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General principles of law

Comments and observations received from Governments

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I. Introduction

1. At its seventy-fourth session (2023), the International Law Commission adopted the draft conclusions on general principles of law, together with commentaries thereto, on first reading.[1] In accordance with articles 16 to 21 of its statute, the Commission decided to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2024.[2] The Secretary-General circulated a note dated 12 September 2023 to Governments transmitting the draft conclusions on general principles of law, with commentaries thereto, and inviting them to submit comments and observations in accordance with the request of the Commission.

2. As of 28 January 2025, written comments had been received from Brazil (1 December 2024), Czech Republic (3 December 2024), Israel (9 December 2024), Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (1 December 2024), Poland (6 December 2024), Singapore (1 December 2024), United Kingdom of Great Britain and Northern Ireland (27 November 2024) and United States of America (17 December 2024).

3. The comments and observations received from Governments are reproduced in chapter II below. The comments and observations are organized thematically as follows: general comments and observations and specific comments on the draft conclusions.[3]

II. Comments and observations received from Governments

A. General comments and observations

Brazil

[Original: English]

Brazil has the honor to submit the following comments and observations. Brazil remains open to any further dialogue with the International Law Commission that would assist in the completion of its work on the subject.

Brazil commends the Commission for the adoption of the draft conclusions on first reading and thanks the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, for his contribution to this work.

Article 38 (1) of the Statute of the International Court of Justice refers to formal sources of international law, and Brazil underscores the importance of general principles of law in this context. We also acknowledge the valuable contribution of the Commission in clarifying the identification, determination and functions of general principles of law as a formal source of international legal obligations.

Brazil welcomes the Commission's choice to avoid the expression "general principles of law recognized by civilized nations", which, despite being referred to in the Statute of the International Court of Justice, is outdated.

However, we believe that "community of nations" is not the most appropriate expression, as it could be interpreted to include international organizations in the formation of these principles, as noted in paragraph 5 of the commentaries to draft conclusion 2. Since these principles derive from national legal systems, Brazil suggests that the Commission adopts the term "general principles of law recognized by the community of States".

[1] Report of the International Law Commission on the work of its seventy-fourth session, *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), paras. 40 and 41.

[2] *Ibid*., para. 38.

[3] In each of the chapters below, comments and observations received are arranged by States, which are listed in English alphabetical order.

…

Brazil attaches great importance to multilingualism, and we regret that materials from Portuguese speaking countries are often absent from United Nations documents, with only sparse references that do not properly reflect the importance of our legal tradition.

A comparative analysis as to the determination of the existence of a principle common to the various legal systems of the world can only be truly wide and representative when including linguistic diversity. We encourage further efforts to expand the linguistic and geographical reach of analyses aimed at covering principles that are derived from national legal systems.

In this context, Brazil encourages the Commission to add an explicit reference to the different languages of the world in draft conclusion 5 paragraph 2.

Czech Republic

[Original: English]

The Czech Republic would like to express its gratitude and appreciation to the Commission and the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, for their work on the topic. In these comments, we would like to comment on those aspects of draft conclusions, which, in our opinion, require further consideration or reconsideration by the Commission.

…

Draft conclusions are based on the presumption of existence of the **general principles of law that may be formed within the international legal system**. As we already noted in our oral statements commenting the annual reports of the International Law Commission, we understand general principles of law as those originating in and derived from the national legal systems (insofar as they can be transposed to and applied in relations among States), and not as those formed primarily within international legal system. We are not convinced that there is sufficient State practice, jurisprudence and teachings available for the suggestion that principles of law that may be formed within the international legal system fall within the category of general principles of law under Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. As mentioned in the Commission's commentaries to draft **conclusions 3 and 7**, similar concerns were expressed by some members of the Commission. We share the opinion of some members of the Commission and Member States that recognition of this category of general principles of law would lead to the confusion with other sources of international law. It would be difficult or even impossible to distinguish such category of general principles of law from customary international law, which, as a specific source of international law, has its own regime for creation and identification of legal norms, including the acceptance (or the absence of such acceptance) of certain practice by States as law.

In our opinion, the Commission should examine in more detail the suggestion that the principles formed within the international legal system are instead highly general rules of conduct that are contained mostly in customary international law, or, less often, in treaties. Such principles may reflect basic elements or essential features of the international legal system. Often, these principles take a customary form, since it is the customary process that by its very nature tends to shape general patterns of State conduct, but may be also taken over and confirmed by a treaty instrument, thus reinforcing its importance in inter-State practice. For example, the principle of sovereign equality of States and the principle of non-intervention in the internal affairs of another State are as such proclaimed in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States of 1970. Further, the prohibition of crimes under international law and the principles underlying the Convention on the Prevention and Punishment of the Crime of Genocide, also mentioned in the Commission's report, have the character of a peremptory norm of customary international law. Therefore, we are of the view that such principles cannot belong into the category of general principles of law under Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. We would like to underline that many general principles of law which are common to national legal orders are now inherent also to

international legal system: it is due to the fact that they are intrinsic to every legal system, whether national or international. Further, in some cases, a so-called general principle might even have the non-legal character of a programme, policy or guiding principle de *lege ferenda*, leading to future creation of norms of international law.

Israel

[Original: English]

The State of Israel would like to express its gratitude to the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, and to the Commission as a whole, for their work on this topic, which constitutes an important component of the Commission's long-term valuable project on the sources of international law.

…

Israel appreciates the Commission's diligent work on the topic "General principles of law". We respectfully submit that further refinement of certain aspects of the draft conclusions and commentary could enhance the clarity, precision, and applicability of the existing text. Specifically, we encourage reconsideration of the second category of general principles and the methodology for its identification, advocate for a more comprehensive approach to comparative analyses, and suggest clearer criteria for identifying authoritative materials. We believe these considerations would contribute to a more robust and broadly supported set of conclusions. Israel remains committed to constructive dialogue and looks forward to continued collaboration with the Commission in the important process of refining the understanding and application of general principles of law as a source of international law.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries, Denmark, Finland, Iceland, Norway, and Sweden, commend the work of the International Law Commission, which at its seventy-fourth session (2023) provisionally adopted, on first reading, 11 draft conclusions concerning the topic "General principles of law".

…

At the outset, the Nordic countries refer to the comments that they have previously made in relation to the topic "General principles of law", in connection with the annual assessment of the Commission's report in the Sixth Committee of the General Assembly of the United Nations.

General principles of law are a primary source of international law, as reflected in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice [...] Its role is more limited than that of the two other types of sources recognized in Article 38, namely treaties and customary international law. Partly for this reason, the conditions for the identification and determination of general principles of law as a source applicable in international law have been less examined compared to treaties and customary international law. We feel that the criteria for identifying general principles of law must be formulated so that their legal significance is not exaggerated in relation to the other primary sources of international law.

The Nordic countries commend the thoroughness of the Commission's work and the broad survey of relevant State practice, jurisprudence and teachings. It is imperative that the Commission's work on this topic remains sufficiently anchored in solid evidence of the existence and content of this primary source of international law. We would like to stress the importance that the conclusions drawn be adequately related to the practice and opinion of States, and that the work on this topic avoid an overreliance on subsidiary means for the determination of law, in the form of judicial decisions and the opinions of individual writers. We would also reiterate the need for a cautious approach given the many sensitivities at play coupled with the cross-cutting nature of the topic.

In light of materials and decisions cited in the report of the Special Rapporteur, we would like to stress that simply invoking the term "principle" in the course of a legal argument does not necessarily signify a reference to a legal source of its own, or evidence of the existence of a certain principle as an independent source of law. The Nordic countries would like to stress the importance of distinguishing clearly and systematically between practice supporting the existence of a general principle, or general principles as a source of law, and cases where invocation of the term "principle" may not be intended or justifiable as a reference to a general principle within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice.

With the benefit of having the final set of draft conclusions, the Nordic countries consider that the outcome of the Commission's work on this topic could provide even more added value and guidance for States and other actors if it identified examples of general principles that the Commission considers to be generally accepted and recognized by the international community. Such identification could of course be done without prejudice to other principles than those identified, so that it is clearly communicated and beyond dispute that the identification of some principles does not prejudge the existence of others. Although such identification may be done in the commentaries, we do consider that the practical use would be even greater if this were to be reflected in the text of the draft conclusions.

Poland

[Original: English]

Poland has followed very closely the International Law Commission's work on "General principles of law". Poland has supported the work of the Commission on this topic as potentially of not only theoretical but also practical importance, in particular for domestic courts and other entities.

…

We notice two basic issues concerning the general principles of law that still require explanation from the Commission. First, how should the term "general" be understood. Does it relate to [the] general character of the norm qualified as general principle of law or rather does it mean that the norm obliges all States irrespective of its level of specificity. Second, what is the importance of the term "principle". Should it be understood *a contrario* to the term "rule" or perhaps should it be rather understood as implicitly referring to domestic law.

Singapore

[Original: English]

Singapore submits its written comments to the International Law Commission for consideration and looks forward to further revision of the draft conclusions. Singapore extends its sincere appreciation to the Commission and the Special Rapporteur for their efforts in developing the draft conclusions.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom expresses its appreciation to the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, to the Drafting Committee and to the Commission as a whole, for their work over a number of years on this important topic including the preparation of the draft conclusions and commentaries.

The United Kingdom expresses its appreciation and recognition of the historic role of the International Law Commission in furthering the progressive development and codification of international law, and the promotion of the rule of law. In light of the fundamental importance of this topic, it is vital that the Special Rapporteur and the Commission take the necessary time to reflect and then mould a future product which not only accurately reflects the practice of States but can also enjoy broad acceptance across the international community as a whole.

…

The United Kingdom welcomed the Commission's decision at its seventieth session to include this topic in its programme of work. The topic of general principles of law continue to offer an opportunity for the Commission to provide valuable clarification on a matter of real practical concern for both States and practitioners.

The United Kingdom remains of the view that questions concerning sources of international law are natural topics for consideration by the Commission and that a careful and well-documented study, focusing on this "third" source of international law listed in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, could be of practical assistance to States and practitioners alike.

As anticipated by the Special Rapporteur in his first report this topic touches on fundamental aspects of the international legal system. The United Kingdom continues to support the views set out by the Special Rapporteur that the Commission should confine the parameters of this topic to explaining how to identify general principles of law and clarifying their nature, scope and functions. In particular, the United Kingdom agrees with the Special Rapporteur that the Commission should not address the substance of general principles of law in its work on this topic. The United Kingdom is therefore also in agreement with the Special Rapporteur that preparing an illustrative list of general principles of law would be impractical, necessarily incomplete and would divert attention away from the central aspects of the topic. References to examples of general principles of law where used in the course of the Commission's work should go in the commentaries and be for illustration only.

The United Kingdom welcomed the Special Rapporteur's statement in his first report that the Commission's work on this topic should be done "in a pragmatic way based on current law and practice". At the same time, the United Kingdom notes that there is relatively little by way of State practice in this area from which to draw conclusions, and where there is practice of States and international courts and tribunals, this has been described as "unclear or ambiguous". It is therefore particularly important that the Commission be transparent if State practice is insufficient.

In light of this it is also particularly important for the Commission to make clear when it is codifying existing law and when it is suggesting the progressive development of the law, or proposing new law. In this regard the United Kingdom recalls its statements in recent Sixth Committee debates on the annual reports of the Commission.[1] It is not sufficient for the Commission to simply provide information in the commentaries from which States – or crucially practitioners and judicial authorities – need to try to deduce the status of a particular provision. Instead, the United Kingdom strongly encourages the Commission to indicate in the commentaries accompanying the draft conclusions, in a clear and transparent manner and taking into account relevant comments it receives from States, those provisions which it considers do reflect *lex lata* and those which it does not.

The United Kingdom has long expressed the view that where the outputs proposed by the Commission involve the progressive development of the law, the Commission should pay careful attention to the views of States which remain the principal law makers in international law. This is of particular importance on a topic such as this which relates to sources of international law.

…

[1] Most recently at the 77th (UK statement (Cluster III) – Report of the ILC on the work of its seventy-third session – Sixth Committee (Legal) – 77th session at https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_uk_3.pdf), 76th (UK statement (Cluster III) – Report of the ILC on the work of its seventy-second session – Sixth Committee (Legal) – 76th session at https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_uk_3.pdf), 74th UK statement (Cluster III) – Report of the ILC on the work of its seventy-first session – Sixth Committee (Legal) – 74th session at https://static.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk_3.pdf), 73rd (UK statement (Cluster I) – Report of the ILC on the work of its seventieth session – Sixth Committee (Legal) – 73rd session at https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_1.pdf) and 72nd (UK statement (Cluster III) -- Report of the ILC on the work of its sixty-ninth session – Sixth Committee (Legal) — 72nd session at https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/uk_3.pdf) sessions of the Sixth Committee.

The United Kingdom reiterates its sincere thanks to the Commission for all its work in preparing the current draft conclusions and commentaries. We look forward to further engagement with the Commission going forward as it reflects on the observations of States and we look forward to considering revised draft conclusions and accompanying commentaries accordingly.

United States of America

[Original: English]

The United States welcomes the opportunity to provide this submission in response to the International Law Commission's request for comments and observations on the draft conclusions on general principles of law and commentaries adopted on first reading.[1] The United States extends its appreciation to the Special Rapporteur for this project, Mr. Marcelo Vázquez-Bermúdez, as well as to the other members of the Commission. The views [of the United States] set forth below are not intended to be exhaustive; the United States welcomes further discussion with and queries from the Commission or Special Rapporteur on this topic.

General comments

The United States supported the Commission's decision to include this topic in its program of work, as it has with other projects focused on the sources of law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice. This is an important and challenging issue, and the Commission's efforts to address it are appreciated.

The United States also recognizes that this topic may have far-reaching implications to the extent general principles of law are considered to give rise to binding obligations for which States did not intend to provide consent. Therefore, as the United States has previously underscored, the Commission should ensure that this project is concluded in a way that gives proper weight to the role of States in recognizing when a general principle of law has formed.[2] As listed in Article 38 (1) of the Statute of the International Court of Justice, general principles of law are sources of law, binding on States, along with treaties and customary international law. The latter two sources of international law require affirmative consent or the existence of virtually uniform State practice and *opinio juris*, respectively, in order to bind States. To establish a general principle of law, the consent required for a State to be bound should be on par with that which is required for customary international law and treaties, even if that consent is not manifested identically.

Additionally, if there are elements of this topic that are understood by the Commission to promote or reflect progressive developments, such elements should be clearly identified. Along these lines, aspects of this topic for which there is insufficient State practice should be characterized accordingly in the draft conclusions and commentary. In this regard, the United States agrees with the Special Rapporteur's view that the topic should be limited to the scope and nature of general principles of law and not involve the identification of specific principles.

…

The United States reiterates its gratitude and support for the work of the Commission in its efforts on the draft conclusions and commentaries. We look forward to further engagement on this topic as it develops.

[1] A/78/10, pp. 10–11.

[2] A/C.6/78/SR.24, remarks of Richard C. Visek, Acting Legal Adviser of the U.S. Department of State on Sixth Committee Agenda Item 77 (24 October 2023).

B. Specific comments on the draft conclusions

1. Draft conclusion 1 – Scope

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

It is the opinion of the Nordic countries that draft conclusions 1 and 2 together comprise a satisfactory definition of (i) the scope of the draft conclusions, (ii) the nature of general principles of law as a source within the framework of international law, and (iii) the principal condition for the existence of a general principle of law in international law, namely the requirement that it be recognized by the community of nations.

The Nordic countries support the characterization of general principles of law as a source of international law and believe that this is compatible with the international legal status applied to them as reflected in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

The Nordic countries note that the formulation of draft conclusion 2 departs from the formulation applied in the Statute of the Court by referring to recognition by the "community of nations" rather than "civilized nations". The latter wording reflects in the view of the Nordic countries an outdated and inappropriate characterization. We are thus satisfied to note that the Commission has applied an updated terminology that, for all intents and purposes, reflects the relevant standard under current *lex lata*. We would, however, like to reiterate our previous statement that the phrase "international community of States" would be preferable, as it seems clearer and more in line with standard terminology.

The issue of recognition is a key concern for the ascertainment of the existence of a general principle of law applicable in international law as a source of law. It may be somewhat unfortunate in this regard that the draft conclusions do not go further in seeking to explain how such recognition is to be established. This pertains to the evidence and levels of acceptance to be able to conclude on the existence or non-existence of a general principle of law applicable as a source of international law.

Elements relevant to such assessment are reflected in other parts of the draft conclusions. Draft conclusion 4 refers to the standard applicable to determine whether a general principle is derived from national legal systems. Draft conclusion 5 concerns the need for a comparative analysis to establish such facts, and that such analysis must be wide and representative, and include an assessment of national laws and practice of national courts. These criteria attach specifically to what draft conclusion 3 refers to as general principles of law "derived from national legal systems". As for the other category referred to in draft conclusion 3, i.e. general principles of law formed within the international legal system, reference is merely made to the need for such principles to be recognized as intrinsic to the international legal system. There is no information in the draft conclusions as to how such recognition is established. Furthermore, draft conclusion 7, paragraph 2, refers to the possible existence of general principles of law formed within the international system in ways other than referred to in draft conclusion 7, paragraph 1. For reasons of clarity and consistency, it would be useful to clarify possible interlinkages with the type of evidence relevant to the formation of customary rules of international law. To this end, a draft conclusion dealing specifically with the issue of recognition could elaborate on the general conditions and evidence that might assist in determining whether a general principle of law is indeed recognized by the community of nations. Special considerations might thereafter be addressed in relation to different types of principles identified in the subsequent parts of the draft conclusions.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom welcomes the scope of the draft conclusions as set out in draft conclusion 1. As stated previously in Sixth Committee, the United Kingdom welcomes the

clarity on the important question of terminology, which have for a long time complicated and confused discussion of the third source of international law listed in Article 38 of the Statute of the International Court of Justice: general principles of law.

The United Kingdom welcomes the clear and concise commentaries that reflect some important points of agreement amongst the members of the Commission and which the United Kingdom shares. First, that the term "general principles of law" as it is used throughout the draft conclusions refers to "the general principles of law" listed in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Second, as set out at paragraph 1 of the commentary to draft conclusion 1, that the differences in terminology between the wording used in draft conclusions 1 (including in the various language versions) and the wording used in Article 38 do not imply any change in the substance of Article 38.

United States of America

[Original: English]

The United States welcomes the framing of draft conclusion 1 and the clarity with which the commentary defines general principles of law as a source of international law in reference to Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

2. Draft conclusion 2 – Recognition

Brazil

[Original: English]

[See comments under general comments and observations.]

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comments on draft conclusions 1 and 8.]

Poland

[Original: English]

Poland is of the view [that] the use of the term "community of nations" in draft conclusion[s] 2 and 7 may be not coherent with the terminology used in general international law, as exemplified by the Vienna Convention on the Law of Treaties, jurisprudence of International Court of Justice and the previous works of the International Law Commission. As the agreed term of art is "international community of States as a whole" or eventually "international community as a whole" there is no need to produce new terminology, which can create additional problems of interpretations and interrelations to already well-established concepts.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom agrees with the Commission that recognition is the essential condition for the emergence of a general principle of law.

The United Kingdom also agrees that the term "civilized nations" is anachronistic and should be avoided. The United Kingdom again welcomes the clarity in the commentary that the differences in terminology between the wording used in draft conclusions 2 (including in the various language versions) and the wording used in Article 38 do not imply any change in the substance of Article 38. In this respect, the United Kingdom welcomes the explanation in paragraph (3) of the commentary to draft conclusion 2 that "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."

[See also comments on draft conclusion 10.]

United States of America

[Original: English]

The United States agrees that State recognition is paramount for the emergence of a general principle of law.[1] One important adjustment to draft conclusion 2 and its commentary could help further reflect and ensure the primacy of the State's role in recognition of general principles of law. The commentary to this draft conclusion (paragraph (5)) suggests that international organizations may contribute to the formation of general principles of law; it is not clear why or when this would (or should) be the case, nor does the commentary develop or provide any support for this proposition, since international organizations do not themselves make customary international law. The better approach would be to recognize that it is the practice of States *within* international organizations that is relevant to the formation of international law, not the practice of international organizations as such. Indeed, the Special Rapporteur acknowledged that there were differing views on the role of international organizations in determining the existence of a general principle of law, and that "the relevant practice had always favoured the analysis of the legal systems of States to identify a general principle of law."[2] Given the differing views on this question and the proper weight that should be accorded States in the recognition of general principles of law, the United States **recommends the deletion of paragraph (5) of the commentary to draft conclusion 2**.

Another adjustment relates to the terminology employed in draft conclusion 2. We agree with the unanimous view of the Commission that the term "civilized nations" is outdated and should be abandoned. However, we share the concerns raised by some members of the Commission about the potential ambiguity introduced by the language "recognized by the community of nations." The United States **recommends that "recognized by States" would provide better clarity for States, courts, and tribunals as they apply the concept in practice**.

The Commission should also consider that a State might maintain a persistent objection to the recognition of a general principle of law similar to the way it might do so with respect to a rule of customary international law.

3. Draft conclusion 3 – Categories of general principles of law

Brazil

[Original: English]

Brazil welcomes draft conclusions 3, subparagraph (a), 4, 5 and 6, which acknowledge general principles of law derived from national legal systems. We reiterate our understanding that these principles must be common to different legal systems around the world, and reflect language diversity.

…

Draft conclusions are mainly aimed at systematizing existing rules of customary international law. However, Brazil notes that draft conclusions 3, subparagraph (b), and 7 reflect an exercise of progressive development in a topic related to the sources of international law.

The negotiating history of the Statute of the International Court of Justice does not support the conclusion that principles formed within the international legal system were referenced in Article 38 (1) (c).

[1] First report on general principles of law, A/CN.4/732 (prepared by Marcelo Vázquez-Bermúdez) ("The requirement of 'recognition' is of particular importance, and perhaps at the heart of the work of the Commission on the topic.").

[2] Report of the International Law Commission, 72nd Session, 26 April–4 June, 5 July–6 August 2021, A/76/10, para. 230.

During the Sixth Committee plenary debates, especially during the seventy-eighth session of the United Nations General Assembly, the vast majority of States expressed doubts about the existence of a second category of general principles of law.

The international community of States has noted that this purported second category lacks clear distinction from customary international law.

Only a few States supported the inclusion of this alleged second category of general principles of law in the draft conclusions. Even these delegations, however, acknowledged the existence of divergent views within the Commission and among States.

Brazil maintains that there is neither sufficient State practice nor *opinio iuris* to substantiate the existence of this proposed second category of general principles of law.

We note that the Commission, in its commentaries to draft conclusion 3, has referenced several decisions of international courts that could be interpreted as supporting the existence of this second category. However, Brazil observes that while these decisions acknowledged the normative value of certain principles, they did not establish their existence as an independent source of international law. Instead, these principles, though recognized as binding norms, are more appropriately classified under other sources of international law, especially customary law.

We also note that the Commission seeks to support the existence of this category through teachings, as referenced in footnote 24 to paragraph (3) of the commentaries to draft conclusion 3. However, Brazil observes that much of the academic work cited by the Commission pertains to principles of international law as metajuridical material sources, which, in our view, should not be considered formal sources under Article 38 of the Statute of the International Court of Justice.

Therefore, Brazil reiterates its recommendation that the Commission refrain from including principles of law formed within the international legal system, when adopting the draft conclusions on second reading.

The Commission could consider as a better course of action the inclusion of a "without prejudice" draft conclusion, in case State practice is to support in the future principles formed within the international legal system as a formal source of legal obligations.

Brazil considers that the deletion of draft conclusions 3, subparagraph (b), and 7 would foster greater consensus, thereby facilitating the adoption of the Commission's recommendations on this topic by the Sixth Committee of the General Assembly in its next session.

[See also comments under general comments and observations.]

Czech Republic

[Original: English]

[See comments under general comments and observations.]

Israel

[Original: English]

Israel maintains its position, shared by other States as well as members of the Commission, that the existence of the proposed second category of general principles of law (those "that may be formed within the international legal system") is not sufficiently supported by State practice or other sources of international law.

Israel is of the view that general principles of law are a source of international law that is meant to assist in addressing gaps within the legal framework. They are derived from national legal systems, and must be recognized as such. The legitimacy of recourse to general principles of law is dependent on a robust methodology in identifying them.

As noted above, Israel believes that the existence of the proposed second category is not supported by sufficient practice. The *travaux préparatoires* of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice made express reference to general

principles derived from domestic legal systems. The decisions of courts and tribunals referred to in the commentary to draft conclusion 3 do not provide sufficient foundation for another, different category of general principles.

Israel also agrees with the view expressed by others, that the proposed second category may lead to confusion with other sources of international law, particularly customary international law, which differ in scope and application.

Israel believes that, given the absence of a broad consensus among States and within the Commission regarding the existence of such a source of international law, a cautious and thorough approach is essential when addressing this issue. In particular, further reconsideration is warranted as to the question whether to suggest that the proposed second category exists and may thus be recognized as a source of international law.

Israel expresses its appreciation to the Commission for acknowledging in the commentaries the existence of divergent views within the Commission and among writers regarding both the existence of, and the criteria for identifying, general principles belonging to this second proposed category (see paragraph (3) of the commentaries to draft conclusion 3, and footnote 25 in the commentaries). Should the Commission decide to retain this second category in the draft conclusions, such an acknowledgment should be retained in the commentary.

[See also comments under general comments and observations.]

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries have previously supported the formulation in draft conclusion 3 which identify two categories of general principles of law. These concern respectively those that are derived from national legal systems and those that may be formed within the international legal system. We recognize that the latter category is disputed, by members within the Commission and also by States that have commented on the work of the Commission. However, we continue to believe that general principles of law can emanate also from the international legal system itself. It is in our view important that this be reflected in the draft conclusions, with a careful analysis of how such principles may be formed. We also support formulating the two categories of general principles in a way that would avoid indicating the existence of any formal priority as amongst them. This applies even though we do consider that the former category, i.e. principles derived from national legal systems, have had the clearest relevance in practice.

It is noted that the two identified categories of general principles are formulated with different tenses. Draft conclusion 3, subparagraph (a), is formulated in the present tense, "General principles of law … that ***are*** derived from national legal systems" (emphasis added). Draft conclusion 3, subparagraph (b), on the other hand, is formulated in the future tense, "General principles of law … that ***may*** be formed within the international legal system" (emphasis added). We note the explanation offered by the Special Rapporteur in the commentary to draft conclusion 3, which explains the different choice of words by reference to the debate and uncertainty surrounding the existence of the second category of general principles referred to in draft conclusion 3, subparagraph (b). In the interest of consistency and clarity, the Nordic countries would prefer that the formulation of draft conclusion 3, subparagraphs (a) and (b), use a consistent formulation. One option could be to insert "may be" also in draft conclusion 3, subparagraph (a), as a substitute for "are". Another could be to simplify the formulation by deleting from subparagraph (a) the phrase "that are" and from subparagraph (b) the phrase "that may be", so that these would read as follows:

General principles of law comprise those:

(a) derived from national legal systems;

(b) formed within the international legal system.

A neutral formulation as proposed here would avoid passing judgment on the possible existence of principles of either category. The objective of draft conclusion 3 would appear

to be concerned with identifying the possible categories of general principles rather than evaluating the conditions for their emergence, which is the objective of draft conclusions 4, 5, 6 and 7 respectively. It therefore seems unnecessary at this stage to insert a temporal qualifier for the two typologies of general principles. Moreover, if no general principle as envisioned in subparagraph (b) does exist, *cf.* the use of future tense, then it would not be clear that such category could be identified at all in draft conclusion 3.

[See also comments on draft conclusion 1.]

Poland

[Original: English]

Draft conclusions 3 and 7 refer to general principles of law which may be formed within the international legal system. This issue however is far from certain and as the Commission discusses one of the sources of international law there is a particular need for ensuring clarity and integrity in this respect. Poland is of the view that the proposal that general principles can be derived directly from international legal system raises several fundamental questions. First, how does the international community of States as whole recognize such a general principles. Second, what is the precise methodology of ascertaining existence of such a general principles. This problem is particularly visible in the structure of 11 draft conclusion already adopted by the Commission. The Commission's proposed detailed provisions on identification of general principles of law derived from national legal systems and conversely rather short and vague conclusions on determination of transposition to the international legal system. Third, accepting such an origin of general principles of law can conflate this source of international law with the general principles of international law as contained for example in General Assembly resolution 2625 titled "The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States". Conflating the two would be in contravention with the functions of general principles of law as provisionally adopted by the Drafting Committee in conclusion 10. Thus if we agree 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" as it is stated in draft conclusion 10, paragraph 1, it is difficult to apply such an approach to the principles of international law.

Singapore

[Original: English]

Singapore notes that draft conclusion 3, subparagraph (b), has been the subject of much debate in both the Commission and the Sixth Committee. The existence of the second category of general principles of law, which are those formed within the international legal system, remains controversial.

Singapore observes that certain principles of laws do appear to support the existence of the second category of general principles. These include sovereign equality and consent to jurisdiction. Nevertheless, in light of the differing opinions expressed in the Commission and the Sixth Committee, Singapore appreciates the balance struck in draft conclusion 3, subparagraph (b), with the use of the phrase "may be formed".

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom notes that draft conclusion 3, proposes two categories of general principles of law. Those "that are derived from national legal systems" and those "that may be formed within the international legal system". The United Kingdom remains sceptical as to whether Article 38, paragraph 1 (c), [of the Statute of the International Court of Justice] includes a second category of general principles of law going beyond general principles derived from national law.

The United Kingdom has noted at the Sixth Committee that while it agrees with the former category, it is quite unclear what the latter category means; the United Kingdom is not convinced that the practice referred to in the Special Rapporteur's first report in support of this second category is sufficient to reach a conclusion on the matter. The United Kingdom

also notes the divergence of views expressed by States and members of the Commission regarding the existence of a category of general principles of law formed within the international legal system.[1]

The United Kingdom maintains that if the Commission retains this second category of general principles of law beyond those derived from national legal systems, that it should ensure that it is not constructed too broadly. The United Kingdom also maintains that the Commission should clearly distinguish the suggested second category of general principles from existing rules of customary international law, to avoid the risk that it could become a shortcut to identifying customary law where this cannot otherwise be established under the rules of customary international law.

United States of America

[Original: English]

Draft conclusion 3 sets out two categories of general principles: (a) those that "are derived from national legal systems" and (b) those that "may be formed within the international legal system." The textual distinction drawn between these two categories is meant, according to paragraph (1) of the commentary, to "acknowledg[e] that there is a debate as to whether a second category of general principles of law exists." The United States nevertheless remains unconvinced that there is sufficient State practice, jurisprudence, or teachings to support the acknowledgement of this supposed second category of general principles of law. Moreover, as one member of the Commission pointed out, this second category risks both identifying "miscellaneous principles as general principles of law that [could] overwhelm[] the other sources of international law [and] dissipating the requirement for State consent to international obligations."[1] Another member similarly cautioned that this second category risks "undermining customary international law, since some may wish to argue that whenever there is insufficient State practice or *opinio juris*, there is nonetheless 'recognition' in the sense of Article 38, paragraph 1 (c), of the Statute. General principles of law would thus become . . . some sort of 'custom lite'."[2] We see merit in these views.

Accordingly, the United States **recommends the deletion of paragraph (b) of draft conclusion 3**. If the Commission declines to delete the category, we strongly recommend framing the potential existence of this second category with a "without prejudice" clause (i.e., general principles of law comprise those that are derived from national legal systems, without prejudice to those that might be formed within the international legal system) and clearly identifying in the commentary that this potential second category of general principles of law is a proposal for progressive development.[3]

[See also comments on draft conclusion 7.]

[1] For example: Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-eighth session, prepared by the Secretariat (A/CN.4/763)

[1] International Law Commission, 73rd Session, 3587th meeting, A/CN.4/SR.3587, p. 7 (5 August 2022) (comments of Mr. Sean Murphy).

[2] Michael Wood, "Customary international law and the general principles of law recognized by civilized nations", *International Community Law Review*, vol. 21 (2019), pp. 307–324, at p. 321.

[3] In the event the Commission declines to delete the second category, the United States would then recommend properly distinguishing between this second category of general principles of law and other sources of law. For example, before referencing putative general principles formed within the international legal system (as presently referenced in the commentary to draft conclusion 7), the Commission should consider whether such principles are instead examples of customary international law rules, an issue the Commission has raised throughout the debate on this topic. *See, e.g.*, International Law Commission, 74th Session, 3644thMeeting, A/CN.4/SR.3644, p. 8 (25 July 2023) (reflecting a concern that the distinction between general principles of law formed within the international legal system and customary international law was not made sufficiently clear in the commentary).

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

Brazil

[Original: English]

[See comments on draft conclusion 3.]

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries agree with the two-step approach to the identification of general principles derived from national legal systems, enshrined in draft conclusion 4, 5 and 6. Specifically, we believe that the two criteria identified in draft conclusion 4 reflect the *lex lata*. To qualify as a general principle applicable as a source of international law, a legal principle derived from national legal systems must be (i) common to the various legal systems of the world and (ii) transposable to the international level.

The Nordic countries are satisfied with the formulation of draft conclusion 4. The Commission might, however, consider amending the formulation of paragraph b. The current wording, "its transposition to the international legal system", seems to invite an empirical assessment rather than a normative evaluation of transposability and applicability. It seems to ask: has the principle been transposed to the international system? This would be a matter of fact. A different question is whether the principle can be transposed to the international system. Also the question as to whether it would be applicable in this context, taking into account the broader context of existing international rules and obligations would be a legal assessment, rather than an empirical investigation. We would therefore invite the Commission to consider amending the formulation of draft conclusion 4, paragraph (b), so that it better conform to the nature of the exercise required. It could, for example, read as follows:

(…)

(b) may be transposable to the international legal system.

[See also comments on draft conclusions 1 and 3.]

Singapore

[Original: English]

[See comments on draft conclusion 10.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom welcomes draft conclusion 4 and the Commission's careful approach to the draft conclusion and commentaries. As stated above the United Kingdom agrees with a category of general principles that are derived from national legal systems. The United Kingdom welcomes the clear and concise articulation in draft conclusion 4 and in the commentaries. In particular, the United Kingdom agrees that recognition is the essential condition for the emergence of a general principle of law. The United Kingdom comments below, in respect of draft conclusion 5, on the need for a careful approach to the determination of general principles of law.

United States of America

[Original: English]

The United States welcomes draft conclusion 4 and appreciates the delineation of the two-step analysis required to identify a general principle of law derived from national legal systems. By setting out an objective methodology, draft conclusion 4 and its commentary

help avoid the risk of automaticity that could otherwise accompany a process of identification of such principles.

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

Brazil

[Original: English]

[See comments on draft conclusion 3.]

Israel

[Original: English]

Israel wishes to emphasize the importance of draft conclusion 5, which refers to the necessity for a comparative and representative analysis of various legal systems of the world in determining the existence or otherwise of a general principle of law.

Furthermore, with regard to paragraph 2 of the commentary to draft conclusion 5, Israel proposes that the Commission consider making express mention of hybrid national legal systems in the analysis. Hybrid national legal systems are those composed of elements from multiple legal systems and traditions. These include systems that integrate various legal traditions, such as common law, civil law, Jewish law, and Islamic law, as noted in paragraph (4) of the commentary to draft conclusion 5. We believe that considering such hybrid systems might help ensure that the comparative analysis captures a broader range of complexities and nuances present in different legal systems globally.

With respect to the commentary to draft conclusion 5, Israel respectfully suggests clarifying that greater weight is to be given to final judgments from highest courts. Highest courts typically possess the authority to set binding precedents, correct lower court errors, and provide definitive interpretations. Their finality and impact would help ensure that comparative legal analysis draws upon well-established legal positions within the jurisdiction concerned.

Paragraph (5) of the commentary to draft conclusion 5 explains that the term "other relevant materials" is meant to include "customary law or doctrine." Doctrine is not of itself a component of a national legal system, and may be of assistance only in a subsidiary manner. This should be made clear.

[See also comments on draft conclusion 8.]

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comments on draft conclusions 1, 3 and 4.]

Poland

[Original: English]

We would like to reiterate our last year comment that there is some inconsistency between draft conclusion 8, paragraph 2, and draft conclusion 5, paragraph 3, in respect to decision of domestic courts. While the former considers decisions of national courts as subsidiary means for determination of general principles the latter indicates that those decisions are part national legal systems, which analysis is crucial for any determinations of a general principle of law.

Singapore

[Original: English]

[See comments on draft conclusions 7 and 10.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom welcomes draft conclusion 5 and the commentary explaining how the existence of a principle common to the various legal systems of the world might be determined, including the clarification that any "comparative analysis" referred to in the draft conclusion does not necessarily require that particular methodologies be employed. The United Kingdom also welcomes the caution in being overly prescriptive and recognizing the need to allow for a case-by-case analysis.

The United Kingdom acknowledges the confirmation in the commentary that paragraph 3 of draft conclusion 5 provides "additional guidance" and that the list of sources within paragraph 3 of draft conclusion 5 is non-exhaustive. The United Kingdom again encourages the Commission to indicate in a clear and transparent manner those provisions which it considers do reflect *lex lata* and those which it does not.

United States of America

[Original: English]

The United States also welcomes draft conclusion 5, which sets out the criteria necessary for the first step in the analysis, namely the determination of the existence of a principle common to the various legal systems of the world. The United States agrees with the statements in the commentary that each national legal system must be analysed in its own context. It also appreciates the Commission's underscoring the point that the existence of a principle common to the various legal systems of the world is not sufficient to establish a general principle of law.

6. Draft conclusion 6 – Determination of transposition to the international legal system

Brazil

[Original: English]

[See comments on draft conclusion 3.]

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comments on draft conclusions 3 and 4.]

Singapore

[Original: English]

[See comments on draft conclusion 10.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Draft conclusion 6 on the transposition to the international legal system of a general principle of law raises important questions.

The United Kingdom notes the articulation in the commentary that, in order to determine the existence of a general principle of law derived from national legal systems, the principle must be compatible with the international legal system. In particular, the United Kingdom agrees that an essential condition for the emergence of a general principle of law is recognition, and in this respect welcomes the reference to "recognition" at paragraph (7) of the draft commentary to draft conclusion 6. However, the United Kingdom is not persuaded that recognition is implicit when the compatibility test is fulfilled, as suggested in the draft commentary.

The United Kingdom urges the Commission to give further consideration to this important point and draft conclusion and looks forwards to considering this issue further and hearing the views of other States.

United States of America

[Original: English]

Draft conclusion 6 provides that 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." The commentary (paragraph (7)) notes correctly, in our view, that 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" (i.e., by States).

That paragraph goes on to note, however, that "recognition is implicit when the compatibility test is fulfilled." The United States disagrees with this proposition. State recognition should not be deemed "implicit" based on compatibility alone. The United States supports the view that some objective indication that States consider a principle to be transposed to the international legal system is required before it may be considered a general principle of law. This might, for example, take the form of an express invocation of the principle by a State (*e.g.*, before international courts or bodies).

Accordingly, we **recommend deleting the second part of paragraph (7) of the commentary to draft conclusion 6, beginning with "In this context," through the end of the paragraph, and amending draft conclusion 6 to read as follows:**

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 **has been recognized as** compatible with that system **by States**. (emphasis added for proposed text)

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

Brazil

[Original: English]

[See comments under general comments and observations and comments on draft conclusion 3.]

Czech Republic

[Original: English]

[See comments under general comments and observations.]

Israel

[Original: English]

With respect to draft conclusion 7 (1), Israel would like to reiterate its serious concern regarding the clarity of the proposed criteria for identifying general principles within the "second category". Israel maintains that the key challenge in this context, if reference to a "second category" is retained, lies in formulating a clear and precise methodology for the identification of such general principles. The current text of the draft conclusion and the commentaries thereto do not provide the necessary clarity. Israel is primarily concerned that the expression "intrinsic" is overly vague and open to multiple interpretations. This, in turn, could lead to arbitrary and inconsistent application of the draft conclusion. Israel suggests that additional, more objective elements may be beneficial for a more consistent application of the suggested methodology.

Regarding draft conclusion 7 (2), Israel respectfully notes that this provision, too, could benefit from further clarification. Israel acknowledges that this provision aims to address concerns raised by some members of the Commission who maintain that general principles of law may nonetheless be formed within the international legal system even without being considered "intrinsic" to it. Yet this paragraph could lead to further uncertainty in interpretation and application of the "second category". Greater clarity is needed in the main text as well as in the commentary thereto.

[See also comments under general comments and observations.]

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries agree with the proposition that general principles of law can emanate also from within the international legal system, as highlighted by draft conclusion 7.

We do, however, consider that there is a certain inconsistency between the formulations in paragraphs 1 and 2 of draft conclusion 7. Paragraph 1 proposes as a condition for the determination of a general principle of law that the community of nations has recognized the principle as intrinsic to the international legal system. Paragraph 2, on the other hand, envisions a possible existence of general principles of law formed within the international legal system on conditions other than those referred to in paragraph 1. This appears to have the effect of watering down, and casting into doubt, the condition inserted in paragraph 1. It does not appear compatible with the wording of draft conclusion 7, paragraph 1.

The Nordic countries support the approach taken in draft conclusion 7 paragraph 1, that a general principle of law emanating from the international legal system should have to be recognized by the international community of nations as intrinsic to the international legal system. This sets a high threshold, which is appropriate, important and in line with existing law and practice, which has not often seen reference to general principles of law formed in such way.

[See also comments on draft conclusions 1 and 3.]

Poland

[Original: English]

As to the text of draft conclusion 7 – this provision contains a fundamental structural problem. Its current wording is based on the premise that general principles of law may be formed within international legal system if they fulfil certain criteria described in paragraph 1. Conversely, in paragraph 2, the Commission envisages the existence of other general principles of law formed within the international legal system for which those criteria are not applicable. As a result, this provision appears to conclude that general principles of law can be formed within the international legal system, but that the Commission does not envisage any particular criteria for identifying them. This gives rise to a fundamental divergence on the sources of general principles of law. On the one hand, the draft conclusions adopted by the Commission are very specific with respect to general principles that can be derived from national legal systems, especially in the detailed conclusions 4 and 5, while on the other as regards general principles of law formed within the international legal system, we are left with paragraph 11 to draft conclusion 7, which states that some other principles of law can be derived from the international legal system without providing any further explanation. Against this background, Poland is of the view that paragraph 2 of draft conclusion 7, which has not been in any significant way elucidated in the commentary, should be deleted from the text.

Another element of draft conclusion 7 which requires more in-depth analysis is the term "intrinsic", which is explained by a single sentence in the commentary. Because this concept seems to be of fundamental importance and can be associated with the process of deduction from well-established rules of international law, it merits further elaboration.

This issue is also closely linked with the examples provided by the Commission in the commentary to draft conclusion 7. Taking into account that international law does not envisage compulsory jurisdiction of international courts and tribunals, it is entirely unclear what kind of rights and obligations for States can be derived from the Commission's proposed "principle of consent to jurisdiction". As to the second example given, the principle of *uti possidetis*, there is certainly a need for more explication of the Commission's position. While chapter IV of the 2023 report of the Commission [A/78/10] seems to qualify *uti possidetis* as a general principle of law, chapter VIII of the same report on sea-level rise in relation to international law informs us that "several members disagreed with the view expressed in the additional paper that *uti possidetis juris* was considered a general principle of law".

Just those two examples illustrate a more general problem. Like the Commission's work on customary law and peremptory norms of general international law (*jus cogen*s), we consider its work on general principles of law as relating primarily to the construction and mechanics of these principles. Thus, we would be cautious about debating whether a particular substantive rule can be considered to have the nature of a general principle, deeming it unnecessary even in the commentary.

[See also comments on draft conclusions 2, 3 and 10.]

Singapore

[Original: English]

Singapore is not opposed to including a methodology for identifying general principles of law formed within the international legal system. However, Singapore reiterates its earlier concern as to whether there is sufficient State practice, jurisprudence or teachings to determine clearly the methodology for their identification. In this regard, Singapore echoes the observation of the Special Rapporteur that it is difficult to identify relevant practice on the second category of general principles of law. Given this difficulty, Singapore emphasizes that the methodology must be clear, specific and sufficiently circumscribed. The importance of these criteria cannot be overstated, in light of the need to avoid the risk that this second category of general principles of law would become a way of bypassing the requirements for identifying rules of customary international law. This is especially since general principles of law may serve as a basis for primary rights and obligations, as well as a basis for secondary and procedural rules.

In view of the above, Singapore urges the Commission to further clarify, in the commentary to draft conclusion 7, how we can ascertain that the "community of nations" has "recognized" a general principle of law "as intrinsic to the international legal system". Singapore suggests that a clarification can be made that the evidence used to ascertain such recognition by the "community of nations" should be wide and representative, including the different regions of the world. This is similar to the criteria set out in paragraph 2 of draft conclusion 5 in relation to general principles of law derived from national legal systems.

On the phrase "intrinsic to the international legal system", Singapore notes the clarification of the term "intrinsic" in paragraph (4) of the commentary, and appreciates the illustrations of how the term is applied to the principle of consent to jurisdiction (paragraph (5)) and the principle of *uti possidetis* (paragraph (6)). Singapore suggests that the principle of sovereign equality can also be added to the commentary to provide a further illustration of the meaning of "intrinsic". Sovereign equality is a fundamental tenet of international law which establishes the uniform legal personality of States and upon which the international legal order is built. In contrast, it is not clear to us that the example cited in paragraph (10) of the commentary fulfils the identification criteria set out in paragraph 1 of draft conclusion 7.

Singapore also reiterates its earlier comment that the caveat in paragraph 2 of draft conclusion 7 that paragraph 1 is "without prejudice to the question of the possible existence of other general principles of law formed within the international legal system" is unclear, overly broad and threatens to undermine the identification criteria in paragraph 1 completely. As such, Singapore is of the view that paragraph 2 of draft conclusion 7 should be removed.

[See also comments on draft conclusion 10.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

As stated above, the United Kingdom remains sceptical as to whether Article 38, paragraph 1 (c), [of the Statute of the International Court of Justice] includes a second category of general principles of law going beyond general principles derived from national law. The United Kingdom also remains sceptical as to how, if such a category exists, it is to be described and identified. The United Kingdom recognizes that draft conclusion 7 attempts to clarify this and address the identification of general principles derived from the international system.

The United Kingdom notes that the question of the existence of the second category of general principles – those formed within the international legal system – also remains contentious, both within the Commission and among other States. The United Kingdom notes that draft conclusion 7 was adopted by the Commission despite differing views among its members. In this regard, the United Kingdom welcomes the transparency of the Commission's approach of setting out clearly in the commentary the diverging views of members.

The United Kingdom agrees with the concern raised by members of the Commission regarding the apparent lack of State practice, case-law and teachings to support fully the existence of such a category or the methodology for the identification of such principles. In particular, it is not clear that there is support for the notion contained in draft conclusion 7 that a general principle of law formed within the international legal system must be recognized as "intrinsic" to the international legal system.

The United Kingdom also agrees with the view expressed by some members of the Commission that, if the Commission were to conclude that there is a category of general principles of law formed within the international legal system, then it must in any event be clearly distinguished from customary international law. In this regard, the United Kingdom notes that at least some of the examples of general principles of law formed within the international legal system referred to by members of the Commission during the debate and outlined in footnote 34 to the commentary of draft conclusion 7 appear to be principles existing within customary international law, such as the principle of non-intervention.

United States of America

[Original: English]

As noted above with respect to draft conclusion 3, the United States continues to disagree that Article 38, paragraph 1 (c), [of the Statute of the International Court of Justice] includes a category of general principles of law formed within the international legal system. Draft conclusion 7 nonetheless sets out a methodology for the identification of general principles of law in this second category. Moreover, the second paragraph of draft conclusion 7 leaves open the possibility that principles other than those identified using the methodology outlined in the first paragraph exist. In the United States' view, even were it established that this second category of general principles of law binding on States might exist, we have strong concerns that the second paragraph seems to open the door to an even more novel and less substantiated source of law, also supposedly binding on States.

Separate and apart from the question of sufficient evidence of this second category, draft conclusion 7's methodology raises some concerns on its own terms. It proposes a means for determining international law binding on States in a way that falls short of the sovereign consent expressly required for treaties and inherent in the development of customary international law.

The Commission proposes a test that would require a showing that a general principle formed within the international legal system is "intrinsic" to that system. In paragraph (4) of the commentary, it defines "intrinsic" to mean that a principle is "specific to the international legal system and reflects and regulates its basic features." In the United States' view, this test is vague and could lead to confusion as to what is or is not a general principle of law. For instance, the first example in the commentary illustrating the "intrinsic" test describes the principle of consent to jurisdiction, which finds its intrinsic character in the equality of

sovereign States and the lack of a judicial body at the international level with universal and compulsory jurisdiction. Yet, it is not clear that this principle is recognized by States as intrinsic to the international legal system. Indeed, such a principle could find its genesis in the presumption that a government or sovereign is immune from the jurisdiction of its own courts unless there has been specific consent or a waiver of sovereign immunity. The Commission's debate over the use of the word "intrinsic" in the context of *uti possidetis* also illustrates this concern.[1] Moreover, the commentary concerning the examples of principles "intrinsic" to the international legal system relies heavily on the views of courts and tribunals, rather than stressing the role of States in identifying these or other purported general principles of law in this hypothetical second category.

Given the considerations above, the United States **recommends that draft conclusion 7 be deleted, and that the discussion about the limited State practice be added to the commentary accompanying draft conclusion 3**.

8. Draft conclusion 8 – Decisions of courts and tribunals

Israel

[Original: English]

Draft conclusion 8 addresses decisions of courts and tribunals. Such decisions serve as a subsidiary means for determining rules of international law, a topic which is currently under consideration by the Commission in its separate work on the topic "Subsidiary means for the determination of rules of international law". It would therefore be advisable for the draft conclusions to align with the Commission's findings regarding this other topic. In addition to our comments regarding the decisions of national courts made in the context of draft conclusion 5, we wish to highlight several elements with regard to recourse to decisions of courts and tribunals, based on some proposals made by the Commission in its work on the other topic.

Israel believes that when assessing decisions of national courts, one must consider several factors. These factors include the position of the court in the domestic judicial hierarchy; the quality of reasoning; whether the relevant court possesses the requisite expertise; whether the decision forms part of a body of concurring decisions; and the extent to which the reasoning remains relevant, taking into account subsequent developments. Such criteria are in line with the current proposals by the Commission, as outlined in its most recent report.[1]

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

Draft conclusions 8 and 9 refer specifically to the potential relevance of judicial decisions and teachings, as subsidiary means for the determination of general principles of law. It is clearly correct to assume that judicial decisions and teachings may, in accordance with Article 38 (1) (d) of the Statute of the International Court of Justice, serve as subsidiary means for the determination of general principles of law as is the case with rules of international law generally. The Nordic countries thus do not dispute the substance of draft conclusions 8 and 9.

[1] *See* International Law Commission, 74th Session, 3643rd Meeting, A/CN.4/SR.3643, pp. 8–10 (25 July 2023); and 3644th Meeting, A/CN.4/SR.3644, pp. 3–5 (25 July 2023). Some Members expressed a view that the term "intrinsic" was inappropriate with respect to *uti possidetis* in that it suggested that colonialism was intrinsic to international law; some also questioned whether on the basis of this test *uti possidetis* would or could be considered a general principle of law. The varying views and proposals expressed in this debate demonstrate how the terminology is vague and could leave decisionmakers or practitioners without clear guidance.

[1] Report of the International Law Commission on the work of its seventy-fifth session, 29 April–31 May and 1 July–2 August 2024, A/79/10, chap. V.

However, we reiterate our previous statements in which we have questioned the need for a specific reference to subsidiary means in such a general sense, without any additional added value specific to the present context. It follows directly from the wording of Article 38 (1) (d) that judicial decisions and teachings may serve as subsidiary means for the determination of rules of international law. There is nothing to suggest that this does not apply, or applies differently, to general principles of law as compared to the other sources listed in Article 38 (1), namely treaties and customary law. The formulation of draft conclusions 8 and 9 does not offer any added value beyond what is already clear from Article 38 (1). As it stands, the Nordic countries would support deleting draft conclusions 8 and 9 from the set of draft conclusions.

Considering that the Commission is engaged with the separate topic of subsidiary means, it would seem more appropriate that any observations regarding the general nature or function of subsidiary means that are not specifically relevant or unique to the present topic, would be addressed in that context. Another concern supporting that same conclusion is that the draft conclusions do not in a similar way single out other factors or types of empirical evidence that might inform the determination and interpretation of general principles of law. This includes, for example, a more detailed reference to types of evidence that may constitute relevant practice and opinion supporting a determination that a general principle has indeed been *recognized* by the community of nations, as is presumed to be required by draft conclusion 2. In this context, the inclusion of draft conclusions 8 and 9 may leave a slightly unbalanced impression and perhaps unwantedly contribute to inflating the relevance of such evidence, whose function is merely that of assisting a determination and not alone constituting primary evidence.

Poland

[Original: English]

[See comments on draft conclusion 5.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom thanks the Commission for their work on draft conclusions 8 and 9 which it considers accurately reflects the provisions of Article 38 [of the Statute of the International Court of Justice], although the United Kingdom queries whether it is necessary to including these draft conclusions in the product on general principles of law.

United States of America

[Original: English]

The United States thanks the Commission for its efforts to identify the subsidiary means for determining the existence and content of general principles of law. It also notes the parallel efforts to address these topics in both the project on customary international law and the project on subsidiary means. While the United States supports efforts to define the content of subsidiary means across these projects, it wonders if the duplication could create confusion if there are even minor discrepancies between the outputs.

9. Draft conclusion 9 – Teachings

Israel

[Original: English]

Israel believes that draft conclusion 9, which addresses the "teachings of the most highly qualified publicists," should be limited to such teachings that are of the highest quality. Paragraph (3) of the commentary to the draft conclusion does express the need for caution in considering academic writings, as these might be expressions of individual opinions, but this is insufficient. The commentary should emphasize the need for writings to reflect a proper scientific methodology and its faithful application.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comments on draft conclusion 8.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[See comments on draft conclusion 8.]

10. Draft conclusion 10 – Functions of general principles of law

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries welcome the formulation of draft conclusion 10 as an accurate reflection of the actual function of general principles of law in international legal practice, namely the residual character of this source of international law and its potential relevance in contributing to coherence of the international legal system. It is noted in this regard that although the category of general principles of law constitutes a primary source of international law, alongside treaties and customary international law, general principles of law usually play a subsidiary role, mainly as a means of interpretation, filling gaps or avoiding situations of *non liquet*. The Nordic countries also note that the International Court of Justice has only rarely referred explicitly to principles of international law and, when it has done so, it has primarily been in the context of procedural obligations rather than substantive law obligations.

[See also comments on draft conclusion 11.]

Poland

[Original: English]

As to the functions of general principles of law, Poland is of the view that they should be resorted to only when a particular issue cannot be resolved as a whole or in part by other rules of international law. Thus, the commentary to draft conclusion 10 should more expressly indicate that general principles should not replace customary or treaty norms in their regulatory function and may be applied as a basis for primary rights and obligations only in limited circumstances. Such an approach would be also applicable to other examples of general principles of law formed within the international legal system in the commentary to draft conclusion 7. For example, the International Court of Justice's reference in the *Corfu Channel* case to "the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" need not lead to the conclusion that the Court considered those principles to derive their binding force from general principles of law.[1]

[See also comments on draft conclusion 3.]

Singapore

[Original: English]

Singapore reiterates its earlier comment that there is tension between the gap-filling function described in paragraph 1 of draft conclusion 10 and paragraph 3 of draft conclusion 11, which sets out the need to resort to "generally accepted techniques of interpretation and conflict resolution in international law" to resolve conflicts between a general principle of law and a rule in a treaty or customary international law.

[1] *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, at p. 22.]

On the examples of general principles of law cited in the commentary to draft conclusion 10, Singapore remains of the view that it is unclear whether all of these examples fulfil the methodology set out in draft conclusions 4 to 7. Singapore suggests that paragraph (6) of the commentary can make it clear that the examples are cited from various decisions, while reserving judgment as to whether they are indeed general principles of law.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom welcomes draft conclusions 10 and 11 and agrees that there is no hierarchy as between the sources of law in Article 38 (1) (a), (b), and (c) [of the Statute of the International Court of Justice]. The United Kingdom welcomes the clear confirmation of this in draft conclusion 11 and paragraph 2 of the commentary to draft conclusion 10.

The United Kingdom, however, suggests that the first paragraph of draft conclusion 10 is deleted to avoid implying some hierarchy or ancillary role where, as confirmed by the Commission, this is not the intention. The United Kingdom also considers that paragraph 1 of draft conclusion 2 may risk suggesting that general principles of law are more expansive than they are. General principles of law are not a complete panacea. The United Kingdom agrees with the views expressed in paragraph (5) of the commentary to draft conclusion 10 that "there may not always be a general principle of law filling the *lacunae* left by treaties or customary international law". The United Kingdom considers that draft conclusion 10 (2) is sufficient to explain the function of general principles but suggests that the order of 10 (2) (a) and (b) are changed to avoid any implication that general principes are ancillary to treaties or customary international law.

The United Kingdom again encourages the Commission to indicate in a clear and transparent manner those provisions which it considers do reflect *lex lata* and those which it does not.

United States of America

[Original: English]

The United States remains unsure of the overall necessity of draft conclusions 10 and 11 both in terms of how helpful they would be to States, judges, and practitioners, and whether they reflect a well-settled understanding of the functions of general principles of law or the relationship between general principles and conventional and customary international law. Nonetheless, we offer some specific remarks on these draft conclusions.

General principles of law are interstitial rules, resort to which should be had, if at all, only when other rules of international law do not address a particular issue in whole or in part (draft conclusion 10 (1)). In this sense, and as acknowledged in paragraph (3) of the commentary, an examination of general principles of law should follow extensive review of other sources of international law (treaty, custom) sequentially.[1] We therefore could support draft conclusion 10 (1), except that we question whether "resolution" of a particular issue is the appropriate test to apply when determining whether to turn to general principles of law. We **recommend instead that "address" may be more suitable in this regard,** as it may be the case that a customary or treaty rule could address an issue sufficient to preclude turning to a general principle of law to fill a gap, even if the customary or treaty rule does not fully provide resolution.

Given the above, we do not agree with draft conclusion 11 (3), which contemplates circumstances of conflicts between a general principle of law and a rule in a treaty or customary international law and determines that they are to be resolved "by applying the generally accepted techniques of interpretation and conflict resolution in international law." Rather, because general principles are interstitial, there logically should be a presumption

[1] We agree, moreover, with paragraph (5) of the commentary that observes that there may not always be a general principle of law filling any *lacunae* left by treaties or customary international law and that general principles may be resorted to only to the extent that they have been identified.

against a conflict situation with a treaty or customary international law rule. Thus, we **recommend draft conclusion 11 (3) be deleted.**

In light of these observations, we also question the necessity of draft conclusion 11 (1), which sets out that general principles of law, as a source of international law, are not in a hierarchical relationship with treaties and customary international law. While we do not dispute that general principles of law are sources of law, binding on States, along with treaties and customary international law, we believe that Article 38 (1) is clear in this regard. We are not convinced that the inherent interstitial nature of general principles of law can be comfortably squared with non-hierarchy or that draft conclusion 11 (1) finds any basis in State practice.

With respect to functions, general principles of law can serve several functions, such as gap-filling, helping interpret other rules, or as procedural rules.[2] At the same time, general principles of law are not meant to resolve any and all instances of *non liquet*. The United States is not convinced that draft conclusion 10 (2) (a)-(b) serve to clarify sufficiently the functions of general principles of law; rather, these provisions may be both under- and overinclusive. In this connection, we are not certain that it is a well-established function of general principles of law to serve to contribute to the coherence of the international legal system and we note that certain of the examples of such general principles of law (e.g., good faith), are not in and of themselves sources of obligations where none would otherwise exist.[3] Thus, the United States **recommends deletion of draft conclusion 10(2) and accompanying commentary**.

For the foregoing reasons, the United States **recommends that paragraphs 1 and 2 of draft conclusion 11 are better placed in the commentary to draft conclusion 10 (1). In the alternative, we would recommend that the text of draft conclusion 11 (1)-(2) be combined with draft conclusion 10 (1) and that the relationship between the three sources of law as sequential be further clarified.**

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

Brazil

[Original: English]

Brazil believes draft conclusion 11 accurately confirms that there is no hierarchical relationship between the sources of international law and that a general principle of law may exist in parallel with treaty or customary rules having identical or analogous content.

Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries support the structure and formulation of draft conclusion 11. We believe that it offers an accurate reflection of the basic interplay between general principles of law and the other primary sources of law, namely treaties and customary international law.

Considering the residual role of general principles referred to earlier in our statement, and the fact that the primary sources are, in fact, commonly operationalized in successive order, as recognized in draft conclusion 10, the Commission might consider reflecting this also in draft conclusion 11. This could, for example, be done by adding the word "formal" before "hierarchical" in draft conclusion 11, paragraph 1, so that it would read: "General

[2] Third report on general principles of law, A/CN.4/753, paras. 40–41 (prepared by Marcelo Vázquez-Bermúdez) ("Commission members and delegations in the Sixth Committee are generally of the view that the main function of general principles of law … is to fill gaps in conventional and customary international law, and to prevent situations of *non liquet* before international courts and tribunals. This view is also widely held in the international law literature.").

[3] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, pp. 105–106, para. 94.

principles of law, as a source of international law are not in a *formal* hierarchical relationship with treaties and customary international law".

Singapore

[Original: English]

[See comments on draft conclusion 10.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[See comments on draft conclusion 10.]

United States of America

[Original: English]

[See comments on draft conclusion 10.]