the differing views within the Commission on some key aspects of the topic were mentioned.

3. Concluding remarks of the Special Rapporteur

130. In his summary of the debate, the Special Rapporteur expressed his gratitude to the members of the Commission and welcomed the enriching debate on his third report. He acknowledged that the topic was a complex one. He emphasized that he had carefully analysed the arguments and concerns expressed by members during the debate.

131. Regarding the scope of the topic, the Special Rapporteur reiterated that the work of the Commission referred to general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. He clarified that both categories of general principles of law (namely, those derived from national legal systems and those formed within the international legal system) were dealt with on the understanding that they fell under Article 38, paragraph 1 (*c*). He further clarified that the statement that the point of departure of the topic should be Article 38, paragraph 1 (*c*), meant that the work of the Commission should not be limited to a literal reading of such provision; rather, it should take into account the existing State practice and jurisprudence, as well as writings.

132. On the question of general principles of law as a source of international law, the Special Rapporteur stated that general principles of law were considered, by the wide majority of the existing practice and doctrine, as a formal source of international law, along with treaties and customary international law. He noted that a number of members of the Commission and States in the Sixth Committee explicitly stated that Article 38, paragraph 1 (*c*), established general principles of law as a source of international law capable of generating norms to regulate conduct at the international level. The judgment of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* was recalled.[1190] Moreover, he explained that the position that Article 38 was limited to the applicable law of the Court implied that there were no sources of international law of a general character; this position, in his view, was unsustainable as it would result in an unacceptable fragmentation of international law, as well as in legal uncertainty, making it impossible for the international legal system to operate.

133. Regarding concerns on inconsistent terminology, the Special Rapporteur recalled that this issue had already been dealt with in the first report, emphasizing that the Commission itself had confirmed on several occasions that "general international law" or "general principles of international law" could refer to general principles of law depending on the context. The Special Rapporteur also explained that when international criminal tribunals applied general principles of law, they were essentially the general principles of law in the sense of Article 38, paragraph 1 (*c*). The Special Rapporteur concluded that the jurisprudence and practice relating to international criminal tribunals were relevant for the topic.

134. Concerning the suggestion by some members to add a non-exhaustive list containing examples of general principles of law, the Special Rapporteur reiterated that such list was not necessary since the primary objective of the topic was to clarify different aspects of general principles of law as a source of international law, including their scope, the methodology for their identification, their functions and relationship with other sources of international law. He stated that the commentaries would refer to relevant practice, which would in turn contain such examples.

135. The Special Rapporteur stated that members of the Commission generally agreed with the two-step approach to the identification of general principles law derived from national

[1190] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 38, para. 56.

legal systems, with the suggestion to adopt a more flexible approach regarding transposition, while maintaining a rigorous methodology, with the notion of compatibility with the international legal system, and with the proposition that transposition was implicit and did not require an express or formal act. The Special Rapporteur also noted that several members agreed that the requirement of recognition as per Article 38, paragraph 1 (*c*), was necessary for transposition. In that regard, the Special Rapporteur clarified that a general principle of law *in foro domestico* was not automatically transposed to the international legal system. He highlighted the need to take into account the differences between national legal systems and the international legal system in the analysis. He also stressed that, in light of the existing practice, jurisprudence and doctrine, the issue of transposition was related to the identification of general principles of law, rather than to the application of an existing general principle of law to a specific case.

136. According to the Special Rapporteur, the main issue before the Commission was to establish clear criteria to determine that a principle *in foro domestico* was transposed to the international legal system. In that regard, he observed that it seemed to have transpired in the plenary debate that compatibility was required for a principle to be considered as transposed. In his view, the compatibility test should be in relation to norms that were universally accepted and that could be considered as a reflection of the basic structure of the international legal system. Taking into account the comments and observations made by members in the plenary, as well as further reflection on certain matters, the Special Rapporteur made a revised proposal for draft conclusion 6, to be considered by the Drafting Committee.

137. With regard to the question of general principles of law formed within the international legal system, the Special Rapporteur recalled that, as in previous years, this question continued to generate differing views among members of the Commission: a number of members supported the existence of general principles of law formed within the international legal system; some members were sceptical, but did not rule out the existence of these principles; and some other members considered that general principles of law were limited to those derived from national legal systems. He reiterated his view that there are grounds to support the existence of general principles of law formed within the international legal system based on an analysis of practice, jurisprudence and doctrine.

138. The Special Rapporteur first explained that the issue before the Commission was to clarify to the extent possible the existence of general principles of law derived from the international legal system. He also stressed that principles falling within this second category governed basic and structural issues of the international legal system, such as sovereign equality of States and consent to the jurisdiction of international courts. He reiterated that Article 38, paragraph 1 (*c*), did not indicate that general principles of law were those limited to general principles of law derived from national legal systems. While the Special Rapporteur acknowledged that practice relevant to the existence of the second category was limited, he stated that it was not insufficient for the Commission to address the question. The Special Rapporteur also clarified that the inductive and deductive methodology in the third report was not different from the methodology proposed for the identification of general principles of law derived from national legal systems. He emphasized that, for both categories of general principles of law, an inductive analysis of norms should first be conducted, followed by a deductive analysis; for the first category, the deductive analysis pertained to the test of compatibility with the international legal system, whereas for the second category, the deductive analysis pertained to demonstrating that the general principle of law in question was inherent to the international legal system.

139. The Special Rapporteur referred to an alternative formulation for draft conclusion 7, to be considered by the Drafting Committee, seeking to find a common ground in light of the comments made by members in the plenary debate.

140. Regarding draft conclusion 10, the Special Rapporteur noted that several members stated that there was no hierarchy between the different sources of international law. With respect to the view by some members that there was a tension between draft conclusion 10 and the gap-filling function, the Special Rapporteur stated that any tension between the two draft conclusions was solved because there seemed to be consensus in the Commission on general principles of law fulfilling the same functions of the other sources of international law, and not being necessarily limited to gap-filling.

141. On draft conclusion 11, regarding the possibility of parallel existence between general principles of law and rules of other sources on international law with identical or analogous content, the Special Rapporteur noted that there were not many discrepancies among the members of the Commission. As regards comments made by some members questioning the parallel existence of general principles of law and rules of customary international law, the Special Rapporteur stated that there was no reason a general principle of law could not exist in parallel with a rule of customary international law. For example, there was a possibility that a rule of customary international law covered only certain aspects of a general principle of law and thus the principle remained useful in interpreting or applying such rule of customary international law.

142. The Special Rapporteur explained that draft conclusion 12 was limited to the principle of *lex specialis* because said principle was usually referred to in practice and in doctrine when discussing the relationship between general principles of law and other sources. Nevertheless, he agreed that other principles could also be pertinent in the context of normative conflict resolution.

143. Regarding comments made by members on the relationship between general principles of law and peremptory norms of general international law (*jus cogens*), the Special Rapporteur noted that the draft conclusions and the commentaries could clarify that the latter could also be important when addressing a normative conflict.

144. The Special Rapporteur considered that draft conclusions 10 to 12 were necessary to provide guidance to States, international courts and tribunals, and practitioners, taking into account the divergent views existing sometimes in practice and in doctrine on the matter. The Special Rapporteur concurred with suggestions to merge draft conclusions 10 to 12, which could be further discussed in the Drafting Committee.

145. Regarding the gap-filling role of general principles of law, the Special Rapporteur noted that members generally agreed to it, while noting that it could not be considered a function as such and that it responded to practical considerations. He explained that the functions of general principles of law were, in principle, the same functions of the other sources of international law contained in Article 38, paragraph 1 (*c*), while acknowledging that, in practice, general principles of law were often resorted to when treaty rules or customary international law did not regulate, or did not fully or clearly regulate, a legal question.

146. In the view of the Special Rapporteur, draft conclusions on the functions of general principles of law were indeed necessary, given the confusion that sometimes existed both in practice and in doctrine. He agreed with the suggestion by some members that draft conclusions 13 and 14 could be merged, which could be further discussed in the Drafting Committee. He indicated that the Drafting Committee could clarify the functions of general principles of law, taking into account the manner in which general principles of law were usually applied in practice.

147. Finally, the Special Rapporteur reiterated his intention to conclude first reading before the end of the current quinquennium.

C. Text of the draft conclusions on general principles of law provisionally adopted by the Commission at its seventy-third session

1. Text of the draft conclusions

148. The text of the draft conclusions provisionally adopted by the Commission at its seventy-third session is reproduced below.

Conclusion 3
Categories of general principles of law

General principles of law comprise those:

(*a*) that are derived from national legal systems;

(*b*) that may be formed within the international legal system.

Conclusion 5
Determination of the existence of a principle common to the various legal systems of the world

1. To determine the existence of a principle common to the various legal systems of the world, a comparative analysis of national legal systems is required.

2. The comparative analysis must be wide and representative, including the different regions of the world.

3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.

Conclusion 7
Identification of general principles of law formed within the international legal system

1. To determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to the international legal system.

2. Paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system.

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its seventy-third session

149. The text of the draft conclusions, together with commentaries, provisionally adopted by the Commission at its seventy-third session, is reproduced below.

Conclusion 3
Categories of general principles of law

General principles of law comprise those:

(*a*) that are derived from national legal systems;

(*b*) that may be formed within the international legal system.

Commentary

(1) Draft conclusion 3 addresses the two categories of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. The term "categories" is employed to indicate two groups of general principles of law in light of their origins and thus the process through which they may emerge. In contrast with subparagraph (*a*) of the draft conclusion, which uses the phrase "are derived from", subparagraph (*b*) uses the phrase "may be formed". The phrase "may be formed" was considered appropriate to introduce a degree of flexibility to the provision, acknowledging that there is a debate as to whether a second category of general principles of law exists.

(2) Subparagraph (*a*) of the draft conclusion refers to the general principles of law that are derived from national legal systems. That general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice include those derived from national legal systems is established in the jurisprudence of courts and tribunals[1191] and

[1191] See, for example, the *Fabiani* case (1896) (in H. La Fontaine, *Pasicrisie internationale 1794–1900: Histoire documentaire des arbitrages internationaux* (Berlin, Stämpfli, 1902), p. 356); *Affaire de l'indemnité russe (Russie, Turquie)*, Award of 11 November 1912, *Reports of International Arbitral Awards* (UNRIAA), vol. XI, pp. 421–447, at p. 445; *Corfu Channel case, Judgment of 9 April 1949: I.C.J. Reports 1949*, p. 4, at p. 18; International Court of Justice, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, para. 88; *Argentine-Chile Frontier Case*, Award of 9 December 1966, UNRIAA, vol. XVI, pp. 109–182, at p. 164; International Court of Justice, *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 38, para. 50; Iran-United States Claims Tribunal, *Sea-Land Service, Inc.* v. *Iran*, Award No. 135-33-1, 20 June 1984,

teachings,[1192] and is confirmed by the *travaux préparatoires* of the Statute.[1193] Draft conclusions 4 to 6 deal in greater detail with the methodology for the identification of these general principles of law.

(3) Subparagraph (*b*) of draft conclusion 3 refers to the general principles of law that may be formed within the international legal system. The existence of this category of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, appears to find support in the jurisprudence of courts and tribunals[1194] and teachings.[1195] Some members, however, consider that Article 38, paragraph 1 (*c*), does not

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Iran-United States Claims Tribunal Reports (IUSCTR), vol. 6, pp. 149 *et seq*., at p. 168; Iran-United States Claims Tribunal, *Questech, Inc.* v. *Iran*, Award No. 191-59-1, 25 September 1985, IUSCTR, vol. 9, pp. 107 *et seq*., at p. 122; Inter-American Court of Human Rights, *Aloeboetoe* et al. v. *Suriname*, Judgment (Reparations and Costs), 10 September 1993, Series C, No. 15, para. 50; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor* v. *Duško Tadić*, No. IT-94-1-A, Judgment, 15 July 1999, Appeals Chamber, para. 225; *Prosecutor* v. *Zejnil Delalić* et al., No. IT-96-21-A, Judgment, 20 February 2001, Appeals Chamber, para. 179; World Trade Organization, Appellate Body, *United States – Tax Treatment for "Foreign Sales Corporations"*, Appellate Body Report, 14 January 2002 (WT/DS108/AB/RW), paras. 142–143; Germany, Constitutional Court, Judgment, 4 September 2004 (2 BvR 1475/07), para. 20; Permanent Court of Arbitration, *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Case No. 2008-7, Award, 22 July 2009, UNRIAA, vol. XXX, pp. 145–416, at p. 299, para. 401; International Centre for Settlement of Investment Disputes, *El Paso Energy International Company* v. *The Argentine Republic*, Case No. ARB/03/15, Award, 31 October 2011, para. 622; Philippines, Supreme Court, *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC*, Decision of 8 March 2016 (G.R. No. 221697; G.R. Nos. 221698-700), pp. 19, 21.

[1192] See, for example, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, Cambridge University Press, 1953/2006), p. 25; G. Abi-Saab, "Cours général de droit international public", in *Collected Courses of the Hague Academy of International Law*, vol. 207 (1987), pp. 188–189; J. A. Barberis, "Los Principios Generales de Derecho como Fuente del Derecho Internacional", *Revista IIDH*, vol. 14 (1991), pp. 11–41, at pp. 30–31; R. Jennings and A. Watts, *Oppenheim's International Law*, vol. I, 9th ed. (Longman, 1996), pp. 36–37; S. Yee, "Article 38 of the ICJ Statute and applicable law: selected issues in recent cases", *Journal of International Dispute Settlement*, vol. 7 (2016), pp. 472–498, at p. 487; P. Palchetti, "The role of general principles in promoting the development of customary international rules", in M. Andenas *et al*. (eds.), *General Principles and the Coherence of International Law* (Leiden, Brill, 2019), pp. 47–59, at p. 48; Pellet and D. Müller, "Article 38", in A. Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford, Oxford University Press, 2019), p. 925.

[1193] Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920* (The Hague, Van Langenhuysen Bros., 1920), pp. 331–336.

[1194] See, for example, International Court of Justice, *Corfu Channel case* (see previous footnote), p. 22; International Court of Justice, *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 23; International Court of Justice, *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment of June 15th, 1954, I.C.J. Reports 1954*, p. 19, at p. 32; International Court of Justice, *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, paras. 20–21; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998 (IT-95-17/1-T), para. 183; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor* v. *Zoran Kupreškić* et al., No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, para. 738.

[1195] See, for example, L. Siorat, *Le problème des lacunes en droit International : Contribution à l'étude des sources du droit et de la fonction judiciaire* (Paris, Librairie générale de droit et de jurisprudence, 1958), p. 286 ; J.G. Lammers, "General principles of law recognized by civilized nations", in F. Kalshoven, P.J. Kuyper and J.G. Lammers (eds.), *Essays on the Development of the International Legal Order in Memory of Haro F. van Panhuys* (Alphen aa den Rijn, Sijthoff & Noordhoff, 1980), pp. 53–75, at p. 67; O. Schachter, "International law in theory and practice: general course in public international law", in *Collected Courses of the Hague Academy of International Law*, vol. 178 (1982), pp. 9–396, at pp. 75, 79–80; R. Wolfrum, "General international law (principles, rules, and standards)", in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law*, vol. IV (entry updated in 2010; Oxford, Oxford University Press, 2012), para. 28; A. A. Cançado Trindade, "General principles of law as a source of international law", in United Nations Audiovisual Library of International Law (2010), at 22:00; B. I. Bonafé and P. Palchetti, "Relying on general principles of

encompass a second category of general principles of law, or at least remain sceptical of its existence as an autonomous source of international law. Further aspects about general principles of law formed within the international legal system are explained in the commentary to draft conclusion 7.

Conclusion 5
Determination of the existence of a principle common to the various legal systems of the world

1. To determine the existence of a principle common to the various legal systems of the world, a comparative analysis of national legal systems is required.

2. The comparative analysis must be wide and representative, including the different regions of the world.

3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.

Commentary

(1) Draft conclusion 5 addresses the first step of the two-step methodology for the identification of general principles of law derived from national legal systems set out in draft conclusion 4, that is, the determination of the existence of a principle common to the various legal systems of the world. Paragraph 1 of the draft conclusion provides that, to determine the existence of such a principle, a comparative analysis is required. Paragraph 2 describes the comparative analysis by indicating that the latter must be wide and representative, including the different regions of the world. Paragraph 3 explains which materials are relevant for the purposes of this methodology.

(2) Paragraph 1 of draft conclusion 5 states that a "comparative analysis of national legal systems" is required to determine the existence of a principle common to the various legal systems of the world. This formulation is based on a general approach that is found in practice and in the literature, whereby national legal systems are assessed and compared in order to establish that a legal principle is common to them. The "comparative analysis" referred to in the draft conclusion does not require that particular methodologies that exist in the field of comparative law be employed. While such methodologies may, when appropriate, provide some guidance, a degree of flexibility is generally maintained in practice. What is relevant for the purposes of draft conclusion 5 is that a common denominator is found across national legal systems.[1196]

(3) What is meant by a legal principle "common" to the various legal systems of the world is not specified in draft conclusion 5. The Commission considered that, since the content and scope of general principles of law derived from national legal systems may vary, it was appropriate not to be overly prescriptive in this regard, thus allowing for a case-by-case analysis. In many cases, the result of the comparative analysis may be the determination of the existence of a legal principle of a general and abstract character.[1197] In other cases, however, the comparative analysis can lead to the ascertainment of legal principles with a more concrete or specific character.[1198]

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law", in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham, Edward Edgar Publishing, 2016), p. 162; A. Yusuf, "Concluding remarks", in M. Andenas *et al*. (eds.), *General Principles and the Coherence of International Law* (footnote 1192 above), p. 450; G. Gaja, "General principles of law", in *Max Planck Encyclopedia of Public International Law* (2020), paras. 17–20.

[1196] See, for example, International Criminal Tribunal for the Former Yugoslavia, *Furundžija* (footnote 1194 above), para. 178; and *Prosecutor v. Dragoljub Kunarac, Radomir Kunac and Zoran Vuković*, Nos. IT-96-23-T & IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, para. 439.

[1197] A general principle of law that is often referred to in practice and in the literature, and which may be considered to be of a general and abstract character, is the principle of good faith.

[1198] Examples of general principles of law that have been invoked or applied in practice, and which may be considered to be of a more specific character (because they present, for instance, precise conditions for their application), include the principles of *res judicata* and *lis pendens*, and the right to lawyer-

(4) The second paragraph of draft conclusion 5 indicates that the comparative analysis for the determination of the existence of a principle common to the various legal systems of the world must be "wide and representative, including the different regions of the world". This description is aimed at clarifying that, while it is not necessary to assess every single legal system of the world to identify a general principle of law, the comparative analysis must nonetheless be sufficiently comprehensive to take into account the legal systems of States in accordance with the principle of sovereign equality of States. The term "different regions of the world" was included to emphasize that it does not suffice to show that a legal principle exists in legal systems representing certain legal families (such as civil law, common law and Islamic law), but that it is also necessary to show that the principle has been recognized widely in the various regions of the world[1199] or, as the International Court of Justice indicated

client confidentiality. See, respectively, International Court of Justice, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaraguas v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 100, at pp. 125–126, paras. 58–61; Permanent Court of International Justice, *Certain German Interests in Polish Upper Silesia, Judgment*, 15 August 1925, *P.C.I.J. Series A*, No. 6, pp. 5 *et seq*., at p. 20; International Court of Justice, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 147, at pp. 152–153, paras. 24–28.

[1199] Examples of State practice where a wide and representative comparative analysis may be considered to have been conducted include International Court of Justice, *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, Observations and Submissions of Portugal on the Preliminary Objections of India, annex 20, pp. 714–752, and Reply of Portugal, annexes 192, pp. 858–861 (including the legal systems of Argentina, Australia, Austria, Belgium, Bolivia (Plurinational State of), Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, France, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Ireland, Italy, Japan, Mexico, Myanmar, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Saudi Arabia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United States of America, Uruguay, Venezuela (Bolivarian Republic of), Yemen and Zambia, and Czechoslovakia and the Soviet Union); International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, Memorial of Nauru, appendix 3 (including the legal systems of Argentina, Australia, Bangladesh, Belgium, Canada, Chile, China, Colombia, Cyprus, Denmark, Ethiopia, Finland, France, Germany, Ghana, Greece, Hungary, India, Ireland, Italy, Japan, Liechtenstein, Mexico, Netherlands, New Zealand, Nigeria, Pakistan, Romania, Senegal, South Africa, Spain, Sri Lanka, Sweden, Switzerland, the United Kingdom and the United States); International Court of Justice, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* (footnote 1198 above), Memorial of Timor-Leste, annexes 22 to 24 (including the legal systems of Australia, Austria, Belgium, Brazil, Bulgaria, China, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Indonesia, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Singapore, South Africa, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Turkey, United Kingdom and the United States, and the European Union, and Hong Kong, China) and Counter-Memorial of Australia, annex 51 (covering the legal systems of Australia, Belgium, Denmark, France, Germany, India, Indonesia, Mexico, Morocco, New Zealand, Russian Federation, Slovakia, Switzerland, Timor-Leste, Uganda, United Kingdom and United States of America). Similar examples are found in the case law. See, for example, International Criminal Tribunal for the Former Yugoslavia, *Delalić* (footnote 1191 above), paras. 584–589 (Australia, Bahamas, Barbados, Croatia, Germany, Italy, Japan, Russian Federation, Singapore, South Africa, Turkey, United States, England, Scotland, and former Yugoslavia, and Hong Kong, China); International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Pavle Strugar*, No. IT-01-42-A, Judgment, Appeals Chamber, 17 July 2008, paras. 52–54 (Australia, Austria, Belgium, Bosnia and Herzegovina, Canada, Chile, Croatia, Germany, India, Japan, Malaysia, Montenegro, Netherlands, Republic of Korea, Russian Federation, Serbia, United Kingdom and United States); International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dražen Erdemović*, Judgment, Appeals Chamber, Case No. IT-96-22-A, Judgment, 7 October 1997, para. 19, referring to the Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras. 59–65 (Australia, Belgium, Canada, Chile, China, Ethiopia, Finland, France, Germany, India, Italy, Japan, Malaysia, Mexico, Morocco, Netherlands, Nicaragua, Nigeria, Norway, Panama, Poland, Somalia, South Africa, Spain, Sweden, Venezuela (Bolivarian Republic of), and England, and former

in the *Barcelona Traction* case, that a principle has been "generally accepted by municipal legal systems".[1200]

(5) Paragraph 3 of draft conclusion 5 provides additional guidance by listing, in a non-exhaustive manner, the sources that may be relied upon to carry out the comparative analysis of national legal systems. The terms "national laws" and "decisions of national courts" are to be understood in a broad way, covering the whole range of materials in national legal systems that can be potentially relevant for the identification of a general principle of law, such as constitutions, legislation, decrees and regulations, as well as decisions of national courts from different levels and jurisdictions, including constitutional courts or tribunals, supreme courts, courts of cassation, courts of appeal, courts of first instance, and administrative tribunals. The term "and other relevant materials" was included so as not to preclude other sources of national legal systems that may also be relevant, such as customary law or doctrine.

(6) In preparing draft conclusion 5, paragraph 3, the Commission was mindful that national legal systems are not identical and that each legal system must be analysed in its own context, taking into account its own characteristics. In certain legal systems, for example, the decisions of national courts may be more relevant to determine the existence of a legal principle, while in others written codes and doctrine may have prevalence. The Commission was also in agreement that all branches of national law, including both private and public law, are potentially relevant for the identification of a general principle of law derived from national legal systems.[1201]

Yugoslavia); *Furundžija* (see footnote 1194 above), para. 180 (Argentina, Austria, Bosnia and Herzegovina, Chile, China, France, Germany, India, Italy, Japan, Netherlands, Pakistan, Uganda, Zambia, and England and Wales, former Yugoslavia, and New South Wales (Australia)); *Kunarac* (see footnote 1196 above), paras. 437–460 (Argentina, Australia, Austria, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Canada, China, Costa Rica, Denmark, Estonia, Finland, France, Germany, India, Italy, Japan, New Zealand, Norway, Philippines, Portugal, Republic of Korea, Sierra Leone, South Africa, Spain, Sweden, Switzerland, Uruguay, United Kingdom, United States and Zambia).

[1200] *Barcelona Traction* (footnote 1191 above), p. 38, para. 50. See also *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC* (footnote 1191 above), pp. 19, 21; *El Paso Energy International Company v. The Argentine Republic* (footnote 1191 above), para. 622; International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 675, para. 104; *Abyei Area* (footnote 1191 above), p. 299, para. 401; Germany, Constitutional Court, Judgment, 4 September 2004 (footnote 1191 above), para. 20; *Kunarac* (see footnote 1196 above), para. 439; *Delalić* (footnote 1191 above), para. 179; *Tadić* (footnote 1191 above), para. 225; International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, No. ICTR-96-4-T, Judgment, 2 September 1998, para. 46; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnil Delalić* et al., No. IT-96-21-T, Decision on the motion to allow witnesses K, L and M to give their testimony by means of video-link conference, Trial Chamber, 28 May 1997, paras. 7–8; *Aloeboetoe* et al*. v. Suriname* (footnote 1191 above), para. 62; *Questech* (footnote 1191 above), p. 122; *Sea-Land Service, Inc. v. Iran* (footnote 1191 above), p. 168; *Corfu Channel case* (footnote 1191 above), p. 18; *Fabiani* case (footnote 1191 above), p. 356; and the *Queen* case between Brazil, Norway and Sweden (1871) (reproduced in La Fontaine, *Pasicrisie internationale 1794–1900*: *Histoire documentaire des arbitrages internationaux* (footnote 1191 above)), p. 155.

[1201] See, for example, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia …* (footnote 1198 above) p. 125, para. 58 (applying the principle of *res judicata*, derived from civil procedure); *Barcelona Traction* (footnote 1191 above), p. 38, para. 50 (applying the principle of separation between companies and shareholders, derived from corporate law); *United States – Tax Treatment for "Foreign Sales Corporations"* (footnote 1191 above), para. 143 (applying a principle relating to taxation of non-residents, derived from tax law); *Questech, Inc. v. Iran* (see previous footnote), p. 122 (applying the principle *rebuc sic stantibus*, derived from contract law); *Sea-Land Service, Inc. v. Iran* (footnote 1191 above), p. 168 (applying the principle of unjust enrichment, derived from civil law or the law of obligations); *Furundžija* (see footnote 1194 above), paras. 178–182, and *Kunarac* (see footnote 1196 above), paras. 439–460 (applying a definition of "rape" derived from criminal law); *Aloeboetoe v. Suriname* (footnote 1191 above), para. 62 (applying a principle relating to succession for purposes of compensation, derived from laws on inheritance or succession); *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC* (footnote 1191 above), p. 21

(7) It should be highlighted that determining the existence of a principle common to the various legal systems of the world is not sufficient to establish the existence and content of a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. As noted in draft conclusion 4, the ascertainment of the transposition of that principle to the international legal system is also required. This second step of the methodology is addressed in draft conclusion 6.

Conclusion 7
Identification of general principles of law formed within the international legal system

1. To determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to the international legal system.

2. Paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system.

Commentary

(1) Draft conclusion 7 addresses the identification of general principles of law formed within the international legal system.[1202]

(2) Paragraph 1 of draft conclusion 7 provides that, to determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to that system. The Commission considered that the existence of this type of general principle of law is justified for a number of reasons. First, there are examples in judicial practice which appear to support the existence of these general principles of law. Second, the international legal system, like any other legal system, must be able to generate general principles of law that are intrinsic to it, which may reflect and regulate its basic features, and not have only general principles of law borrowed from other legal systems. Third, nothing in the text of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice limits general principles of law to those derived from national legal systems. Fourth, the *travaux préparatoires* of the Statute do not exclude the existence of such principles.

(3) As regards the methodology for the identification of general principles of law formed within the international legal system, the Commission considered that it is similar to that applicable to general principles of law derived from national legal systems. In both cases, first, an inductive analysis of existing norms is carried out: in the case of the principles of the first category, existing rules in national legal systems are analysed; in the case of the second category, existing rules in the international legal system are analysed. The methodology is also deductive for both categories: in the case of general principles of law derived from national legal systems, their compatibility with the international legal system must be determined; and in the case of principles formed within the international legal system, it must be shown that such principles are intrinsic to the international legal system.

(applying a principle of nationality of foundlings, derived from laws on nationality). See also *El Paso Energy International Company v. The Argentine Republic* (footnote 1191 above), para. 622 ("'general principles' are rules largely applied *in foro domestico*, in private or public, substantive or procedural matters"); *South West Africa, Second Phase* (footnote 1191 above), Dissenting Opinion of Judge Tanaka, p. 250, at p. 294 ("So far as the 'general principles of law' are not qualified, the 'law' must be understood to embrace all branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc.").

[1202] Examples that were referred to by members of the Commission during the debates of the Commission include the principle of sovereign equality of States, the principle of territorial integrity, the principle of *uti possidetis juris*, the principle of non-intervention in the internal affairs of another State, the principle of consent to the jurisdiction to international courts and tribunals, elementary considerations of humanity, respect for human dignity, the Nürnberg Principles and principles of international environmental law.

(4) The second paragraph of draft conclusion 7 indicates that the draft conclusion is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system. This paragraph was included to reflect the view of some members of the Commission who supported the existence of general principles of law formed within the international legal system, but considered that paragraph 1 of the draft conclusion would be too narrow and would not encompass other possible principles that, while not intrinsic or inherent in the international legal system, may nonetheless emerge from within the latter system and not from national legal systems.

(5) Draft conclusion 7 was adopted by the Commission despite differing views among its members, in the interest of obtaining further comments by States on the matter before the completion of the first reading.

(6) Several members, while not excluding that a second category of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice might exist, raised the concern that no sufficient State practice, jurisprudence or teachings existed to support fully the existence of the second category, making it difficult to determine in a clear manner the methodology for their identification.

(7) Some other members were of the view that Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice is limited to the general principles of law derived from national legal systems. The view was expressed that, at the time of the drafting of the Statute of the Permanent Court of International Justice, the Advisory Committee of Jurists did not accept general principles of law formed within the international legal system,[1203] and that, during the drafting of the Statute of the International Court of Justice, the proposal for the creation of general principles of law within the international legal system was not accepted.[1204] Some members cautioned that the Commission should be careful and not engage in an exercise of progressive development in a topic concerning one of the sources of international law. The view was also expressed that confusion with the other sources of international law should be avoided. In this regard, some members of the Commission considered that the distinction between customary international law and general principles of law formed within the international legal system, within the meaning given in draft conclusion 7, was not clear, and that the Commission should be cautious not to put forward a methodology for the identification of those general principles of law that could overlap with the conditions for the emergence of rules of customary international law.

(8) It is emphasized that the present commentary, together with the commentary to draft conclusion 3, are provisional and the Commission will revisit them at a later stage.

[1203] *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920* (footnote 1193 above), 15th meeting, p. 335.

[1204] *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, vol. XIII, 5th meeting of Committee IV/1, 10 May 1945, p. 162 (1945), at p. 164.