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1. The text of the draft conclusions and commentaries thereto adopted by the Commission on first reading at its seventy-fourth session is reproduced below.

General principles of law

Conclusion 1
Scope

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

Commentary

(1) Draft conclusion 1 is introductory in nature. It provides that the draft conclusions concern general principles of law as a source of international law. The term "general principles of law" is used throughout the draft conclusions to refer to "the general principles of law recognized by civilized nations" listed in Article 38, paragraph 1 (*c*), of the Statute of International Court of Justice, analysed in the light of the practice of States, the jurisprudence of courts and tribunals, and teachings.[1]

(2) Draft conclusion 1 reaffirms that general principles of law constitute one of the sources of international law. The legal nature of general principles of law as such is confirmed by their inclusion in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, together with treaties and customary international law, as part of the "international law" that shall be applied by the Court to decide the disputes submitted to it. The predecessor of that provision, Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice, was the result of lengthy discussions in 1920 within the League of Nations, and in particular the Advisory Committee of Jurists established by the Council of the League, which sought to codify the practice that existed prior to the adoption of the Statute. Since then, general principles of law as a source of international law have been referred to in State practice, including in bilateral and multilateral treaties, as well as in the decisions of different courts and tribunals.[2]

(3) The term "source of international law" refers to the legal process and form through which a general principle of law comes into existence. The draft conclusions aim to clarify the scope of general principles of law, the method for their identification, and their functions and relationship with other sources of international law.

Conclusion 2
Recognition

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

[1] Taking into consideration recent practice of States and jurisprudence, the French and Spanish texts of draft conclusion 1 refer, respectively, to "*principes généraux du droit*" and "*principios generales del derecho*". It was understood that the use of "*du droit*" and "*del derecho*" did not change, nor imply a change to, the substance of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.

[2] See, for example, A/CN.4/732 (first report) and A/CN.4/742 (memorandum by the Secretariat).

Commentary

(1) Draft conclusion 2 reaffirms a basic element of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, namely, that for a general principle of law to exist, it must be "recognized" by the community of nations.

(2) Recognition features widely in the practice of States, the jurisprudence of courts and tribunals and in teachings as the essential condition for the emergence of a general principle of law. This means that, to determine whether a general principle of law exists at a given point in time, it is necessary to examine all the available evidence showing that its recognition has taken place. The specific criteria for this determination are objective and are developed in subsequent draft conclusions.

(3) Draft conclusion 2 employs the term "community of nations" as a substitute for the term "civilized nations" found in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, because the latter term is anachronistic.[3] The term "community of nations" is found in article 15, paragraph 2, of the International Covenant on Civil and Political Rights, a treaty to which 173 States are parties and which is thus widely accepted.[4] The term used in the authentic languages of the Covenant is replicated in the different language versions of draft conclusion 2. For example, "l'ensemble des nations" in French and "communidad internacional" in Spanish. By employing this formulation, the draft conclusion aims to stress that all nations participate equally, without any kind of distinction, in the formation of general principles of law, in accordance with the principle of sovereign equality set out in Article 2, paragraph 1, of the Charter of the United Nations.

(4) The use of the term "community of nations" is not intended to modify the scope or content of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. In particular, the term does not seek to suggest that there is a need for a unified or collective recognition of a general principle of law, nor does it suggest that general principles of law can only arise within the international legal system. Furthermore, the term "community of nations" should not be confused with the term "international community of States as a whole" found in article 53 of the Vienna Convention on the Law of Treaties,[5] relating to peremptory norms of general international law (*jus cogens*).

(5) The use of the term "community of nations" does not preclude that, in certain circumstances, international organizations may also contribute to the formation of general principles of law.

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",

[3] Other terms considered included "States", "community of States", "the international community", "nations", "nation States" and "nations as a whole".

[4] The provision reads: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171. See United Nations, *Status of Multilateral Treaties*, chap. IV.4.

[5] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

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[6] and teachings,[7] and is confirmed by the *travaux préparatoires* of the Statute.[8] 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[9] and

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[6] 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; International Court of Justice, *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, *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 and 21.

[7] 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; A. 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.

[8] 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.

[9] See, for example, International Court of Justice, *Corfu Channel case* (see footnote 6 above), 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,

teachings.[10] Some members, however, consider that Article 38, paragraph 1 (*c*), does not 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 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.

Commentary

(1) Draft conclusion 4 addresses the requirements for the identification of general principles of law derived from national legal systems. It provides that, to determine the existence and content of a general principle of law, it is necessary to ascertain: (*a*) the existence of a principle common to the various legal systems of the world; and (*b*) the transposition of that principle to the international legal system.

(2) This two-step analysis is widely accepted in practice and the literature and is aimed at demonstrating that a general principle of law has been "recognized" in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. It is an objective method to be applied by all those called upon to determine whether a given general principle of law exists at a specific point in time and what the content of that general principle of law is.

(3) Subparagraph (*a*) addresses the first requirement for identification, that is, the ascertainment of the existence of a principle common to the various legal systems of the world. This exercise, which is essentially inductive, is necessary to show that a legal principle has been generally recognized by the community of nations. The use of the term "the various legal systems of the world" is aimed at highlighting the requirement that a principle must be found in legal systems of the world generally. It is an inclusive and broad term, covering the variety and diversity of national legal systems of the world. This requirement is further developed in draft conclusion 5.

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.

[10] 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 law", in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham, Edward Edgar Publishing, 2016), pp. 160–176, at p. 162; A. Yusuf, "Concluding remarks", in M. Andenas *et al*. (eds.), *General Principles and the Coherence of International Law* (footnote 7 above), p. 450; G. Gaja, "General principles of law", in *Max Planck Encyclopedia of Public International Law* (2020), paras. 17–20.

(4) Subparagraph (*b*) addresses the second requirement for identification, that is, the ascertainment of the transposition of the principle common to the various legal systems of the world to the international legal system. This requirement, which is further elaborated on in draft conclusion […], is necessary to show that a principle is not only recognized by the community of nations in national legal systems, but that it is also recognized as applicable within the international legal system.

(5) Subparagraph (*b*) employs the term "transposition", understood as the process of determining whether, to what extent and how a principle common to the various legal systems can be applied in the international legal system. The use of this term is not intended to suggest that a formal or express act of transposition is required.

(6) The term "transposition" was preferred to "transposability", which is sometimes used in this context. Transposition necessarily encompasses transposability; the latter term refers to whether or not a principle identified through the process indicated in subparagraph (*a*) can be applied in the international legal system, but does not cover the whole process of ascertainment of transposition.

(7) Owing to the differences between the international legal system and national legal systems, a principle or some elements of a principle identified through the process indicated in subparagraph (*a*) may not be suitable to be applied in the international legal system. Therefore, "transposition" encompasses the possibility that the content of the general principle of law identified through this two-step analysis may not be identical to the principle found in the various national legal systems.

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.[11]

[11] See, for example, International Criminal Tribunal for the Former Yugoslavia, *Furundžija* (footnote 9 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.

(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.[12] In other cases, however, the comparative analysis can lead to the ascertainment of legal principles with a more concrete or specific character.[13]

(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[14] or, as the International Court of Justice indicated

[12] 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.

[13] 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-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 (Nicaragua 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*, 25 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.

[14] 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, annex 194, 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, Türkiye, 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)* (see footnote 13 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, Türkiye, 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

in the *Barcelona Traction* case, that a principle has been "generally accepted by municipal legal systems".[15]

(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.[16]

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*, Appeals Chamber (see footnote 6 above), paras. 584–589 (Australia, Bahamas, Barbados, Croatia, Germany, Italy, Japan, Russian Federation, Singapore, South Africa, Türkiye, 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 Yugoslavia); *Furundžija* (see footnote 9 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 11 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).

[15] *Barcelona Traction* (see footnote 6 above), p. 38, para. 50. See also *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC* (footnote 6 above), pp. 19 and 21; *El Paso Energy International Company v. The Argentine Republic* (footnote 6 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 6 above), p. 299, para. 401; Germany, Constitutional Court, Judgment, 4 September 2004 (footnote 6 above), para. 20; *Kunarac* (see footnote 11 above), para. 439; *Delalić*, Appeals Chamber (footnote 6 above), para. 179; *Tadić* (footnote 6 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 6 above), para. 62; *Questech* (footnote 6 above), p. 122; *Sea-Land Service, Inc. v. Iran* (footnote 6 above), p. 168; *Corfu Channel case* (footnote 6 above), p. 18; *Fabiani* case (footnote 6 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 6 above)), p. 155.

[16] See, for example, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia* (footnote 13 above), p. 125, para. 58 (applying the principle of *res judicata*, derived from

(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 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 insofar as it is compatible with that system.

Commentary

(1) Draft conclusion 6 concerns the determination of the transposition of a principle common to the various legal systems of the world to the international legal system. It states that such a principle may be so transposed insofar as it is compatible with the international legal system. It ought to be recalled that, as draft conclusion 4 makes clear, determining transposition is the second requirement for purposes of ascertaining the existence and content of a general principle of law derived from national legal systems.

(2) Draft conclusion 6 states that a principle common to the various legal systems of the world "may be" transposed to the international legal system. The words "may be" are used to highlight that transposition does not occur in an automatic fashion.

(3) The relevant test for the purposes of determining transposition is that the principle common to the various legal systems of the world must be shown to be "compatible" with the international legal system. The rationale that underlies this compatibility test is that the international legal system and national legal systems have distinct structures and characteristics that should not be overlooked. Principles that may be common to the various legal systems of the world, adopted first and foremost to meet the needs of a particular society and to apply within a specific legal system, are not necessarily capable of operation at the international level due to those differences.

(4) A principle *in foro domestico* may be considered compatible with the international legal system , if it is suitable to apply within the framework of the international legal system, when conditions for its application exist.[17]

civil procedure); *Barcelona Traction* (footnote 6 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 6 above), para. 143 (applying a principle relating to taxation of non-residents, derived from tax law); *Questech* (see footnote 6 above), p. 122 (applying the principle *rebuc sic stantibus*, derived from contract law); *Sea-Land Service* (footnote 6 above), p. 168 (applying the principle of unjust enrichment, derived from civil law or the law of obligations); *Furundžija* (see footnote 9 above), paras. 178–182, and *Kunarac* (see footnote 11 above), paras. 439–460 (applying a definition of "rape" derived from criminal law); *Aloeboetoe v. Suriname* (footnote 6 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 6 above), p. 21 (applying a principle of nationality of foundlings, derived from laws on nationality). See also *El Paso Energy International Company v. The Argentine Republic* (footnote 6 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 6 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.").

[17] For instance, in the *North Atlantic Coast Fisheries* case, the tribunal rejected the principle of "international servitude" as it was considered as "being but little suited to the principle of sovereignty". *North Atlantic Coast Fisheries Case (Great Britain, United States)*, Award, 7 September 1910, UNRIAA, vol. XI, pp. 167–226, at p. 182. In *North Sea Continental Shelf*, the

(5) An example commonly referred to in this regard is the right of access to courts that invariably exists across national legal systems. Such a right cannot be transposed because it would be incompatible with the fundamental principle of consent to jurisdiction in international law, which underlies the structure and functioning of international courts and tribunals. Transposition of the right of access to courts would not only result in a direct contravention of the principle of consent to jurisdiction – that right would also be incapable of operating at the international level due to the absence of conditions for its application, *i.e.* a judicial body with universal and compulsory jurisdiction to settle disputes.

(6) Draft conclusion 6 indicates that a principle common to the various legal systems of the world may only be transposed "insofar as" it is compatible with the international legal system. The use of these words ("insofar as") is meant to highlight that there is a degree of flexibility when determining transposition. As indicated in the commentary to draft conclusion 4 above: if only part of that principle is compatible with the international legal system, it may be transposed to that extent only.[18]

(7) Draft conclusion 6 must be read together with draft conclusion 2, which indicates that, for a general principle of law to exist, it must be recognized by the community of nations. Therefore, recognition that a principle common to the various legal systems of the world may

International Court of Justice rejected the "principle of the just and equitable share" invoked by Germany as a general principle of law, pointing out that it was "quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement". *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 21–23, paras. 17 and 19–20. In the *Tadić* case, regarding the principle that a tribunal must be established by law, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia observed that "[i]t is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations … Consequently the separation of powers element of the requirement that a tribunal be 'established by law' finds no application in an international law setting." Taking into account several human rights conventions and decisions by human rights bodies, the Appeals Chamber considered that "established by law" means "in accordance with the rule of law". *Prosecutor v. Duško Tadić a/k/a "DULE"*, Case No. IT-94-1-A, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 43-45. In *Delalić et al.*, a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia considered that the "principles of legality [*nullum crimen sine lege and nulla poena sine lege*] exist and are recognised in all the world's major criminal justice systems", but that it was "not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems … because of the different methods of criminalisation of conduct in national and international criminal justice systems". As a result, the Trial Chamber found that "the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order. To this end, the affected State or States must take into account the following factors, *inter alia*: the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States." *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T Judgment, 16 November 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 403 and 405

[18] Owing to the differences between the international and domestic legal systems, sometimes only certain aspects of a principle common to various legal systems can be transposed to the international legal system. As a result of the transposition, general principles of law applied in international settings may not have exactly the same content as the relevant domestic legal principles. See, e.g., *Tadić* (footnote 6 above), paras. 41–45; International Criminal Tribunal for the Former Yugoslavia, *Delalić* (footnote 17 above), paras. 403–405; *Furundžija* (footnote 9 above), para. 178; *El Paso Energy International Company v. The Argentine Republic* (footnote 6 above) para. 622; International Court of Justice, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 695, Separate Opinion of Judge Simma, para. 13. It has been noted, in this regard, that a principle *in foro domestico* cannot be transposed "lock, stock and barrel" (International Court of Justice, *International status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128, Separate Opinion of Judge McNair, p. 146, at p. 148).

be transposed to the international legal system is required. In this context, recognition is implicit when the compatibility test is fulfilled. In other words, if a principle common to the various legal systems of the world does not contravene fundamental principles of international law and the conditions for its application exist at the international level, it can be inferred that the community of nations has recognized that it may be transposed. No formal act of transposition is required for a general principle of law to emerge.

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.[19]

(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 and State 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 specific to it, 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 or in its drafting history limits general principles of law to those derived from national legal systems.

(3) As regards the methodology for the identification of general principles of law formed within the international legal system, the Commission considered that it has similarities to the methodology applicable to the identification of general principles of law derived from national legal systems, addressed in draft conclusions 4 to 6 above. In both cases, an inductive analysis of existing norms is first carried out. In the case of the principles of the first category, rules existing in the various legal systems of the world are analysed comparatively to determine the existence of a principle common to them. For the principles of the second category, in turn, an analysis of existing rules in the international legal system is required in order to find principles reflected in those rules or underlying them, and having an autonomous status. This analysis must take into account all available evidence of the recognition of the principle in question by the community of nations, such as international instruments reflecting the principle, resolutions adopted by international organizations or at intergovernmental conferences, and statements made by States.

(4) The methodology is also deductive for both categories. As regards general principles of law derived from national legal systems, their compatibility with the international legal system must be determined. General principles formed within the international legal system, for their part, must be shown to be intrinsic to that system. The term “intrinsic” means that

[19] 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. (Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles), are contained in *Yearbook of the International Law Commission, 1950*, vol. II, p. 374, para. 96.)

the principle is specific to the international legal system and reflect and regulate its basic features.

(5) The principle of consent to jurisdiction can be considered as a general principle recognized by the community of nations as intrinsic to the international legal system due to the basic features of the latter. It is a consequence of the principle that sovereign States are equal and the fact that a judiciary with universal and compulsory jurisdiction to which any dispute may be submitted does not exist at the international level. This principle inspires and finds reflection in various international instruments, and has been often referred to in the case law.[20]

(6) The principle of *uti possidetis* is another general principle that can be considered recognized by the community of nations as intrinsic to the international legal system. In *Frontier Dispute (Burkina Faso/Mali)*, a Chamber of the International Court of Justice referred to it as a general principle logically connected to the phenomenon of independence, which has been recognized and confirmed by solemn affirmations of States. The Chamber noted:

> it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless, the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.[21]

(7) The Chamber further maintained that "[t]he fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope".[22] It similarly recalled that the principle had been reflected in statements by African leaders, the Charter of the Organization of African Unity, and in resolution AGH/Res.16 (I), adopted at the first session of the Conference of African Heads of State in 1964.[23] The Chamber added that the obligation to respect pre-existing boundaries in the event of a State succession "derives from a general rule of international law, whether or not the rule is expressed in the formula of *uti possidetis*. Hence the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States … are evidently declaratory rather than constitutive: they recognize and confirm an existing principle".[24] Thus, the principle of *uti possidetis*, considered logically connected to the phenomenon of independence, has been applied by States and recognized and confirmed through solemn declarations, international instruments, and resolutions.

(8) In the *Corfu Channel* case, the International Court of Justice identified some international obligations on the basis of certain general and well-recognized principles,

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[20] See, for example, *Case of the monetary gold* (footnote 9 above), p. 32 ("[t]o adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent"); International Court of Justice, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 92, at pp. 132–133, para. 94.

[21] *Frontier Dispute* (see footnote 9 above), p. 565, para. 20.

[22] *Ibid*., para. 21.

[23] *Ibid*., pp. 565–566, para. 22.

[24] *Ibid*., para. 24. See also p. 567, para. 26 ("the applicability of *uti possidetis* in the present case cannot be challenged merely because in 1960, the year when Mali and Burkina Faso achieved independence, the Organization of African Unity which was to proclaim this principle did not yet exist, and the above-mentioned resolution calling for respect for the pre-existing frontiers dates only from 1964").

namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every States' obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[25]

(9) The Court did not apply the Hague Convention,[26] which is applicable only in time of war and, in any event, Albania was not a party to it. Instead, it identified certain obligations based on "general and well-recognized principles", which appear to have been deduced from existing rules of conventional and customary international law. These principles may be considered intrinsic to the international legal system.

(10) In *Furundžija*, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia identified and applied a "general principle of respect for human dignity" on the basis that "[t]he essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person" and it is "the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law".[27]

(11) 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 in the international legal system, may nonetheless emerge from within the latter system and not from national legal systems.

(12) 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 are available to fully support the existence of the second category, making it difficult to determine in a clear manner the methodology for their identification.

(13) 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. 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 not 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.

[25] *Corfu Channel case* (see footnote 6 above), p. 22: "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every States obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."

[26] Convention (VIII) of 1907 relative to the Laying of Automatic Submarine Contact Mines (The Hague, 18 October 1907), *The Hague Conventions and Declarations of 1899 and 1907*, J.B. Scott, ed. (New York, Oxford University Press, 1915), p. 151.

[27] *Furundžija* (footnote 9 above), para. 183.

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.

Commentary

(1) Draft conclusion 8 concerns the role of decisions of courts and tribunals, both international and national, as an aid in the identification of general principles of law. The approach towards this issue is the same as that adopted by the Commission in its conclusions on the identification of customary international law,[28] both of them being sources of international law.

(2) Decisions of international courts and tribunals are often relied upon in order to determine the existence or otherwise of general principles of law, in particular those derived from national legal systems, as well as their content. To cite but a few examples, in the *Corfu Channel* case, the International Court of Justice found that the use of indirect evidence, in addition to being admitted in "all systems of law", was "recognized by international decisions".[29] In *Pedra Branca/Pulau Batu Puteh*, the Court similarly noted that "[i]t is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claims must establish that fact".[30] In the *Chagos Marine Protected Area* arbitration, the tribunal noted that the "frequent invocation [of the principle of estoppel] in international proceedings has added definition to the scope of the principle".[31]

(3) The European Court of Human Rights and the Inter-American Court of Human Rights have likewise relied on prior international decisions to justify the existence of the principle *iura novit curia*.[32] In international criminal law, prior decisions by international courts and tribunals have also played a significant role in the identification of general principles of law.[33]

(4) Decisions by national courts may also be relied upon in the identification of general principles of law. In this regard, it should be recalled that decisions of national courts serve a dual role in the identification of general principles of law. On the one hand, as draft conclusion 5 indicates, they may be relevant for purposes of the comparative analysis required to determine the existence of a principle common to the various legal systems of the world. On the other hand, decisions by national courts may serve as a subsidiary means for the determination of general principles of law when such decisions themselves examine the

[28] *Yearbook … 2018*, vol. II (Part Two), paras. 65–66.

[29] *Corfu Channel case* (see footnote 6 above), p. 18.

[30] International Court of Justice, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 12, at p. 31, para. 45.

[31] Permanent Court of Arbitration, *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Case No. 2011-03, Award of 18 March 2015, UNRIAA, vol. XXXI, p. 543, para. 436.

[32] European Court of Human Rights, *Handyside v. the United Kingdom*, 7 December 1976, Series A, No. 24, para. 41; European Court of Human Rights, *Guerra and Others v. Italy*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I, para. 44; Inter-American Court of Human Rights, *Velásquez Rodríguez* v. *Honduras*, Judgment (Merits) of 29 July 1988, Series C, No. 4, para. 163.

[33] See, for example, International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, Trial Chamber, 12 November 2002, paras. 58-61; Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, paras. 25-26; Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman* et al., Case No. SCSL-04-14-PT, Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 2 June 2004, paras. 22-30; Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay* et al., Case No. SCSL-04-15-T, Ruling on the Issue of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, 12 July 2004, paras. 10-11.

existence and content of a general principle of law. Draft conclusion 8 concerns only the latter scenario.

(5) Draft conclusion 8 follows closely the language of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, according to which, while decisions of the Court have no binding force except between the parties, judicial decisions are a subsidiary means for the determination of rules of international law, including general principles of law. The term "subsidiary means" denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law (unlike treaties, customary international law and general principles of law). The use of the term "subsidiary means" does not, and is not intended to, suggest that such decisions are not important for the identification of general principles of law.

(6) Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of general principles of law is considered and such principles are identified and applied, may offer valuable guidance for determining the existence or otherwise of general principles. The value of such decisions may vary greatly, however, depending both on the quality of the reasoning (including the extent to which it results from an examination of various legal systems of the world and transposition, in the case of general principles derived from national legal systems, and from an analysis of the existing rules in the international legal system, and relevant resolutions adopted by international organizations or at intergovernmental conferences, in the case of general principles formed within the international legal systems), and on the reception of the decision, in particular by States and in subsequent case law.

(7) Paragraph 1 refers to "international courts and tribunals", a term intended to cover any international body exercising judicial powers that is called upon to consider general principles of law. Express mention is made of the International Court of Justice, the principal judicial organ of the United Nations whose Statute is an integral part of the Charter of the United Nations and whose members are elected by the General Assembly and Security Council, in recognition of the significance of its case law and its particular position as the only standing international court of general jurisdiction. While the International Court of Justice has expressly mentioned Article 38, paragraph 1 (*c*), on only a few occasions, it has referred to several general principles of law in its jurisprudence (as the Permanent Court of International Justice did), contributing to the understanding of this source of international law and to the scope of particular principles.[34] The term "international courts and tribunals" also includes (but is not limited to) specialist and regional courts, such as the International Tribunal for the Law of the Sea, the International Criminal Court and other international criminal tribunals, regional human rights courts and the World Trade Organization Dispute Settlement Body. It also includes inter-State arbitral tribunals and other arbitral tribunals applying international law. The skills and the breadth of evidence usually at the disposal of the international courts and tribunals may lend significant weight to their decisions, subject to the considerations mentioned in the preceding paragraph.

(8) For the purposes of this draft conclusion, the term "decisions" includes judgments, awards and advisory opinions, as well as orders on procedural and interlocutory matters. Separate and dissenting opinions may shed light on the decision and may discuss points not covered in the decision of the court or tribunal concerned, but they need to be approached

[34] See, for example, *Corfu Channel case* (footnote 6 above), pp. 18 and p. 22; *Reservations to the Convention on Genocide* (footnote 9 above), p. 23; *Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13th,1954: I.C.J. Reports 1954*, p. 47, at p. 53; *Right of Passage* (footnote 14 above), p. 43; *South West Africa, Second Phase* (footnote 6 above), p. 47, para. 88; *North Sea Continental Shelf* (footnote 17 above) pp. 21–22, paras. 17-18; *Barcelona Traction* (footnote 6 above), p. 37, para. 50; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166, at p. 181, para. 36; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325, at pp. 338–339, para. 29; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia* (footnote 13 above), p. 100, para. 58; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2018*, p. 139, at p. 166, para. 68.

with caution since they reflect the viewpoint of the individual judge or arbitrator, and may set out points not accepted by the court or tribunal.

(9) Paragraph 2 concerns decisions of national courts (also referred to as domestic or municipal courts). The distinction between international and national courts is not always clear-cut; in the present draft conclusions, the term "national courts" includes courts with an international composition operating within one or more domestic legal systems, such as "hybrid" courts and tribunals with mixed national and international composition and jurisdiction.

(10) Some caution is called for when seeking to rely on decisions of national courts as a subsidiary means for the determination of general principles of law. This is reflected in the different wording of paragraphs 1 and 2, in particular the use of the words "[r]egard may be had, as appropriate" in paragraph 2. National courts operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent. Their decisions may reflect a particular national perspective. Unlike most international courts, national courts may sometimes lack international law expertise and may have reached their decisions without the benefit of hearing arguments advanced by States.

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.

Commentary

(1) Draft conclusion 9 concerns the role of teachings in the identification of general principles of law. Following closely the language of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, it provides that such works may be resorted to as a subsidiary means for determining general principles of law, that is to say, when ascertaining whether there is a principle common to the various legal systems of the world that may be transposed to the international legal system, or whether there is a principle formed within the international legal system. The term "teachings", often referred to as "writings", is to be understood in a broad sense; it includes teachings in non-written form, such as lectures and audiovisual materials.

(2) As with decisions of courts and tribunals, referred to above in draft conclusion 8, teachings are not themselves a source of international law, but may offer guidance for the determination of the existence and content of general principles of law. This auxiliary role recognizes the value that teachings may have in collecting and assessing national laws and other materials and the compatibility of a principle *in foro domestico* with the international legal system; in weighing up relevant rules in the international legal system and relevant resolutions adopted by international organizations or at intergovernmental conferences to assess the recognition of a general principle of law formed within the international legal system; in identifying divergences and the possible absence or development of general principles of law; and in evaluating the law. Teachings may be particularly useful to overcome any linguistic barriers found when conducting a comparative analysis of national legal systems.

(3) There is need for caution when drawing upon writings, since their value for determining the existence of a general principle of law varies: this is reflected in the words "may serve as" in the draft conclusion. Teachings sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate its development (*lex ferenda*). Furthermore, teachings may reflect the national or other individual viewpoints of their authors. Teachings may moreover differ greatly in quality, and assessing the authority of a given work is thus essential.

(4) The reference to "publicists of the various nations" highlights the importance of having regard, so far as possible, to teachings that are representative of the various legal systems and regions of the world and in various languages. This may acquire particular importance when identifying general principles of law derived from national legal systems.

(5) The output of private international bodies engaged in the codification and development of international law may provide a useful resource in this regard. Such collective bodies include the Institute of International Law (*Institut de droit international*) and the International Law Association. The value of each output needs to be carefully assessed in the light of the expertise of the body concerned, the extent to which the output seeks to state existing law, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body, and the reception of the output by States and others.

(6) Among other subsidiary means, special attention is warranted as regards the output of the Commission considering, in particular, its unique mandate as a subsidiary organ of the General Assembly to promote the progressive development of international law and its codification, its composition with members from different regions and representing the various legal systems of the world, and its close relationship with the General Assembly and States, including the benefit it enjoys of receiving oral and written comments from States as it proceeds with its work.

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.

Commentary

(1) Draft conclusion 10 addresses the functions of general principles of law. It states that general principles are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part. It also indicates that general principles of law contribute to the coherence of the international legal system, and that they may serve, *inter alia*, to interpret and complement other rules of international law, and as a basis for primary rights and obligations, secondary rules and procedural rules. Draft conclusion 10 applies to all general principles of law, regardless of whether they are derived from national legal systems or formed within the international legal system, depending on the general principle in question.

(2) It ought to be recalled that the functions of general principles of law are not, in principle, different from those performed by other sources of international law. Treaties, customary international law and general principles of law are all equally listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, and it is in the light of this and their application in practice that the functions of general principles of law should be understood.

(3) Paragraph 1 of draft conclusion 10 indicates that 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.[35] This aims to capture the tendency in practice and in doctrine, when assessing a particular issue, to first determine whether there is a treaty rule or rule of customary international law that may provide a solution, and to resort to general principles of law if the two other sources prove insufficient. The words "are mainly resorted to" clarify that this is

[35] See also Pellet and Müller, "Article 38", pp. 934–935; H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London, Longmans, 1927), p. 85; F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden, Martinus Nijhoff, 2008), pp. 42–43; M. Bogdan, "General principles of law and the problem of *lacunae* in the law of nations", *Nordic Journal of International Law*, vol. 46 (1977), pp. 37–53, at pp. 37–41; Yee, "Article 38 of the ICJ Statute and applicable law", p. 487; Bonafé and Palchetti, "Relying on general principles in international law"), p. 162.

not the only manner in which one may proceed, and that in some cases general principles of law may be directly resorted to depending on the circumstances. The Commission thereby sought to avoid the misconception that general principles of law play an ancillary role in comparison to treaties or custom.

(4) The term "other rules of international law" refers to treaties and rules of customary international law. The words "do not resolve a particular issue in whole or in part" are meant to clarify that general principles of law may be applied when an issue does not find a solution in treaties or custom at all, or when treaties and custom provide only a partial solution and general principles may serve as a complement.

(5) It ought to be noted that there may not always be a general principle of law filling the *lacunae* left by treaties or customary international law. A general principle of law may be used in the manner described in paragraph 1 of draft conclusion 10 only to the extent that it can be identified in accordance with the present draft conclusions.

(6) Paragraph 2 of draft conclusion 10 begins with the factual proposition that general principles of law contribute to the coherence of the international legal system.[36] While rules of the other sources of international law could also be regarded as contributing in some way to the coherence of the international legal system, certain general principles appear to be aimed at performing this function in a more direct manner. Examples of such general principles of law may include *pacta sunt servanda*, good faith, the principles of *lex specialis* and *lex posterior*, respect for human dignity and elementary considerations of humanity.

(7) Paragraph 2 also refers to two more concrete functions of general principles. The term "*inter alia*" is used to indicate that the functions referred to are not exhaustive, while the words "may serve" indicate that the functions of general principles must be determined on a case-by-case basis depending on their content and scope.

(8) Subparagraph (*a*) states that general principles of law may serve to interpret and complement other rules of international law. That general principles of law may be relied upon for purposes of interpretation is well-established in practice.[37]

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[36] See statement of H.E. Mr. Abdulqawi Ahmed Yusuf, President of the International Court of Justice before the Sixth Committee of the General Assembly, New York, 1 November 2019, para. 37 ("The question of coherence in international law is an existential one. The lack of a centralized legislator at the international level has often triggered fears about the possible effect of contradictions between international legal norms. It has also raised questions about possible *lacunae* in international law, and its corollary, the potential declaration by the Court of a *non liquet*. General principles have proved effective in helping the Court to address both structural problems of law-making in international society and to promote coherence"). See also H. Thirlway, *The Sources of International Law* (Oxford, Oxford University Press, 2019), p. 113 ("The principles contemplated by [Article 38, paragraph 1 (c), of the Statute of the International Court of Justice] are, or at all events include, those principles without which no legal system can function at all, that are part and parcel of legal reasoning"); R. Kolb, *Theory of International Law* (Oxford, Hart Publishing, 2016), p. 136 ("From the logical point of view, there are some general principles that must be supposed to conceive a legal order. Without these principles, the construction of the sources would fall into a vicious circle"); T. Gazzini, "General principles of law in the field of foreign investment", *Journal of World Investment and Trade*, vol. 10 (2009), p. 106 (General principles of law "lie at the very foundation of the [international] legal system and are indispensable to its operation" (citing B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*)); M. Andenas and L. Chiussi, "Cohesion, convergence and coherence of international law", in M. Andenas *et al.* (eds.), *General Principles and the Coherence of International Law* (Leiden, Brill, 2019), p. 10 ("principles of law represent a central cohesive force, revealing and reinforcing the systemic nature of the system. Second, they operate as a tool for intra-systemic convergence in the constellation of international courts and tribunals, avoiding or reducing fragmentation in the approaches adopted in different sub-fields of international law by ensuring that they remain part of general international law. Third, principles of law promote inter-systemic coherence by bridging the gap between international law and domestic legal systems").

[37] See, for example, European Court of Human Rights, *Golder* v. *the United Kingdom*, Judgment of 21 February 1975, Series A No. 18, para. 35 ("Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of 'any relevant rules of international law

(9) That general principles of law are resorted to interpret other rules of international law is confirmed by article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties, which requires the interpreter of a treaty to take into account "any relevant rules of international law applicable in the relations between the parties". The report of the Commission's Study Group on fragmentation of international law states that this provision deals with the case where sources external to a treaty are relevant in its interpretation, which may include other treaties, customary rules or general principles of law.[38]

(10) The term "complement" in paragraph 2, subparagraph (*a*), of draft conclusion 10 is meant to cover other cases where a general principle of law is applied simultaneously with a treaty rule or rule of customary international law.[39]

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applicable in the relations between the parties'. Among those rules are general principles of law and especially 'general principles of law recognized by civilized nations' … The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles"); World Trade Organization, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, 6 November 1998 (WT/DS58/AB/R), *Dispute Settlement Reports 1998*, vol. VII, p. 2755, at para. 158 ("The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states … our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law"); *United States – Tax Treatment for "Foreign Sales Corporations"* (footnote 6 above), para. 142 ("Although these instruments do not define 'foreign-source income' uniformly, it appears to us that certain widely recognized principles of taxation emerge from them. In seeking to give meaning to the term 'foreign-source income' in footnote 59 to the *SCM Agreement*, which is a tax-related provision in an international trade treaty, we believe that it is appropriate for us to derive assistance from these widely recognized principles which many States generally apply in the field of taxation"); *Kupreškić* (footnote 9 above), para. 609 ("The Trial Chamber is thus called upon to examine what acts not covered by Article 5 of the Statute of the International Tribunal may be included in the notion of persecution. Plainly, the Trial Chamber must set out a clear-cut notion of persecution, in order to decide whether the crimes charged in this case fall within its ambit. In addition, this notion must be consistent with general principles of criminal law such as the principles of legality and specificity"). See also Central American Court of Justice, *El Salvador v. Nicaragua*, Judgment of 9 March 1917, in *American Journal of International Law*, vol. 11 (1917), pp. 674-730, at p. 728; *Furundžija* (footnote 9 above), para. 180; *Kunarac* (footnote 11 above), paras. 437-460; *Delalić*, Appeals Chamber (footnote 6 above), para. 538; International Centre for Settlement of Investment Disputes, *Total S.A. v. Argentine Republic*, Case No. ARB/04, Decision on liability, 27 December 2010, para. 125; *El Paso Energy International Company* v. *The Argentine Republic* (footnote 6 above), para. 624; Permanent Court of Arbitration, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-7, Award, 21 December 2020, paras. 1713, 1715 and 1717.

[38] Report of the Study Group on fragmentation of international law, *Yearbook … 2006*, vol. II (Part Two), para. 251, at p. 180, conclusions (17)-(20).

[39] In the *Barcelona Traction* case, for example, the International Court of Justice considered that applying general principles of law was appropriate since the customary rules on diplomatic protection did not address the specific issue of the relationship between companies and shareholders, noting in particular that "international law ha[d] not established its own rules" on the matter (*Barcelona Traction* (see footnote 6 above), pp. 33-34, para. 38. See also *Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (see footnote 15 above), p. 675, para. 104). Similarly, the arbitral tribunal in the *Proceedings concerning the OSPAR Convention* noted, in determining the law applicable to the dispute, that "[i]t should go without saying that the first duty of the Tribunal is to apply the OSPAR Convention [Convention for the Protection of the Marine Environment of the North-East Atlantic]. An international tribunal, such as this Tribunal, will also apply customary international law and general principles unless and to the extent that the Parties have created a *lex specialis* (*Proceedings pursuant to the OSPAR Convention (Ireland – United Kingdom)*, Decision of 2 July 2003, UNRIAA, vol. XXIII, pp. 59–151, at p. 87, para. 84). See also *Prosecutor v. Dražen Erdemović*, No. IT-96-22-T, Sentencing Judgment, 29 November 1996, para. 26 ("the Trial Chamber notes that the Statute and the Rules provide no further indication as to the length of imprisonment to which the perpetrators of crimes falling within the International Tribunal's jurisdiction, including crimes against humanity, might be sentenced. In order to review the scale of penalties applicable for

(11) Subparagraph (b) indicates that general principles of law may serve as the basis for primary rights and obligations, secondary rules and procedural rules. The term "primary rights and obligations" covers the proposition that, like any other source of international law, general principles of law may give rise to substantive rights and obligations incumbent upon States and other subjects of international law, and that international responsibility may be engaged for a breach thereof.[40] Examples of such general principles include the prohibition of unjust enrichment,[41] the principle of *uti possidetis*,[42] the principle that attribution of territory *ipso facto* carries with it the waters appurtenant to the territory attributed,[43] principles underlying the Convention on the Prevention and Punishment of the Crime of Genocide,[44] the prohibition of crimes under international law,[45] elementary considerations of humanity, freedom of maritime communication, every States obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States,[46] and foundlings' right to be presumed to have been born of nationals of the country in which they are found.[47]

(12) The words "secondary and procedural rules" in subparagraph (*b*) are meant to cover certain general principles of law that may be characterized as performing such specific functions in light of their particular content.

(13) Secondary rules include, for instance, the principle of *force majeure* as a ground for precluding wrongfulness,[48] the obligation to make reparation for breaches of international law,[49] the obligation to pay moratory or compensatory interests,[50] *rebus sic stantibus*,[51] the

crimes against humanity, the Trial Chamber will identify the features which characterise such crimes and the penalties associated with them under international law and national laws, which are expressions of general principles of law recognised by all nations").

[40] Art. 12 (Existence of a breach of an international obligation) of the 2001 articles on State responsibility for international wrongful acts provides that: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin". In explaining the meaning of the term "regardless of its origin", the commentary noted that "[i]nternational obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order". See *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76−77, at p. 55, para. (3) of the commentary to art. 12. See also *Yearbook … 1976*, vol. II (Part Two), pp. 80–87.

[41] *Sea-Land Service* (see footnote 9 above), p. 169.

[42] *Frontier Dispute* (see footnote 9 above), p. 565, paras. 20–21.

[43] *Dispute between Argentina and Chile concerning the Beagle Channel*, Decision of 18 February 1977, UNRIAA, vol. XXI, pp. 53–264, at p. 145.

[44] *Reservations to the Convention on Genocide* (see footnote 9 above), p. 23 (Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277).

[45] See article 15, paragraph 2, of the International Covenant on Civil and Political Rights ("Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations"). See also article 7, paragraph 2, of the European Convention on Human Rights ("This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations") (Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221).

[46] *Corfu Channel case* (see footnote 6 above), p. 22.

[47] *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC* (see footnote 6 above), p. 21.

[48] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 78, para. (8) of the commentary to art. 23 of the articles on responsibility of States for internationally wrongful acts.

[49] Permanent Court of International Justice, *Case concerning the Factory at Chorzów (Merits)*, Judgment of 13 September 1928, PCIJ Series A, No. 17, p. 29.

[50] *Affaire de l'indemnité russe (Russie, Turquie)*, Award of 11 November 1912, UNRIAA, vol. XI, pp. 421–447, at p. 441.

[51] *Questech* (see footnote 9 above), p. 122.

"clean hands" doctrine,[52] and principles on succession of individuals to determine reparation.[53]

(14) Procedural rules refer to those regulating the process in international courts and tribunals. A typical example is the principle of *res judicata*, which has been acknowledged on several occasions as a general principle of law by international courts and tribunals.[54] Other such principles include *iura novit curia*,[55] *compétence-compétence*,[56] excess of mandate,[57] the principle that no one can be judge in its own suit,[58] burden of proof,[59] indirect evidence,[60] and trial *in absentia*.[61]

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.

Commentary

(1) Draft conclusion 11 clarifies certain aspects concerning the relationship between general principles of law, on the one hand, and treaties and customary international law, on the other.

(2) Paragraph 1 of draft conclusion 11 indicates that general principles of law are not in a hierarchical relationship with treaties and customary international law. This statement follows Article 38, paragraph 1, of the Statute of the International Court of Justice, which lists the three sources of international law without indicating the existence of any hierarchy

[52] International Court of Justice, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment, 30 March 2023, paras. 81–82.

[53] *Aloeboetoe* v. *Suriname* (see footnote 6 above), paras. 61–62. `

[54] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia* (see footnote 13 above), p. 100, at pp. 125–126, paras. 58–61.

[55] See footnote 32 above.

[56] Permanent Court of International Justice, *Interpretation of Greco-Turkish Agreement of December 1st, 1926*, Advisory Opinion of 28 August 1928, PCIJ Series B, No. 16, p. 20.

[57] *Abyei Area* (see footnote 6 above), p. 299, para. 401.

[58] Permanent Court of International Justice, *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion of 21 November 1925, PCIJ Series B, No. 12, p. 32 (considering that Article 15, paragraphs 6 and 7, of the Covenant of the League of Nations reflected the "well-known rule that no one can be judge in his own suit").

[59] International Centre for Settlement of Investment Disputes: *Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *The Hashemite Kingdom of Jordan*, Case No. ARB/02/13, Award of 31 January 2006, paras. 70 *ff*; *Autopista Concesionada de Venezuela, C.A.* v. *Bolivarian Republic of Venezuela*, Case No. ARB/00/5, Award of 23 September 2003, para. 110; *International Thunderbird Gaming Corporation* v. *United Mexican States*, Award of 26 January 2006, para. 95; *Asian Agricultural Products Limited* v. *Republic of Sri Lanka*, Case No. ARB/87/3, Award of 27 June 1990, para. 56.

[60] *Corfu Channel case* (see footnote 6 above), p. 18.

[61] *Sesay* (see footnote 33 above), paras. 9–10.

among them, as well as the conclusions of the work of the Study Group on the fragmentation of international law,[62] which confirm that no such hierarchy exists.[63]

(3) It ought to be recalled that, as indicated in paragraph 1 of draft conclusion 10, 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. As explained in the commentary thereto, this reflects what for the most part, but not always, occurs in practice, which can be explained in terms of legal reasoning, and as a result of the application of the *lex specialis* principle.[64] It was the Commission's understanding, however, that this practice should not be understood as suggesting that a hierarchical relationship exists between general principles of law and treaties and customary international law. The three sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice enjoy equal status. General principles of law may be applied directly or simultaneously with other rules of international law to interpret or complement them, as indicated in the commentary to draft conclusion 10.

(4) Paragraph 1 of draft conclusion 11 is a statement of general international law. It should be noted, however, that nothing prevents States from establishing, for example, a treaty regime envisaging a different arrangement, such as the Rome Statute of the International Criminal Court,[65] article 21 of which seemingly creates a hierarchy between the different sources to be applied by the Court referred to therein.[66]

(5) In line with the above, paragraph 2 of the draft conclusion states that 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. The Commission thereby intended to highlight that general principles of law are a separate source of international law, with their own requirements for identification, and that their existence and applicability as part of general international law is not affected if a treaty rule or a rule of customary international law addresses the same or a similar subject matter.

(6) This situation may arise, for example, when a treaty codifies a general principle of law in its entirety, with the result that a given rule may be found, with identical content, both in the treaty in question and in general principles of law. In such a case, the general principle of law may continue to inform the interpretation and application of the treaty, and it would remain applicable as a matter of general international law between the States parties to the

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[62] Conclusions of the work of the Study Group on the fragmentation of international law, *Yearbook … 2006*, vol. II (Part Two), p. 182, para. (31) ("The main sources of international law (treaties, custom and general principles of law as laid out in Article 38 of the Statute of the International Court of Justice) are not in a hierarchical relationship *inter se*").

[63] This proposition is also generally accepted in teachings. See, for example, Pellet and Müller, "Article 38", p. 935; J. Dugard and D. Tladi, "Sources of international law" in J. Dugard *et al.* (eds.), *Dugard's International Law: A South African Perspective*, 5th ed. (Cape Town, Juta & Company Ltd., 2018), pp. 28–56, at pp. 28-29; Palchetti, "The role of general principles in promoting the development of customary international rules", p. 49; C. Bassiouni, "A functional approach to 'general principles of international law'", *Michigan Journal of International Law*, vol. 11 (1990), pp. 768–818, at pp. 781–783; Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, pp. 20–22; Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, p. 20; M. Diez de Velasco Vallejo, *Instituciones de Derecho Internacional Público*, 18th ed. (Madrid, Tecnos, 2013), pp. 121-122; V. D. Degan, *Sources of International Law* (The Hague, Martinus Nijhoff, 1997), p. 5; T. Gazzini, "General principles of law in the field of foreign investment", p. 108.

[64] See, for example, *Right of Passage* (footnote 14 above), p. 43 ("Having arrived at the conclusion that the course of dealings between the British and Indian authorities on the one hand and the Portuguese on the other established a practice, well understood between the Parties, by virtue of which Portugal had acquired a right of passage in respect of private persons, civil officials and goods in general, the Court does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result").

[65] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

[66] See also art. 61 of the African Charter on Human and People's Rights (Nairobi, 27 June 1981; United Nations, Treaty Series, vol. 1520, No. 26363, p. 217.

treaty and non-parties, and between States non-parties to the treaty.[67] Similarly, a treaty may codify a general principle of law only in part, in which case the general principle of law would need to be taken into account when interpreting and applying the treaty rule in question, and would furthermore remain applicable between parties and non-parties to the treaty.[68] Analogous considerations apply with respect to customary international law, depending on the specific content of the customary rule in question.[69] A general principle of law may apply in various areas of international law, such as the principle of good faith, which may become customary rules,[70] but the principle maintains its distinct existence and applicability.

(7) Paragraph 3 of draft conclusion 11 indicates that any conflict between a general principle of law and a rule in treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law. This paragraph must be read together with the conclusions of the Study Group on the fragmentation of international law, which it builds upon. The "generally accepted techniques of interpretation and conflict resolution in international law" mentioned in the draft conclusion refer to principles such as *lex specialis derogat legi generali*, *lex posterior derogat legi priori*, the principle of harmonization, as well as to articles 31 to33 of the Vienna Convention on the Law of Treaties. Furthermore, account must be taken of recognized hierarchical relationships by the substance of the rule (peremptory norms of general international (*jus cogens*)), and by virtue of a treaty provision (such as Article 103 of the Charter of the United Nations).

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[67] An example in this regard is the principle *pacta sunt servanda*, reflected in article 26 of the Vienna Convention on the Law of Treaties, which may apply as a treaty rule between the States parties to the Convention, and as a general principle of law between States parties and non-parties to the Convention, as well as between States non-parties to the Convention. The preamble to Convention notes that "the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized".

[68] The principle of *res judicata*, for example, has been referred to on various occasions by the International Court of Justice as a principle that is at the same time a general principle of law and a rule provided for in its Statute (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia* (see footnote 13 above), p. 125, para 58; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)* (see footnote 34 above), p. 166, para. 68). Another instance where the Court seems to have noted the parallel existence of a rule laid down in its Statute and a general principle of law is the *Nottebohm* case, as regards the principle *compétence-compétence* (*Nottebohm case (Preliminary Objection), Judgment of November 18th, 1953: I.C.J. Reports 1953*, p. 111, at p. 120). With respect to the principle *rebuc sic stantibus*, the Iran-United States Claims Tribunal noted that "[t]his concept of changed circumstances … has in its basic form been incorporated into so many legal systems that it may be regarded as a general principle of law; it has also found a widely recognized expression in article 62 of the Vienna Convention on the Law of Treaties" (*Questech* (see footnote 6 above), p. 122). A further example is the doctrine of abuse of rights, codified in article 300 of the United Nations Convention on the Law of the Sea ((Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3), and the general principles of criminal law codified in Part 3 of the Rome Statute of the International Criminal Court.

[69] For example, the "*pacta tertiis nec nocent nec prosunt*" principle, which is codified in article 34 of the Vienna Convention on the Law of Treaties, may be considered a rule of customary international law and a general principle of law at the same time.

[70] The general principle of good faith has been codified, for instance, in the Vienna Convention on the Law of Treaties (e.g., arts. 26 and 31). Conclusion 2, paragraph 1, of the conclusions on subsequent agreement and subsequent practice in relation to the interpretation of treaties, adopted by the Commission, states that the rules set forth in articles 31 and 32 of the Vienna Convention of the Law of Treaties also apply as customary international law (*Yearbook … 2018*, vol. II (Part Two), para. 51). The principle of good faith is also reflected in the Friendly Relations Declaration.