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Fourth report on general principles of law

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I. Introduction

1. At its seventieth session, in 2018, the Commission decided to include the topic "General principles of law" in its current programme of work.[1]

2. At its seventy-first session, in 2019, the Commission held a general debate on the basis of the Special Rapporteur's first report.[2]

3. A second general debate took place at the Commission's seventy-second session, in 2021, after restrictions related to the coronavirus disease (COVID-19) had been lifted, on the basis of a second report submitted by the Special Rapporteur[3] and a memorandum prepared by the Secretariat entitled "General principles of law".[4]

4. At its seventy-third session, in 2022, the Commission had before it the third report of the Special Rapporteur,[5] which was aimed at completing the set of draft conclusions on the topic. A full set of 11 draft conclusions, together with commentaries thereto, was adopted by the Commission on first reading at its seventy-fourth session, in 2023.[6] In accordance with articles 16 to 21 of its statute, the Commission decided to transmit the draft conclusions adopted on first reading, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted by 1 December 2024.

5. During the debate in the Sixth Committee in 2023, in which some 60 States participated,[7] delegations commended the work done by the Commission on the topic to date, which complemented the Commission's other contributions on the sources of international law. The importance of the topic was emphasized. Delegations generally welcomed the draft conclusions and the commentaries thereto as texts that could facilitate the work of all those who may be called upon to identify and apply general principles of law. Many delegations also made detailed comments on the text adopted on first reading, providing valuable

[1] Report of the International Law Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third session, Supplement No. 10* (A/73/10), para. 28.

[2] A/CN.4/732.

[3] A/CN.4/741 and Corr.1.

[4] A/CN.4/742.

[5] A/CN.4/753.

[6] The text of the draft conclusions on general principles of law and commentaries thereto adopted by the Commission on first reading is reproduced in the 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.

[7] Statements were made by Algeria (A/C.6/78/SR.28), Argentina (A/C.6/78/SR.28), Armenia (A/C.6/78/SR.27), Australia (A/C.6/78/SR.23), Austria (A/C.6/78/SR.24), Belarus (A/C.6/78/SR.24), Brazil (A/C.6/78/SR.23), Cameroon (A/C.6/78/SR.25), Canada (A/C.6/78/SR.25), Chile (A/C.6/78/SR.24), China (A/C.6/78/SR.27), Colombia (A/C.6/78/SR.27), Côte d'Ivoire (A/C.6/78/SR.28), Croatia (A/C.6/78/SR.27), Cuba (A/C.6/78/SR.25), the Czech Republic (A/C.6/78/SR.25), Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/78/SR.23), Ecuador (A/C.6/78/SR.24), El Salvador (A/C.6/78/SR.28), Estonia (A/C.6/78/SR.24), France (A/C.6/78/SR.23), Greece (A/C.6/78/SR.27), Guatemala (A/C.6/78/SR.27), India (A/C.6/78/SR.25), Indonesia (A/C.6/78/SR.27), Iran (Islamic Republic of) (A/C.6/78/SR.24), Ireland (A/C.6/78/SR.25), Israel (A/C.6/78/SR.24), Italy (A/C.6/78/SR.23), Jamaica (A/C.6/78/SR.28), Japan (A/C.6/78/SR.28), Lebanon (A/C.6/78/SR.28), Malaysia (A/C.6/78/SR.27), Mexico (A/C.6/78/SR.25), Micronesia (Federated States of) (A/C.6/78/SR.27), Netherlands (Kingdom of the) (A/C.6/78/SR.24), Peru (A/C.6/78/SR.25), the Philippines (A/C.6/78/SR.28), Poland (A/C.6/78/SR.24), Portugal (A/C.6/78/SR.24), the Republic of Korea (A/C.6/78/SR.28), Romania (A/C.6/78/SR.25), the Russian Federation (A/C.6/78/SR.26), Senegal (A/C.6/78/SR.29), Sierra Leone (A/C.6/78/SR.27), Singapore (A/C.6/78/SR.23), Slovakia (A/C.6/78/SR.25), Slovenia (A/C.6/78/SR.27), South Africa (A/C.6/78/SR.25), Spain (A/C.6/78/SR.27), Switzerland (A/C.6/78/SR.24), Thailand (A/C.6/78/SR.25), Türkiye (A/C.6/78/SR.27), Uganda (A/C.6/78/SR.27), the United Kingdom of Great Britain and Northern Ireland (A/C.6/78/SR.23), the United States of America (A/C.6/78/SR.24), Viet Nam (A/C.6/78/SR.25), the Holy See (A/C.6/78/SR.28), the State of Palestine (A/C.6/78/SR.28) and the European Union (A/C.6/78/SR.23). The statements made in the Sixth Committee are available in full (in the original languages) on the web page of the Sixth Committee, at www.un.org/en/ga/sixth/.

suggestions as to how specific draft conclusions and the commentaries thereto might be improved.[8]

6. As of the date of submission of the present report, written comments and observations in response to the request contained in the Commission's report on the work of its seventy-fourth session had been received from Brazil, the Czech Republic, Israel, Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), Poland, Singapore, the United Kingdom of Great Britain and Northern Ireland and the United States of America.[9]

7. The Special Rapporteur has engaged with academia and held discussions regarding the draft conclusions adopted by the Commission with various experts in the field, in particular at the following events: a workshop organized by the Lauterpacht Centre for International Law, University of Cambridge, United Kingdom, held on 5 July 2023;[10] a seminar on general principles of law organized by the Institute of International Law and the Department of International Law of China Foreign Affairs University, held on 28 September 2023;[11] and a seminar on general principles of law organized by the Oxford Institute for Ethics, Law and Armed Conflict and the Institute of European and Comparative Law, held at Magdalen College, University of Oxford, United Kingdom, on 21 January 2025.[12] The Special Rapporteur is thankful for the interest shown and the useful contributions made by the participants.

8. Following the programme of work set out in the Special Rapporteur's first report of 2019,[13] the present report addresses the main comments and observations that have been made on the draft conclusions and commentaries thereto adopted on first reading, in both the 2022 and 2023 debates in the Sixth Committee and in writing in response to the Commission's request.

9. The present report is structured into three sections. After the present, introductory section, section II addresses the comments and observations received from States on the draft conclusions adopted on first reading, both those that are general in nature and those that are specific with respect to each draft conclusion. Section III offers some remarks concerning the final outcome of the Commission's work on the topic. In addition, the report has two annexes, which contain a marked-up text of the draft conclusions adopted on first reading with proposed amendments by the Special Rapporteur and a clean text of the draft conclusions adopted on first reading with proposed amendments by the Special Rapporteur.

[8] See the 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). See also the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-ninth session, prepared by the Secretariat (A/CN.4/778).

[9] All references in the present document to the written comments and observations of States are to document A/CN.4/779, in which they are reproduced.

[10] The participants in the workshop, in addition to the Special Rapporteur, were Pierre d'Argent, Mariana de Andrade, Paul Berman, Fernando Lusa Bordin, Daniel Costelloe, Alfredo Crosato Neumann, Tom Grant, Devika Hovell, Miles Jackson, Fraser Janeczko, Katie Johnston, Alison McDonald KC, Campbell McLachlan, Federica Paddeu, Brendan Plant, Niccolò Ridi, Xuan Shao, Antonios Tzanakopoulos, Michael Wood KC, Hannah Woolaver, Sam Wordsworth KC and Rumiana Yotova.

[11] The participants in the seminar, in addition to the Special Rapporteur, included Junke Xu, Sienho Yee, Naigen Zhang, Ru Ding, Luping Zhang, Tiantian He, Bin Jiang, Yang Liu, Yan Song, Liren Luo, Xuan Shao, Kaijun Pan, Xiao Mao and Yang Xie.

[12] The participants in the seminar, in addition to the Special Rapporteur, were Dapo Akande, Judge Awn Al-Khasawneh, Mads Andenas KC, Janina Barkholdt, Eirik Bjorge, Alfredo Crosato Neumann, Ximena Fuentes, Campbell McLachlan KC, Paolo Palchetti, Xuan Shao and Juliana Valle Pereira Guerra. Other participants included Freya Baetens, Ludovica Chiussi, Tvetelina van Benthem, Fernando Lusa Bordin, Sir Malcom Evans, Lawrence Hill-Cawthorne, Shastikk Kumaran, Johan R. Leiss, Vyaj Lovejoy, Maurice Mendelson KC, Theodor Meron, Federico Ortino, Niccolò Ridi, Catherine Redgwell, Federica Paddeu, Lavanya Rajamani, Luíza Leão Soares Pereira, Ahila Sornarajah, Stefan Talmon, Antonios Tzanakopoulos and Jan Wouters.

[13] A/CN.4/732, paras. 259–261.

II. Comments and observations received from States

10. The Special Rapporteur is grateful to all the States in the Sixth Committee that commented and provided observations orally and in writing on the draft conclusions adopted on first reading in 2023, as well as on the draft conclusions provisionally adopted in 2021 and 2022. As is usually the case, those comments and observations are thoughtful and constructive and should assist the preparation of the final output of the Commission on the topic.

11. The comments and observations received are considered in two subsections below: subsection A addresses general comments and observations on the draft conclusions as a whole, and subsection B addresses comments and observations on specific draft conclusions. In each case, the comments and observations are briefly described, and the Special Rapporteur then makes his corresponding suggestions. The Special Rapporteur's suggestions mainly concern the text of the draft conclusions, but he also indicates, in general terms, whether changes should be made to the commentaries to the draft conclusions as well.

A. General comments and observations

1. Comments and observations by States

12. States in the Sixth Committee have continued to support the work of the Commission on the topic and highlighted its relevance. States have generally been of the view that the Commission is well placed to provide useful guidance on general principles of law as a source of international law, as it has done in the past with respect to other sources, notably treaties and customary international law. There is also ample support for the form that the Commission intends to give to the final outcome of its work on the topic, that is, draft conclusions accompanied by commentaries, consistent with the Commission's recent work on similar topics.

13. The Nordic countries commended the thoroughness of the Commission's work on the topic and the broad survey of relevant State practice, jurisprudence and teachings, recalling that the draft conclusions should remain sufficiently anchored in "solid evidence of the existence and content of this primary source of international law".[14] The United Kingdom, by contrast, considered that there was "relatively little by way of State practice" in that area from which to draw conclusions and that, where there was practice by States or international courts and tribunals, such practice had been described as "unclear or ambiguous". On that basis, the United Kingdom highlighted the importance of transparency where practice was insufficient, emphasizing that the Commission should make clear when it was codifying international law, suggesting the progressive development of international law, or even proposing new law.[15]

14. The Nordic countries, moreover, stated that the role of general principles of law was more limited than that of treaties and customary international law and that the conditions for their identification had therefore been comparatively less examined in practice and in the literature. It was suggested that the criteria for the identification of general principles of law must be formulated so that their legal significance was not exaggerated in relation to the other primary sources of international law.[16] Slovakia noted that "the practical benefit of analysing the topic at the international level was rather limited", adding that "[t]he autonomy of the judicial institutions for which the question of general principles of law predominantly arose should be respected".[17]

[14] See the written comments and observations of Norway (on behalf of the Nordic countries).
[15] See the written comments and observations of the United Kingdom.
[16] See the written comments and observations of Norway (on behalf of the Nordic countries).
[17] See the statement by Slovakia (A/C.6/78/SR.25).

15. Some States urged the Commission not to rush in its consideration of the topic in view of the number of unresolved questions.[18] The Nordic countries highlighted the need for a "cautious approach given the many sensitivities at play coupled with the cross-cutting nature of the topic".[19]

2. Recommendations of the Special Rapporteur

16. The Special Rapporteur welcomes the comments made by the States in the Sixth Committee that continue to support the work of the Commission on the topic. The Special Rapporteur is in full agreement that the Commission is well positioned to provide useful guidance to all those called upon to resort to general principles of law as a source of international law, in particular as regards how to identify such principles, what their functions are and how they relate to other sources of international law.

17. The Special Rapporteur notes the concern of the United Kingdom regarding the perceived lack of sufficient practice to address the topic. However, in the view of the Special Rapporteur, and as many other States have noted, the Commission has to date analysed the extensive practice of States and international courts and tribunals, together with relevant doctrine, in a comprehensive manner. That practice is indeed substantial and allows the Commission to appropriately clarify the various aspects of general principles of law that fall within the scope of the topic.

18. Granted, there may be certain specific aspects of the draft conclusions for which practice is more limited, and that should be acknowledged.

19. As regards the views expressed by the Nordic countries and Slovakia on the practical importance of the topic or of general principles of law more generally, the Special Rapporteur does not consider that such importance has been somehow overstated or exaggerated in the draft conclusions or in the commentaries thereto, which are in fact neutral on the matter. Most States in the Sixth Committee, as noted above, have repeatedly recalled the usefulness of the work undertaken by the Commission, in the light of existing practice. The objective is to clarify several key aspects of the source of international law listed in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, without making an *a priori* determination as to how useful they were in the past, how useful they are at present and how useful they may be in the future.

20. It is of course undeniable that general principles of law have been resorted to relatively less often than treaties or customary international law in the past. As the Special Rapporteur has explained in previous reports, this may be for a variety of reasons, such as the proliferation of treaties, which can make it less necessary to rely on non-written rules and principles of international law; the fact that the nature of general principles of law and the methodology for their identification may have been considered unclear; or the fact that general principles of law are mainly resorted to when other rules of international law do not resolve a particular issue.

21. Be that as it may, general principles of law remain one of the three main sources of international law referred to in Article 38, paragraph 1, of the Statute of the International Court of Justice and, as draft conclusion 11 makes clear, there is no hierarchy among them. The nature of general principles of law as a source of international law entails that they have the capacity to produce new binding norms, which in itself is significant from a legal point of view and deserves attention.

22. As regards the comment of Slovakia concerning the autonomy of judicial institutions, the Special Rapporteur does not consider that the draft conclusions encroach upon it in any way; indeed, the goal is to avoid doing so. The Special Rapporteur further recalls that the Commission has already held debates on the question of whether international courts or tribunals play a special role in the formation of general principles of law, as has been suggested by some authors. The Commission has subsequently adopted the approach,

[18] See the statement by the Russian Federation (A/C.6/78/SR.26); and the full text of the statement made on the topic by Armenia in the Sixth Committee during the seventy-eighth session of the General Assembly, available on the web page of the Sixth Committee.

[19] See the written comments and observations of Norway (on behalf of the Nordic countries).

reflected in draft conclusion 8, that decisions of courts and tribunals must be regarded as a subsidiary means for the determination of general principles of law. The Special Rapporteur wishes to emphasize that general principles of law should not be understood in a court-centric manner; this would not be consistent with their nature as a source of international law that may also be invoked outside judicial or arbitral proceedings, and may lead to a misunderstanding that courts and tribunals have law-making power.

23. As regards the concerns of some States that the Commission should not rush in the adoption on second reading of the draft conclusions, the Special Rapporteur recalls that the topic has been included in the programme of work of the Commission since 2018. Four reports, including the present one, have been submitted by the Special Rapporteur, addressing all the aspects of the topic as identified in the initial syllabus,[20] on the basis of existing State practice, jurisprudence and relevant doctrine. The Special Rapporteur is thus of the view that the draft conclusions on the topic are ready for adoption by the Commission on second reading at its seventy-sixth session, subject to the outcome of the debates that will take place within the Commission and the Sixth Committee.

B. Specific comments and observations

1. Draft conclusion 1: Scope

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

(a) Comments and observations by States

24. States endorsed the Commission's approach of confining the scope of the draft conclusions to general principles of law as a source of international law, clarifying the methodology for their identification, their functions and their relationship with other sources of international law.[21] The view was reiterated that the starting point or basis for the work of the Commission must be Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice,[22] which refers to "the general principles of law recognized by civilized nations".

25. The United Kingdom welcomed "the clarity on the important question of terminology"[23] and the understanding that the draft conclusions concerned the "general principles of law" referred to in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. The Nordic countries stressed the importance of "distinguishing clearly and systematically between practice supporting the existence of a general principle … 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".[24]

26. India suggested that a new conclusion containing a definition of "general principles of law" would be useful and could be added after draft conclusion 10, on the functions of general principles of law.[25] Poland noted, in a similar vein, that the meaning of the words "general" and "principle" in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice should be clarified. Specifically, Poland queried whether the word "general" referred to the "general character" of general principles of law or, rather, to the fact that those principles were binding on all States irrespective of their level of specificity. As regards the world "principle", the question was raised as to whether it should be distinguished from the

[20] *Yearbook of the International Law Commission 2017*, vol. II (Part Two), annex I.
[21] See the written comments and observations of the United Kingdom.
[22] See the statements by India (A/C.6/78/SR.25), Ireland (A/C.6/78/SR.25) and Jamaica (A/C.6/78/SR.28). See also the statements by Côte d'Ivoire (A/C.6/78/SR.28), Indonesia (A/C.6/78/SR.27), the Philippines (A/C.6/78/SR.28) and Slovenia (A/C.6/78/SR.27).
[23] See the written comments and observations of the United Kingdom.
[24] See the written comments and observations of Norway (on behalf of the Nordic countries).
[25] See the statement by India (A/C.6/78/SR.25).

term “rule” or, rather, whether it should be understood as referring implicitly to domestic law.[26]

27. Most States have, moreover, expressed the view that the Commission did not need to prepare an illustrative list of general principles of law and that examples thereof could be provided in the commentaries to the draft conclusions as necessary and for illustration only. The Nordic countries, by contrast, considered that a draft conclusion containing examples of general principles of law could be useful.[27]

(b) Recommendations of the Special Rapporteur

28. Being introductory in nature, draft conclusion 1 has not raised significant concerns among States. The scope of the work of the Commission has been clear and specific from the outset, and States have continuously supported the Commission’s approach.

29. The Special Rapporteur reiterates that the starting point of the work of the Commission is Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, analysed in the light of the practice of States and the jurisprudence of international courts and tribunals. In this context, the Special Rapporteur has made clear in previous reports that it is of utmost importance to be careful with terminology in the context of the topic, given that the term “principle” is very often used in practice, but reference is not always necessarily to general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute. Indeed, rules contained in treaties and in customary international law are sometimes also called “principles”.[28] The Special Rapporteur has been careful in the selection of examples of relevant practice in this regard from the outset, although it is of course inevitable that debates among Commission members may arise as to whether a particular principle falls within the scope of the topic.

30. The Special Rapporteur agrees with the view of those States that do not consider that a list of examples of general principles of law is necessary, either in the text of the draft conclusions or in the commentaries thereto. As the Special Rapporteur has previously noted, such a list would necessarily be incomplete, and in any event examples of general principles of law are referred to in the commentaries for illustration. The Special Rapporteur would thus suggest that the Commission maintain the approach that it has taken to the issue to date.

31. As regards the suggestion of India to include a draft conclusion defining the term “general principles of law”, the Special Rapporteur does not consider that such an inclusion is warranted. In many ways, the draft conclusions as a whole, by clarifying the origins or categories of general principles of law, the methodology for their identification, their functions and their relationship with other sources of international law, already provide a comprehensive notion of what must be understood by “general principles of law”. A new, separate draft conclusion containing a definition of such principles might thus lead to repetition.

32. Relatedly, however, Poland raised some important questions, which have been to some extent addressed by the Commission, concerning the meaning of the terms “general” and “principle” in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. The Special Rapporteur has explained in previous reports that the term “principle” is often used interchangeably with the term “rule” in practice and in the literature and that there would therefore be little use in trying to draw conclusions from the term “principle”‘ alone.[29]

33. The term “general”, by contrast, may deserve closer attention. It could be interpreted – and it has been interpreted by some – as referring either to the general or abstract character of the content of general principles of law, or to the general scope of application of those principles. The Commission appears to have rejected the first of those propositions, having indicated, in the commentary to draft conclusion 5, on the determination of the existence of a principle common to the various legal systems of the world, that general principles of law

[26] See the written comments and observations of Poland.
[27] See the written comments and observations of Norway (on behalf of the Nordic countries).
[28] A/CN.4/732 (first report), paras. 38, 39 and 254–258.
[29] *Ibid.*, paras. 146–154.

may be both abstract and specific in content, a matter that must be assessed on a case-by-case basis.[30]

34. This approach could lead to an interpretation of the draft conclusions that suggests that the term "general" in Article 38, paragraph 1 (*c*), must be understood as referring to the general scope of application of general principles of law and, more specifically, that these principles always, by definition, form part of general international law, binding on all States. This relates to the question raised by some States and international organizations in the Sixth Committee, namely, whether principles with a limited scope of application, within regional and subregional legal systems (and perhaps at the bilateral level), may also exist. This issue will be further addressed below in relation to draft conclusion 2, on recognition.

35. In the light of the above, the Special Rapporteur considers that no amendments to draft conclusion 1 are necessary at the current stage. However, additions could be made to the commentary to reflect some of the points addressed above, in particular as regards the need for all those who may be called upon to deal with general principles of law to pay attention to terminology.

2. Draft conclusion 2: Recognition

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

(a) Comments and observations by States

36. There was ample support in the Sixth Committee for draft conclusion 2, according to which, for a general principle of law to exist, it "must be recognized by the community of nations". There is no disagreement among States that "recognition" is the essential condition for the emergence of a general principle of law and that the methodology for identification requires an assessment of all available evidence of such recognition, based on specific and objective criteria.

37. States supported the inclusion of the term "community of nations" in draft conclusion 2, in replacement of the term "civilized nations" found in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. States such as Argentina, Brazil, Chile, the Republic of Korea, Sierra Leone and South Africa agreed with the Commission's position that the term "civilized nations" was anachronistic.[31] Other States, such as Mexico, the Philippines and Viet Nam, noted that such an approach was consistent with the principle of sovereign equality of States, in the sense that all States participated equally, without any distinction, in the process of formation of general principles of law.[32]

38. Some States stressed that the term "community of nations" should not be confused with the term "international community of States as a whole",[33] which the Commission employed in the context of its work on the topic of peremptory norms of general international law (*jus cogens*) and imposed a higher threshold for the identification of a norm.[34] Estonia suggested that "the draft conclusions should not use the term 'international community of States as a whole', found in the Vienna Convention on the Law of Treaties[35] in the context of *jus cogens* norms, because it set an unnecessarily high threshold". According to Estonia, "the essence of a general principle of law should not change, even if terminology was

[30] Para. (3) of the commentary to draft conclusion 5, A/78/10, para. 41, at p. 18.

[31] See the statements by Argentina (A/C.6/78/SR.28), Brazil (A/C.6/78/SR.23), Chile (A/C.6/78/SR.24), the Republic of Korea (A/C.6/78/SR.28), Sierra Leone (A/C.6/78/SR.27) and South Africa (A/C.6/78/SR.25). See also the written comments and observations of Brazil.

[32] See the statements by Mexico (A/C.6/78/SR.25), the Philippines (A/C.6/78/SR.28) and Viet Nam (A/C.6/78/SR.25).

[33] See the statements by Estonia (A/C.6/78/SR.24) and Slovenia (A/C.6/78/SR.27).

[34] The draft conclusions adopted by the Commission and the commentaries thereto are reproduced in the Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 43 and 44.

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

modernized".[36] Poland noted in that regard that the use of the term "community of nations" would appear not to be consistent with the terminology employed elsewhere in general international law and that there was no need to produce new terminology that might create "problems of interpretations and interrelations to already well-established concepts".[37]

39. Cameroon questioned the use of the term "*l'ensemble des nations*" in the French version of draft conclusion 2, which in its view was not used consistently throughout the draft conclusions and the commentaries thereto, and suggested using the term "States" instead.[38] Brazil, for its part, suggested employing the term "community of States", considering that general principles of law derived exclusively from national legal systems and would thus exclude recognition by other actors, such as international organizations.[39] Peru was of the view that "community of nations" was more appropriate than "civilized nations", although wording such as "recognized by States or recognized in State practice" could also have been used.[40] Algeria suggested using the term "community of States" and the Nordic countries the term "international community of States".[41]

40. The United States similarly considered that draft conclusion 2 and the commentary thereto should "reflect and ensure the primacy of the State's role in recognition of general principles of law". It noted that it was not clear why or when international organizations could contribute to the formation of general principles of law and that a better approach would be to say that it was the practice of States within international organizations that was relevant, not the practice of international organizations as such. Accordingly, the United States suggested deleting paragraph (5) of the commentary to draft conclusion 2.[42]

41. Estonia, on the other hand, noted that, while one needed to assess "first and foremost the positions of States" when determining whether a general principle of law had been identified and recognized, international organizations could also provide "useful contributions".[43] Austria suggested using the term "international community" because the term "community of nations" would exclude international organizations and other subjects of international law and because the term "nation" had different meanings and was politically sensitive.[44] Jamaica, referring to paragraph (5) of the commentary to draft conclusion 2, recommended that the Commission identify examples of circumstances in which international organizations might contribute to the formation of general principles of law.[45]

42. The European Union called for further reflection on the role of international organizations, including its own role, and suggested using the term "international community" instead of "community of nations". It noted that reference to the practice of the European Union had remained limited, and stressed that its practice was indeed relevant in the context. It drew attention to article 340 of the Treaty on the Functioning of the European Union[46] and article 6, paragraph 3, of the Treaty on European Union,[47] and suggested that, in the process of identifying general principles of law, the practice of the European Union could serve as a reference when determining how the methods of comparative law should be used

[36] See the statement by Estonia (A/C.6/78/SR.24).
[37] See the written comments and observations of Poland.
[38] See the statement by Cameroon (A/C.6/78/SR.25). In its statement, Senegal also called for consistency across the various language versions of the draft conclusion (A/C.6/78/SR.29). See also the statement by Lebanon (A/C.6/78/SR.28).
[39] See the statement by Brazil (A/C.6/78/SR.23); and the written comments and observations of Brazil.
[40] See the statement by Peru (A/C.6/78/SR.25).
[41] See the statements by Algeria (A/C.6/78/SR.28) and Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.23).
[42] See the written comments and observations of the United States.
[43] See the statement by Estonia (A/C.6/78/SR.24).
[44] See the statement by Austria (A/C.6/78/SR.24).
[45] See the statement by Jamaica (A/C.6/78/SR.28).
[46] Treaty on the Functioning of the European Union (consolidated version), *Official Journal of the European Union*, No. C 202, 7 June 2016, p. 47.
[47] Treaty on European Union (consolidated version), *ibid.*, p. 13.

in that context, in particular when an international judicial body was faced with the task of identifying general principles of international law.[48]

43. Austria observed that draft conclusion 2 "left open the exact nature of the recognition of general principles [of law]", and suggested adding the words "as such" after "recognized". It also raised the question of "whether such recognition could take place instantly or whether it would have to evolve over a certain period of time".[49]

44. The United States was of the view that 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".[50]

(b) Recommendations of the Special Rapporteur

45. The Special Rapporteur notes that there is general endorsement of draft conclusion 2 as adopted on first reading. The key issue on which views to some extent differ is that of exactly which actors are capable of recognizing a general principle of law for purposes of its formation and which terminology to employ in the draft conclusion accordingly, whether "community of nations" or some other term. This issue is further related to a slightly more complex question that has not been fully addressed by the Commission to date: whether general principles of law are by definition universally applicable or, rather, whether general principles of law with a more limited scope of application may also exist under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice (whether regional, subregional, bilateral, or of another type).

46. At the outset, the Special Rapporteur recalls that the Commission borrowed the term "community of nations" from article 15 of the International Covenant on Civil and Political Rights,[51] concerning the principle of legality under human rights law, which provides that nothing in that provision "shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the *general principles of law recognized by the community of nations*" (emphasis added). As the Special Rapporteur explained in his first report, the negotiating history of the Covenant shows that the negotiating States had intended to refer to general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, but that, since the term "civilized nations" proved controversial, it was decided to employ the term "community of nations".[52]

47. Contrary to what Poland has suggested, therefore, the Commission is not producing new terminology that could cause confusion with other well-established concepts in international law. The term "community of nations", as an alternative for "civilized nations" in the context of general principles of law, has been known since at least 1966, when the International Covenant on Civil and Political Rights was adopted.

48. That said, the Special Rapporteur shares the concern expressed by Poland and some other States that general principles of law should not be confused with peremptory norms of general international law (*jus cogens*), which required acceptance and recognition by the "international community of States as a whole". In its draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), the Commission clarified that such acceptance and recognition must be "by a very large and representative majority of States"; that acceptance and recognition by all States was not required; and that the positions of other actors, while potentially relevant "in providing context", did not in and of themselves form part of such acceptance and recognition.[53] The

[48] See the statement by the European Union (A/C.6/78/SR.23). See also the full text of that statement, available on the web page of the Sixth Committee.

[49] See the statement by Austria (A/C.6/78/SR.24).

[50] See the written comments and observations of the United States.

[51] International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[52] A/CN.4/732, para. 184.

[53] Draft conclusion 7 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/77/10, para. 43, at p. 12.

Commission determined that, in addition to customary international law, treaties and general principles of law "may also serve as bases for" *jus cogens* norms.[54] These provisions reaffirm that general principles of law and *jus cogens* norms are different in nature and should not be confused, not least as regards the methodology for their identification. This point is already made in the commentaries to the draft conclusions on general principles of law adopted by the Commission on first reading,[55] but the commentaries could be expanded to place greater emphasis on it.

49. The Special Rapporteur has also taken note of the concern expressed by some States regarding the equivalents of the term "community of nations" used in the other language versions of article 15 of the International Covenant on Civil and Political Rights: "جماعة الأمم" in Arabic; "各国" in Chinese; "l'ensemble des nations" in French; "международное сообщество" in Russian; and "la comunidad internacional" in Spanish. Nonetheless, the Special Rapporteur does not consider that there are significant differences between these various terms. In all cases, reference is made to a community of nations or an international community. This could be clarified in the commentary to the draft conclusion.

50. The key question remains, however, of exactly which actors are covered by the term "community of nations" under draft conclusion 2. Views among States are divided, as noted above, between: (a) those that consider that only State recognition is relevant; and (b) those that consider that international organizations may also play a role in the formation of general principles of law.

51. To address this issue, the Special Rapporteur finds it useful to refer to each of the two categories of general principles of law. As regards general principles of law derived from national legal systems, there is no doubt that the term "community of nations" refers primarily to States, as many delegations in the Sixth Committee have indicated. Draft conclusions 4 to 6 make clear that, to identify such principles, one must conduct a wide and representative comparative analysis to ascertain the existence of a principle common to the various legal systems of the world and then ascertain the transposition of that principle to the international legal system insofar as it is compatible with that system. This all suggests, again, that it is primarily States that recognize general principles of law as such, be it individually in their national legal systems, or individually or collectively at the international level for purposes of transposition.

52. The Special Rapporteur is not convinced, however, that a potential role for international organizations in the formation of general principles of law derived from national legal systems should be outright excluded. There may be cases where, for example, an international organization is empowered by delegation to issue legislative acts on a variety of matters, which are directly applicable in the legal systems of the members of the organization. While the key criterion for purposes of identification remains the requirement that the principles deriving from such legislative acts be found also in national legal systems, the organization does play a role. Indeed, those acts may serve as evidence that a principle is common to all the members of an organization, to some extent simplifying the required comparative analysis.

53. The Special Rapporteur recalls, moreover, that the Commission has clarified the potential role of the conduct of other actors for the identification of norms – a role that is essentially secondary – in the context of previous topics. In line with the Commission's work on those topics, the Special Rapporteur is of the view that those other actors, such as non-governmental organizations, do not participate in the recognition of general principles of law in the sense described above, but their conduct may be relevant in providing context and for assessing recognition by the community of nations. These positions do not, in and of themselves, form part of such recognition.

54. Similar considerations apply with respect to general principles of law formed within the international legal system. Thus, as explained in more detail below, the emergence of

[54] Draft conclusion 5, *ibid*.

[55] Para. (4) of the commentary to draft conclusion 2, A/78/10, para. 41, at p. 14.

such principles primarily requires their recognition by States as intrinsic to the international legal system. At the same time, the conduct of international organizations themselves may also, at times, serve as evidence of such recognition, for example in treaties between international organizations or in other instruments adopted by them.

55. In the light of the above, the Special Rapporteur would suggest adopting an approach consistent with that adopted by the Commission in the context of its work on other topics.[56] While recognition under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice refers essentially to recognition by States, international organizations may in certain cases also contribute to the recognition of general principles of law. The positions of other actors may also be relevant when assessing the recognition of a general principle of law by the community of nations.

56. The Special Rapporteur would thus suggest adding three additional paragraphs to draft conclusion 2, which would read as follows:

> "**Draft conclusion 2**
> **Recognition**
>
> 1. For a general principle of law to exist, it must be recognized by the community of nations.
>
> 2. It is primarily the recognition by States that contributes to the formation of general principles of law.
>
> 3. In certain cases, the recognition by international organizations may also contribute to the formation of general principles of law.
>
> 4. While the positions of other actors may be relevant in providing context and for assessing recognition by the community of nations, these positions do not, in and of themselves, form part of such recognition."

57. As noted above, the European Union drew attention to some practice that it considered relevant for the topic. In particular, it referred to article 340 of the Treaty on the Functioning of the European Union, which deals with issues of contractual and non-contractual liability of the Union and refers, as part of the law applicable to the latter, to "general principles common to the laws of the Member States". The European Union also referred to article 6, paragraph 3, of the Treaty on European Union, which provides that "[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms *and as they result from the constitutional traditions common to the Member States*, shall constitute general principles of the Union's law" (emphasis added).

58. These examples raise a separate issue connected with the requirement of recognition, namely, whether, in addition to general principles of law that are universally applicable (and which require recognition by the community of nations), general principles of a more limited scope of application may also fall within the scope of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.

59. The Special Rapporteur recalls that this issue was briefly referred to in his earlier reports[57] and that members of the Commission have so far expressed differing views thereon. In addition to the treaties relating to the European Union, other relevant instruments include the African Charter on Human and Peoples' Rights,[58] article 61 of which refers to "general principles of law recognized by African States", and the 1997 Rules of Procedure of the Economic Court of the Commonwealth of Independent States, article 29 of which refers to "general principles of law recognized by the Member States of the Commonwealth".

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[56] See, notably, conclusion 4 of the conclusions on identification of customary international law. The draft conclusions adopted by the Commission and the commentaries thereto are reproduced in A/73/10, paras. 65 and 66. See also General Assembly resolution 73/203 of 20 December 2018, annex.

[57] See A/CN.4/732 (first report), paras. 36 and 125.

[58] African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.

60. In a similar vein, the Caribbean Court of Justice has noted that:

> The search in the application and interpretation of the Revised Treaty [of Chaguaramas Establishing the Caribbean Community including the CARICOM [Caribbean Community] Single Market and Economy][59] is to discover Community law. In this quest the Court has to apply such rules of international law as may be applicable [Art 217 (1) of the Revised Treaty]. Part of that law is the emerging customary international law on, for example, the concept of *ultra vires* acts of organs of international organizations. *The Court may also consider "the general principles of law recognized by civilized nations". If one applies Article 217 of the Revised Treaty the principles of law common to the principal legal systems of the Community are a source of law for this Court, as it is for the International Court of Justice: see Article 38(1)(c) of the Statute of the International Court of Justice*. *This Court may take into account the principles and concepts common to the laws of Member States*. The search is for general principles of law common to Member States. It is not necessary for the principle to be expressed identically in all Member States. It is sufficient if the general principle is widely accepted … If the general principle is widely accepted throughout the Community and relevant it may become part of Community law. These are tests that will have to be applied if this Court is asked to strike down the decisions authorizing suspension of the CET [common external tariff] on grounds that derive from the domestic law applicable to judicial review in common law jurisdictions.[60]

61. The above-mentioned practice suggests the existence of certain general principles of law with a limited scope of application within a regional or subregional legal system, which are nevertheless analogous to those falling under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. This is notably the case within the framework of regional or subregional legal systems such as those of the European Union and of the Caribbean Community. General principles of law may be "general" for a particular group of States, namely, those that belong to the relevant legal system.

62. By contrast, the Special Rapporteur notes that there is no State or judicial practice relating to bilateral principles.

63. In the light of the above, the Special Rapporteur proposes the addition of the following draft conclusion:

> "**Draft conclusion 12**
> **General principles of law with a limited scope of application**
>
> The present draft conclusions are without prejudice to the existence of general principles of law with a limited scope of application."

64. Given the limited practice of States and international courts and tribunals clearly shedding light on this issue, the Special Rapporteur considers that the Commission would need to make clear in the commentaries that this is an area in which the law is still developing. Consistency should also be maintained, insofar as relevant, with the approach of the Commission to the issue of particular customary international law in its work on identification of customary international law.[61]

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[59] Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM [Caribbean Community] Single Market and Economy (Nassau, 5 July 2001), United Nations, *Treaty Series*, vol. 2259, No. 40269, p. 293.

[60] *Trinidad Cement Limited v. The Caribbean Community*, case [2009] CCJ 2 (OJ), Judgment, 5 February 2009, para. 41 (emphasis added). Article 217, para. 1, of the Revised Treaty of Chaguaramas provides that: "The Court, in exercising its original jurisdiction under Article 211, shall apply such rules of international law as may be applicable." See also Caribbean Court of Justice, *SM Jaleel & Co Ltd & Guyana Beverages Inc v. Guyana*, case [2017] CCJ 2 (OJ), Judgment, 9 May 2017, para. 29 ("This Court, unlike the ECJ [European Court of Justice], has no mandate to defer to national law, but, of course, in developing Community law it will have regard to principles of international law including the general principles of law as reflected, for instance, in national law reflecting common values and interests.").

[61] Commentary to draft conclusion 16, A/73/10, para. 66, at pp. 154–156.

65. Finally, some remarks are warranted about the observation of the United States concerning the notion of the persistent objector. The Special Rapporteur recalls that this "rule" or "doctrine" has been recognized by the Commission in its work on identification of customary international law,[62] and it entails, in essence, that a customary rule that, during its process of formation, has been clearly, publicly and persistently objected to may not be opposable to the State making the objection.

66. General principles of law, like rules of customary international law, can be dipositive in nature. Therefore, as long as they do not possess a peremptory character, States remain free to modify or derogate from them, depending on their needs and interests at a particular point in time.

67. That said, the Special Rapporteur notices that the notion of the persistent objector has not generally been referred to in practice or in the literature in the context of general principles of law, and with reason.[63] Notably, the process of formation of such principles, which may be characterized as more diffuse than that of custom, would leave little space for its application in reality. For example, a State would need to follow the developments in the various legal systems of the world to assess whether a new general principle of law may be emerging. Moreover, the transposition of a principle *in foro domestico* provides a significant filter for those principles that would not be compatible with the international legal system. Given the lack of relevant practice and the limited practical significance of this issue, the Special Rapporteur does not consider it necessary to address it in detail in the draft conclusions.

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

General principles of law comprise those:

(a) that are derived from national legal systems;

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

(a) Comments and observations by States

68. There were differing views among States in the Sixth Committee regarding draft conclusion 3, according to which general principles of law include: (a) those that are derived from national legal systems; and (b) those that may be formed within the international legal system.

69. That general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice include those derived from national legal systems is a proposition that was not questioned by any State. Draft conclusion 3 has thus been widely accepted by States insofar as those general principles are concerned,[64] without prejudice to certain specific issues relating to the methodology for their identification addressed in subsequent draft conclusions. By contrast, some concerns and doubts have continued to be raised as regards the existence of general principles of law formed within the international legal system that may fall within the scope of the topic.

70. Some general comments were made. Brazil, for example, observed that the "structural scope, origin and function" of each category seemed to be different, and requested "additional clarification regarding the precise distinction" between the two categories.[65] The Czech Republic stated that it "was not convinced that sufficient State practice, jurisprudence and teachings were available to suggest that [general principles of law formed within the international legal system] fell within the category of general principles of law under Article

[62] Commentary to draft conclusion 15, *ibid.*, pp. 152–154.

[63] See, exceptionally, Michael Akehurst, "Equity and general principles of law", *International and Comparative Law Quarterly*, vol. 25, No. 4 (1976), pp. 801–825, at pp. 816, 820 and 821.

[64] See the statements by Algeria (A/C.6/78/SR.28), Brazil (A/C.6/77/SR.30 and A/C.6/78/SR.23), the Czech Republic (A/C.6/77/SR.30), El Salvador (A/C.6/77/SR.30), the Philippines (A/C.6/78/SR.28) and Sierra Leone (A/C.6/78/SR.27). See also the statement by Guatemala (A/C.6/78/SR.27).

[65] See the statement by Brazil (A/C.6/77/SR.30).

38 of the Statute [of the International Court of Justice]".[66] Regarding the title of the draft conclusion, Cameroon suggested using the term "typology" instead of "categories".[67]

71. Several States expressed support for the inclusion of the second category.[68] Ecuador observed that there was sufficient practice, jurisprudence and doctrine in support of it, and that, like any other legal system, national or regional, international law had the capacity to generate its own general principles of law and not only resort to general principles of law derived from other legal systems.[69] Chile similarly considered that it would be difficult to conceive that the international legal system could not generate its own general principles.[70] Australia welcomed the commentary to draft conclusion 7, on the identification of the second category, and noted the inclusion of some instances of State practice and decisions of international courts and tribunals therein.[71]

72. Some States referred to what they considered examples of general principles of law formed within the international legal system. Viet Nam, for example, referred to the term "universally recognized principles of law", which was frequently used in instruments of the Association of Southeast Asian Nations, and considered that, in that context, it seemingly referred to "principles governing international relations".[72] The Philippines referred to its Constitution, which provided that: "The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land* and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."[73] Singapore also mentioned several principles that appeared to support the existence of the second category of general principles, namely, "sovereign equality, a fundamental tenet of international law that established the uniform legal personality of States and upon which the international legal order is built, and State consent to binding dispute settlement, which was a corollary to and an expression of sovereign equality".[74]

73. On the other hand, some States questioned the existence of the second category on various grounds.[75] One reason stated was the perceived lack of sufficient State practice, jurisprudence or teachings in support of such a category of general principles, which not only raised questions about their existence but also posed challenges regarding the determination of the methodology for their identification.[76] Brazil noted in that regard that, by proposing the second category, the Commission was engaging in progressive development on a topic related to the sources of international law.[77] The United States was of a similar view,

[66] See the statement by the Czech Republic (A/C.6/78/SR.25).
[67] See the statement by Cameroon (A/C.6/78/SR.25).
[68] See the statements by Chile (A/C.6/77/SR.30 and A/C.6/78/SR.24), Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.23), Ecuador (A/C.6/77/SR.31), El Salvador (A/C.6/77/SR.30 and A/C.6/78/SR.28), Mexico (A/C.6/78/SR.25), Micronesia (Federated States of) (A/C.6/78/SR.27), Netherlands (Kingdom of the) (A/C.6/78/SR.24), Peru (A/C.6/78/SR.25), the Philippines (A/C.6/78/SR.28), Sierra Leone (A/C.6/78/SR.27), Spain (A/C.6/78/SR.27), Switzerland (A/C.6/78/SR.24), Uganda (A/C.6/78/SR.27), Viet Nam (A/C.6/78/SR.25), the Holy See (A/C.6/78/SR.28) and the State of Palestine (A/C.6/77/SR.31 and A/C.6/78/SR.28). See also the statement by Guatemala (A/C.6/78/SR.27).
[69] See the statement by Ecuador (A/C.6/77/SR.31); and the full text of that statement, available on the web page of the Sixth Committee.
[70] See the statement by Chile (A/C.6/77/SR.30).
[71] See the statement by Australia (A/C.6/78/SR.23).
[72] See the statement by Viet Nam (A/C.6/78/SR.25).
[73] See the full text of the statement made on the topic by the Philippines in the Sixth Committee during the seventy-eighth session of the General Assembly, available on the web page of the Sixth Committee (emphasis in original).
[74] See the statement by Singapore (A/C.6/77/SR.29).
[75] See the statements by the Czech Republic (A/C.6/78/SR.25), France (A/C.6/78/SR.23), Ireland (A/C.6/78/SR.25), Israel (A/C.6/78/SR.24), Romania (A/C.6/78/SR.25) and Slovakia (A/C.6/78/SR.25).
[76] See the statements by Slovakia (A/C.6/77/SR.30) and the United States (A/C.6/78/SR.24). See also the written comments and observations of Brazil, the Czech Republic, Israel, Singapore and the United States.
[77] See the written comments and observations of Brazil.

suggesting that the Commission should make that clear in the commentary, should it decide to retain draft conclusion 3 and include the second category in some fashion.[78]

74. Furthermore, Brazil and Israel considered that the second category was unsupported by the *travaux préparatoires* of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.[79]

75. For some States, the lack of consensus in the Sixth Committee was itself an indication that caution was called for in recognizing the existence of the second category of general principles and in defining their nature and contours.[80] Some States, while remaining open to accepting the existence of the second category, encouraged the Commission to provide more examples of relevant practice and case law, including by distinguishing such examples from rules of customary international law.[81]

76. Regarding the examples of general principles of law that may be formed within the international legal system mentioned in the commentary to draft conclusion 3, some States questioned whether they actually fell under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.[82] Brazil, for example, observed that, while some of the judicial decisions relied upon by the Commission "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, [were] more appropriately classified under other sources of international law, especially customary law". Brazil further noted that the teachings referred to by the Commission pertained to principles of international law as "metajuridical material sources" beyond the scope of the topic.[83] Ireland suggested that "the draft conclusions and commentaries would benefit from a more thorough examination of the case law of international courts and tribunals in order to determine whether that category could truly be deemed to exist".[84]

77. Several States stressed the importance (and difficulty) of distinguishing the second category of general principles from customary international law.[85] Brazil, Israel, the Republic of Korea, Romania and Slovakia expressed concern that the introduction of that category of general principles, together with the methodology for their identification, risked conflating the two sources.[86] Thailand stressed that the criteria for identification of general principles must be adequately clear so as to distinguish them from customary international law.[87] The Republic of Korea also suggested addressing the distinction between the second category and customary international law in more detail to "provide additional support for the existence of that category".[88] The Czech Republic was of the view that "[i]t would be difficult or even impossible to distinguish" between the two sources.[89]

78. The Czech Republic also suggested that the Commission should examine in more detail the suggestion that the principles formed within the international legal system were instead highly general rules of conduct that were "contained mostly in customary international law, or, less often, in treaties", which might reflect "basic elements or essential features of the international legal system". Such principles, including the principles of sovereign equality and non-intervention, were often part of customary international law and could also be reflected in treaties, thus reinforcing their importance in inter-State practice. Furthermore, the Czech Republic stated that many general principles of law that were

[78] See the written comments and observations of the United States.
[79] See the written comments and observations of Brazil and Israel.
[80] See the statement by Israel (A/C.6/78/SR.24).
[81] See the statement by Ireland (A/C.6/77/SR.30).
[82] See, for example, the written comments and observations of Israel.
[83] See the written comments and observations of Brazil.
[84] See the statement by Ireland (A/C.6/77/SR.30).
[85] See the statements by Lebanon (A/C.6/78/SR.28) and Thailand (A/C.6/78/SR.25); and the written comments and observations of the United States.
[86] See the statements by Israel (A/C.6/78/SR.24), the Republic of Korea (A/C.6/78/SR.28) and Romania (A/C.6/78/SR.25); and the written comments and observations of Brazil and Israel.
[87] See the statement by Thailand (A/C.6/78/SR.25).
[88] See the statement by the Republic of Korea (A/C.6/78/SR.28).
[89] See the written comments and observations of the Czech Republic.

common to national legal orders were now inherent also in the international legal system, which was due to the fact that they were "intrinsic to every legal system, whether national or international".[90]

79. Poland indicated that the second category should not be confused with the "general principles of international law" contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[91] For Poland, conflating them would be inconsistent with the functions of general principles of law as stated in draft conclusion 10, notably, their main function of applying when other rules of international law did not resolve a particular issue in whole or in part.[92]

(b) Recommendations of the Special Rapporteur

80. The Special Rapporteur notes that some disagreement continues to exist among States regarding draft conclusion 3. The category of general principles of law derived from national legal systems has received unanimous support, yet that of general principles of law formed within the international legal system, while also enjoying support, has given rise to doubts and scepticism on the part of several States. In his recommendations, the Special Rapporteur will therefore focus on the issue of the existence of the second category. His recommendations must be read together with those relating to the more specific aspects of methodology in the context of draft conclusion 7.

81. Contrary to what some States have suggested, the Special Rapporteur considers that the general principles of law falling under the second category are rooted in both State practice and the jurisprudence of international courts and tribunals, as has been amply shown in the work of the Commission to date. Moreover, as some delegations have pointed out, Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice is drafted in broad terms; nothing in that provision indicates that general principles of law are limited to those originating in national legal systems. The Special Rapporteur considers that a basic premise to be followed is that international law itself, like any legal system, has the capacity to generate principles specific to it, without the need to borrow from other legal systems.

82. The second category is further supported by the drafting history of Article 38, paragraph 1 (*c*), of the Court's Statute. In the Advisory Committee of Jurists, the idea that general principles of law were those that were "accepted by all nations *in foro domestico*" was mentioned by Mr. Phillimore.[93] However, according to Mr. de Lapradelle, "the principles which formed the bases of national law, were also sources of international law. The only generally recognised principles which exist, however, are those which have obtained unanimous or quasi-unanimous support."[94] Accordingly, he suggested that it was preferable not to indicate "exactly the sources from which these principles should be derived".[95]

83. Furthermore, Mr. Fernandes stated that "[w]hat is true and legitimate in national affairs, for reasons founded in logic and not in the arbitrary exercise of sovereignty, cannot be false and illegal in international affairs, where, moreover, legislation is lacking and customary law is being formed very slowly, so that the practical necessity of recognising the application of such principles is much greater".[96] He mentioned as an example the "American declaration of rights and duties of Nations" and explained that the Court should have the power to base its sentences, in the absence of a treaty or custom, "on those principles of

[90] *Ibid.*

[91] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), 24 October 1970.

[92] See the written comments and observations of Poland.

[93] Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes* (The Hague, Van Langenhuysen Brothers, 1920), *procès-verbal* of the 15th meeting and annexes thereto, pp. 331–351, at p. 335.

[94] *Ibid.*, p. 335.

[95] *Ibid.*, p. 336.

[96] *Ibid.*, pp. 331 and 346.

international law which, before the dispute, were not rejected by the legal traditions of one of the States concerned in the dispute".[97] In the view of the Special Rapporteur, this reflects an understanding that general principles of law may derive from either national legal systems or the international legal system.[98]

84. The Special Rapporteur notes the examples of general principles of law formed within the international legal system mentioned by States in their comments, which include, as noted above, the principle of sovereign equality and the principle of consent to jurisdiction. In addition to these examples and the examples referred to in the commentaries to draft conclusions 3 and 7, the Special Rapporteur would also draw attention to the principle of speciality, which governs the functioning of international organizations,[99] the principle that municipal law cannot prevail over international law,[100] the duty to make reparations for an internationally wrongful act,[101] the principle of peaceful settlement of disputes,[102] the duty to cooperate,[103] and the principle commonly referred to as *Kompetenz-Kompetenz* in German

[97] *Ibid.*, p. 346.

[98] Mr. Anzilotti, who acted as the Committee's Secretary-General and subsequently became a Judge of the Permanent Court of International Justice, also observed that general principles of law included those formed within the international legal system. D. Anzilotti, *Cours de droit international* (French translation by G. Gidel, Paris, Sirey, 1929), vol. I, p. 117 ("Quant aux principes généraux de droit, dont parle le nº 3 de l'article 38, ce sont avant tout les principes généraux de l'ordre juridique international, et, en second lieu, les principes universellement admis dans les législations des peuples civilisés." [As for the general principles of law mentioned in No. 3 of Article 38, these are first and foremost the general principles of the international legal order and, in the second place, the principles universally accepted in the legislative texts of civilized peoples.]), cited in Eirik Bjorge, "General principles of law formed within the international legal system", *International and Comparative Law Quarterly*, vol. 72, No. 4 (2023), pp. 845–867, at p. 850.

[99] International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at pp. 78 and 79, para. 25; and para. (7) of the general commentary to the draft articles on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two), para. 88, at p. 47.

[100] International Court of Justice, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, at pp. 34 and 35, para. 57; and Permanent Court of International Justice, *The Greco-Bulgarian "Communities", Advisory Opinion, 31 July 1930, P.C.I.J., Series B, No. 17*, at p. 32.

[101] Permanent Court of International Justice, *Case concerning the Factory at Chorzów (Claim for Indemnity) (Merits), Judgment, 13 September 1928, P.C.I.J., Series A, No. 17*, at p. 29.

[102] International Court of Justice, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 47, para. 86 ("this obligation [to negotiate] merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes"); and *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 32, para. 75 ("The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes. As the Court stated in the *North Sea Continental Shelf* cases: '… this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes' (*I.C.J. Reports 1969*, p. 47, para. 86)"); and Court of Justice of the European Union, *Latvia v. European Commission*, Case T-293/18, Order, 30 January 2020, para. 4, quoting a letter from the European Commission ("Finally, if there is a general principle in international law of peaceful settlement of disputes, there is no obligation under EU [European Union] or international law to bring judicial proceedings, as international law provides for different ways to settle disputes, not all of them of [a] judicial nature.").

[103] International Tribunal for the Law of the Sea, *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, Reports of Judgments, Advisory Opinions and Orders* (*ITLOS Reports*) *2001*, p. 95, at p. 110, para. 82 ("the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the [United Nations] Convention [on the Law of the Sea] and general international law").

and *la compétence de la compétence* in French.[104] It has also been suggested that the principle of systemic integration in the context of the interpretation of international rules is a general principle of law formed within the international legal system.[105]

85. The Special Rapporteur agrees that the methodology for the identification of general principles of law must be rigorous. This matter will be discussed in greater detail in relation to draft conclusion 7. For present purposes, it is important to emphasize that, when identifying general principles of this category, one must ascertain whether the principle in question has been recognized by the community of nations as a norm of general application, having a status independent from a particular treaty regime or customary rule, that is, as a general legal principle that can operate independently in international law. Evidence of such recognition should be assessed on a case-by-case basis, within the relevant context, to determine whether the international community regards the principle as binding.

86. Regarding the title of the draft conclusion and the choice between the terms "categories" and "typology", the Special Rapporteur considers that the former term has garnered the broadest support within the Commission and offers the clearest guidance for practical purposes.

87. As noted above, some States have queried what the distinction is between the two categories of general principles of law referred to in draft conclusion 3. The Special Rapporteur considers that the only distinction between the two is the methodology for their identification, as developed in other draft conclusions. No distinction should be drawn between the two categories of general principles of law in terms of their functions and relationship with other rules of international law.

88. Finally, the Special Rapporteur also finds it necessary to make some remarks about the difference between general principles of law formed within the international legal system and customary international law.

89. The distinction between these two sources of international law is based on the method for their identification. For a rule of customary international law to exist, there must be a general practice accepted as law (accompanied by *opinio juris*). General principles of law formed within the international legal system, by contrast, must be recognized by the community of nations as intrinsic to that system.

90. For the identification of customary rules, State practice is examined within the international community to establish whether it is general and whether it is accompanied by a sense of legal right or obligation (*opinio juris*). By contrast, the identification of general principles of law formed within the international legal system involves, first, an inductive analysis of the international legal framework itself, conventional and customary, taking into account all available evidence, such as international instruments, and, once the principles are identified, a deductive process, to ascertain whether they are intrinsic to the international legal system, that is, if they reflect and regulate its basic features.

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[104] International Court of Justice, *Nottebohm case (Preliminary Objection), Judgment of November 18th, 1953, I.C.J. Reports 1953*, p. 111, at p. 119 ("in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction. This principle was expressly recognized in Articles 48 and 73 of the Hague Conventions of July 29th, 1899, and October 18th, 1907, for the Pacific Settlement of International Disputes, to which Guatemala became a Party."). See also Permanent Court of International Justice, *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV), Advisory Opinion, 28 August 1928, P.C.I.J., Series B, No. 16*, at p. 20; International Court of Justice, *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 53, at pp. 68 and 69, para. 46; and *Prosecutor v. Duško Tadić a/k/a "Dule"*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 18.

[105] Campbell McLachlan, *The Principle of Systemic Integration in International Law* (Oxford, Oxford University Press, 2024), paras. 2.181–2.194 ("Integration as a general principle") and 9.81–9.84 ("General principles of law").

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

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

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

(b) its transposition to the international legal system.

(a) Comments and observations by States

91. States generally welcomed the inclusion and formulation of draft conclusion 4, concerning the two-step analysis required for the identification of general principles of law derived from national legal systems. Comments and observations relating to specific aspects of this methodology, covered by draft conclusions 5 and 6, are addressed below.

(b) Recommendations of the Special Rapporteur

92. No amendments to draft conclusion 4 or the commentary thereto appear necessary at the time of submission of the present report.

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

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

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

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

(a) Comments and observations by States

93. States generally welcomed the Commission's approach to the first step of the methodology for identification of general principles of law derived from national legal systems, that is, the determination of the existence of a principle common to the various legal systems of the world.

94. El Salvador, Guatemala, India, Israel, Lebanon, Peru, Sierra Leone and Uganda welcomed the conclusion that the determination of the existence of a principle common to the various legal systems of the world required a comparative analysis that must be wide and representative, including different regions of the world.[106] Thailand also stressed that the formation or determination of general principles of law must be done with "due consideration for the variety of legal systems and the specific characteristics thereof", as that was essential to ensuring that the principle was "widely recognized among nations".[107] Switzerland noted that the term "principle common to the various legal systems of the world" should be interpreted as broadly as possible and that all branches of national law, private and public, were relevant for the identification of a general principle of law, as shown by the case law collected in the commentaries to the draft conclusions.[108]

95. Armenia suggested that further clarification could be provided in the commentary regarding the comparative analysis referred to in draft conclusion 5. In particular, it suggested that "a distinction could be drawn between national practice that concerned internal law matters and national practice that addressed questions of international law", noting the importance of identifying with precision the qualitative nature of the "national practice" that

[106] See the statements by El Salvador (A/C.6/78/SR.28), Guatemala (A/C.6/78/SR.27), India (A/C.6/78/SR.25), Israel (A/C.6/78/SR.24), Lebanon (A/C.6/78/SR.28), Peru (A/C.6/78/SR.25), Sierra Leone (A/C.6/78/SR.27) and Uganda (A/C.6/78/SR.27).

[107] See the statement by Thailand (A/C.6/78/SR.25).

[108] See the statement by Switzerland (A/C.6/78/SR.24).

would count towards the formation of a general principle of law.[109] Israel suggested that "hybrid national legal systems" should also be mentioned, so as to capture "a broader range of complexities and nuances present in different legal systems globally".[110]

96. Israel also suggested that it should be clarified in the commentary that greater weight was to be given to final judgments of the highest courts, which typically possessed the authority to set binding precedents, correct lower court errors and provide definite interpretations. It also noted that doctrine could be of assistance only in a subsidiary manner and that that should be made clear.[111]

97. Brazil stressed the importance of linguistic diversity for a comparative analysis that was truly wide and representative and suggested adding an express reference to the different languages of the world in draft conclusion 5, paragraph 2.[112]

98. The Czech Republic was of the view that the threshold for the determination of general principles of law seemed to be too high and might not reflect existing practice. It added in that regard that "[g]eneral principles of law were in most cases universally recognized legal postulates and their identification was the result of a long process", not of an *ad hoc* exercise.[113]

(b) Recommendations of the Special Rapporteur

99. The Special Rapporteur notes the wide endorsement by States in the Sixth Committee of draft conclusion 5. Some of the comments received raise questions relating to certain specific matters that can be addressed in the commentary to the draft conclusion to provide further clarification, as explained below.

100. The Special Rapporteur agrees that, as suggested by Brazil, linguistic diversity is also a factor that must be taken into account when conducting the comparative analysis required for the identification of general principles of law derived from national legal systems. The need to guarantee such linguistic diversity is in fact already reflected, to a degree, in draft conclusion 5, given that an assessment of the various legal systems of the world will necessarily call for consideration of the different languages in which those legal systems may operate. This can be reflected in the commentary to the draft conclusion.

101. The Special Rapporteur agrees with the suggestion made by Israel that it should be clarified in the commentary to draft conclusion 5 (paragraphs (5) and (6) in particular) that, in conducting the comparative analysis, greater weight is to be given to decisions of the highest courts, in accordance with the structure of the judicial system of each State. Reference to "hybrid national legal systems" may also be included.

102. As regards the point made by Armenia, the Special Rapporteur is not convinced that it was necessary for the Commission to make an *a priori* determination of the qualitative nature of the national law that may be relevant for the formation of general principles of law and, more specifically, of whether the national law in question must always be "internal" as opposed to having some international component. Such a distinction might be difficult to make in practice, and in any event it could not be excluded that national laws having some form of international or transnational component could give rise to a general principle of law.

103. Finally, the Special Rapporteur agrees with the Czech Republic that many general principles of law are universally recognized legal postulates, sometimes the product of a long process of formation. The methodology for identification contained in draft conclusions 4 to 6 is aimed precisely at guiding those who may be called upon to identify a general principle

[109] See the statement by Armenia (A/C.6/78/SR.27).

[110] See the written comments and observations of Israel (where "hybrid national legal systems" are defined as those systems "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").

[111] *Ibid.*

[112] See the statement by Brazil (A/C.6/78/SR.23); and the written comments and observations of Brazil.

[113] See the statement by the Czech Republic (A/C.6/78/SR.25). See also the written comments and observations of the Czech Republic.

of law at a particular point in time to demonstrate, with objective evidence, that such recognition has indeed taken place.

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

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

(a) Comments and observations by States

104. There is wide acceptance by delegations in the Sixth Committee of draft conclusion 6, according to which 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. A number of concerns have, however, been raised as regards certain specific aspects of this part of the methodology for identification.

105. Italy suggested that further analysis of the limits to transposition would be useful, so as to identify "some general essential features of the process of assessing the transposition".[114] Various States also noted that clarification of how transposition would operate in practice would be useful.[115] Greece was of the view that positive examples illustrating transposition should be provided in the commentary to provide more clarification.[116]

106. The Islamic Republic of Iran considered that draft conclusion 6 was of key importance. It highlighted the importance of State consent, noting that a principle could not be transposed to the international legal system "if it lacked or challenged in any manner that consent".[117] The Russian Federation also highlighted State consent, noting that paragraph (7) of the commentary to draft conclusion 6 created a "legal fiction" by allowing recognition of the transposition of a principle *in foro domestico* to be inferred from its suitability for application within the international legal system.[118] South Africa highlighted that the Commission should ensure that draft conclusion 6 did not create the impression that transposition "either was automatic or required a formal act".[119]

107. Türkiye also expressed doubts about the proposition that recognition could be implicit when the "compatibility test" was fulfilled.[120] The United States shared that concern, adding that, since there was no hierarchy among treaties, customary international law and general principles of law, State consent must be required to identify a general principle.[121]

108. For the United States, there needed to be some objective indication – in the form of State recognition of a principle through pleadings before international courts, for example – that "States considered a rule to be applicable on the international plane before it could be considered to have reached the status of a general principle of law".[122] The United States suggested deleting the second part of paragraph (7) of the commentary to draft conclusion 6, where the Commission stated that recognition was implicit when the compatibility test was fulfilled. The United States moreover suggested amending draft conclusion 6 to read: "A principle common to the various legal systems of the world may be transposed to the international legal system insofar as it *has been recognized as* compatible with that system *by States.*"[123]

109. Viet Nam suggested that transposition should occur "through the explicit consent of the community of nations" and that, in case of conflict between a principle *in foro domestico* and a "treaty-based principle", transposition could not be considered as being recognized,

[114] See the statement by Italy (A/C.6/78/SR.23).
[115] See the statements by Greece (A/C.6/77/SR.31) and the Philippines (A/C.6/77/SR.31).
[116] See the statement by Greece (A/C.6/78/SR.27).
[117] See the statement by the Islamic Republic of Iran (A/C.6/78/SR.24).
[118] See the statement by the Russian Federation (A/C.6/78/SR.26).
[119] See the statement by South Africa (A/C.6/77/SR.30).
[120] See the statement by Türkiye (A/C.6/78/SR.27).
[121] See the statement by the United States (A/C.6/78/SR.24).
[122] *Ibid.* See also the written comments and observations of the United States.
[123] See the written comments and observations of the United States (emphasis in original).

and the latter should prevail.[124] Thailand expressed concern that, since general principles of law were an "independent form of international law", draft conclusion 6 might lead to a misunderstanding about their legal nature.[125]

110. Austria noted that transposition was a condition for the recognition of general principles of law as addressed in draft conclusion 2. It suggested, accordingly, that the compatibility test be incorporated into draft conclusion 2.[126] The Russian Federation also suggested an amendment to draft conclusion 2, noting that a general principle of law must not only be recognized by the community of nations, but also be "recognized as applicable within the international legal system".[127]

111. Belarus expressed concern that, in the process of transposition, the original meaning of a principle deriving from national legal systems might be significantly distorted, or "the way in which it was understood in the national legal systems of one small but influential group of States might become dominant in international law". Belarus was thus of the view that it was important to clarify in draft conclusions 2, 5 and 6 "the entities that usually participated directly in the transposition of a general principle of law … including in the context of the settlement of disputes by international judicial and arbitral bodies; and to establish clear criteria for considering that a general principle of law was legally logical and compatible with the international legal system, that it was recognized by the community of nations and that it was suitable for application in transposed form".[128]

112. Ireland suggested using the word "reception" or the word "absorption" instead of "transposition", which conveyed the idea of moving something, given that a general principle of law did not require any specific measure to be given effect in international law.[129]

(b) Recommendations of the Special Rapporteur

113. The Special Rapporteur notes the wide support for draft conclusion 6, which is based on relevant State practice, jurisprudence and teachings. The Commission has dedicated considerable attention to this draft conclusion, bearing in mind that, while the criteria for the identification of general principles of law must be rigorous, a degree of flexibility is also required so as not to make such identification an impossible task.

114. Some of the concerns raised by States relate to the specific criteria that must be applied to ascertain transposition. Draft conclusion 6 indicates that what is required is to determine that a principle common to the various legal systems of the world is "compatible" with the international legal system; insofar as such compatibility exists, the principle in question may be considered a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. It is clarified in the commentary to draft conclusion 6 that a principle *in foro domestico* may be considered compatible with the international legal system "if it is suitable to apply within the framework" of that system.[130]

115. The Special Rapporteur considers that additional clarification of what these criteria entail could be included in the commentary. For example, it could be clarified in the commentary that a principle common to the various legal systems of the world is suitable to apply within the framework of the international legal system if it serves a regulatory function that is equivalent, to some degree, to the regulatory function that it serves at the domestic level and is appropriate to the international legal system.

116. It could, further, be mentioned in the commentary that the principle *in foro domestico* must also be able to operate in the international legal system when conditions exist that are equivalent, to some degree, to the conditions under which it applies domestically. This serves

[124] See the statement by Viet Nam (A/C.6/78/SR.25).
[125] See the statement by Thailand (A/C.6/78/SR.25).
[126] See the statement by Austria (A/C.6/78/SR.24); and the full text of that statement, available on the web page of the Sixth Committee.
[127] See the statement by the Russian Federation (A/C.6/78/SR.26).
[128] See the statement by Belarus (A/C.6/78/SR.24).
[129] See the statement by Ireland (A/C.6/78/SR.25); and the full text of that statement, available on the web page of the Sixth Committee.
[130] Para. (4) of the commentary to draft conclusion 6, A/78/10, para. 41, at p. 21.

to avoid distortion or misapplication of the principle as recognized in the various legal systems of the world. If, for example, the application of a principle *in foro domestico* requires specific procedural and institutional arrangements that do not exist at the international level, transposition would be precluded.[131]

117. Some States, as noted above, have also raised concerns regarding the Commission's statement that, once the conditions for transposition are fulfilled, recognition pursuant to Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice is "implicit". At the same time, there seems to be no questioning of the fact that "[n]o formal act of transposition is required for a general principle of law to emerge".[132]

118. The Special Rapporteur recalls that, for a general principle of law to emerge, recognition is necessary both at the domestic level (through the existence of a principle in the various legal systems of the world) and at the international level (through the recognition that the principle may be transposed). At the same time, there is no State practice, jurisprudence or teachings indicating that express recognition is necessary for transposition. Such a proposition would, moreover, seem incompatible with the fact that general principles of law are a non-written source of international law. This explains the Commission's conclusion that recognition on this level is essentially implicit; it is presumed when certain conditions are met. That presumption is, of course, rebuttable, and thus does not imply automaticity of transposition.

119. That said, the Special Rapporteur draws attention to his second report, where he adduced some examples of practice in which parties to a dispute had sought to demonstrate the existence or otherwise of a general principle of law by invoking international instruments that in some form reflected a principle *in foro domestico*, thus potentially confirming its transposition.[133] The Special Rapporteur considers that that practice could be taken into account in the commentary to the draft conclusion, where it could be mentioned that, while it is not a requirement for transposition, there is sometimes evidence to be found at the international level confirming transposition of a principle common to the various legal systems of the world, which may take a wide range of forms, such as reference to such principles in treaty provisions; pleadings before international courts and tribunals; public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; and resolutions adopted by an international organization or at an intergovernmental conference.

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[131] See A/CN.4/741 and Corr.1 (second report), paras. 92–95. See also International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, Separate Opinion of Judge Shahabuddeen, p. 270, at pp. 289 and 290 ("As has often been remarked, to overestimate the relevance of private law analogies is to overlook significant differences between the legal framework of national societies and that of the international community, as well as differences between the jurisdictional basis and powers of the Court and those of national courts; 'lock, stock and barrel' borrowings would of course be wrong … On the other hand, nothing in those differences requires mechanical disregard of the situation at municipal law; to speak of a joint obligation is necessarily to speak of a municipal law concept. The compulsory or involuntary character of municipal jurisdiction, with its facilities for enforcing contribution among co-obligors, does not, I think, wholly account for the fact that, at municipal law, a suit may be competently brought against one co-obligor in respect of a joint obligation."); and *William A. Parker (U.S.A.) v. United Mexican States*, Mexico-U.S.A. General Claims Commission, Award of 31 March 1926, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 35–41, at p. 39, para. 5 ("the Commission announces that, however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses or issue processes for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as 'universal principles of law', or 'the general theory of law', and the like.")

[132] Para. (7) of the commentary to draft conclusion 6, A/78/10, para. 41, at p. 22.

[133] A/CN.4/741 and Corr.1, paras. 97–106.

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

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

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

(a) Comments and observations by States

120. Draft conclusion 7, as adopted in 2023 by the Commission on first reading, is entitled "Identification of general principles of law formed within the international legal system" and provides in paragraph 1 that, "[t]o determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to the international legal system". Paragraph 2, for its part, states that "[p]aragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system".

121. States in the Sixth Committee made several comments with respect to this draft conclusion. Regarding the use of terms, Ireland pointed out the need to explain the use of the word "Identification" in the title of the draft conclusion, noting that the verb "determine" was used instead in paragraph 1. Ireland queried whether those two terms had the same meaning and highlighted that, in the French text, the word "*détermination*" was used in the title and "*déterminer*" in paragraph 1.[134]

122. As regards the methodology for identification of general principles of law formed within the international legal system laid down in paragraph 1 of the draft conclusion, several States expressed general support for the approach adopted by the Commission,[135] with a few explaining how they understood it. The State of Palestine, for example, stated that the methodology in question was "an inductive analysis of relevant treaties, customary rules and other international instruments such as General Assembly and Security Council resolutions and declarations at international conferences". It also stressed "the universal power of the General Assembly and the enforcement power of the Security Council and their indispensability to the formation and formulation of general principles of law".[136]

123. Ecuador stated that it understood that principles that were "intrinsic to the international legal system" were those that "reflected or regulated the basic characteristics of, and were inherent to and essential for the functioning of the system". Ecuador also agreed that the Commission's approach to general principles of law formed within the international legal system was similar, in terms of methodology, to that for those derived from national legal systems, in the sense that both required an inductive and a deductive analysis. For Ecuador, the inductive analysis concerned the assessment of norms existing in the international legal system, whether in treaties or customary international law, as well as in other instruments that might reflect recognition by the community of nations, such as resolutions of the General Assembly or declarations adopted at intergovernmental conferences. The deductive analysis, for its part, ensured that the principles identified were intrinsic to the international legal system. Ecuador also emphasized that such a general principle must be "recognized by the community of nations as a norm of general application", existing independently of a particular treaty regime or customary rules, thus confirming its autonomy.[137]

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[134] See the statements by Ireland (A/C.6/77/SR.30 and A/C.6/78/SR.25).

[135] See the statements by Ecuador (A/C.6/77/SR.31), Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/77/SR.29), Sierra Leone (A/C.6/77/SR.31 and A/C.6/78/SR.27) and the State of Palestine (A/C.6/77/SR.31 and A/C.6/78/SR.28).

[136] See the statement by the State of Palestine (A/C.6/77/SR.31).

[137] See the statement by Ecuador (A/C.6/77/SR.31). See also the full text of that statement, available on the web page of the Sixth Committee.

124. Mexico also observed that the methodology for identifying general principles of law formed within the international legal system had aspects that were similar to the methodology applicable to the identification of general principles of law derived from national legal systems.[138]

125. Some States emphasized the need to ensure representativeness and diversity when formulating the methodology for the identification of general principles of law formed within the international legal system. Malaysia, for instance, observed that "criteria such as variety and diversity must be considered".[139] Sierra Leone similarly stressed that general principles of law formed within the international legal system must reflect "the diversity and pluralism of the contemporary international law landscape".[140]

126. Several States expressed concern that the methodology laid down in paragraph 1 of draft conclusion 7, read together with the "without prejudice" clause in paragraph 2, was not clear enough, and highlighted the need to establish clearer criteria that would facilitate the process of distinguishing such general principles from treaties and customary international law.[141] Singapore expressed concern that there might not be sufficient practice to determine clearly the methodology for identifying the general principles formed within the international legal system, and stressed that the methodology must be "clear, specific and sufficiently circumscribed", to avoid the risk of "bypassing the requirements for identifying rules of customary international law". That risk was particularly apparent, in the view of Singapore, as general principles of law might serve as a basis for primary rights and obligations, as well as for secondary and procedural rules.[142]

127. Some States raised concern about the lack of clarity regarding the precise criteria for establishing recognition of a principle as "intrinsic" to the international legal system.[143] The United States observed that the term "intrinsic" seemed to have an element of automaticity to it that was difficult to square with the guidance in draft conclusion 2 that, for a general principle of law to exist, it must be recognized by the community of nations. Thus, the United States considered that it would seem prudent to include in draft conclusion 7 an express requirement that States recognize a principle as legally binding, not simply that it was "intrinsic" to the international legal system.[144] Furthermore, the United States highlighted the risk of allowing for the identification of general principles as binding on States without first ensuring their consent.[145]

128. Israel noted that the expression "intrinsic" was "overly vague and open to multiple interpretations", which "could lead to arbitrary and inconsistent application of the draft conclusion". Therefore, "more objective elements" would be beneficial for "a more consistent application of the suggested methodology".[146] Singapore also suggested that it be clarified that recognition by the "community of nations" in the context of the second category must be wide and representative, including the different regions of the world, consistent with draft conclusion 5, paragraph 2.[147]

129. By contrast, the Kingdom of the Netherlands welcomed the retention of the category of general principles of law formed within the international legal system and appreciated the clarification in the commentary to draft conclusion 7 of the meaning of the phrase "intrinsic

[138] See the statement by Mexico (A/C.6/78/SR.25).
[139] See the full text of the statement made on the topic by Malaysia in the Sixth Committee during the seventy-seventh session of the General Assembly, available on the web page of the Sixth Committee.
[140] See the statement by Sierra Leone (A/C.6/78/SR.27).
[141] See the statements by Chile (A/C.6/78/SR.24), France (A/C.6/78/SR.23), Jamaica (A/C.6/78/SR.28) and Portugal (A/C.6/78/SR.24); and the written comments and observations of Israel and the United Kingdom.
[142] See the written comments and observations of Singapore.
[143] See the statements by Indonesia (A/C.6/78/SR.27), Israel (A/C.6/78/SR.24), Micronesia (Federated States of) (A/C.6/78/SR.27), the Republic of Korea (A/C.6/78/SR.28) and Singapore (A/C.6/78/SR.23); and the written comments and observations of Poland.
[144] See the statement by the United States (A/C.6/78/SR.24).
[145] See the written comments and observations of the United States.
[146] See the written comments and observations of Israel.
[147] See the written comments and observations of Singapore.

to the international legal system".[148] The Nordic countries considered that the phrase "recognized by the international community of nations as intrinsic to the international legal system" set a high threshold, which was "appropriate, important and in line with existing law and practice", which had not often seen reference to general principles of law formed in such way.[149]

130. Regarding paragraph 2 of draft conclusion 7, several States expressed concern that it would make it uncertain whether the criteria established in paragraph 1 were essential for identifying general principles formed within the international legal system.[150] Poland noted in this regard that draft conclusion 7 contained a "fundamental structural problem": while paragraph 1 indicated that certain criteria must be fulfilled for those general principles to emerge, paragraph 2 envisaged other types of principles for which those criteria were not applicable.[151] Singapore was similarly of the view that paragraph 2 was unclear, overly broad and threatened to undermine the identification criteria in paragraph 1 completely.[152] The United States indicated that paragraph 2 of the draft conclusion seemed to open the door to "an even more novel and less substantiated source of law, also supposedly binding on States".[153] Poland and Singapore suggested deleting paragraph 2.[154]

131. Some States that doubted the existence of the second category of general principles suggested replacing draft conclusion 7 (and, accordingly, draft conclusion 3 (b)) – with a "without prejudice" clause. For the United States, a "without prejudice" clause would allow the issue to "be addressed in the future if State practice were ever to support more conclusively the existence of the category".[155] Brazil also considered that a "without prejudice" clause would be more appropriate, in case State practice was to support in the future principles formed within the international legal system as a formal source of legal obligations. That, in the view of Brazil, would foster greater consensus and thereby facilitate the adoption of the Commission's recommendations on the topic by the Sixth Committee and the General Assembly.[156]

132. A few States questioned some of the examples of general principles of law formed within the international legal system mentioned in the commentary to draft conclusion 7.[157] Poland called for caution "about debating, even in the commentaries, whether a particular substantive rule could be considered to have the nature of a general principle".[158]

(b) Recommendations of the Special Rapporteur

133. Having considered the different views expressed by States in the Sixth Committee, the Special Rapporteur considers that it is appropriate to take a cautious approach, while bearing in mind the need to maintain a balance between flexibility and rigour when formulating the criteria for the identification of general principles of law. Accordingly, the Special Rapporteur suggests providing further clarification in the commentary, while leaving the text of draft conclusion 7 unchanged.

134. Regarding the use of "identification" in the title and "to determine" in the text of the draft conclusion, as noted by Ireland, the Special Rapporteur considers that no change is necessary. Once the existence and content of a general principle of law formed within the

[148] See the statement by the Kingdom of the Netherlands (A/C.6/78/SR.24).
[149] See the written comments and observations of Norway (on behalf of the Nordic countries).
[150] See the statements by Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.23), Indonesia (A/C.6/78/SR.27) and Singapore (A/C.6/78/SR.23); and the written comments and observations of Israel.
[151] See the written comments and observations of Poland.
[152] See the written comments and observations of Singapore.
[153] See the written comments and observations of the United States.
[154] See the statement by Poland (A/C.6/78/SR.24); and the written comments and observations of Poland and Singapore.
[155] See the 2022 statement by the United States (A/C.6/77/SR.30). See also the 2023 statement by the United States (A/C.6/78/SR.24); and the written comments and observations of the United States.
[156] See the written comments and observations of Brazil.
[157] See the statements by Poland (A/C.6/78/SR.24) and the Republic of Korea (A/C.6/78/SR.28); and the written comments and observations of the United Kingdom.
[158] See the statement by Poland (A/C.6/78/SR.24).

international legal system are "determined", the result is that the principle has been "identified". Furthermore, the terminology used is consistent with the approach adopted by the Commission in its work on identification of customary international law.[159]

135. Regarding the requirement that "the community of nations has recognized the principle as intrinsic to the international legal system", some States argued that it was overly vague and risked undermining the requirement of State consent in conventional and customary international law. At the same time, several States expressed support for the current methodology as laid down in paragraph 1 of the draft conclusion, involving an inductive and a deductive assessment.

136. The Special Rapporteur agrees that rigorous criteria are necessary to prevent abuse in practice. However, at the same time, the criteria cannot be so stringent as to prevent the formation and identification of general principles of law formed within the international legal system, which would be inconsistent with the approach adopted in State practice, jurisprudence and teachings.

137. Some States have emphasized the importance of distinguishing norms that are legally binding from those that are not. The Special Rapporteur concurs with those States regarding the significance of this distinction and the necessity of making clear that general principles of law formed within the international legal system cannot be construed in such a way that makes it possible to derive binding obligations from non-binding instruments alone; one must look at the international law framework. In this regard, it must be recalled that the requirement that a principle be recognized by the community of nations as "intrinsic to the international legal system" in itself encompasses the legally binding character of the principle. As such, there is no need to repeat this requirement in the text of the draft conclusion.

138. Furthermore, the Special Rapporteur agrees with Singapore that, just as for general principles of law derived from national legal systems, the "recognition" by the community of nations required for the identification of general principles law that may be formed within the international legal system must also be "wide and representative, including the different regions of the world". This could be clarified in the commentary.

139. It is explained in the commentary that, in order to identify a general principle of law formed within the international legal system, an inductive analysis of existing rules in the international legal system is necessary, taking into account all available evidence of the recognition of the principle in question by the community of nations. This analysis is required in order to find a principle reflected in or underlying those rules. The analysis encompasses customary international law, treaties and other international instruments, resolutions adopted by international organizations or at intergovernmental conferences, and statements made by States.[160] Beyond this inductive analysis, a deductive assessment is also required, which involves ascertaining that the principle is "intrinsic" to the international legal system, that is, that it reflects and regulates the basic features of the latter.

140. The recognition by the community of nations can be ascertained through this methodology, and a general principle of law thus identified is not only legally binding but also independent from the sources from which it is derived.[161]

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[159] Conclusions 1, 2 and 16, para. 2, of the conclusions on identification of customary international law, General Assembly resolution 73/203 of 20 December 2018, annex. See also A/73/10, para. 65, at pp. 119 and 122.

[160] Para. (3) of the commentary to draft conclusion 7, A/78/10, para. 41, at p. 23.

[161] Rüdiger Wolfrum, "General international law (principles, rules, and standards)", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedias of International Law*, vol. IV (entry last updated in 2010; Oxford, Oxford University Press, 2012), pp. 344 – 368, at pp. 348 and 349, paras. 33 and 34 ("It is not of relevance whether the same terms are used in various international norms, but rather whether these norms reflect identical principles … It has been argued that principles derived from treaty or customary international law cannot have the status of sources of international law since they belong to the source from which they have been developed. This is true for such principles which have a meaning only within a particular treaty regime and which do not form the basis for new rights and

141. The principle of consent to the jurisdiction of international courts and tribunals[162] illustrates this methodology. First, it is a principle common to several instruments, such as treaties establishing permanent courts, special agreements, treaties containing compromissory clauses, and general dispute settlement treaties, applicable across the various fields of international law. Second, the fact that all these instruments require States' consent to submit a dispute to third-party adjudication cannot be explained but for the existence of the principle in question, which reflects and regulates a basic feature of the international legal system.

142. The Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[163] and the principle of speciality applicable to international organizations can serve as additional examples to illustrate the methodology under paragraph 1 of draft conclusion 7.

143. During the Nürnberg trials, the Tribunal had recourse to general principles of law and affirmed that its decisions were consistent, more specifically, with the principle of legality, and that the Charter establishing the Tribunal was an "expression of international law existing at the time of its creation".[164] The Tribunal affirmed moreover that:

> The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.[165]

144. To demonstrate that war of aggression can constitute a crime under international law, even absent a conventional or customary rule on the matter, the Tribunal resorted to provisions in international instruments,[166] including the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact),[167] the Hague Convention of 1907,[168] the practice of military tribunals, the draft of a Treaty of Mutual Assistance prepared by 29 States, the preamble to the unratified League of Nations Protocol for the Pacific Settlement of International Disputes, the declaration on the prohibition of wars of aggression of 24 September 1927 unanimously adopted at the Eighth Assembly of the League of Nations, the unanimous resolution of 18 February 1928 of 21 American republics at the Sixth International Conference of American States, and certain provisions in the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).[169] In particular, the Tribunal drew attention to preambular expressions such as the assertions that "a war of aggression constitutes a violation of this solidarity [of members of the international

obligations. The situation, however, is different for such principles that have obtained an independent status of their own.")

[162] International Court of Justice, *Case of the monetary gold removed from Rome in 1943 (Preliminary Question), Judgment of June 15th, 1954, I.C.J. Reports 1954*, p. 19, at p. 32 ("To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."); and *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 92, at pp. 132 and 133, para. 94.

[163] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[164] International Military Tribunal, Judgment, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 1 (1947), pp. 171–341, at p. 218.

[165] *Ibid.*, p. 221.

[166] *Ibid.*, pp. 219–222.

[167] General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (Paris, 27 August 1928), League of Nations, *Treaty Series*, vol. 94, No. 2137, p. 57.

[168] Convention (IV) (The Hague, 18 October 1907) with Respect to the Laws and Customs of War on Land, J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1915), p. 41.

[169] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919), *British and Foreign State Papers*, 1919, vol. CXII (London, HM Stationery Office, 1922), p. 1.

community] and is an international crime" and constitutes "a supreme offense against international morality and the sanctity of treaties". On the basis of these various materials, the Tribunal decided that "resort to a war of aggression [was] not merely illegal, but [was] criminal" under international law at the time.[170]

145. The principles applied in the Nürnberg trials were subsequently unanimously affirmed by the General Assembly in resolution 95 (I) of 11 December 1946. The General Assembly also directed the Commission to formulate these principles.[171]

146. During its first session, the Commission considered whether it should ascertain to what extent the Nürnberg Principles constituted "principles of international law" and decided that, since the Nürnberg Principles "had been affirmed by the General Assembly, the task entrusted to the Commission … was not to express any appreciation of these principles as principles of international law but merely to formulate them".[172] Furthermore, in the context of its work related to the 1996 draft Code of Crimes against the Peace and Security of Mankind,[173] the Commission identified, based on the Nürnberg Principles (I and II), the "general principle of the direct applicability of international law with respect to individual responsibility and punishment for crimes under international law"[174] and the "general principle of the autonomy of international law over national law with respect to the criminal characterization of conduct constituting crimes under international law".[175]

147. The Nürnberg Principles were further implicitly affirmed in the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as general principles of law, as the *travaux préparatoires* of both treaties show.[176]

148. It may thus be observed that the recognition of the Nürnberg Principles as legally binding norms of international law, in the jurisprudence of the Nürnberg Tribunal, was ascertained based on, *inter alia*, treaties, other international instruments, and declarations by States. These principles were "affirmed" unanimously in General Assembly resolution 95 (I),[177] and the formulation of the Nürnberg Principles by the Commission clarified and substantiated the content of these principles.

149. In *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice applied the "principle of speciality" when determining whether the World Health Organization could request an advisory opinion by the Court on matters relating to the use of force. The Court determined that:

> [I]nternational organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them … The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need

[170] International Military Tribunal, Judgment, in *Trial of the Major War Criminals*, vol. 1 (1947), p. 222.
[171] General Assembly resolution 95 (I) of 11 December 1946.
[172] *Yearbook ... 1950*, vol. II, document A/1316, p. 374, para. 96. See also *Yearbook ... 1949*, p. 133, para. 35; and *Yearbook ... 1950*, vol. II, document A/CN.4/22, p. 189, para. 36.
[173] The draft Code adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 1996*, vol. II (Part Two), para. 50.
[174] Para. (8) of the commentary to draft art. 1 of the draft Code, *ibid.*, at p. 18.
[175] Para. (12) of the commentary to draft art. 1, *ibid.*
[176] International Covenant on Civil and Political Rights art. 15, para. 2; and Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950; United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221), art. 7, para. 2. For the *travaux* of both articles, see A/2929, chap. VI, para. 96; A/4625, paras. 15 and 16; A/C.3/SR.1008, paras. 2, 3 and 14; A/C.3/SR.1010, para. 9; A/C.3/SR.1012, para. 15; A/C.3/SR.1013, paras. 14, 15 and 17; and Council of Europe, European Commission of Human Rights, "Preparatory work on article 7 of the European Convention on Human Rights", Information document prepared by the Secretariat of the Commission (DH (57) 6), p. 4.
[177] General Assembly resolution 95 (I) of 11 December 1946.

> for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers.[178]

150. The principle of speciality was thus identified through an inductive analysis considering the constituent instruments of international organizations, as well as the objectives of such organizations in the light of "the necessities of international life".[179] The principle of speciality, which governs international organizations, may be considered to be intrinsic to the international legal system.

151. In the above-mentioned examples, the determination of the existence and content of the general principles of law formed within the international legal system was conducted on the basis of an analysis of available evidence, including norms of international law, international instruments, and declarations of States. The inductive analysis allowed for the identification of those general principles. The identified principles, after a deductive reasoning process, may be considered intrinsic to the international legal system.

152. The Special Rapporteur considers it necessary to further emphasize that the inductive and deductive analyses must be thorough and comprehensive. Concrete evidence is required to demonstrate the existence of a principle and that it is recognized by the community of nations as intrinsic to the international legal system. Moreover, as some States have highlighted, the assessment of the required degree of recognition must be wide and representative, including the different regions of the world.

153. As regards the "without prejudice" clause in paragraph 2 of draft conclusion 7, the Special Rapporteur recalls that its aim is to allow for future developments regarding general principles of law that may be formed within the international legal system but are not necessarily intrinsic thereto. Reference has been made in the literature, for example, to the principle of the cultural heritage of humanity, which is reflected in or underlies various international conventions and other international instruments on the matter.[180]

8. Draft conclusion 8: Decisions of courts and tribunals

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

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

(a) Comments and observations by States

154. Delegations in the Sixth Committee generally welcomed draft conclusion 8, according to which decisions of courts and tribunals are subsidiary means for the determination of general principles of law.

155. Israel indicated that, when assessing decisions of national courts, one must consider several factors, including the position of the court in the domestic judicial hierarchy; the quality of the reasoning; whether the relevant court possesses the requisite expertise; and whether the decision forms part of a body of concurring decisions.[181] Greece highlighted that the value of decisions of national courts may vary and requested clarification as to how those decisions might play a role in the determination of general principles of law that might be

[178] *Legality of the Use by a State of Nuclear Weapons* (see footnote 99 above), pp. 78 and 79, para. 25. See also para. (7) of the general commentary to the draft articles on the responsibility of international organizations, *Yearbook … 2011, vol. II (Part Two)*, para. 88, at p. 47.

[179] *Legality of the Use by a State of Nuclear Weapons* (see footnote 99 above), pp. 78 and 79, para. 25.

[180] Francesco Francioni, "Custom and general principles of international cultural heritage law", in Francesco Francioni and Ana Filipa Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law* (Oxford, Oxford University Press, 2020), pp. 531–550.

[181] See the written comments and observations of Israel.

formed within the international legal system.[182] Cameroon, for its part, suggested that decisions of national courts were not subsidiary means, but "*moyens directs*" [direct means] for the determination of general principles of law.[183]

156. Austria suggested using the word "jurisprudence" instead of "decisions" and that the role of advisory opinions should be clarified further. It also suggested that the Commission could consider whether bodies other than courts and tribunals that were empowered to decide disputes, interpret the law authoritatively or render advisory opinions should also be covered by draft conclusion 8.[184]

157. Chile considered that the inclusion of draft conclusions 8 and 9 was not necessary, given that the content of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice was sufficient in that it already referred to subsidiary means for the determination of rules of law without mentioning the role of those means in respect of each of the other sources.[185] The Nordic countries expressed a similar view, recalling that the Commission was dealing with subsidiary means for the determination of rules of international law as a separate topic.[186]

(b) Recommendations of the Special Rapporteur

158. The Special Rapporteur notes the ample support in the Sixth Committee for draft conclusion 8, the inclusion of which is important for the purpose of clarifying the role of courts and tribunals in the identification of general principles of law (both those derived from national legal systems and those that may be formed within the international legal system). Draft conclusion 8 is of course without prejudice to the Commission's work on the separate topic of subsidiary means for the determination of rules of international law.

159. The Special Rapporteur agrees with the suggestion by Greece and Israel that it should be further clarified in the commentary to draft conclusion 8 that several factors ought to be considered when resorting to decisions of national courts as a subsidiary means for the determination of general principles of law, such as the position of the court in question in the hierarchy of the judicial system, the quality of the reasoning, and the expertise that the court possesses. It is recalled that this issue is already addressed in paragraphs (6), (9) and (10) of the commentary, which follows, for consistency, the Commission's approach in its work on identification of customary international law.[187]

160. As regards the suggestion made by Cameroon, the Special Rapporteur recalls that it is explained in paragraph (4) of the commentary to draft conclusion 8 that, in the context of general principles of law, decisions of national courts serve "a dual role". On the one hand, such decisions may serve as evidence of recognition for determining the existence of a principle common to the various legal systems of the world, pursuant to draft conclusion 5. On the other, decisions in which national courts seek to determine the existence of a general principle of law may be resorted to as a subsidiary means. The Special Rapporteur has provided examples of the latter scenario in previous reports.[188]

161. The Special Rapporteur is flexible regarding the use of the word "jurisprudence" instead of "decisions" in draft conclusion 8, as suggested by Austria. There may, however, be a preference for keeping the word "decisions" for consistency with the Commission's work on identification of customary international law. As regards decisions by bodies other than courts and tribunals that could also serve as subsidiary means for the determination of general principles of law, reference to them could be made in the commentaries, provided

[182] See the statement by Greece (A/C.6/78/SR.27).
[183] See the full text of the statement made on the topic by Cameroon in the Sixth Committee during the seventy-seventh session of the General Assembly (in French), available on the web page of the Sixth Committee.
[184] See the statement by Austria (A/C.6/78/SR.24).
[185] See the statement by Chile (A/C.6/77/SR.30).
[186] See the statement by Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.23). See also the statement by Slovakia (A/C.6/78/SR.25).
[187] Commentary to draft conclusion 13 of the draft conclusions on identification of customary international law, A/73/10, para. 66, at pp. 149 and 150.
[188] See, for example, A/CN.4/741 and Corr.1 (second report), paras. 34 and 94.

that consistency is maintained with the Commission's work on subsidiary means for the determination of rules of international law, a topic that is still under consideration.

9. Draft conclusion 9: Teachings

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

(a) Comments and observations by States

162. Draft conclusion 9 provides that teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of general principles of law. States generally expressed support for the draft conclusion, with some suggestions being made.

163. Cameroon considered that the phrase "the most highly qualified" was a value judgment and that only the relevance and usefulness of the teachings should be taken into account. It thus suggested using the phrase "*la doctrine des publicistes des différentes nations dont la constance et la pertinence des travaux sont avérées*" [teachings of the publicists of the various nations whose works are proven to be enduring and relevant].[189] Cameroon welcomed the analysis in paragraph (4) of the commentary to draft conclusion 9, emphasizing the importance of relevant teachings that were representative of the various legal systems and regions of the world, in various languages.[190]

164. The Philippines pointed out that the term "teachings" should include those in both written and unwritten forms, such as lectures and audiovisual materials.[191] The Islamic Republic of Iran considered that, in terms of subsidiary means, judicial decisions should be given greater weight than teachings. In that connection, the Islamic Republic of Iran noted that the International Court of Justice had rarely invoked "teachings" in its work, although some regional and municipal courts had relied on teachings to corroborate their judicial reasoning.[192] Israel, for its part, suggested that "the need for writings to reflect a proper scientific methodology and its faithful application" should be emphasized in the commentary.[193]

165. A few States suggested the deletion of draft conclusion 9. The Nordic countries agreed with the basic position contained in the draft conclusion but considered it unnecessary and inappropriate, given the fact that the Commission was currently considering subsidiary means for the determination of rules of international law as a separate topic.[194] Similarly, Chile considered it unnecessary to include a separate draft conclusion on teachings as a subsidiary means, as doing so could lead to confusion.[195] Slovakia expressed similar views.[196]

(b) Recommendations of the Special Rapporteur

166. The Special Rapporteur notes that there is ample support for draft conclusion 9.

167. Regarding the comments of some States about the necessity and usefulness of the draft conclusion, the Special Rapporteur wishes to re-emphasize the importance of providing clear guidance on the role of teachings as a subsidiary means for determining the existence and content of general principles of law. While appropriate attention should be given to the Commission's ongoing work on the topic of subsidiary means, there remains a need to address the specific role of teachings in the context of general principles of law. It is also

[189] See the full text of the statement made on the topic by Cameroon in the Sixth Committee during the seventy-seventh session of the General Assembly (in French), available on the web page of the Sixth Committee; and the 2023 statement by Cameroon (A/C.6/78/SR.25).
[190] See the statement by Cameroon (A/C.6/78/SR.25).
[191] See the statement by the Philippines (A/C.6/78/SR.28).
[192] See the statement by the Islamic Republic of Iran (A/C.6/78/SR.24).
[193] See the written comments and observations of Israel.
[194] See the statements by Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.23) and Norway (on behalf of the Nordic countries) (A/C.6/77/SR.29).
[195] See the statement by Chile (A/C.6/77/SR.30).
[196] See the statement by Slovakia (A/C.6/78/SR.25).

worth recalling that the Commission has already addressed the role of teachings in the draft conclusions on identification of customary international law and on identification and legal consequences of peremptory norms of general international law (*jus cogens*), and that the Commission should maintain consistency.

168. Regarding the phrase "the most highly qualified", the Special Rapporteur shares the sentiment and concerns expressed by Cameroon. He is attentive to the debates within the Commission and the Sixth Committee regarding the topic of subsidiary means for the determination of rules of law and considers it necessary to maintain consistency with the general approach taken in that context.[197] Accordingly, the Special Rapporteur proposes amending the existing text to read as follows:

> "**Draft conclusion 9**
> **Teachings**
>
> Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of general principles of law."

169. As regards the weight to be given to teachings relative to judicial decisions, the Special Rapporteur considers that a case-by-case analysis is necessary; there is no hard-and-fast rule in that regard.

170. Lastly, the Special Rapporteur agrees with the Philippines that teachings can be in written and unwritten forms and considers that it would be helpful to clarify this point in the commentary.

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

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

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

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

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

(a) Comments and observations by States

171. Draft conclusion 10 addresses the functions of general principles of law. It provides that general principles are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part. It also indicates that general principles of law contribute to the coherence of the international legal system and that they may serve, *inter alia*, to interpret and complement other rules of international law and as a basis for primary rights and obligations, secondary rules and procedural rules.

172. Several States expressed general support for the approach and functions outlined in draft conclusion 10.[198] The Nordic countries supported the "residual characteristic" of that particular source of international law and "its relevance in terms of contributing to the coherence of the international legal system".[199] The Philippines pointed out that general principles of law were a direct source of and an independent basis for rights and obligations, a means to interpret and complement other rules of international law and a means to ensure the coherence of the international legal system.[200] Israel supported the view that general

[197] Draft conclusion 5 of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, Report of the International Law Commission on the work of its seventy-fifth session, *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10* (A/79/10), para. 74, at p. 31.

[198] See the statements by Australia (A/C.6/77/SR.30), Chile (A/C.6/77/SR.30), Ecuador (A/C.6/77/SR.31 and A/C.6/78/SR.24) and the United Kingdom (A/C.6/77/SR.30).

[199] See the statement by Norway (on behalf of the Nordic countries) (A/C.6/77/SR.29).

[200] See the statement by the Philippines (A/C.6/77/SR.31).

principles of law contributed to the coherence of the international legal system.[201] Australia agreed that the functions of general principles of law supported and complemented existing treaties and customary international law.[202] Guatemala considered that a general principle of law could be applied directly or with other rules of international law, with the purpose of interpreting or complementing them.[203]

173. Some States referred to certain broader functions of general principles of law. Portugal, for example, noted that general principles of law set "an ethical and normative model for other norms".[204] The Kingdom of the Netherlands remarked that "general principles of law served as a reference framework that helped international courts and tribunals as well as States and other subjects of international law to interpret other rules of international law".[205] The Islamic Republic of Iran observed that general principles of law had "made important contributions to the development of international law over the past century".[206]

174. The Holy See noted that the diverse nature of general principles of law was relevant to draft conclusion 10. For instance, principles such as that of sovereign equality of States, which established the basic structure of the international community, differed significantly from principles of a procedural nature such as the principle commonly referred to as *Kompetenz-Kompetenz* in German and *la compétence de la compétence* in French. While the latter were invoked only in the absence of other rules, as noted in paragraph 1 of draft conclusion 10, the former – those principles of an "almost constitutional nature" – underpinned the entire application of international law.[207]

175. Regarding paragraph 1, several States agreed that general principles of law were mainly resorted to when other rules of international law did not resolve a particular issue in full or in part.[208] Some States noted, however, an apparent conflict between the "gap-filling" role of general principles of law as covered in draft conclusion 10 and the non-hierarchical relationship referred to in draft conclusion 11.[209]

176. Slovenia pointed out that general principles of law were "parallel to the other sources of international law" and that their functions were not limited to a "gap-filling" role.[210] Portugal and the State of Palestine also remarked that the function of general principles of law was not limited to "gap-filling".[211] South Africa noted that the "gap-filling" role could also be performed by sources other than general principles of law.[212]

177. Some States criticized paragraph 1 of draft conclusion 10. Colombia remarked that it might risk calling into question the nature of general principles of law as an autonomous and primary source of international law.[213] Austria noted that paragraph 1 was phrased as a statement of fact rather than as a rule and questioned its usefulness.[214]

178. Poland suggested that general principles of law should be resorted to only when a particular issue could not be resolved in whole or in part by other rules of international law and that it should be clarified in the commentary that "general principles should not replace

[201] See the statement by Israel (A/C.6/78/SR.24).
[202] See the statement by Australia (A/C.6/78/SR.23).
[203] See the statement by Guatemala (A/C.6/78/SR.27).
[204] See the statement by Portugal (A/C.6/77/SR.29).
[205] See the statement by the Kingdom of the Netherlands (A/C.6/77/SR.31).
[206] See the statement by the Islamic Republic of Iran (A/C.6/78/SR.24).
[207] See the statement by the Holy See (A/C.6/78/SR.28).
[208] See the statements by the Czech Republic (A/C.6/78/SR.25), Estonia (A/C.6/78/SR.24), Guatemala (A/C.6/78/SR.27), Ireland (A/C.6/78/SR.25), Mexico (A/C.6/78/SR.25), Poland (A/C.6/78/SR.24) and Portugal (A/C.6/78/SR.24).
[209] See the statements by Egypt (A/C.6/77/SR.30), Ireland (A/C.6/77/SR.30 and A/C.6/78/SR.25), Romania (A/C.6/78/SR.25) and Singapore (A/C.6/77/SR.29); and the written comments and observations of Singapore.
[210] See the statement by Slovenia (A/C.6/77/SR.30).
[211] See the statements by Portugal (A/C.6/77/SR.29) and the State of Palestine (A/C.6/77/SR.31).
[212] See the statement by South Africa (A/C.6/77/SR.30).
[213] See the statement by Colombia (A/C.6/78/SR.27).
[214] See the statement by Austria (A/C.6/78/SR.24).

customary or treaty norms in their regulatory function and may be applied as a basis for primary rights and obligations only in limited circumstances".[215] The United States proposed using the word "address" instead of "resolve", noting that it might 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 [did] not fully provide resolution".[216]

179. The Nordic countries queried whether it would be better to address the elements outlined in paragraph 2 (a) and (b) in the commentary instead of in the text of the draft conclusion, as those elements were common to all primary sources.[217]

180. In terms of the commentary, Poland suggested that it should be expressly indicated that general principles of law should not replace the regulatory function of customary or treaty rules and could serve as a basis for primary rights and obligations only in limited circumstances.[218] Austria questioned some of the examples of general principles mentioned in the commentary, questioning their status as general principles of law.[219]

(b) Recommendations of the Special Rapporteur

181. States generally supported draft conclusion 10 on the functions of general principles of law.

182. Nevertheless, some States questioned the inclusion of paragraph 1, noting that it was a statement of fact and not of a normative character. Several States also stated that general principles of law were not limited to a "gap-filling" role. On the basis of these comments, the Special Rapporteur proposes changing the order of paragraphs 1 and 2 of draft conclusion 10. The content of paragraph 1, being a statement of fact of what mainly, but not always occurs, should be given less prominence.

183. Draft conclusion 10 applies to all general principles of law, regardless of whether they are derived from national legal systems or formed within the international legal system.

184. Other issues raised by States, in particular the relationship of general principles of law with other sources of international law, are addressed below, in relation to with draft conclusion 11.

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

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

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

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

(a) Comments and observations by States

185. Draft Conclusion 11 clarifies the relationship between general principles of law and treaties and customary international law. Paragraph 1 explains that "[g]eneral principles of law, as a source of international law, are not in a hierarchical relationship with treaties and customary international law". Paragraph 2 provides that "[a] general principle of law may exist in parallel with a rule of the same or similar content in a treaty or customary international law". Paragraph 3 explains that "[a]ny conflict between a general principle of law and a rule

[215] See the written comments and observations of Poland.
[216] See the written comments and observations of the United States.
[217] See the statements by Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.23) and Norway (on behalf of the Nordic countries) (A/C.6/77/SR.29).
[218] See the statement by Poland (A/C.6/78/SR.24).
[219] See the statement by Austria (A/C.6/78/SR.24).

in a treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law".

186. Several States supported the general approach taken in the draft conclusion, including the absence of a hierarchy among the sources of international law, the possibility of the parallel existence of general principles of law and conventional and customary rules, and the techniques for resolving conflicts among rules.[220] For instance, El Salvador welcomed the Commission's understanding that there was a "dynamic relationship" between general principles of law and the other two sources reflected in the draft conclusion: whereas general principles of law might be codified in an international instrument and could even amount to or give rise to international custom, the fact that a general principle of law might have the same content as a rule of customary international law did not diminish or extinguish the applicability of that principle; on the contrary, such situations would reinforce or complement the principle.[221] Brazil noted that draft conclusion 11 accurately confirmed that there was "no hierarchical relationship" between the sources of international law and that a general principle of law might exist "in parallel with treaty or customary rules having identical or analogous content".[222]

187. A few general suggestions were also made. Chile raised the issue of whether special treatment should be given to general principles formed within the international legal system in the context of the relationship with the other two sources.[223] France suggested that draft conclusion 11 should be divided into two conclusions, to deal separately with the relationship between general principles of law and treaties and between general principles of law and customary international law.[224] The Holy See made reference to principles that had a "higher normative value", either because they constituted peremptory norms of international law or because they enunciated "basic features of the Westphalian system", and suggested that, in its drafting, the Commission should pay greater attention to the actual substance of the principles in question.[225]

188. Regarding paragraph 1, different views were expressed with regard to whether general principles of law were not in a hierarchical relationship with treaties and customary international law and, if they were, whether it was a "formal" or "informal" hierarchy. Most States supported the position that there was no hierarchy between general principles of law and treaties and customary international law.[226] Belarus and Cameroon, by contrast, believed that Article 38, paragraph 1, of the Statute of the International Court of Justice did establish a hierarchy among the three sources.[227] Portugal, however, objected to the view that Article 38 of the Statute of the International Court of Justice established a hierarchy among sources of international law.[228]

[220] See the statements by Brazil (A/C.6/77/SR.30), Ecuador (A/C.6/77/SR.31), El Salvador (A/C.6/77/SR.30), Lebanon (A/C.6/78/SR.28), Micronesia (Federated States of) (A/C.6/77/SR.31) and Spain (A/C.6/78/SR.27).

[221] See the statement by El Salvador (A/C.6/77/SR.30)

[222] See the written comments and observations of Brazil.

[223] See the statement by Chile (A/C.6/77/SR.30).

[224] See the statement by France (A/C.6/78/SR.23).

[225] See the statement by the Holy See (A/C.6/78/SR.28)

[226] See the statements by Algeria (A/C.6/78/SR.28), Brazil (A/C.6/77/SR.30), Colombia (A/C.6/78/SR.27), Croatia (A/C.6/77/SR.31 and A/C.6/78/SR.27), Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.23), Ecuador (A/C.6/77/SR.31), El Salvador (A/C.6/78/SR.28), Estonia (A/C.6/78/SR.24), India (A/C.6/77/SR.26 and A/C.6/78/SR.25), Iran (Islamic Republic of) (A/C.6/77/SR.30), Micronesia (Federated States of) (A/C.6/77/SR.31), Norway (on behalf of the Nordic countries) (A/C.6/77/SR.29), the Philippines (A/C.6/78/SR.28), Portugal (A/C.6/77/SR.29) and Slovenia (A/C.6/78/SR.27); and the written comments and observations of the United Kingdom.

[227] See the statements by Belarus (A/C.6/78/SR.24) and Cameroon (A/C.6/78/SR.25).

[228] See the statement by Portugal (A/C.6/77/SR.29)

189. For the Philippines, the Russian Federation and Slovakia, despite the absence of a formal hierarchy, an informal hierarchy nevertheless existed in practice, and general principles did not enjoy the same status as the other sources.[229]

190. Similarly, considering the "residual" role of general principles of law in practice, the Nordic countries suggested adding the word "formal" before "hierarchical".[230] The United States stated that it saw no need for paragraph 1 of draft conclusion 11, given that "the inherent interstitial nature of general principles of law" could not be "comfortably squared with non-hierarchy" and that there was in any event no practice supporting the draft conclusion in that regard.[231]

191. Several States, as noted above, pointed out the apparent contradiction between the absence of hierarchy under draft conclusion 11, on the one hand, and paragraph 1 of draft conclusion 10, on the other.[232] However, other States noted that they saw no such contradiction. For Chile, for example, the three sources listed in Article 38, paragraph 1, of the Statute of the International Court of Justice operated at the same hierarchical level, without prejudice to the precedence of some over others, on the basis of the *lex specialis* principle; as such, there was no contradiction between the absence of hierarchy and the fact that general principles of law were mainly resorted to when other rules of international law did not resolve a particular issue in whole or in part.[233] Croatia and Slovenia also expressed support for the position that the supplementary role of general principles of law was explained by the *lex specialis* principle. General principles, in their view, were *lex generalis* relative to the other sources.[234]

192. Regarding paragraph 2 of draft conclusion 11, "[a] general principle of law may exist in parallel with a rule of the same or similar content in a treaty or customary international law", some States questioned the position stated therein. For the Russian Federation, when a general principle of law became a rule in a treaty or customary international law, "it would be absorbed by said treaty or customary international law and cease to exist"; therefore, "general principles of law would not be recognized as an independent basis for the rights and obligations of States under international law, but they would still aid in interpretation of, filling of lacunae in and ensuring the coherence of the international legal system".[235]

193. Malaysia, while acknowledging the parallel existence of general principles of law and conventional and customary rules, stated that it was important to acknowledge that "the emergence of a general principle of law was dependent on its compatibility with every treaty and customary rule in the context in which it was to be applied".[236]

194. On the other hand, Algeria, Chile and Guatemala expressed support for the view that general principles of law were an autonomous source of international law.[237]

195. Some States sought clarification regarding the general principles of law formed within the international legal system and other sources of international law. Belarus suggested that, in draft conclusion 11 or the commentary thereto, a distinction should be drawn between such principles and customary international law; it also suggested providing clarification as to the relationship between those principles and *jus cogens* norms, highlighting that it was "necessary to establish that the principle in question was not contradicted by a peremptory

[229] See the statements by the Philippines (A/C.6/77/SR.31), the Russian Federation (A/C.6/78/SR.26) and Slovakia (A/C.6/78/SR.25).

[230] See the statements by Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.23) and Norway (on behalf of the Nordic countries) (A/C.6/77/SR.29).

[231] See the written comments and observations of the United States.

[232] See the statements by Austria (A/C.6/78/SR.24), Egypt (A/C.6/77/SR.30), Estonia (A/C.6/77/SR.30), Ireland (A/C.6/77/SR.30 and A/C.6/78/SR.25) and Romania (A/C.6/78/SR.25).

[233] See the statement by Chile (A/C.6/77/SR.30).

[234] See the statements by Croatia (A/C.6/77/SR.31 and A/C.6/78/SR.27) and Slovenia (A/C.6/77/SR.30 and A/C.6/78/SR.27).

[235] See the statements by the Russian Federation (A/C.6/77/SR.31 and A/C.6/78/SR.26).

[236] See the statement by Malaysia (A/C.6/78/SR.27).

[237] See the statements by Algeria (A/C.6/78/SR.28), Chile (A/C.6/77/SR.30 and A/C.6/78/SR.24) and Guatemala (A/C.6/78/SR.27).

norm of general international law".[238] Croatia, Indonesia and Japan also cautioned against confusing general principles of law with customary international law.[239]

196. Regarding paragraph 3, Slovakia noted that it was "difficult to envisage a situation where a general principle of law would be in conflict with a customary rule of international law, especially in the case of the proposed category of general principles of law formed within the international legal system".[240] The United States similarly indicated that, "because general principles of law [were] interstitial, there logically should be a presumption against a conflict situation with a treaty or customary international law rule", and recommended deleting draft conclusion 11, paragraph 3.[241]

197. Brazil noted that *jus cogens* norms might be reflected in general principles of law, thereby precluding the application of the *lex specialis* principle.[242]

(b) Recommendations of the Special Rapporteur

198. On the basis of these comments and suggestions, the Special Rapporteur makes the recommendations set out below.

199. Regarding the relationship between the three sources, the absence of hierarchy has received broad support and aligns with the position taken by the Commission in the context of its work on the topic of fragmentation of international law. Furthermore, given the clear text of Article 38 of the Statute of the International Court of Justice, general principles of law must not be confused with "subsidiary means for the determination of rules of law". Therefore, the wording "subsidiary source" should be avoided.

200. Regarding the suggestion of adopting the notion of "formal hierarchy", as opposed to "hierarchy", the Special Rapporteur considers that such wording may suggest that an "informal hierarchy" exists between the sources, which is unsupported by State and judicial practice and contrary to the views of the majority of States in the Sixth Committee.

201. Furthermore, as suggested by the text of Article 38 of the Statute of the International Court of Justice, and as widely accepted by States, general principles of law are an autonomous source of international law. The fact that general principles of law often play a supplementary role in relation to the other two sources is due to the operation of the *lex specialis* principle. As general principles of law are usually *lex generalis* relative to the norms of the other two sources on the same subject, the latter would take precedence over the former. This is consistent with the conclusions reached in the work of the Commission on fragmentation of international law.

202. The Special Rapporteur considers that it would be useful to further clarify the distinction between general principles of law and customary international law, as was suggested by some States, in line with what has been addressed in the present report in the context of draft conclusion 3. It would also be helpful to offer more explanation in the commentary regarding the relationship between general principles of law and peremptory norms of general international law (*jus cogens*).

III. Final outcome

203. As suggested by the Special Rapporteur in his first report, and supported by States in the Sixth Committee, it is proposed that the final outcome of the Commission's work on the topic consist of: (a) a set of draft conclusions with commentaries adopted by the Commission; and (b) a bibliography. This approach is consistent with that followed by the Commission in

[238] See the statement by Belarus (A/C.6/78/SR.24).
[239] See the statements by Croatia (A/C.6/78/SR.27), Indonesia (A/C.6/78/SR.27) and Japan (A/C.6/78/SR.28).
[240] See the statement by Slovakia (A/C.6/78/SR.25).
[241] See the written comments and observations of the United States.
[242] See the statement by Brazil (A/C.6/77/SR.30).

the context of its work on the topics of identification of customary international law and peremptory norms of general international law (*jus cogens*).

204. The Special Rapporteur further proposes that the Commission recommend that the General Assembly: (a) take note of the Commission's draft conclusions on general principles of law in a resolution, annex the draft conclusions to the resolution, and ensure their widest dissemination; (b) commend the draft conclusions, together with the commentaries thereto, to the attention of States and all those who may be called upon to identify and apply general principles of law; and (c) take note of the bibliography prepared by the Special Rapporteur.

Annex I

Marked-up text of the draft conclusions adopted on first reading with proposed amendments by the Special Rapporteur

General principles of law

Conclusion 1
Scope

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

Conclusion 2
Recognition

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

2. It is primarily the recognition by States that contributes to the formation of general principles of law.

3. In certain cases, the recognition by international organizations may also contribute to the formation of general principles of law.

4. While the positions of other actors may be relevant in providing context and for assessing recognition by the community of nations, these positions do not, in and of themselves, form part of such recognition.

Conclusion 3
Categories of general principles of law

General principles of law comprise those:

(a) that are derived from national legal systems;

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

Conclusion 4
Identification of general principles of law derived from national legal systems

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

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

(b) its transposition to the international legal system.

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

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

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

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

Conclusion 6
Determination of transposition to the international legal system

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

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

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

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

Conclusion 8
Decisions of courts and tribunals

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

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

Conclusion 9
Teachings

Teachings ~~of the most highly qualified publicists of the various nations may serve as~~, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of general principles of law.

Conclusion 10
Functions of general principles of law

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

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

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

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

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

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

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

2. 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.

Conclusion 11
Relationship between general principles of law and treaties and customary international law

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

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

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

Conclusion 12
General principles of law with a limited scope of application

The present draft conclusions are without prejudice to the existence of general principles of law with a limited scope of application.

Annex II

Clean text of the draft conclusions adopted on first reading with proposed amendments by the Special Rapporteur

General principles of law

Conclusion 1
Scope

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

Conclusion 2
Recognition

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

2. It is primarily the recognition by States that contributes to the formation of general principles of law.

3. In certain cases, the recognition by international organizations may also contribute to the formation of general principles of law.

4. While the positions of other actors may be relevant in providing context and for assessing recognition by the community of nations, these positions do not, in and of themselves, form part of such recognition

Conclusion 3
Categories of general principles of law

General principles of law comprise those:

(a) that are derived from national legal systems;

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

Conclusion 4
Identification of general principles of law derived from national legal systems

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

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

(b) its transposition to the international legal system.

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

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

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

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

Conclusion 6
Determination of transposition to the international legal system

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

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

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

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

Conclusion 8
Decisions of courts and tribunals

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

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

Conclusion 9
Teachings

Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of general principles of law.

Conclusion 10
Functions of general principles of law

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

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

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

2. 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.

Conclusion 11
Relationship between general principles of law and treaties and customary international law

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

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

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

Conclusion 12
General principles of law with a limited scope of application

The present draft conclusions are without prejudice to the existence of general principles of law with a limited scope of application.