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Chair: Mr. Abdelaziz (Vice-Chair) . . . . . (Egypt)
later: Ms. Al-Thani . . . . . (Qatar)

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21-15981 (E)

In the absence of Ms. Al-Thani (Qatar), Mr. Abdelaziz (Egypt), Vice-Chair, took the Chair.

The meeting was called to order at 10 a.m.

Agenda item 82: Report of the International Law Commission on the work of its seventy-second session (*continued*) (A/76/10)

1. **The Chair** invited the Committee to continue its consideration of chapters VII and VIII of the report of the International Law Commission on the work of its seventy-second session (A/76/10).

2. **Mr. Pieris** (Sri Lanka) said that the Commission had included the topic of succession of States in respect of State responsibility in its programme of work in order to address the question of whether international law allowed for succession to obligations arising from the international responsibility of a predecessor State when that State had ceased to exist. The Commission had offered some exceptions to the traditional rule of non-succession, but it was a matter of great contention whether those were truly exceptions and not solutions originating from international law. Another question the Commission had sought to address was whether the successor State had the same legal personality as the internationally liable predecessor State that no longer existed, or whether that personality was extinguished when the predecessor State ceased to exist.

3. Article 1 of the articles on responsibility of States for internationally wrongful acts stated that every internationally wrongful act of a State entailed the international responsibility of that State. It could be concluded from that provision that international liability was attributable exclusively to the State that had committed the internationally wrongful act. Therefore, succession to that responsibility would require the new State to continue the legal personality of the predecessor State responsible for the internationally wrongful act. In the absence of clear continuity of legal personality from the predecessor State to the successor State, succession could result in the invalidation of treaties and alliances, as the successor State did not succeed to the rights and obligations of the predecessor State under those agreements.

4. Referring to the topic of general principles of law, he noted the six main points highlighted by the Special Rapporteur from the debates in the Commission and in the Committee, summarized in paragraphs 174 to 179 of the Commission's report (A/76/10), and said that his delegation agreed that the topic should deal with the legal nature of general principles of law as one of the sources of international law

5. **Mr. Klussmann** (Germany), referring to the topic of general principles of law, said that the Special Rapporteur's extensive analysis in his second report (A/CN.4/741 and A/CN.4/741/Corr.1) constituted an excellent basis for corroborating the rules on and the methodology for identifying general principles of law. Germany agreed with the Special Rapporteur and the Commission that a cautious approach was advisable when discussing issues related to such fundamental elements of the international legal system as the rules on the sources of international law. In particular, the contentious category of general principles of law formed within the international legal system required careful consideration.

6. Referring to the draft conclusions proposed by the Special Rapporteur in his second report, he said that Germany welcomed the provisional adoption by the Commission of draft conclusions 4, in addition to draft conclusions 1 and 2, which had been proposed in his first report (A/CN.4/732), with commentaries thereto. It also agreed with the proposed methodology for the identification of general principles of law derived from national legal systems as laid out by the Special Rapporteur in Part II of his second report.

7. With regard to draft conclusion 5 (Determination of the existence of a principle common to the principal legal systems of the world), Germany agreed that the comparative legal analysis underlying the "recognition" element in the determination of general principles of law derived from national legal systems must cover different "legal families". The analysis must also provide for geographical representation and diversity for any findings on general principles of law to be legal and legitimate. The suggested formulation, that the analysis must be "sufficiently wide and representative", captured that requirement well.

8. Although it was important for all States to make national legal sources as widely available as possible, the lack of access to information on certain national legal systems with regard to a particular issue did not alter or reduce the requirement of representativeness, which was inherent in the notion of commonality of a principle to the various legal systems of the world. It also could not absolve those seeking to determine the existence of a general principle from a sufficiently wide and representative comparative analysis and must not lead to premature findings on the existence of such a principle. Consideration of each and every legal system in the world was not required to ensure representativeness.

9. As to draft conclusion 6 (Ascertainment of transposition to the international legal system), the

Special Rapporteur had concluded that, for a principle common to the principal legal systems of the world to be transposed to the international legal system, it must be compatible with "fundamental principles of international law". Such principles, according to the Special Rapporteur, included the principle of sovereignty, the notion of territorial sovereignty, the basic concept of continental shelf entitlement, and the principles set out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

10. While Germany generally agreed with using the compatibility test, further analysis would be helpful to identify other kinds of principles that could qualify as "fundamental" in that context, especially given that the enumeration in the Special Rapporteur's report was introduced with the word "include", meaning that it was inconclusive. It was crucial to differentiate between such "fundamental principles", which might bar the influx of legal principles from the domestic legal sphere into the international legal system, and basic principles or characteristics of the international legal system, as well as international norms and general principles of law, which did not have that quality.

11. While Germany, unlike some States, did not exclude the possibility that general principles of law formed within the international legal system existed as a source of international law, it believed that the criteria for identifying them must be sufficiently strict, so as to minimize the risk that the rules governing the identification of customary international law were undermined or bypassed in practice. Germany welcomed the remarks made in that regard by the Special Rapporteur in paragraphs 15 and 120 of his second report. Nevertheless, Germany shared the concerns voiced by some Commission members that the proposed methodology for determining the "recognition" of general principles of law formed within the international legal system might not actually achieve that objective.

12. With regard to the proposed means of determining the existence of a general principle of law formed within the international legal system, set out in draft conclusion 7, further explanation was needed regarding the requirement in draft conclusion 7 (a) that it be ascertained that the principle was widely recognized in treaties and other international instruments. It was unclear what the precise criteria might be for considering a certain element within a treaty or instrument as having emancipated itself from its origin in order to acquire a distinct and independent legal status as a general principle of law.

13. It was doubtful that binding legal principles formed within the international legal system might be derived from purely non-legally binding instruments, although a non-legally binding instrument could be referred to in order to corroborate a legal principle recognized in other, legally binding instruments. It was also unclear whether, as far the determination of principles derived from the domestic legal order, a comparative analysis of international treaties and other instruments would be necessary to ascertain whether a principle was widely recognized in the sense of draft conclusion 7 (a), and whether such analysis would need to cover not only as many treaties and instruments as possible but also a variety of treaties and instruments from different areas, sub-areas or regimes of international law.

14. The precise methodology for ascertaining that a principle underlay general rules of conventional or customary international law, as set out in draft conclusion 7 (b), remained vague and merited further discussion. His delegation recognized the difficulty of identifying the content of the basic features and fundamental requirements of the international legal system from which a general principle might be deduced, as set out in draft conclusion 7 (c), bearing in mind the risk of somewhat subjective results and legal uncertainty, a point which had also been raised during the discussions in the Commission and should be addressed further.

15. **Mr. Kawase** (Japan), referring to the topic of general principles of law, said that the discussion on the identification of general principles of law derived from national legal systems and those formed within the international legal system was important, but the Commission should clarify the difference between general principles of law formed within the international legal system and customary international law. The Drafting Committee should thoroughly examine the draft conclusions proposed by the Special Rapporteur and provide further explanations and commentaries. It would also be helpful if the Commission could elaborate on the definitions of terms used in the draft conclusions, in particular the definition of "general principles of law".

16. **Mr. Zukal** (Czechia), referring to the topic of succession of States in respect of State responsibility, and draft articles 7, 8 and 9 and the commentaries thereto provisionally adopted by the Commission, said that his delegation agreed with the premise, expressed in draft article 7 (Acts having a continuing character), that a successor State was responsible for its own wrongful conduct committed after the date of

succession. That was true whether the wrongful act was of a continuing character or consisted of a single act.

17. His delegation also agreed that, in certain circumstances, the successor State assumed secondary obligations resulting from the predecessor State's wrongful conduct committed before the date of succession. However, it was doubtful that the rule for determining whether the international responsibility of the successor State extended to the consequences of an act of the predecessor State could be based on the acknowledgement and adoption of the act as its own by the successor State. Those concepts had been adapted from article 11 (Conduct acknowledged and adopted by a State as its own) of the articles on responsibility of States for internationally wrongful acts, which referred to acknowledgement and adoption by an existing State of conduct which was not attributable to a State.

18. With regard to the relative importance of the continuing character of the wrongful act, in paragraph (4) of its own commentary to article 14 (Extension in time of the breach of an international obligation) of the articles on responsibility of States for internationally wrongful acts, the Commission had stated that whether a wrongful act was completed or had a continuing character would depend both on the primary obligation and on the circumstances of the given case. In paragraph (5) of the commentary, the Commission had also stated that the distinction between completed and continuing acts was a relative one, and that where a continuing wrongful act had ceased, the act was considered for the future as no longer having a continuing character, even though certain effects of the act might continue.

19. What mattered, therefore, was not the continuing character of the wrongful act, but rather its lasting consequences and the ability of the successor State to contribute to the elimination of those consequences, including through restitution. The importance of the consequences of a wrongful act was evident in particular when such an act was committed by a State against the predecessor State, because the successor State inherited the burden of the damage caused by the wrongful act, whether the wrongful conduct against the successor State retained its continuing character after the date of succession or was eventually stopped.

20. Furthermore, the sole focus of draft article 7, despite its seemingly general ambit, was on internationally wrongful acts of continuing character committed by the predecessor State and followed by those committed by the successor State. The Commission had not, however, analysed the situation where internationally wrongful acts of a continuing character had been committed by a State against the predecessor State and had been followed, after the date of succession, by the same kind of wrongdoing against the successor State.

21. In that scenario, the impact of the wrongful conduct, both before and after the date of succession, would be felt by the same population or would affect the same property, even though they had passed from the jurisdiction of the predecessor State to the jurisdiction of the successor State. The successor State should be entitled to reparation of injury which had accumulated both before and after the date of succession. Once again, it was not important whether the wrongful act consisted of a single act or was of a continuing character. The focus of the draft article should instead be on the lasting adverse effects of the act committed by the predecessor State or against it and their desired elimination, in accordance with the requirements of fairness and restoration of justice.

22. His delegation did not see sufficient reason for restating the provisions of article 10, paragraphs 2 and 3, of the articles on responsibility of States for internationally wrongful acts in draft article 8 (Attribution of conduct of an insurrectional or other movement). If the draft article was indeed necessary, the Commission should also elaborate a provision to address the reverse scenario, namely, reparation for internationally wrongful acts committed against an insurrectional or other movement which succeeded in establishing a new State. Regarding draft article 9 (Cases of succession of States when the predecessor State continued to exist), his delegation noted with satisfaction that some of the concerns it had raised in the past had been addressed in the commentary to the draft article.

23. Turning to the topic of general principles of law, he said that his delegation looked forward to the Commission's consideration and development of the draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1). He reiterated his Government's position that it understood general principles of law as those originating in and derived from national legal systems, and not as those formed primarily within the international legal system.

24. His delegation shared the concerns of some members of the Commission and Member States that recognition of the latter category of general principles of law could be problematic because there was insufficient State practice to identify them; it would be hard or impossible to distinguish them from customary international law; and recognizing such general

principles of law could lead to the circumvention of State consent. The latter concern sprang from draft conclusion 7 (Identification of general principles of law formed within the international legal system), paragraph (a), of the draft conclusions proposed by the Special Rapporteur in his second report, according to which the existence of a general principle of law formed within the international legal system could be determined on the basis of its wide recognition in treaties and other international instruments. Consequently, a principle thus identified could bind States that had not yet accepted to be bound by the relevant rule from which the principle had been derived, thereby circumventing State consent, which was the foundation of international law.

25. His delegation continued to believe that principles formed within the international legal system applied only to relations between States or other subjects of international law, which made them distinct from and independent of general principles of law within the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Principles formed within the international legal system were highly general rules of conduct that were contained in a source of international law, namely in treaties or international custom. Such principles often took a customary form, since it was the customary process that by its very nature tended to shape general patterns of State conduct. Occasionally, a customary principle was taken over and confirmed by a treaty, thus reinforcing its importance in inter-State practice.

26. Even though, according to Article 38, paragraph 1 (c), general principles of law formally constituted one of the three sources of international law, in practice they only supplemented the main sources of international law – treaties and international custom. The Special Rapporteur and the Commission should clarify the relationship between general principles of law and other sources of international law in their next reports.

27. **Ms. Bhat** (India), referring to the topic "Succession of States in respect of State responsibility" and the draft articles proposed by the Special Rapporteur in his fourth report (A/CN.4/743), said with regard to draft article 7 bis (Composite acts) that her delegation took note of the explanation provided by the Special Rapporteur that a composite act differed from acts having a continuing character. However, the Special Rapporteur should further examine matters related to shared responsibility when a predecessor State continued to exist, and also the application of the obligation of cessation in the case of a composite act or a continuing act which had occurred during the succession process.

28. With regard to draft articles 16 to 19, her delegation agreed with the view that there was a need to clearly distinguish reparation, on one hand, and cessation and assurances and guarantees of non-repetition, on the other, and that the draft articles should be simplified so that they would become only two provisions: one concerning cessation and non-repetition, and the other concerning reparation.

29. India agreed with the Special Rapporteur on the subsidiary nature of the proposed draft articles on the topic and on the priority to be given to agreements between the States concerned. It also agreed on the need to take into account geographically diverse sources of State practice and to have an explanation in the commentaries of the relationship between State practice and each draft article, which would clearly show which draft articles were supported by State practice and which constituted progressive development of international law. Like other delegations, India believed that a decision on whether the outcome of the topic should be draft guidelines, principles or model clauses could not be taken until the Commission concluded most of its substantive work.

30. Turning to the topic "General principles of law", she said that a careful approach must be taken with regard to the sources of international law. The basis for the Commission's work should be Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, as well as State practice and jurisprudence. In her delegation's view, there was no hierarchy among the sources of international law under Article 38. Accordingly, general principles of law should not be described as a subsidiary or secondary source. Instead, they could be described as a "supplementary source".

31. India agreed that the term "civilized nations" found in Article 38, paragraph 1 (c), was inappropriate and outdated, and should not be used in the draft conclusions on the topic. It should be replaced with "community of nations", which was used in the International Covenant on Civil and Political Rights. Her delegation appreciated the Special Rapporteur's view that a definition of general principles of law could be useful to clarify the scope of the Commission's work on the topic. It also welcomed his suggestion that the Commission could consider such a definition after addressing the functions of general principles of law.

32. Regarding the identification of general principles of law derived from national legal systems, India agreed with the two-step analysis: determining the existence of a principle common to the principal legal systems of the world, and ascertaining its transposition to the international legal system. Her delegation looked

forward with interest to the future work on the functions of general principles of law and their relationship with other sources of international law.

33. **Ms. Langerholc** (Slovenia) said with regard to the topic "Succession of States in respect of State responsibility" that her delegation agreed with the Special Rapporteur on the subsidiary nature of his proposed draft articles and on the priority to be given to agreements between the States concerned, as was also the case in other areas of State succession. It also agreed with the Special Rapporteur, as set out in paragraph 155 of the Commission's report (A/76/10), that State practice, which was diverse and context-specific, did not support the primacy of the "clean slate" rule. That rule was an extremely rare exception in State succession which in practice had been used almost exclusively for the succession of so-called newly independent States that gained or regained their independence in the process of decolonization, or for odious debts. Apart from those two cases, the rule constituted such a strong deviation from State practice in State succession that it should not be retained as an option.

34. Slovenia acknowledged that the Special Rapporteur had adequately incorporated aspects of State responsibility into his proposed draft articles, in particular attribution of conduct of an insurrectional or other movement, acts having a continuing character, and acknowledgment and adoption of the act of another State. Nonetheless, it believed that, in its commentaries, the Commission should closely examine the interrelationship between State succession and State responsibility, rather than focus exclusively on State responsibility.

35. Her delegation also agreed with the Special Rapporteur that the different forms of reparation should be dealt with in separate draft articles, as each had different requirements and conditions, which could have important consequences for State succession. For example, while all successor States might be able to provide compensation, not all might be able to provide restitution. The Commission should also pay particular attention to the formulations used by the Special Rapporteur in the draft articles, for example "in particular circumstances" and "may request", as they reflected the complex and specific nature of succession issues.

36. Slovenia agreed with the Special Rapporteur's view to consider the need to combine codification with the progressive development of international law. It also agreed with the jurists who argued that it was more important to examine what effects both had on the text under consideration than to determine whether a particular provision reflected only codification or progressive development.

37. Concerning the topic "General principles of law", she said that the Special Rapporteur had rightly observed that the terminology used was imprecise, as terms such as "principles of international law", "general international law", "general principles of international law" and "fundamental principles of international law" were used interchangeably. Slovenia agreed that there was a difference between the notion of principles as a source of law and the notion of principles as a subcategory of customary or conventional international law – a difference that was not reflected in the terminology used by States. Her delegation hoped that the Commission would help clarify the relevant terminology.

38. Each source of international law referred to in Article 38 of the Statute of the International Court of Justice had a certain scope of validity; international conventions applied to States parties, and international custom in principle applied *erga omnes*, except for persistent objectors. General principles of law had been included as a source of international law in the Statute of the Permanent Court of International Justice in 1920, at a time when treaties had been few and far between, and when the most important source had been international custom.

39. The purpose had been to enable courts to decide cases and avoid *non liquet* situations by taking into account the most basic principles that made the law function as such and were therefore universal and universally applicable. Since international law had been in its infancy, only national law principles had been available, which was why the category of general principles of law derived from national legal systems was uncontroversial for States and within the Commission. International law had since evolved, spread into new areas and developed its own principles, but they were not of the same nature as the principles referred to in Article 38, paragraph 1 (c).

40. Although her delegation accepted the possibility of general principles formed within the international legal system, it believed that any principles identified as general principles of law should not lose their most basic character: they should enable the law to function as such even at the international level. Therefore, Slovenia advocated a very cautious approach in identifying those principles and their sources, precisely because of their applicability *erga omnes*. Identification of a norm as a general principle of law should not create a shortcut to the process of formation of international

custom, which had a much higher threshold than "recognition".

41. The Commission should clarify the terminology used to capture the different nature of principles applied in international law, the characteristics that general principles of law should have to qualify as such, and the difference between the formation of customary international law and general principles of law.

42. **Ms. Mägi** (Estonia) said, concerning the topic "Succession of States in respect of State responsibility", that her delegation supported the Special Rapporteur's approach in his fourth report and appreciated the fact that he had taken into consideration the articles on responsibility of States for internationally wrongful acts, thereby ensuring consistency with the Commission's work on other topics. Her delegation was also pleased that the Special Rapporteur's analysis had been based on the reflection that the consequences of State responsibility were twofold: reparation in the narrow sense (with its three different forms), and the obligation of cessation and non-repetition.

43. Referring to the draft articles proposed by the Special Rapporteur in his fourth report (A/CN.4/743), she said that Estonia supported the inclusion of draft articles that supported reparations for the injured States and contained references to guarantees of non-repetition. Her delegation also found it important, as noted in paragraph 31 of the report, that while the principle of full reparation remained a general rule of customary international law, the States concerned were free to arrive at an agreement that provided less than full reparation.

44. Estonia also found it essential that a State had the right to decide whether to waive its claims of reparation or present them for a certain amount at a certain point in time. However, in her delegation's opinion, the waiver of the claim did not mean that the internationally wrongful act had not occurred, and the injured State had the right to decide when and how to present the claim. Not presenting the claim directly after the internationally wrongful act occurred did not prevent the injured State from invoking responsibility in a reasonable length of time. Her delegation found the way forward proposed by the Special Rapporteur to be reasonable and looked forward to the issues he planned to address in his fifth report.

45. Turning to the topic "General principles of law", she said that her delegation appreciated the two-step methodology chosen for identifying general principles of law derived from national legal systems. It commended the Special Rapporteur's survey of relevant State practice, jurisprudence and teachings, but agreed with some members of the Commission that the opinions of States expressed in the course of litigation should be properly weighed. Estonia also agreed that further consideration should be given to the possible inclusion of the practice of international organizations in the comparative analysis of national legal systems, especially in cases where those organizations had been given the power to issue rules that were binding on their member States and directly applicable in the legal systems of the latter.

46. With respect to the identification of general principles of law formed within the international legal system, Estonia was of the view that a more in-depth analysis and further discussions were needed in order to distinguish between rules of conventional or customary law or *jus cogens* norms and general principles of law, including their parallel existence. The terms "principle" and "rule" needed further clarification, both separately and in relation to each other. That would be useful not only for the topic at hand but also for a better understanding of the relationship between the two in emerging fields, such as international law applicable to States' use of information and communications technology.

47. The inclusion in a future report of a section with definitions of the terms "general international law", "general principles of international law" and "fundamental principles of international law" would also be welcome. Estonia was of the view that resolutions of the United Nations and other bodies, as potential forms of recognition of general principles of law or as subsidiary means for the determination of general principles of law, should be analysed. Estonia supported the Special Rapporteur's proposal to address the functions of general principles of law and their relationship with other sources of law in his third report, although it might also be necessary to consider other issues raised in discussions in the Commission and in the Committee.

48. **Ms. Lungu** (Romania), referring to the topic "Succession of States in respect of State responsibility", said that her delegation understood the Special Rapporteur's argument that succession to responsibility represented a continuation of the work on State succession. It failed, however, to see the normative character of his proposed draft articles, many of which were simply an application of the rules of customary law on responsibility of States for internationally wrongful acts to the particular situation of State succession. Romania remained unconvinced of the need to regulate that specific field. Moreover, questions relating to the sharing of rights and obligations were the subject of specific agreements between the States concerned. Such

agreements had priority over the draft articles, which remained subsidiary in nature and could only become relevant in the absence of a specific agreement, as the Special Rapporteur noted in his fourth report (A/CN.4/743).

49. Romania believed that no rule of automatic succession to State responsibility existed, and therefore encouraged the Special Rapporteur to revise the text of the draft articles and their related commentaries to ensure consistency in his approach.

50. With respect to the topic "General principles of law", her delegation shared the view that only general principles derived from national legal systems could be considered general principles of law as a source of international law. Therefore, it did not encourage the inclusion of a study in relation to potential general principles of law formed within the international legal system. It was also important not to conflate the identification of general principles of law with the identification of customary international law.

51. Romania agreed with the Special Rapporteur and the Commission on the two-step approach for identifying general principles of law derived from national legal systems, and endorsed the proposal to replace the reference to "civilized nations" found in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice with "community of nations". It also agreed that the study should include examples of national jurisprudence as a means for identifying general principles of law, but did not believe that the teachings of scholars could be relied upon for that purpose.

52. **Ms. Nguyen** Quyen Thi Hong (Viet Nam), referring to the topic "Succession of States in respect of State responsibility", said that her delegation supported the Special Rapporteur's balanced and cautious approach. As State practice in cases of unification and separation remained scarce, Viet Nam appreciated the Special Rapporteur's efforts to examine relevant State practice, jurisprudence and teachings as part of an exercise to codify rules of international law on the subject.

53. Viet Nam took the view that "non-succession" remained the predominantly applicable principle, with certain exceptions in particular circumstances, such as when the successor State agreed to share the responsibility incurred by the predecessor State. The succession of States in respect of State responsibility should be based on negotiations freely entered into and with an appropriate time frame. Therefore, the draft articles on the topic should remain of a subsidiary nature and priority should be given to agreements between the States concerned.

54. Her delegation took note of the five new draft articles proposed by the Special Rapporteur in his fourth report (A/CN.4/743). In particular, it supported the inclusion of draft articles on compensation, satisfaction and restitution, as forms of reparation.

55. Turning to the topic "General principles of law", she said that her delegation appreciated the Special Rapporteur's careful and extensive approach, as he had taken into consideration State practice and the comments of States. With regard to the draft conclusions he proposed in his second report (A/CN.4/741 and A/CN.4/741/Corr.1), while draft conclusion 6 contained two requirements for a principle of law from a national legal system to be transposed to the international legal system, Viet Nam believed that such a principle must be compatible with the fundamental principles of international law enshrined in the Charter of the United Nations.

56. With respect to draft conclusion 7, on the method for identifying general principles of law formed within the international legal system, the fact that a principle was identified because it was widely recognized in treaties and other international instruments did not automatically render it binding on States that had not consented to be bound by the relevant treaty rules. Her delegation proposed that the Special Rapporteur give consideration to the phrase "universally recognized principles of law", which had been used in the documents of many bodies, including the Association of Southeast Asian Nations. The Special Rapporteur should also ensure that there was consistency between the notions of universality and generality of general principles of law.

57. **Ms. Miley** (Ireland), referring to the topic "General principles of law", said that her delegation endorsed the Special Rapporteur's general approach that the criteria for identifying general principles of law must be sufficiently strict so as to prevent them from being used as a shortcut to identifying norms of international law, and at the same time flexible enough so that identification did not become an impossible task. It also agreed that the outcome of the work should be a set of draft conclusions with commentaries thereto.

58. With regard to the draft conclusions provisionally adopted by the Commission, Ireland was pleased that draft conclusion 1 had been adopted following careful consideration of the terminology to be used in the different language versions. It welcomed the Commission's reaffirmation that general principles of law were a source of international law, as indicated in

Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. It appreciated the clear explanation of the aim of the draft conclusions in the commentaries. With regard to the definition of the term "source of international law" provided in paragraph (3) of the commentary to the draft conclusion, her delegation suggested that the words "in the context of these conclusions" could be inserted in the first sentence, which would then read: "The term 'source of international law' in the context of these conclusions refers to the legal process and form through which a general principle of law comes into existence."

59. Concerning draft conclusion 2, Ireland endorsed the reaffirmation that for a general principle to exist, it must be recognized by the community of nations. It welcomed the Commission's intention to establish specific criteria for determining whether a general principle of law existed at a given time. The draft conclusion could, however, be made clearer by the insertion of the phrase "as a source of international law". It would then read: "For a general principle of law to exist as a source of international law, it must be recognized by the community of nations." That would also provide a helpful link to draft conclusion 1.

60. Ireland welcomed the removal of the inappropriate and outdated term "civilized nations" and supported the Commission's use of the term "community of nations" instead, which also appeared in article 15, paragraph 2, of the International Covenant on Civil and Political Rights. It agreed with the Commission's aim of ensuring that all nations participated equally, without any kind of distinction, in the formation of general principles of law, in accordance with the principle of sovereign equality. Ireland concurred with some members of the Commission that the term allowed for just enough flexibility, and also welcomed the Commission's clarification that the phrase was not intended to modify the scope or content of Article 38, paragraph 1(c), of the Statute. It also agreed that the term "community of nations" was not to be confused with "international community of States as a whole", used in article 53 of the Vienna Convention on the Law of Treaties.

61. With respect to draft conclusion 4, her delegation believed that the Commission might have to return to the question of identification of general principles of law derived from national legal systems when it had concluded its deliberations on the existence of the second proposed category, namely general principles of law formed within the international legal system.

62. Ireland took note of the two-step analysis introduced in the draft conclusion for identifying general principles of law derived from national legal systems and welcomed the clarification in the commentary that the analysis was aimed at demonstrating that a general principle of law derived from a national legal system had been "recognized", thus providing a link to draft conclusion 2. However, while the word "identification" was used in the title of the draft conclusion, the word "determine" was used in the chapeau. Ireland suggested that, for consistency and clarity, the same word should be used in both places. In the French version of the draft conclusion, the same term was used in both the title and the chapeau: ("*Détermination*" and "*déterminer*"). That approach should be followed in the English version as well.

63. Regarding the first step of the two-step analysis, the requirement to ascertain the existence of a principle common to the various legal systems of the world, her delegation welcomed the Commission's broad and inclusive approach, reflected in the wording of the requirement that it was necessary to ascertain the existence of a principle common to the "various legal systems of the world", rather than the "principal legal systems of the world". That was further developed in draft conclusion 5, in which the word "various" should also be used, as indicated in the Drafting Committee. With respect to the requirement of "transposition to the international legal system" set out in paragraph (b) of the draft conclusion, Ireland agreed that "transposition" was preferable to "transposability". It noted the clarification that that was not intended to suggest that a formal or express act of transposition was required, and agreed that such an act was not required by Article 38, paragraph 1(c).

64. Concerning the other draft conclusions proposed by the Special Rapporteur in his first and second reports (A/CN.4/732, and A/CN.4/741 and A/CN.4/741/Corr.1), her delegation endorsed the view that it would be necessary to consider draft conclusion 3, insofar as it related to the second proposed category of general principles, namely general principles formed within the international legal system, together with draft conclusions 6 and 7. Ireland noted the divergence of views within the Commission and the Committee regarding the existence of that category of general principles, and agreed that further examination of that issue would be helpful. The inclusion of examples of practice and case law was particularly valuable when analysing the viability or otherwise of that category of general principles.

65. Ireland emphasized the importance of ensuring that the distinction between general principles of law and customary international law was clearly reflected in the draft conclusions and commentaries thereto. It was

pleased that the Special Rapporteur had provided examples of how the two sources differed, but suggested that the issue could be examined further in future reports. Her delegation endorsed his proposal to address the functions of general principles of law and their relationship with other sources of international law in his third report.

66. *Ms. Al-Thani (Qatar) took the Chair*.

67. **Mr. Howe** (United Kingdom) said with regard to the topic "Succession of States in respect of State responsibility" that his delegation welcomed the Special Rapporteur's acknowledgement that State practice did not support the primacy of either automatic succession or a "clean slate", as well as his confirmation that the proposed draft articles were not intended to imply automatic succession. The United Kingdom reiterated its longstanding concern that it was not possible to extrapolate general conclusions from specific cases on a topic such as the one under consideration, where priority must be given to agreements between the States concerned, and where those agreements were the product of context-specific negotiations, inevitably combining political, cultural and legal considerations.

68. The United Kingdom took note of the Commission's view that it could decide on the most suitable format for the outcome of the topic at a later stage. It also noted with interest the suggestion by some members of the Commission that model clauses could be drafted to be used as a basis for States to negotiate agreements on succession in respect of State responsibility. The United Kingdom continued to maintain an open mind as to the utility of the topic and what outputs might best assist States.

69. Turning to the topic "General principles of law", he said that the Commission and the secretariat had already made an important contribution to various questions of terminology, which had for a long time complicated and confused the discussion on the third source of international law listed in Article 38 of the Statute of the International Court of Justice, namely general principles of law. The result of that contribution was visible in draft conclusions 1, 2 and 4 and the commentaries thereto, provisionally adopted by the Commission, and in draft conclusion 5, provisionally adopted by the Drafting Committee. Those texts constituted a good basis for future work on the topic.

70. His delegation welcomed the clear and concise commentaries, which reflected important points of agreement among the members of the Commission and which the United Kingdom shared: first, that the term "general principles of law" was used throughout the draft conclusions to refer to "the general principles of law" listed in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice; second, that the differences in terminology between the wording used in draft conclusions 1 and 2 (including in the various language versions) and the wording used in Article 38 did not imply any change in the substance of Article 38; and third, that recognition was the essential condition for the emergence of a general principle of law.

71. The thoughtfulness with which Commission members were approaching the topic was apparent from the excellent plenary debate, which had been well reflected in the summary records and in the Commission's annual report. The United Kingdom stressed the importance of having full summary records.

72. As to future work on the topic, the United Kingdom took note of the text of draft conclusion 5 and looked forward to seeing the accompanying commentary. It had no comment on the Special Rapporteur's proposals for draft conclusions 8 and 9, which were meant to reflect accurately the provisions of Article 38. However, draft conclusion 6, on the ascertainment of transposition of a general principle of law to the international legal system, raised important questions which the Drafting Committee would need to examine carefully in order to produce a satisfactory text.

73. The remaining draft conclusions proposed by the Special Rapporteur – draft conclusions 3 and 7 – concerned the central and as yet unresolved questions of whether Article 38, paragraph 1 (c), included a second category of general principles of law that went beyond general principles derived from national law and, if so, how such a category was to be described and identified. Those questions remained controversial, both within the Commission and among States and writers. The United Kingdom was open to studying any proposals that the Commission might make on that subject.

74. His delegation agreed with the main concerns set out in paragraph 187 of the Commission's report (A/76/10): that there would not be sufficient or conclusive practice to reach conclusions regarding that category of general principles of law; the difficulty of distinguishing those principles from customary international law; and the apparent risk that the criteria for identifying general principles in that category would not be sufficiently strict, which could render them too easy to invoke. The United Kingdom endorsed the view that, if the Commission were to conclude that there was a second category of general principles of law beyond those derived from national legal systems, that second category must not be constructed too broadly and must be clearly distinguished from existing rules of customary international law, to avoid the risk that it

would become a shortcut to identifying customary norms where general practice had not yet emerged.

75. **Ms. Chigiyal** (Federated States of Micronesia), referring to the topic "General principles of law", said that her delegation welcomed the general agreement within the Commission to use the term "community of nations" in its work, in place of the anachronistic and inappropriate term "civilized nations", found in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Her delegation supported the use of the term "nations", which, while most commonly used to refer to States, was broad enough to include indigenous nations, which might not necessarily be recognized as "States" by the international community. Indeed, several members of the Commission had supported the use of the term "nations", because it would provide a more diverse source of legal systems and traditions than the word "States". Her delegation strongly agreed with that consideration.

76. The customary rules and practices and legal systems of indigenous and first peoples could be considered to reflect general principles of law if they were common to many indigenous nations around the world and were reflected in some form in the international legal system. In that regard, the Commission should take into account such customary rules and practices as careful stewardship of natural resources and the environment, respect for cultural practices, equitable management of community interests and constant attention to the needs of future generations, as reflected in international climate change law, international biodiversity law, the law of the sea and other areas of international law.

77. Micronesia encouraged the Commission to consider those customary rules and practices as foundations for general principles of law in the current international legal system. Her delegation appreciated the Special Rapporteur's careful efforts, in his second report (A/CN.4/741 and A/CN.4/741/Corr.1), to distinguish between general principles of law derived from national legal systems and those formed within the international legal system, a concern which her delegation had raised in response to his first report (A/CN.4/732). It also commended him for drawing on existing international law and practice to identify potential general principles of law formed within the international legal system, including those widely recognized in treaties, those that underlay general rules of conventional or customary international law, and those that were inherent in the basic features and fundamental requirements of the international legal system, including the principle of consent to jurisdiction and the principle of *uti possedetis juris*.

78. However, sweeping conclusions should be avoided at the current stage of the work on the topic, as questions about principles formed within the international legal system remained. In particular, it had yet to be determined how such principles should be distinguished from treaty law and customary international law. Furthermore, the reference in the report of the Commission (A/76/10) to the principle that the land dominated the sea might need to be further considered and refined, in the light of the ongoing discussions within the Commission and other forums concerning the preservation of maritime zones in the face of sea-level rise caused by climate change.

79. The Special Rapporteur and the Commission should consider whether general principles of law that were of a regional character or that were specific to some other type of grouping could exist, and whether such principles would be applicable beyond the region or grouping in question. If it was possible for customary international law to be regional or specific to a grouping smaller than the international community as a whole, it might follow that general principles of law could be as well. The laws and practices of States and indigenous nations of the Pacific region might be a useful subject of study in that regard.

80. **Ms. Mohd Izzuddin** (Malaysia), referring to the topic "Succession of States in respect of State responsibility", said that her delegation agreed with the view expressed by the Special Rapporteur in his fourth report (A/CN.4/743) that the draft articles on the topic were subsidiary in nature and that priority should be given to agreements between the States concerned. The Special Rapporteur should consider the suggestion to include model clauses and examples of succession agreements between States in the commentaries to the draft articles.

81. Her delegation also supported the Special Rapporteur's view on the importance of maintaining consistency, in terminology and substance, with the previous work of the Commission. It was particularly important for the draft articles to be consistent with the articles on responsibility of States for internationally wrongful acts, which were largely considered to reflect customary international law. The Special Rapporteur should further elaborate on the point made in his fourth report that the "transfer of responsibility" of States was different from the "transfer of rights and obligations arising from responsibility" of States, in order to avoid confusion.

82. Referring to the draft articles proposed by the Special Rapporteur in his fourth report, she said that her delegation supported the insertion of the provision on

composite acts (draft article 7 bis) next to draft article 7 (Acts having a continuing character), which had been provisionally adopted by the Drafting Committee at the seventy-first session of the Commission. Draft article 7 bis was a useful complement to draft article 7, in that it highlighted the difference between composite acts and acts having a continuing character. However, the scope of its paragraphs 1 and 2 should be further clarified, in particular with respect to the responsibility of the predecessor State when it continued to exist. Also, the draft article should be taken into consideration in deliberations on the issue of shared responsibility between a predecessor State and a successor State, which had yet to be addressed by the Special Rapporteur.

83. Her delegation would appreciate an explanation of the apparent inconsistencies between draft article 16 (Restitution), paragraph 1, and article 35 (b) of the articles on responsibility of States for internationally wrongful acts, in particular with regard to the omission, from draft article 16, of the phrase "to the benefit deriving from restitution instead of compensation", which was found at the end of article 35.

84. Draft article 17 (Compensation) was generally acceptable; however, in order to give effect to the general principle of prohibition of unjust enrichment, the Special Rapporteur might wish to address, in the commentary, methods for determining the amount of compensation owed. It would also be useful for him to clarify the form of satisfaction that would be required under draft article 18 (Satisfaction). In that connection, her delegation proposed that reference be made to article 37 of the articles on responsibility of States for internationally wrongful acts.

85. Malaysia supported the inclusion of draft article 19 (Assurances and guarantees of non-repetition), but found the word "appropriate" used in paragraphs 2 (a) and 2 (b) to be vague and subjective. It could consequently create uncertainty as to which party should determine the form that the assurances and guarantees should take, and which party or forum should decide on the appropriate form of assurance and guarantee of non-repetition, in the event that the parties were unable to agree. The Special Rapporteur could clarify that uncertainty by providing examples of assurances and guarantees of non-repetition. In addition, since it was stipulated in draft articles 16, 17 and 19 that an injured State "may request" restitution, compensation or assurances and guarantees, the Special Rapporteur should make it clear whether the requested State was legally obliged to comply with the request.

86. Her delegation supported the future programme of work proposed by the Special Rapporteur and called on him to make good on his stated readiness to take more geographically diverse State practice into account in his work. In that regard, it was important to consider practice from Asian and African States, rather than focusing solely on European sources.

87. Turning to the topic "General principles of law", and referring to the draft conclusions and commentaries thereto provisionally adopted by the Commission, she said that draft conclusion 1 (Scope) reaffirmed the well-established principle that general principles of law were a source of international law. The Commission's future work should provide useful clarity on the scope and functions of general principles of law, the means by which they could be identified and their relationship with other sources of international law.

88. With regard to the Commission's decision to use the term "community of nations" in draft article 2 (Recognition), Malaysia agreed that the term "civilized nations" should be avoided. It acknowledged that the term "community" was widely used in international conventions and that it was an important concept within the Association of Southeast Asian Nations. However, her delegation had reservations with regard to the assertion, in paragraph (5) of the commentary to the draft article, that use of the term "community of nations" did not preclude that, in certain circumstances, international organizations might also contribute to the formation of general principles of law. The Special Rapporteur should give further consideration to that question, since international organizations did not have the same standing, structure, character, obligations, responsibilities or powers as sovereign States.

89. As for draft conclusion 4, her delegation considered that diverse national legal systems should be included in the comparative analysis required for the identification of general principles of law derived from national legal systems, to ensure that the analysis was representative of legal systems from around the world. In that connection, her delegation highly commended the Special Rapporteur for his consideration of Islamic law and the law of Asian countries in his second report. The materials used for the comparative analysis should be materials that amounted to evidence of State practice.

90. **Ms. Hanlumyuang** (Thailand), speaking on the topic "General principles of law", said that general principles of law were among the sources of international law listed in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice and were important for filling gaps in international law and avoiding situations of *non liquet*. However, there was a

need to establish the criteria for their identification. At the same time, those criteria should not be overly broad and should show clearly that there was a distinction between general principles of law and existing rules of customary international law, in order to avoid the risk of the identification of general principles of law becoming a shortcut to the identification of customary norms where general practice had not yet emerged.

91. Referring to the draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1), she said with regard to draft conclusion 5 that while the determination of the existence of a principle common to the principal legal systems of the world might not require an examination of every legal system, legal family and region, it was important to consider the inclusiveness and unique characteristics of those selected for analysis. The Commission would be best positioned to address the needs and concerns of the international community if its membership was inclusive and provided space for fresh perspectives.

92. **Mr. Košuth** (Slovakia) said that the Commission's consideration of the topic "Succession of States in respect of State responsibility" could help clarify the rules governing the sort of legal consequences of internationally wrongful acts pre-dating State succession, in particular those relating to reparation. His delegation reiterated that the Commission's work on the topic should be consistent with the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, as well as the articles on nationality of natural persons in relation to the succession of States.

93. A set of draft articles would be the most appropriate form for the final outcome of the Commission's work on the topic, which was without prejudice to the question of a future convention, to be decided only after work on the topic had been completed. Slovakia had noted the Special Rapporteur's hope that the first reading of his proposed draft articles would be completed in 2021, but agreed with the views expressed during the Commission's session that it should not be hasty in its consideration of the topic.

94. With regard to the draft articles and commentaries thereto provisionally adopted by the Commission, Slovakia appreciated the Commission's efforts to ensure that draft articles 7 (Acts having a continuing character) and 8 (Attribution of conduct of an insurrectional or other movement) were consistent with the articles on responsibility of States for internationally wrongful acts; however, their added value and relevance to the topic were unclear.

95. Draft article 7 was focused primarily on wrongful acts of successor States that took place after the date of succession, which was entirely governed by the articles on State responsibility and not relevant to the topic of succession of States in respect of State responsibility. The draft article should instead contain a clear rule on whether the responsibility of the successor State extended to internationally wrongful acts of a continuing character committed by the predecessor State that commenced prior to the date of succession. It should also set out any elements of the succession regime that applied specifically to acts of a continuing character. It would also be useful to explore questions concerning reparation in cases where reparation had not been made in full by the predecessor State, and also issues relating to scenarios where an internationally wrongful act committed against the predecessor State had consequences continuing after the date of succession.

96. Draft article 8 simply restated article 10, paragraphs 2 and 3, of the articles on State responsibility. His delegation generally supported draft article 9 (Cases of succession of States when the predecessor State continues to exist), paragraphs 2 and 3. However, the wording of paragraph 2 could be amended to strengthen the position of the injured State to address the injury.

97. Turning to the topic of general principles of law, he said, with regard to the draft conclusions provisionally adopted by the Commission, that his delegation was pleased that the Commission had ultimately decided not to include a reference to formal sources of international law in the commentary to draft conclusion 1 (Scope). While his delegation had consistently maintained that the approach to the topic of general principles of law should be guided by Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, it was not convinced that the drafters of the Statute had intended to categorize general principles of law as a formal source of international law. Article 38 simply provided that those principles should be applied by the Court in situations of *non liquet*.

98. General principles of law were not formed through normative legal processes resulting in the creation of legal norms; rather, they were the product of a theoretical generalization of domestic legal norms, provided that such principles were common to the legal systems of the world. For that reason, the question of whether general principles of law were a material source

of international law, or a source of international law at all, should be further examined.

99. His delegation agreed that the term "civilized nations" was anachronistic, and welcomed the use of the term "community of nations" in draft conclusion 2 (Recognition). The term "community of States" was another alternative worth considering. While Slovakia welcomed draft conclusion 4 (Identification of general principles of law derived from national legal systems), it did not consider transposition to the international legal system as the necessary requirement for the existence of general principles of law, as it understood that such principles were recognized in and derived from *foro domestico*.

100. Referring to the draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1), he said that draft conclusion 6 (Ascertainment of transposition to the international legal system), paragraph (b), was redundant, as there was no possibility of a general principle of law not being compatible with fundamental principles of international law.

101. Lastly, his delegation did not believe that general principles of law could be formed within the international legal system, as indicated in draft conclusion 7. The content of the draft conclusion actually concerned principles of international law, which had already been codified in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and either formed part of customary law or were embodied in treaties. Therefore, draft conclusion 7 was outside the scope of the topic.

102. **Mr. Doh Kwangheon** (Republic of Korea) said that the draft articles on the topic of succession of States in respect of State responsibility were subsidiary in nature and that priority should be given to agreements between the States concerned, as stated in draft article 1, paragraph 2, provisionally adopted by the Commission at its seventy-first session. In that regard, his delegation took note of the provisional adoption by the Drafting Committee of draft articles 10 and 10 bis, according to which, in situations where a State that had committed an internationally wrongful act was united with or incorporated into another State, the injured State and the successor State must agree on how the injury should be addressed.

103. Referring to the draft articles provisionally adopted by the Commission at its seventy-second session, he said that his delegation commended the Commission for phrasing draft article 7 (Acts having a continuing character) in such a way as to reflect the principles set out in article 11 and article 14, paragraph 2, of the articles on responsibility of States for internationally wrongful acts. With regard to draft article 9 (Cases of succession of States when the predecessor State continues to exist), the Commission should further elaborate on the "particular circumstances" where a successor State might be "relevant for addressing the injury", as stated in paragraph (5) of the commentary to the draft article.

104. As for the draft articles proposed by the Special Rapporteur in his fourth report (A/CN.4/743), his delegation was not convinced that draft articles 16, 17 and 18, concerning specific forms of reparation, were necessary, since they did not deviate in any way from customary international law on the matter as codified in the articles on responsibility of States for internationally wrongful acts. It would be more useful for the Commission to focus on the relationship between the different categories of State succession and reparation in general, taking fully into account the relevant principles of international law and the importance of agreements between the parties.

105. With respect to the topic of general principles of law, his delegation welcomed the Commission's decision to employ the term "community of nations", as used in the International Covenant on Civil and Political Rights, rather than "civilized nations", as contained in Article 38 of the Statute of the International Court of Justice, in the text of the draft conclusions it had provisionally adopted. The use of "community of nations" made it clear that all nations participated on an equal footing in the formation of general principles of law, in accordance with the principle of sovereign equality.

106. His delegation also welcomed the use of the term "various legal systems of the world", rather than "principal legal systems of the world", as originally proposed by the Special Rapporteur, in draft conclusion 4. The chosen term reflected the variety and diversity of national legal systems and indicated that principles must be found in legal systems of the world generally. The Commission should further examine and clarify the definition and content of "general principles of law formed within the international legal system".

107. The Republic of Korea had nominated Lee Keun-Gwan for election to the Commission for its upcoming term and trusted that other delegations would support his candidacy.

108. **Ms. Aagten** (Netherlands), referring to the topic "Succession of States in respect of State responsibility", said that, contrary to what was indicated in the fourth

report of the Special Rapporteur (A/CN.4/743), the Netherlands remained unconvinced that the final outcome of the Commission's work should take the form of draft articles, draft principles or draft guidelines and would not support such an outcome. Depending on how the work on the topic developed, the final outcome could be a study, a report or an analysis, or possibly a list of issues for consideration in the case of State succession, perhaps in the form of a checklist or building blocks for succession agreements.

109. Her Government supported the members of the Commission who had expressed concern about the frequent restating of the law on State responsibility, as the draft articles could risk misstating the law. Rather than taking such an approach, the Special Rapporteur should collect and examine relevant State practice, in particular the various agreements concluded by States in situations of State succession.

110. With regard to the Commission's debate on the general rule of non-succession and the rule of "automatic" succession, the Commission's work should be based on the principle that no vacuum in State responsibility should emerge in cases of dissolution or unification, where the original State had disappeared, or in cases of secession, where the predecessor State remained. Whether or not rights or obligations were transferred in specific situations should be assessed on a case-by-case basis and addressed in a succession agreement. If no such agreement could be reached, a vacuum should be avoided by transferring rights and obligations to the successor State or States.

111. The Netherlands also had concerns about the Special Rapporteur's treatment of reparation. The law on State responsibility, as reflected in the articles on responsibility of States for internationally wrongful acts, adequately addressed the question of reparation. Since every situation involving a wrong to be repaired was different, the appropriate and just form of reparation had to be determined on a case-by-case basis. Satisfaction, for example, was a typical form of reparation that could not be predefined, and its flexibility had proven to be very useful in the settlement of disputes. There was no reason to take a different approach in situations of succession of States. The Special Rapporteur should therefore refrain from defining or redefining the various forms of reparation and instead align his work with the Commission's work on the responsibility of States.

112. With regard to the topic "General principles of law", her delegation continued to support the two categories proposed by the Special Rapporteur, namely general principles of law derived from national legal systems and general principles of law formed within the international legal system. The Netherlands therefore supported the future programme of work proposed by the Special Rapporteur in his second report, in particular with regard to the examination of the relationship between general principles of law and other sources of international law. It was important to distinguish the methodology for identifying general principles of law formed within the international legal system from the methodology for identifying other sources of international law, in order to determine whether general principles of law constituted a source of international law in and of themselves or whether they could be regarded as a source of international law only when they were also part of customary international law or were recognized in treaty law.

113. General principles of law could serve as a useful reference for the identification or deduction of applicable rules of general international law and could thus be used by judges of international courts and tribunals in the settlement of disputes. For instance, in the award on the merits in the *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, the Arbitral Tribunal of the Permanent Court of Arbitration had held that the right to protest at sea, which derived from international human rights standards, such as freedom of expression and freedom of assembly, was an internationally lawful use of the sea related to freedom of navigation. Thus, it had used a general principle of law with underpinnings in international human rights law to assist in the interpretation and application of a general principle of the law of the sea, namely the principle of freedom of navigation, one of the freedoms of the high seas.

114. **Mr. Sakowicz** (Poland) said, with regard to the topic of succession of States in respect of State responsibility, that his delegation agreed with the general observations in the Special Rapporteur's fourth report concerning the subsidiary nature of the draft articles on the topic, the priority of agreements between the States concerned, and the importance of preserving consistency with the Commission's previous work, in particular the articles on responsibility of States for internationally wrongful acts. However, Poland reiterated its view that draft articles did not seem to be the most appropriate form of the final outcome for the topic. A set of draft conclusions, with model clauses in an annex, would be more useful.

115. Turning to the topic "General principles of law", he said that the Commission's work could have both theoretical and practical importance. His delegation agreed with the Special Rapporteur that the scope of the topic should include the legal nature of general

principles of law as a source of international law, the identification of general principles of law and the relationship between general principles of law and other sources of international law.

116. Referring to the draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1), he said that the use of the term "legal families" in paragraph 2 of draft conclusion 5 (Determination of the existence of a principle common to the principal legal systems of the world) should be reconsidered, especially since its relationship to the term "principal legal systems of the world" was not explained. Moreover, the purpose of the paragraph was unclear, as it was difficult to determine the relationship between "legal families" and the "national legislations" referred to in paragraph 3. In his delegation's view, primary importance should be ascribed to national legislations.

117. With regard to draft conclusion 6 (Ascertainment of transposition to the international legal system), the transposition of principles was not mentioned expressly in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Therefore, more consideration should be given to the question of whether transposition could be considered a requirement for the recognition of a general principle of law. Furthermore, the phrase "fundamental principles of international law" should be qualified by the phrase "as contained in the United Nations Charter". Otherwise, general principles of law could become subordinate to other sources of international law.

118. As for draft conclusion 7 (Identification of general principles of law formed within the international legal system), paragraphs (a) and (b), Poland took the view that considering provisions widely recognized in treaties to be general principles of law would blur the distinction between those two separate sources of international law. Moreover, considering treaties to be simply a source of general principles of law could lower the threshold for them becoming generally binding. The fact that some norms of international law, in particular those derived from treaties and custom, and general principles of law could exist in parallel did not explain how some customary norms could also be considered general principles of law.

119. Lastly, there was an inconsistency between draft conclusion 8, paragraph 2, and draft conclusion 5, paragraph 3, with regard to the decisions of national courts. In draft conclusion 8, such decisions were presented as a subsidiary means for the determination of the existence of general principles of law, whereas in draft conclusion 5 they were presented as a part of national legal systems, an analysis of which was crucial for the determination of the existence of a general principle of law.

120. **Mr. Al-Edwan** (Jordan), referring to the topic "Protection of the atmosphere", said that the set of draft guidelines adopted by the Commission on second reading filled a gap in the international legal framework for protecting the environment from atmospheric pollution and atmospheric degradation. The obligation of States to protect the atmosphere, set out in draft guideline 3, was the cornerstone of such protection. The precautionary principle was another key element of the atmospheric protection regime. Although it was not explicitly enshrined in the draft guidelines, it was implicitly reflected in several, including draft guidelines 3, 4, 5 and 7. It should be noted that the draft guidelines did not entail an obligation *erga omnes*, as clearly stated in the commentaries, and that the compliance provided for in draft guideline 11 concerned only the rules and procedures contained in relevant agreements to which States were parties.

121. Turning to the topic "Provisional application of treaties", he said that the lack of established and consistent practice had made the Commission's work challenging. Nevertheless, the draft Guide to Provisional Application of Treaties, and the commentaries thereto, as adopted by the Commission on second reading, would help States, international organizations and practitioners to better understand the scope of the topic and harmonize their practice to the extent possible.

122. The draft Guide, which fell primarily within the realm of progressive development, rather than codification, allowed for the necessary flexibility in the formulation and implementation of treaty provisions concerning provisional application. As practice developed, States should pay particular attention to the draft guidelines that reproduced mutatis mutandis provisions of the Vienna Convention on the Law of Treaties. In that connection, further discussion was needed on the legal effects of provisional application; reservations; resolutions of international organizations as forms of agreement; and the interaction between the internal laws of States, rules of international organizations and the provisional application regime.

123. His delegation supported the Commission's work on the topic of immunity of State officials from foreign criminal jurisdiction and considered that preserving sovereign equality and combating impunity for international crimes were both legitimate interests that should be taken into account in the project. It was well established that immunity *ratione personae* was

absolute for the so-called troika (Heads of State, Heads of Government and Ministers for Foreign Affairs) under international law.

124. Referring to the draft articles provisionally adopted so far by the Commission, he said that his delegation supported the limitations placed on immunity *ratione materiae* under draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply). In the case of crimes of such serious concern to the international community, the right to functional immunity should not prevail over the right of the forum State to exercise jurisdiction. However, specific procedural safeguards should be developed in connection with draft article 7 to protect foreign officials from politically motivated prosecutions. Such safeguards would balance the legal interests of the States concerned and encourage wider acceptance of the draft articles.

125. With regard to the draft articles proposed by the Special Rapporteur in her eighth report (A/CN.4/739), his delegation welcomed draft article 17 (Settlement of disputes), which should be binding, and whose application should have a suspensive effect. His delegation would prefer, however, that such suspension result from the invocation of immunity and last for a specific period of time. His delegation did not see the need for the "without prejudice" clause contained in draft article 18, which stipulated that the draft articles were without prejudice to the rules governing the functioning of international criminal tribunals, because immunity from foreign criminal jurisdiction had to do with horizontal relations between States. If it were included, it should not result in international tribunals having primacy over horizontal relations between States, or States circumventing their obligations towards other States.

126. With regard to the topic "Sea-level rise in relation to international law", his delegation believed that rising sea levels represented a real threat to States and populations worldwide, and had significant implications for specially affected States, their territories, maritime zones and sovereign entitlements. His delegation therefore commended the Study Group on the topic and its Co-Chairs for their comprehensive examination of issues related to maritime zones, baselines and maritime delimitations in their first issues paper (A/CN.4/740 and A/CN.4/740/Corr.1).

127. In its discussions, the Commission should bear in mind the importance of maintaining the integrity of the United Nations Convention on the Law of the Sea, taking into account legal continuity, equity and stability, and balancing the legitimate interests of all relevant States and the international community as a whole. When making conclusions concerning baselines, maritime zones and entitlements, the Commission should apply the relevant rules under the Vienna Convention on the Law of Treaties in good faith and in the light of the object and purposes of the United Nations Convention on the Law of the Sea.

128. As for the topic "General principles of law", which complemented the Commission's work on other sources of international law, it was important for the work to be based on Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. It was well established that general principles of law derived from national legal systems were a source of international law, but the Commission could help shed light on questions that were as yet unsettled, such as the scope and legal nature of those principles and the methods for their identification.

129. Concerning the draft conclusions provisionally adopted by the Commission, his delegation supported the use of the term "community of nations" in draft conclusion 2 (Recognition). It did not consider the word "nations" to be vague and appreciated the fact that the term was broader than "States" and yet maintained the provision's faithfulness to the object and purpose of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. The Commission should conduct a more in-depth analysis of the requirement of recognition, as it applied to general principles of law derived from national legal systems, and of the meaning of "transposition to the international legal system", referred to in draft conclusion 6. His delegation considered national laws to be transposable to the international legal system, but found the notion of "compatibility with the fundamental principles of international law", as provided for in draft conclusion 6 (b), to be irrelevant and problematic.

130. Concerning draft conclusion 7, his delegation was not convinced of the existence of general principles of law formed within the international legal system. National and international courts and tribunals had used terms such as "principles of international law" or "general principles of international law" to refer to customary international law, which had helped create a false impression that general principles of law could be formed within the international legal system. However, the existence of that category of principles was supported by only a small number of publicists, who all based their arguments on deduction, rather than practice or acceptance by States. The Commission should therefore exercise caution on the matter.

131. With regard to the programme of work, Jordan had full confidence in the Commission to select appropriate topics to move from the long-term programme to the current programme, and would support any decision taken in that regard.

132. **Mr. Pildegovičs** (Latvia), referring to the topic "Succession of States in respect of State responsibility", said that the Commission should ensure consistency with its previous work, in particular the articles on responsibility of States for internationally wrongful acts. Given that State responsibility was one of the foundational issues of public international law, Latvia encouraged the Commission to ensure that the final products of its work on various aspects of the question were as consistent as possible, in terms of methodology and terminology.

133. As for the topic of general principles of law, his delegation fully endorsed the Commission's decision to use the term "community of nations" in conclusion 2 of the draft conclusions which it had provisionally adopted, rather than "civilized nations", found in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, because the latter term was anachronistic. It also supported the important clarification in paragraph (4) of the commentary to the draft conclusion that the choice of term was not intended to modify the scope or content of Article 38, paragraph 1 (c).

134. Latvia appreciated the way in which the process for identifying general principles of law derived from national legal systems was expressed and explained in draft conclusion 4 and the commentary thereto. It was particularly important to bear in mind that, as stated in paragraph (3) of the commentary, the term "various legal systems of the world" was aimed at highlighting the requirement that a principle must be found in legal systems of the world generally. The identification of general principles of law derived from national legal systems must therefore be conducted diligently, taking into consideration the regional and linguistic pluralism of the world; it must not be based solely on the examination of practice in the global North.

135. His delegation welcomed the emphasis placed by the Commission, including the Drafting Committee, on multilingualism, including with regard to the discussions on the French and Spanish equivalents of the term "general principles of law" that had led to the inclusion of footnote 426 in the Commission's report (A/76/10).

136. **Mr. Skachkov** (Russian Federation), referring to the topic of general principles of law, said that his delegation welcomed the Special Rapporteur's position on the need to adopt a cautious and balanced approach and his intention to adhere in his examination of the topic to the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. It further agreed with the view expressed in the Commission that the title of the topic should have a specific and clear reference to that article.

137. The issue of terminological consistency continued to be of concern and was crucial for the scope of the topic. For example, the word "principle" was used in many formulations, including "recognized legal principles", "general principles", "general principles of international law", "basic principles" and "fundamental principles of law". There were also principles in international relations that were not rules of international law. For example, in its memorandum on general principles of law (A/CN.4/742), the Secretariat had included a review of the principles of criminal law based on the decisions of international criminal courts. Not all of those principles were general principles of law in the sense of Article 38, paragraph 1 (c). Furthermore, the principles of criminal law formulated in the decisions of the International Criminal Tribunal for the Former Yugoslavia, which had been based on an analysis of the laws of a rather limited number of countries and not on whether they had been recognized in international law, were the subject of criticism and could not be used as input for the codification of international law. It would be beneficial for the Commission to conduct another study of the relevant terminology and the scope of the topic.

138. His delegation had previously stated that it was doubtful whether general principles of law constituted an autonomous source of international law. The predominant view in Russian doctrine was that recognition of such principles by States emerged either in the form of treaties or through customary international law. The Commission appeared to differentiate between the sources of international law chiefly based on the way they emerged and were identified, and it seemed keen to attribute an autonomous character to general principles of law and to demarcate them clearly from other principles of law. However, it was not clear whether such demarcation reflected reality or was a theoretical construct.

139. The Commission had formulated special methods for identifying general principles of law, as set out in draft conclusions 2 and 4, which it had provisionally adopted. In line with draft conclusion 2, for a general principle of law to exist, it needed to be "recognized by the community of nations". In its commentary to the draft conclusion, the Commission had stated that to determine whether a general principle of law existed at a given point in time, it was necessary to examine all the

available evidence showing that its recognition had taken place. However, it was not clear how recognition might be established based on the aforementioned evidence or what would constitute such evidence. The Commission had also decided to use the term "the community of nations", borrowed from the International Covenant on Civil and Political Rights, to replace the phrase "civilized nations", found in Article 38, paragraph 1 (c). Although his delegation agreed that the term "civilized nations" was anachronistic, "States" would be preferable to the proposed alternative.

140. In line with draft conclusion 4, in order to determine the existence and content of a general principle of law derived from national systems, it was necessary to ascertain the existence of a principle common to the various legal systems of the world and its transposition to the international legal system. The meaning of the term "transposition" and how it related to "recognition" was not entirely clear. The will of States was at the origin of any source of law. That was true in the case of treaties and norms of customary international law, as demonstrated previously by the Commission. The same was true of general principles of law. A principle was therefore recognized and transposed into international law through the same means by which States expressed *opinio juris*. Thus, a principle could be transposed into international law by means of a treaty, although not every treaty could perform that role.

141. His delegation was concerned that in the commentary to the draft conclusion, the term "transposition" was described as referring merely to ascertainment by a court whether a principle could be applied in the international legal system; in effect, whether there were any obstacles to its application in international law. That approach diminished the role of States and was not in accordance with Article 38 of the Statute of the International Court of Justice. The Court had been described in the chapeau of Article 38 as one "whose function is to decide in accordance with international law such disputes as are submitted to it", a phrase that had not been included in the corresponding article of the Statute of the Permanent Court of International Justice. The inclusion of that phrase in Article 38 confirmed his delegation's view that a general principle of law could not emerge solely because it had become widespread in national legal systems.

142. The Commission's attempt to weigh in on the question of hierarchy between treaties and customary international law as sources of international law in the course of its work on the articles on the law of treaties had not found support among States. The issue had come up again in the context of general principles of law. The Commission should not equate general principles of law with other sources of international law. It was a well-known fact that the Article 38, paragraph 1 (c), of the Statute had been included to avoid situations of *non liquet*. Thus, from the outset, the drafters of the Statute had given general principles of law a supporting role, which had become even more apparent as international law developed. The Commission should ensure that the mechanism by which general principles of law were recognized did not allow the requirements for the identification of customary international law to be circumvented or for the role of States in that process to be negated.

143. His delegation allowed for the possible existence of a second category of general principles of law, namely general principles of law formed within the international legal system. However, the examples of that category provided by the Special Rapporteur in his report were in fact rules of treaty law and customary law, including the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg principles), the principles embodied in the Martens clause, and the principle of the freedom of maritime communication and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. The Commission should not rush in its consideration of the topic. It should carefully examine the comments of States and revisit some of the draft conclusions and commentaries thereto which it had already provisionally adopted.

144. Turning to the topic of succession of States in respect of State responsibility, he reiterated his delegation's doubts regarding the utility of draft articles, in view of the paucity and inconsistency of relevant State practice on the topic and the varied and contradictory interpretations reflected in the doctrine. It was therefore no surprise that although the topic had been included on the Commission's programme of work in 2017, the debate regarding the existence of a general rule governing succession and the form that the final outcome should take was ongoing.

145. His delegation shared the Special Rapporteur's conclusion that neither a "clean slate" principle nor a rule of automatic succession was acceptable as a general rule of succession, and that treaties took precedence in that regard. The Special Rapporteur's thorough analysis supported the view that draft articles were not an optimal form for recommendations to States on the subject of succession. Other, more appropriate forms, such as model provisions, existed.

146. His delegation continued to view as extraneous the inclusion of provisions on the responsibility of predecessor States that continued to exist, given the Commission's comprehensive work on the topic of State responsibility. The Commission should instead focus its attention on situations where succession might affect the responsibility of States.

147. With regard to draft articles 16, 17 and 18, proposed by the Special Rapporteur in his fourth report (A/CN.4/743), his delegation shared the doubts expressed by some members of the Commission regarding the value of having specific stand-alone draft articles for different forms of reparation. It was also unclear why the Special Rapporteur had focused on the investigation and punishment of responsible persons as being the most appropriate form of satisfaction, as stated in his report and reflected in draft article 18. The Commission had previously noted the multitude of forms that satisfaction could take and had refrained from establishing any sort of hierarchy among them. There was also no indication that the prosecution of crimes under international law, provided as an example of satisfaction by the Special Rapporteur, was carried out with a view to giving satisfaction, or in the light of responsibility of States or succession of States on forms of responsibility.

148. In both its articles on succession of States in respect of treaties and its articles on succession of States in respect of State property, archives and debts, the Commission had included provisions concerning the temporal application of the articles, which had subsequently been included in the conventions based on those articles. A similar provision would be useful in the final outcome on the current topic, regardless of its final form.

149. With regard to the future programme of work on the topic, further refinement of the provisions on responsibility in cases of succession of States did not seem worthwhile, nor did it seem realistic that the Commission would complete its work on the topic in the near term. The Commission could instead conduct a general review of the topic based on the work completed thus far. A study of general principles of succession, including the principle of fairness, would also be of interest.

150. **Mr. Nyanid** (Cameroon) said with regard to the topic "Succession of States in respect of State responsibility" that his delegation supported the Special Rapporteur's views on the subsidiary nature of his proposed draft articles and the priority to be given to agreements entered into between the States concerned. It would be useful to include examples of succession agreements between States in the commentaries and to draft model clauses on State responsibility for use in the negotiation of succession agreements.

151. With regard to the general rule of non-succession, Cameroon concurred with the Special Rapporteur's assertion that State practice was diverse and context-specific and did not support the primacy of either the "clean slate" rule or automatic succession. There were no clear rules of international law supporting automatic transmission to the successor State of the entire set of rights and obligations arising from the legal system in force before the date of succession; therefore, only the transmission of individual rights and obligations of the predecessor State could be contemplated.

152. The Commission should take into account more geographically diverse sources of State practice in its work on the topic. It should also maintain consistency, in terminology and substance, with its previous work. In that connection, the draft articles should contain a provision on their temporal scope, based on article 7 of the Vienna Convention on Succession of States in respect of Treaties and article 4 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

153. Referring to the content of the fourth report of the Special Rapporteur (A/CN.4/743), he said that while chapter III was entitled "Impact of succession of States on forms of responsibility", it actually seemed to deal with the consequences of internationally wrongful acts committed by States, in particular with regard to forms of reparation. Moreover, obligations of cessation and assurances and guarantees of non-repetition, like other forms of reparation, were not forms of responsibility, but rather legal consequences of responsibility pursuant to the articles on responsibility of States for internationally wrongful acts.

154. With regard to the transfer of rights and obligations to the successor State, his delegation believed that it was important to protect the rights of the State's nationals, even after succession, through the mechanism of diplomatic protection. A draft article in that regard should therefore be included in the text of the draft articles. In the current state of international law, individuals were objects of international law, not subjects of international law, and therefore could not submit a case to the International Court of Justice seeking redress for harm done to them as a result of a violation of international law. That was the inference that could be drawn from Article 34 of the Statute of the International Court of Justice, which stipulated that "only States may be parties in cases before the Court." Individuals therefore depended on their State of

nationality to protect them when other States threatened or violated their rights.

155. Since the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, it was the State that took up the case of one of its subjects; it did not substitute itself for its subject, but was asserting its own right, which the Court referred to as "the right to ensure, in the person of its subjects, respect for the rules of international law". Given that the basis for diplomatic protection was the link of nationality between the State and the individual, and if it was admitted that, in cases of State succession, nationals of the predecessor State became nationals of the successor State, then the successor State had grounds for its posture. The principle of continuous nationality also offered grounds for that posture.

156. His delegation had concerns regarding the question of transferring obligations to the successor State in order to ensure the provision of reparation for acts of the predecessor State that had taken place before the date of succession. That concept appeared to be inconsistent with the requirement of attribution under article 2 of the articles on responsibility of States for internationally wrongful acts and was not well supported by case law. In both *Robert E. Brown (United States) v. Great Britain* and *F. H. Redward and Others (Great Britain) v. United States (Hawaiian Claims)*, the Arbitral Tribunal had held that if no responsibility was attributable to the successor State for a violation of international law by the predecessor State, the obligations arising from the responsibility were not transferred to the successor State. The judgment in the *Lighthouses Arbitration* case between France and Greece was in line with that finding.

157. There was a need to clearly distinguish reparation, on the one hand, and cessation and assurances and guarantees of non-repetition, on the other. In that connection, his delegation supported the proposal to simplify draft articles 16 to 19, proposed by the Special Rapporteur in his fourth report, so that they would become only two provisions: one concerning cessation and non-repetition, and the other concerning reparation. Further discussion of the forms of reparation with reference to the different categories of State succession was necessary, in particular in relation to the circumstances leading to various solutions.

158. With regard to draft article 16 (Restitution), Cameroon considered that the kind of restitution made should depend on the type of injury in question. The definition of "restitution" already in use in the context of State responsibility should be reflected in the draft article. The phrasing of paragraph 1 should be clearer, less subjective and consistent with the wording of article 35 of the articles on responsibility of States for internationally wrongful acts. Paragraph 3 of the draft article was not in accordance with the rules on State responsibility pertaining to reparation, since agreements envisaged in the paragraph, between predecessor and successor States, could not produce legal effects in relation to injured States. His delegation considered the entire draft article to be superfluous, as it simply restated relevant provisions of the articles on responsibility of States for internationally wrongful acts.

159. His delegation supported the concept of compensation as provided for in draft article 17. However, the provision on satisfaction, as per draft article 18, was unclear regarding situations where the predecessor State ceased to exist, as well as when and under what conditions a successor State was entitled to request satisfaction. More generally, it was worth noting that the content of draft articles 16 to 19 was already covered by the general rules on State responsibility. His delegation suggested that the Commission refrain from reformulating or rewriting the law on State responsibility, so as to avoid the risk of misstating it.

160. Turning to the topic "General principles of law", he said that general principles of law were classified as the third formal source of international law in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. However, his delegation believed that they were designed to fill gaps in international law. It appeared that the intention of the drafters had been to enable the Court to rule on matters not covered by the two traditional sources of international law. While the scope of the first two sources was clearly delimited, the scope of general principles of law was not. Consequently, they had to be analysed thoroughly, carefully and rigorously.

161. For his delegation, general principles of law, which were applied to avoid situations of *non liquet*, were characterized by their origin, because international judges had to draw inspiration in such cases from national laws. In that sense, they were a way of systematizing national laws. Despite the desire to avoid any *non liquet*, any mention of general principles of law appeared as a provision designed to enable judges to rule, even in absence of explicit rules. In that sense, general principles of law could not be defined a priori. His delegation therefore supported the Special Rapporteur's general approach whereby the criteria for identifying general principles of law must be sufficiently strict to prevent them from being used as a shortcut to identifying norms of international law, and

at the same time flexible enough that identification would not be an impossible task.

162. The identification of general principles of law should be based on where judges had deduced the principles from and how they had adapted the principles to the requirements of international law. The fact that judges had very rarely referred to the principles provided for in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice as "general principles of law" made those questions particularly important. The term had been used by the International Court of Justice in its advisory opinion on *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, and international criminal courts used it rather more frequently. It appeared, however, that the Court was becoming less hesitant to use the term. In any event, use of the term alone was not yet sufficient for the identification of general principles of law; the method by which a principle had been deduced gave a clearer indication of whether it was actually a general principle of law.

163. Referring to the draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/741 and A/CN.4/741/Corr.1), he said with regard to draft conclusion 4 (Identification of general principles of law derived from national legal systems) that it would be inappropriate to establish a hierarchy among national legal systems. Moreover, despite the widespread belief that all legal systems were based on either common law or civil law, some were actually a combination of the two, or completely different from either.

164. It should also be borne in mind that a practice that had become a principle did not have to be unanimous in order to be considered "general". For example, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the International Court of Justice had deduced "principles of international humanitarian law" on the basis of the four Geneva Conventions of 1949, and in the *East Timor (Portugal v. Australia)* case, it had deduced the opposability *erga omnes* of the principle of the right to self-determination from the Charter of the United Nations. Those principles were determined to be general principles of law on the basis of their particular importance in the international legal order.

165. His delegation considered that the high level of support for the category of general principles of law derived from national legal systems, noted in paragraph 178 of the Commission's report (A/76/10), amounted to an invitation to examine new aspects of that question. In that regard, Cameroon encouraged the Special Rapporteur to take into consideration traditional systems – including the rich and long-standing African system of customary law – which made it possible to settle disputes when so-called modern law fell short.

166. Without prejudice to the developments in the work on draft conclusion 5 (Determination of the existence of a principle common to the principal legal systems of the world), his delegation had concerns about the criteria for identifying the "principal legal systems of the world", also referred to in draft conclusion 4. The criteria were not clear, and their use would be discriminatory, as it would tacitly establish a hierarchy among legal systems.

167. It should be borne in mind that the term "legal system" referred to the way in which systems for adopting and applying rules of law were organized and implemented at the national level. In that connection, it was worth noting that in the arbitral award in *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, general principles of law were described as "principles common to the legal systems of the various States of the world". Therefore, it would be better to focus not on groupings of States but rather on the recognition of principles, the relevance of principles of emerging law and their usefulness in international law.

168. As for the question of whether the word "transposition" should be replaced with "transposability" in draft conclusion 4 (b), Cameroon agreed with the Special Rapporteur that the transposition of a principle common to the principal legal systems of the world to the international legal system was not automatic; it could take place only if the principle was compatible with the fundamental principles of international law and if conditions existed for the adequate application of the principle in the international legal system. However, his delegation had doubts about the Special Rapporteur's affirmation that, since there was no hierarchy between the sources of international law listed in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, compatibility with a rule of conventional or customary international law was not a requirement for transposition.

169. Cameroon preferred the approach taken by the Permanent Court of International Justice in the *Case of the S.S. Lotus (France v. Turkey)*, in which it had described general principles of law as "international law as it is applied between all nations belonging to the community of States", thereby highlighting that such principles were an integral part of international law. It also seemed to imply that those principles were derived from the traditional bases of international law: treaties and custom.

170. His delegation suggested that the words “the most highly qualified” be removed from draft conclusion 9 (Teachings), since they were subjective. Only relevance and usefulness should be taken into account. If a distinction had to be maintained, it would be desirable to say “the teachings of publicists from different nations whose work has proven to be consistent and relevant”.

171. Following the interruption by the Chair to adjourn the meeting owing to time constraints, his delegation would conclude its remarks on the topic at the 25th meeting of the Committee.

The meeting rose at 1.10 p.m.