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International Law Commission

Seventy-third session (second part)

Provisional summary record of the 3588th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 5 July 2022, at 10 a.m.

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Present:

Chair:	Mr. Tladi
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

Statement by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel

Mr. de Serpa Soares (United Nations Legal Counsel) said that his oral report would focus mainly on the activities of the Office of the Legal Counsel over what had been an exceptional year for many reasons. The full written report would be posted on his website.

The world was currently facing multiple challenges: fresh outbreaks of the coronavirus disease (COVID-19) showed that the pandemic was far from over; the number of violent conflicts was the highest it had been since 1945; people and ecosystems were suffering from the drastic effects of climate change; and the world economy was under unprecedented pressure. In those circumstances, there was simply no durable alternative to dialogue, international cooperation and the rule of law. For that reason, the United Nations placed international law at the centre of its activities and, consequently, the International Law Commission played an important role in global efforts to overcome those challenges.

As in previous years, the Codification Division had provided substantive servicing for the Sixth Committee at the seventy-sixth session of the General Assembly, in 2021. Although the Committee had had to adjust its working methods to comply with strict COVID-19 mitigation measures, it had successfully concluded its consideration of the agenda items allocated to it and had maintained its tradition of adopting its resolutions and decisions without a vote. The General Assembly, acting on the Committee's recommendation, had adopted, without a vote, 20 resolutions and 10 decisions on items allocated to the Sixth Committee, including resolution 76/116 on the fortieth anniversary of the Manila Declaration on the Peaceful Settlement of International Disputes. The participation of Commission members, including the Chair and special rapporteurs, in the Committee's debate on the Commission's report on the work of its seventy-second session (A/76/10) had been invaluable.

The Committee had noted the completion of the second reading of the draft guidelines on the protection of the atmosphere and the draft guidelines and draft annex that constituted the Guide to Provisional Application of Treaties. The General Assembly had subsequently welcomed the conclusion of the work on those topics in resolutions 76/112 and 76/113 respectively. The Committee had also taken note of the Commission's decision to include the topic "Subsidiary means for the determination of rules of international law" in its long-term programme of work.

The Sixth Committee's consideration of the agenda items "Crimes against humanity" and "Protection of persons in the event of disasters" had been predicated on the Commission's draft articles on prevention and punishment of crimes against humanity and its draft articles on the protection of persons in the event of disasters. The General Assembly had decided in its resolution 76/119 that a Sixth Committee working group should examine the draft articles on the protection of persons in the event of disasters and give further consideration to the Commission's recommendation that they should form the basis of a convention, and to any other potential course of action. That working group would be convened at the seventy-eighth and seventy-ninth sessions of the Assembly and would report on the outcome of its deliberations to the Sixth Committee at the seventy-ninth session of the General Assembly.

The Codification Division had continued to implement the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. Member States attached great importance to the Programme as a capacity-building pillar in the field of international law and as a means of promoting the rule of law. Unfortunately, the COVID-19 pandemic had hindered the activities planned for 2021: neither the regional courses in international law for Africa, Asia-Pacific and Latin America and the Caribbean, nor the International Law Fellowship Programme, could be held in person. As an interim capacity-building measure, the Codification Division had provided applicants with a remote, self-paced learning curriculum. In addition, four interactive online workshops on the peaceful settlement of international disputes had been conducted for some applicants to the training programmes. Interactive webinars had likewise been held for the alumni of earlier

training programmes. It was to be hoped that the International Law Fellowship Programme to be held in person in The Hague in July 2022 would mark a return to regular scheduling. The organizers of the Programme were grateful to Commission members who devoted their time and expertise to assist in shaping the future of young international lawyers, especially those from developing countries and countries with emerging economies.

The United Nations Audiovisual Library of International Law, an online training resource available worldwide free of charge on the Internet, was another component of the Programme of Assistance. He was very grateful to present and former Commission members who had contributed to it by recording lectures, drafting introductory notes to legal instruments and assisting in the development of its research library.

The Office of the Legal Counsel had been extremely busy in 2022, as it had been called upon to address a wide spectrum of public international law issues. In the context of the Russian military offensive in Ukraine, those issues had ranged from the privileges and immunities of United Nations personnel, such as Ukrainian staff members' immunity from call-up for national service, to the obligation of the parties to the conflict to guarantee the safety and security of such personnel. They had also covered procedural matters, such as the application of Article 12 (1) of the Charter of the United Nations when the General Assembly met to consider a dispute or situation before the Security Council had met to exercise its Charter functions in respect of that matter, as well as the implementation of intergovernmental bodies' decisions, such as General Assembly resolution ES-11/3 of 7 April 2022 suspending the rights of membership of the Russian Federation in the Human Rights Council.

One issue of particular note had concerned the decision of the Russian Federation on the status of certain areas of the Donetsk and Luhansk regions of Ukraine. The Secretary-General had sought guidance from the Office of the Legal Counsel before issuing an immediate statement on the subject. In the light of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which had been adopted by the General Assembly in 1970, his Office had found that the Russian Federation's decision was inconsistent with three of the principles set forth in the Declaration, namely, the principles of non-intervention, the sovereign equality of States and the equal rights and self-determination of peoples. That advice had been reflected in the Secretary-General's press release of 21 February, in his meeting with the press on 22 February and in his remarks to the General Assembly on 23 February. The General Assembly had used similar language in its resolution ES-11/1 on "Aggression against Ukraine", adopted at its eleventh emergency special session in March 2022. International law textbooks said much about recognition as a prerequisite for statehood, but not much about so-called "premature" recognition and less still about recognition of an entity which simply did not exist, or whether such recognition was in and of itself a violation of international law. It was good for the international legal order that the General Assembly and the Secretary-General had clearly affirmed that the latter kind of recognition was a violation of international law, and in particular of the Charter of the United Nations.

The very fact that the Secretary-General had made those statements was noteworthy. The authority of the Secretary-General to make statements on matters involving or affecting the United Nations was well established through unchallenged practice dating from the earliest years of the United Nations. Hundreds of such statements were issued every year. Long-standing practice had further established that he also had the authority to make statements characterizing specific actions by States as inconsistent with the principles on which the United Nations was founded, as well as statements that particular actions by States violated the prohibition of the threat or use of force. He could do so, notably, when neither the Security Council nor the General Assembly had taken any action on the matter concerned. To date, only one State had challenged the authority of the Secretary-General to make such statements. As the current crisis had unfolded, the Secretary-General had sought the guidance of the Office of the Legal Counsel on that point. It had confirmed his authority on the basis of established practice, since the latter was a source of the Organization's rules, as the International Law Commission itself had found on more than one occasion. His Office had also confirmed that, while the Secretary-General must be impartial in making such

statements, there was no requirement that he must be neutral. Neither the United Nations as a whole, nor the Secretary-General in particular, could be neutral when respect for the principles on which the Organization was founded was at issue. As Dag Hammarskjöld had said to the Security Council in the wake of the Anglo-French invasion of Egypt in 1956:

> "As a servant of the Organization, the Secretary-General has the duty to maintain his usefulness by avoiding public stands on conflicts between Member nations unless and until such an action might help to resolve the conflict. However, the discretion and impartiality thus imposed on the Secretary-General by the character of his immediate task may not degenerate into a policy of expediency. He must also be a servant of the principles of the Charter, and its aims must ultimately determine what for him is right and wrong. For that he must stand." (S/PV.751, para. 4).

On 5 August 2021, the Secretary-General had issued a report entitled *Our Common Agenda* which was of direct relevance to the work of the International Law Commission. On 21 September 2020, at its high-level segment, the General Assembly had adopted the Declaration on the Commemoration of the Seventy-Fifth Anniversary of the United Nations, in which Member States had declared that they would abide by international law and ensure justice; that the purposes and principles of the Charter and international law remained timeless, universal and an indispensable foundation for a more peaceful, prosperous and just world; and that they would abide by the international agreements they had entered into and the commitments they had made. Member States had also requested the Secretary-General to provide recommendations to "advance [their] common agenda and to respond to current and future challenges". The Secretary-General's response, contained in the above-mentioned report, had been welcomed by the General Assembly on 15 November 2021.

As far as international law was concerned, the report called for international cooperation to be guided by international law. More specifically, the report noted that "consideration could be given to a global road map for the development and effective implementation of international law". The report's recommendations regarding international law rested on some essential premises, namely: that States had a primary role in making and interpreting international law; that the United Nations provided a unique platform and framework for addressing contemporary global challenges through international law; that the Sixth Committee was the primary forum for considering legal questions in the General Assembly; and that the International Law Commission had a mandate to make recommendations for the purpose of encouraging the progressive development and codification of international law. Nevertheless, the Office of the Legal Counsel had flagged a number of risks. First, Member States might contend that it was not for the Secretary-General to interpret international law or determine whether States were implementing or complying with it. Second, existing agreements on specific issues might unravel: it had to be borne in mind that non-compliance with existing legal regimes did not necessarily mean that new ones were required. Third, an entire normative process might be compromised if it was not properly launched at the outset.

Our Common Agenda included the recommendation that consideration should be given to a global road map for the development and effective implementation of international law, and suggested four specific actions where the Secretariat could play a role: first, encourage the accession of States to multilateral treaties and other instruments open to all States that addressed matters of global concern, such as the protection of the environment; second, encourage States to accept the compulsory jurisdiction of the International Court of Justice and to withdraw any existing reservations in that regard, because that was of fundamental importance for promoting the use of peaceful means for settling disputes; third, help States to identify the most pressing gaps in the international legal framework, so that existing rules might be adapted or new rules devised; and, fourth, help States to understand and overcome the reasons for non-compliance with international law.

The third suggested action, helping States to identify the most pressing gaps in the international legal framework, was of particular relevance to the Commission. In fact, he wished to launch a discussion among Member States on the contemporary role of the General Assembly in proposing topics to the International Law Commission for the progressive development and codification of international law. It was equally important to note that *Our Common Agenda* recognized the unique position of the United Nations as a vital forum for

the development of international law, as it was the only universal platform where legal questions of global concern could be discussed. Overall, the Secretary-General's report strengthened a principled framework for the development of international law. However, it was vital to involve diverse stakeholders in the process because, ultimately, international law benefited not only States but also their people.

Some unconstitutional changes of government in 2021 had led to competing requests for participation in the intergovernmental organs of the United Nations. For example, the credentials of representatives of Myanmar and Afghanistan had been questioned at the seventy-sixth session of the General Assembly. The Credentials Committee had met on 1 December 2021, but had deferred its decision on the matter without specifically addressing the question of whether the representatives of Myanmar and Afghanistan could continue to participate provisionally in the meetings of the General Assembly at the seventy-sixth session. Rule 29 of the rules of procedure of the General Assembly allowed a Member State to participate provisionally until the Committee had reported and the General Assembly had given its decision. Representatives of the permanent missions of Afghanistan and Myanmar had therefore continued to participate provisionally in the above-mentioned session of the General Assembly after the adoption of resolution 76/15.

Other intergovernmental bodies in the United Nations system had likewise deferred decisions on the credentials of representatives of Myanmar and Afghanistan. In some cases, the decisions adopted contained a reference to General Assembly resolution 396 (V), which recommended that "whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case" and that "the attitude adopted by the General Assembly … concerning any such question should be taken into account in other organs of the United Nations and in the specialized agencies".

Although the United Nations had a presence in both Afghanistan and Myanmar, the United Nations Secretariat played no role in the recognition of Governments. It had nevertheless taken care when engaging with the *de facto* authorities to act in a manner consistent with the decisions adopted by its intergovernmental organs, in particular the decisions of the Security Council and the General Assembly.

Turning to the area of accountability, he noted that the International Residual Mechanism for Criminal Tribunals had recorded some significant judicial achievements in 2021, with the delivery in June of the appeal judgment in the case of *Prosecutor v. Ratko Mladić*, and the trial judgment in *Prosecutor v. Jovica Stanišić and Franko Simatović*. Appeal proceedings in the latter case had commenced in September 2021 and were expected to be completed in June 2023. The pretrial proceedings in *Prosecutor v. Félicien Kabuga* were continuing and the court hearing had been expected to open in June 2022, provided that the Trial Chamber decided that he was fit to stand trial.

The International Residual Mechanism had also made decisive progress with the tracking of fugitives from the International Criminal Tribunal for Rwanda. As the Prosecutor had confirmed the deaths of Protais Mpiranya and Phénéas Munyarugarama in May, only four fugitives still remained at large.

At the Extraordinary Chambers in the Courts of Cambodia, the Supreme Court Chamber had terminated Case 003 against Meas Muth and Case 004 against Yim Tith in the absence of a definitive and enforceable indictment against either of them. With the appeal judgment in Case 002/02 against Khieu Samphan, which was due by the end of 2022, the Extraordinary Chambers would complete their work and move into their residual phase in 2023.

The year 2022 also marked the twentieth anniversary of the establishment of the Special Court for Sierra Leone, and several commemorative events had been held to celebrate that milestone event, including the opening of a memorial garden in Sierra Leone.

In March 2022, the Appeals Chamber of the Special Tribunal for Lebanon had reversed the acquittals by the Trial Chamber of Mr. Hassan Habib Merhi and Mr. Hussein Hassan Oneissi and had convicted them of crimes related to the February 2005 attack in

Beirut that had killed the former Lebanese Prime Minister Rafik Hariri and 21 others and injured 226 people. On 16 June 2022, the Appeals Chamber had unanimously decided to sentence both of the accused to life imprisonment for each of the five counts on which they had been convicted, that being the heaviest sentence under the Tribunal's statute and rules of procedure and evidence.

Over the two previous years, the Special Tribunal for Lebanon had faced several challenges. In 2020, the Tribunal had required significant restructuring owing to financial constraints that had resulted in an unexpected 37 per cent reduction in its budget. The socioeconomic crisis in Lebanon had then led the Tribunal to seek a subvention from the General Assembly for both 2021 and 2022. The Secretary-General was currently obliged to seek subventions every year for the Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia and the Residual Special Court for Sierra Leone to avoid their collapse.

The financial constraints of the Special Tribunal for Lebanon had led to a trial being stayed indefinitely two weeks before it was due to commence. That represented a major setback to victims who had waited so long for their voices to be heard and to collective justice efforts more generally. The Tribunal's difficulties were yet another example that supported his Office's long-standing view that voluntary funding of *ad hoc* tribunals was not sustainable. International justice needed long-term commitment and predictable, stable and sustainable funding. For the first time, an international court case had been stayed just before the trial was due to begin owing to a lack of funding. If the international community was serious about accountability, it could not let that happen again.

The experience of the Special Tribunal for Lebanon also highlighted the importance of having appropriate governing structures that could ensure the timely delivery of judicial work, guarantee judicial independence, provide accountability mechanisms for judges and other senior officials, and establish an oversight body that had not only legal expertise, but also expertise in financial and accounting matters. The Tribunal's problems also highlighted the importance of making a realistic assessment of the breadth of the mandate given to a tribunal and the time it would take to complete that mandate. As tribunals were independent, it was very hard to limit a mandate once it had been given. The mandate of the Special Tribunal for Lebanon was very broad and covered the investigation of cases related to the Hariri assassination, which, while logical, meant that the investigative activities had continued for years and would have persisted, had it not been for the Tribunal's financial crisis.

The Special Tribunal for Lebanon, like all such tribunals, was struggling to ensure that Member States understood that criminal justice and accountability required a long-term effort and included residual functions, often tied to the enforcement of sentences, lasting for decades. If the international community was not prepared to enter into such long-term commitments for each individual tribunal, some thought must be given to how to secure the performance of their residual functions in the most cost-efficient and practical manner. One answer might be to set up a common administrative hub, but that would require Member States to accept that different tribunals created by different bodies and for different purposes would have to share administrative personnel and resources.

The drawdown and closure of the African Union–United Nations Hybrid Operation in Darfur (UNAMID), pursuant to Security Council resolution 2559 (2020), marked another reduction in the number of peacekeeping missions. To enable a seamless drawdown, liquidation and exit, the Security Council had requested the Government of the Sudan to fully respect all provisions of the Status of Forces Agreement of 9 February 2008 until the departure of the final element of UNAMID from the Sudan, in particular the provisions relating to the safety and security of UNAMID. The drawdown had presented challenges in the face of current and anticipated security threats, such as civil unrest, banditry, unauthorized intrusions into the UNAMID Logistics Base and the risk of theft of UNAMID assets. Such challenges persisted, notwithstanding the commitment by the Government of the Sudan to assume full responsibility for the protection of its citizens, to comply strictly with all international standards for the protection of civilians – including proactive monitoring and anticipation, increased army and police deployment, and community protection – and to facilitate the delivery of humanitarian assistance, including by providing full and unhindered

humanitarian access and ensuring the safety and security of humanitarian personnel. The Office of Legal Affairs had been consulted with regard to the need for a security presence to support the Government's efforts, with questions from the Security Council centring around the size of such a security presence and its mandate, particularly with regard to the use of force. A minimal presence tasked with the provision of static security protection had been agreed upon by the Security Council, which had authorized the retention of a guard unit from existing UNAMID resources to protect UNAMID personnel, facilities and assets for the duration of the drawdown and liquidation. Security Council resolution 2559 (2020) did not specify the size and configuration of the guard unit; however, following consultations among relevant Secretariat departments and the mission, it had been agreed that a Formed Police Unit of 363 officers would remain.

The conflict in the Tigray region of Ethiopia had affected United Nations peacekeeping missions in the Sudan and South Sudan. In late 2019, allegations had emerged concerning harassment and ill-treatment of troops of Tigrayan origin deployed as members of Ethiopian contingents in certain missions. It had also been reported that some contingent members had been disarmed and confined to barracks or repatriated to their home country against their will, even if they had expressed concerns to members of their respective missions about returning to Ethiopia. Some police officers were reported to have expressed concern about direct discrimination; others feared being arrested upon their return, particularly following the arrest and detention upon return of at least three police officers of Tigrayan origin who had previously served with UNAMID. Such reports raised concerns that the repatriation of police officers to Ethiopia would put them at real risk of human rights violations.

As part of its response and contingency preparations, the Office of Legal Affairs had provided specific legal advice on the steps that the Organization should take in cases where contingent members expressed concerns about being repatriated. The advice recalled that, in line with the Charter of the United Nations, in particular Articles 1 (3), 55 and 56, the Organization sought to promote respect for all applicable rules of international human rights law, which included international refugee law. It was noted that the Organization could not compel mission personnel, including military personnel or police officers, to return at the request of their Governments, and that, should such individuals not wish to return, for example owing to concerns regarding their treatment or safety, they would be advised of their option to seek international protection according to international law and applicable domestic law. The relevant advice to the individual would be provided by the Office of the United Nations High Commissioner for Refugees, and relevant determinations would generally be for the host State to make. The mission would need to officially notify the host State authorities of the continued presence in the country of individuals who had sought some form of protection. Nothing in the model memorandum of understanding with countries contributing troops or other legal arrangements with Member States concerning police and other mission personnel would prevent the Organization from facilitating the proper consideration of an asylum application by members of missions. Ultimately, the Organization would need to inform the Government of the respective officers' decision not to return. In communicating that information, it should recall the obligations assumed by Ethiopia with regard to the safety and protection of its nationals under the relevant international law instruments, such as those related to international human rights law, including international refugee law.

The Charter of the United Nations made it clear that officials of the Organization must enjoy the privileges and immunities necessary for it to fulfil its purposes. The Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies set out the minimum standards that were essential in that regard. The Organization routinely entered into host country agreements for United Nations offices or conferences and smaller events held away from Headquarters, building on those conventions and specifying requirements in more detail. As the work of the Organization had evolved since 1945, so had the standards reflected in such host country agreements. The Commission's work had been incorporated where relevant: the provisional application of host country agreements, for instance, was dealt with on the basis of the guidance and draft model clauses on the provisional application of treaties that the Commission had recently developed.

Member States generally had no difficulty in granting the Organization the privileges and immunities necessary for it to operate effectively in the modern world, but there had been attempts to erode the minimum standards provided for in the Conventions by, for example, seeking to introduce conditions for the enjoyment by United Nations officials of immunity from legal process, or otherwise limiting the Organization's privileges and immunities. Such challenges arose not only in connection with the negotiation of host country agreements, where the Organization maintained firm "red lines", but also in connection with the work of the Organization. Of particular concern were isolated instances of criminal prosecutions of United Nations personnel for matters falling squarely within the exercise of their official functions, which, as such, were covered by the functional immunity to be accorded to United Nations officials and experts on mission, regardless of their nationality. The Organization would continue with its efforts to ensure the necessary respect for the whole range of privileges and immunities that it required to fulfil its purposes effectively and free from interference, while also cooperating with Member States in the administration of justice within the legal framework of the Organization.

Difficulties continued to be experienced with respect to the timely issuance of visas for Secretariat personnel of certain nationalities and representatives of certain Member States to work or participate in activities at United Nations Headquarters; some travel restrictions were also being imposed. In view of growing concerns about the impact of such restrictions on the work of the Organization, there had been a sustained effort by the affected Member States to get the Secretary-General to invoke section 21 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations. The Office of Legal Affairs had been working to achieve a meaningful improvement in the situation and avoid such a step, which he believed would not be in the interests of either party. Some progress had been observed.

The Chair expressed particular appreciation on behalf of the Commission for the work of the Codification Division of the Office of Legal Affairs, whose dedication had enabled the Commission to meet in 2021 when other bodies had been unable to do so as a result of the COVID-19 pandemic.

Mr. Park said that he would like to hear the Legal Counsel's views on the likelihood of diplomatic conferences being convened to adopt international instruments based on the Commission's work, in particular on the protection of persons in the event of disasters and on crimes against humanity, given that no such conference had been held for almost two decades.

Mr. Murphy, enquiring about the mandate of the Sixth Committee working group to be established on protection of persons in the event of disasters and the potential outcome of its work, said that independent experts, including former special rapporteurs on particular topics, had sometimes been asked to assist such working groups. Would such interaction between the Commission and the Sixth Committee be of benefit in the case of either of the two topics in question, and would the approach being taken to the protection of persons in the event of disasters be replicated for crimes against humanity?

Mr. Rajput asked what new approaches were being envisaged by the Secretariat and Member States with regard to the nature and functioning of the international criminal system and its associated administrative structures. He also asked whether the Legal Counsel thought that the Commission's work on exceptions to immunity, which had proved controversial, would have an impact on international organizations, especially the United Nations.

Mr. Jalloh, emphasizing that the development and effective implementation of international law was a *sine qua non* for international relations, asked how the process of referring topics to the Commission might evolve. Concerns had been expressed about the relationship between the Commission and the General Assembly for some time, as initial enthusiasm for topics seemed to give way to deadlock within the Sixth Committee once the Commission's work was done. He wondered whether consideration should be given to Sixth Committee decisions being taken by vote, rather than by consensus.

Mr. de Serpa Soares (United Nations Legal Counsel) said that in his opinion – which he had shared candidly with the Sixth Committee – the latter had become a graveyard for the Commission's projects. Interest in a topic while it was being studied by the Commission

often failed to translate into political commitment once the Commission's work was complete, leading to understandable frustration on the part of Commission members. Only Member States could decide whether consensus decision-making remained the best approach, but the Secretariat had tried hard to improve the situation and foster a better relationship between the Commission and the Sixth Committee. Periodically holding Commission meetings at United Nations Headquarters contributed to a better understanding among Member States of how international law came to be made and helped to engage them in that process, as well as ensuring good communication among different parts of the United Nations family.

Part of the Commission's role was to gauge interest among Member States in different areas of international law and to tailor its work accordingly. Both professionally and personally, he considered that environmental issues were of increasing concern to the international community and that a more robust legal framework was needed, but the Commission must determine how a general interest might translate into specific topics and what the output of each topic might be. As a lawyer trained in the Romano-Germanic tradition, he tended to favour the adoption of treaties over principles, guidelines and other forms of "soft" law, but perspectives varied among jurists.

In his view, the enthusiasm for the international criminal system seen in the 1990s, embodied in the creation of numerous *ad hoc* tribunals as a result of innovative thinking and interpretation of the Charter of the United Nations, had largely waned. Some tribunals, such as the Special Court for Sierra Leone, had proved extremely successful; in other cases, notably the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon, structural flaws had caused difficulties. Tribunals established with voluntary financing were unsustainable and did not serve the cause of international justice well. If more tribunals were to be created – which he considered unlikely in the short term – it must be on the basis of regular budget funding to ensure continuity, and sound governance structures must be put in place. In recent years, several quasi-judicial mechanisms had been set up to gather evidence of alleged crimes with a view to future prosecutions in international or domestic forums; their work was being conducted in a highly professional manner and was proving useful. Not all States had the resources or legal framework to prosecute international crimes under domestic law, but some cases had been brought, for example in Germany, that had led to successful convictions.

With regard to the immunity of United Nations staff, misunderstandings abounded in the public perception. Very few staff, and only at the highest levels, enjoyed full diplomatic immunity; in most cases immunity was purely functional. He had personally waived his immunity in respect of minor traffic offences, considering it a matter of individual responsibility, not a burden that should fall on the Organization. Nevertheless, immunity remained vital to protect United Nations staff, especially those working in the field, from harassment and persecution by some Governments that would go to great lengths to undermine the cause of human rights. He urged the Commission to keep the practical implications of its work on the topic in mind and to steer away from purely academic discussions. As the oldest office in the United Nations, the Office of Legal Affairs had extensive archives and a great deal of experience that it would be happy to share.

Mr. Grossman Guiloff said that he would be interested to hear more about cooperation with regional organizations – for example the Inter-American Juridical Committee – and academia in pursuit of common objectives, such as the dissemination of international law.

Mr. Hassouna said that, across the world, the challenge currently facing international law was one of credibility and relevance. In the pursuit of their political interests, States paid only lip service to international law, which caused ordinary citizens to question its value. In that connection, he would be interested to hear the Legal Counsel's views on the steps that could be taken by the United Nations to address that challenge. He wondered, for example, whether the Organization should launch a media campaign to explain the relevance of international law and its role in inter-State relations, whether it should impose sanctions on States that did not respect international law, whether it should carry out awareness-raising activities in schools and at universities and whether it should hold more conferences and seminars on international law throughout the world.

Mr. Murase said that, since the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property in 2004, the Sixth Committee seemed to have lost interest in turning the Commission's outputs into legally binding instruments. In response, the Commission had tended to produce fewer sets of draft articles. He wondered whether, in the Legal Counsel's view, that trend heralded the beginning of the end for the Commission.

The current situation in Ukraine was of relevance to several of the topics on the Commission's agenda, in particular "Peremptory norms of general international law (*jus cogens*)" and "Protection of the environment in relation to armed conflicts". In that connection, he wondered whether the Office of the Legal Counsel was involved in the question of war crimes perpetrated by officials of the Russian Federation.

Mr. Cissé said that, in view of the continued interest shown by the international community in issues relating to the law of the sea, he would be grateful if the Legal Counsel could comment on the current status of the draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction and the likelihood of its adoption in the near future.

Mr. de Serpa Soares (United Nations Legal Counsel) said that he had recently attended the 2022 United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development, which had been a great success. He served as the Secretary-General of the intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. He hoped that, at its forthcoming session in August 2022, the intergovernmental conference would be able to adopt the draft agreement under consideration.

In recent months, there had been many important developments in the law of the sea. In March 2022, the United Nations Environment Assembly had decided to launch negotiations on an international legally binding instrument on plastic pollution. In June 2022, after decades of negotiations, the Ministerial Conference of the World Trade Organization had adopted an agreement on fisheries subsidies. In his view, there was an increased awareness of the importance of environmental issues among the international community. The Commission's work on the topic "Sea-level rise in relation to international law" was of great interest to States, particularly small island developing States.

His first battle as the Legal Counsel had been to ensure the financial stability of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, which had been established in 1965 on the basis of voluntary financial contributions. He had averted a dire financial situation by securing generous financial contributions for the Programme from Australia and Germany and had subsequently ensured that funding for its activities was made available from the regular budget.

He made efforts to engage with as many other entities as possible without jeopardizing the quality and integrity of the activities for which he was responsible and within the limits of available resources. He had regular contacts with the Asian-African Legal Consultative Organization and had been invited to speak at its events. He had less engagement with the European Union, which had adopted a very lecturing tone on matters of international law. In general, he tended to prioritize engagement with the legal bodies of international organizations, such as the International Monetary Fund and the World Bank. Each year, he chaired a meeting of the United Nations Legal Advisers Network. He had twice raised the possibility of engagement with the Institute of International Law, but his approaches had been rebuffed. He had forged contacts with the Oxford Process on International Law Protections in Cyberspace, an initiative that brought together academics, industry leaders and other stakeholders. In the context of cyberspace, the expertise of the private sector was critical and often surpassed that of States. He had recently been invited to speak at a panel discussion on the Oxford Process, and he and the organizers had found their interactions to be mutually enriching.

International law was the common language of States. They all invoked international law to justify their positions, although their arguments were not always convincing. It was therefore premature to speak of the death of international law, which remained the cement that bound the international community together. International law had faced many challenges throughout its existence and would overcome those that it was currently facing. With regard to non-compliance with international law by States, efforts should be made to understand the reasons in each specific case. In addition, there was a need to ensure greater respect for the International Court of Justice and its jurisdiction. Although some States might adopt seemingly outrageous legal positions, it was important to keep the dialogue open and to continue to offer solid legal arguments in response.

The meeting was suspended at 11.45 a.m. and resumed at 11.55 a.m.

General principles of law (agenda item 6) (*continued*) (A/CN.4/753)

Mr. Forteau said that he was grateful to the Special Rapporteur for his third report on general principles of law (A/CN.4/753). Part one of the report, which concerned the issue of transposition, seemed not to require any particular comments in plenary. The Special Rapporteur's summary of the positions of members of the Commission and Member States on that issue would be of great use to the Drafting Committee at the current session. Similarly, he could deal with part four of the report fairly swiftly: in his view, the proposed future programme of work was not realistic, and the Commission would not be in a position to adopt all the draft conclusions and the commentaries thereto on first reading until 2023.

In his remaining comments, he would focus on parts two and three of the report. While he agreed with the Special Rapporteur on many points, he disagreed rather significantly and profoundly on others.

With regard to part two of the report, which concerned general principles of law formed within the international legal system, he had some reservations regarding the Special Rapporteur's summary of the debate in the Sixth Committee. Although the Special Rapporteur was careful to recall that the category of general principles of law formed within the international legal system continued to be "subject to divergent views among Commission members and States in the Sixth Committee", it was suggested, in paragraph 4 of the report, that most States were in favour of that category. His own analysis of the positions expressed by States in the Sixth Committee in 2021 was radically different. If one read the debates in full, it was clear that comments criticizing or casting doubt on draft conclusion 7 far outweighed those expressing unconditional support. In addition, scholars who had carried out in-depth studies of the *travaux préparatoires* relating to Article 38 of the Statute of the International Court of Justice had recently concluded that the category of general principles of law formed within the international legal system was in fact an "innovation" of the International Law Commission. Moreover, having gone back over the Special Rapporteur's previous reports, he had not been able to find any real practice in support of such a category.

The additional analysis provided by the Special Rapporteur in his third report had added nothing truly new to the analysis provided and discussed in previous years. His own position on the matter therefore remained more or less unchanged: he was agnostic in the sense that, while he did not rule out the possibility that such principles might exist, he had yet to see a single good example. Consequently, he continued to harbour serious reservations regarding draft article 7 in general and its paragraphs 1 and 2 in particular.

Moreover, even if there did exist "general principles" that constituted a general synthesis of conventional or customary norms, the Special Rapporteur had not demonstrated that their mere existence was enough to make them independent of those norms. The Special Rapporteur had yet to properly explore the question of the autonomy, as a source of law, of general principles of law drawn from international law. Practice seemed to show something very different from the Special Rapporteur's conclusions: while it was true that principles were sometimes deduced from other norms, they generally retained the same nature as those norms. A principle that had been deduced from customary law continued to belong to customary law, just as a principle that had been deduced from treaty law continued to belong to treaty law. That was shown by judgments of the International Court of Justice.

Of course, there existed a number of "principles" that were often used by international courts and tribunals. However, the principles in question were essentially legal techniques or maxims, which were characteristic of all legal reasoning; they were not "general principles of law" in the strict sense of the term. As Hersch Lauterpacht had noted, such "principles" were often invoked as a way of referring to "canons" or to simple legal "common sense". The Commission should clarify the distinction between legal principles of that type and general principles of law in the strict sense.

To overcome the lack of any real practice in support of a second category of general principles, those formed within the international legal system, the Special Rapporteur resorted to four arguments, each of which struck him as problematic.

First, the Special Rapporteur provided a long list of quotations from statements made by members of the Commission. However, those statements could not compensate for the lack of practice.

Second, the Special Rapporteur noted in paragraph 29 of the report that, if agreement could be reached within the Commission that general principles of law formed within the international legal system existed, the Commission would be in a position to recognize that category. The second step would be to determine the methodology for the identification of those principles. But the Special Rapporteur had it the wrong way round: the Commission could only recognize such principles if it had first observed in practice that they existed. Only on the basis of that practice, if there was any, would it be possible – as a second step – to determine the methodology for their identification.

Third, in paragraph 31 of the report, the Special Rapporteur set out a methodology for identifying general principles of law without explaining its legal basis or demonstrating that it reflected existing practice. Such an approach was hardly compatible with the statement, in paragraph 26, that the intention was "not to engage in an exercise of progressive development". Moreover, the Special Rapporteur's proposed methodology seemed confused on that point.

Fourth, the Special Rapporteur had significantly expanded the category to include principles of all types without considering their precise legal value and scope. Yet distinctions certainly needed to be drawn. The Special Rapporteur had introduced a degree of nuance, in draft conclusion 14, by setting out three different functions of general principles, but the question was whether each of those functions concerned the same type of general principles. For example, there was no doubt that a principle with no normative scope could be used for the purposes of interpretation. However, did such a principle really constitute a "general principle of law" within the meaning of the Commission's draft and Article 38 of the Statute of the International Court of Justice?

In paragraphs 60 to 92 of the report, for example, the Special Rapporteur invoked the principle of good faith. However, in the arbitral award cited, good faith was referred to not as a general principle of law but as a "common guiding beacon". It was also very clear from international case law that a reference to good faith in a legal text did not in itself create rights and obligations. For example, in its 1998 judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, the International Court of Justice had referred to good faith as a "principle" rather than a "general principle of law" and had recalled that it was "not in itself a source of obligation where none would otherwise exist". Equally, he had been surprised to read, in paragraph 131, that the Special Rapporteur seemed to consider protection of legitimate expectations to be a general principle of law, as such a characterization had been clearly rejected by the Court in its 2018 judgment in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*. In that connection, the Special Rapporteur referred to certain arbitral awards but failed to note that, according to others, legitimate expectations were not protected by a general principle of law but were linked to other sources of law. The same supposed principle was invoked once again in paragraph 132, where the Special Rapporteur also made reference to such principles as transparency and predictability. It was doubtful that those constituted general principles of law under international law in its current state. They could not be considered general principles of law recognized by the community of nations as a whole simply because they had been mentioned

in arbitral awards in the specific context of investment law. A similar comment could be made about the "principle of equity" mentioned in paragraph 136.

To be clear and to prevent any misunderstanding, he was fully aware of the paramount need for legal techniques that allowed international law to "live" and to fulfil its functions by more flexible means than the traditional sources of law. Those techniques, beginning with tools of interpretation, were inherent and necessary to any legal system. However, it would be a serious mistake to categorize all such techniques as "general principles of law", since many of them, in particular techniques of legal reasoning, operated with much greater flexibility than general principles of law. Striving to fit them into the formal category of "general principles of law" was to run the risk of making them less flexible and less easy to use by forcing the judge to provide a justification whenever they were brought into play. By hampering judicial functions in that way, the Commission would create the risk of curtailing any development and flexibility in the interpretation and application of international law, which would run counter to its task of promoting the progressive development of international law.

Part three of the report, which concerned the functions of general principles of law, was very rich, supported by solid case law and, on the whole, broadly convincing, particularly when it came to the "gap-filling" role of general principles of law.

The question arose as to how the draft conclusions would be applied in the event that the Commission recognized the existence of two categories of general principles of law. When looking for a general principle of law, should one begin with the first category and, if none was found, move on to the second? Or should one look in both categories at the same time? What if there was a discrepancy between the two categories? There was of course no practice to clarify the matter, but that lack of practice could surely be attributed to the fact that it was doubtful that there existed two distinct categories of general principles of law.

There seemed to be a contradiction between draft conclusions 10 to 12, on the one hand, and draft conclusion 13, on the other. If the function of general principles of law was to fill the gaps in other sources of law, how could they exist in parallel or conflict with treaty and customary rules with identical or analogous content? As shown by the examples cited in paragraphs 49 to 57, 63 and 64, general principles of law were invoked in the absence of another applicable rule. To overcome that logical problem, it would appear necessary to specify in the text of draft conclusions 10 to 12 that those provisions applied only to "existing" general principles. There were indeed two key critical dates: a general principle of law arose when there was a gap in other sources of law, and only once that principle had arisen could it exist in parallel and potentially conflict with other sources. For that reason, draft conclusions 13 and 14 should be placed before draft conclusions 10 to 12.

Even with those drafting changes, one might wonder whether draft conclusion 12, on the *lex specialis* principle, was fully consistent with draft conclusion 13: if a general principle of law applied only in the absence of another source of law, the *lex specialis* principle had no role to play. In addition, the Special Rapporteur offered no real practice in support of draft conclusions 11 and 12 but only arguments based on an analogy drawn with the relationship between treaties and custom, which did not seem relevant, since custom did not apply only to fill gaps. Moreover, the analysis of the *lex specialis* principle, in paragraphs 95 to 107, seemed very cursory and simplistic and did not reflect the current state of practice and case law, which were much more complex and nuanced. In any case, not every conflict between a general principle of law and another source necessarily had to be resolved in favour of the most specific rule. Other solutions were possible. For example, depending on the circumstances, the rule that prevailed could be the most recent one or the one that reflected a norm of *jus cogens*.

Incidentally, the possibility that the provision on applicable law might provide for a different solution should be taken into account in draft conclusion 12. It should be recalled that Article 38 of the Statute of the International Court of Justice was nothing more than a provision establishing the law applicable before that jurisdiction and that the sources of law applicable before other jurisdictions might well be articulated differently in the relevant provisions. That could be seen to some extent in article 21 of the statute of the International Criminal Court, but it was also the case for other provisions of the same type.

For those reasons, he was opposed to the referral of draft conclusion 12 to the Drafting Committee. If the Commission wished to address the issue of conflicts among norms, it needed to carry out a more detailed study by examining other tools for resolving such conflicts.

The Commission needed to decide whether general principles of law were being addressed as a single category or whether a distinction was to be drawn among them on the basis of their normative scope. With regard to draft conclusion 14, various questions arose. Could any general principle fulfil the three functions in question, or did it depend on the type of principle? In particular, should a distinction not be drawn between principles with a normative scope and those without? Did the Commission intend to cover non-binding principles in its draft conclusions? Was such an approach compatible with draft conclusion 1, in which reference was made to general principles of law "as a source of international law"? Without answers to those questions, it would be difficult to determine how to use draft conclusion 14. Ultimately, as other members had noted, there was a need for greater clarity regarding the precise scope of the topic.

Before concluding, he wished to express concern that the translations of the Special Rapporteur's third report had been issued very late, two months after the submission of the original English advance copy and only one week before the start of the plenary debate. That delay undermined the principle of equality among the Commission's working languages and, indirectly, that of the equality among its members. Admittedly, the members of the Commission were all able to work in English, but the authority and quality of the Commission's work depended on the fact that it was able to work in several languages. The situation was all the more regrettable in view of the fact that the topic of general principles of law demanded special attention to the diversity of national legal systems.

Sir Michael Wood said that the Special Rapporteur's third report on general principles of law shed further light on an often misunderstood source of international law. Unlike Mr. Murase, he thought it clear that general principles of law were indeed a source of international law under Article 38 of the Statute of the International Court of Justice.

He agreed with much of what the Special Rapporteur said regarding transposition in paragraphs 11 to 17 in part one of his report. The central issue addressed in part two of the report was the existence, or not, of a category of general principles of law other than those derived from national legal systems. Commission members continued to hold a range of views on that issue. He suggested that the Commission should proceed on the assumption that its task, its challenge, was to see whether there could be such a second category. If the Commission could come up with a credible way of describing such a category, it would then be for States to comment on what was proposed.

The main part of the report, part three, dealt with the functions of the general principles of law referred to in Article 38 (1) (*c*) of the Statute and their relationship to treaties and customary international law, the other sources of international law. Looking into those matters might help the Commission better to understand general principles of law, but he was not convinced that it would be useful to have draft conclusions on all of those matters.

He was not convinced that any of the five draft conclusions proposed in part three were needed. It was one thing to describe functions and relationship by way of background, quite another to try to encompass such matters in draft conclusions. In its extensive work on treaties, the Commission had not found it necessary to include provisions on the functions of treaties or on their relationship to other sources of international law, at least not in general terms. Nor when dealing with customary international law had the Commission found it necessary to propose provisions on the functions of customary international law, or on the hierarchy between rules of customary international law on the one hand and treaties or general principles of law on the other.

It was perhaps a reflection of the divergent views on general principles of law that the Special Rapporteur considered that such provisions might be useful for the present topic. For example, a draft conclusion on "gap-filling" might help to explain the supplementary role that general principles of law often played in practice. Yet there was no obvious need to seek to reduce those matters to draft conclusions. Any useful explanations could be addressed in commentaries, perhaps in an introductory commentary to the whole set of conclusions.

Three of the draft conclusions proposed in part three of the report addressed the relationship between general principles of law and other sources of law. Proposed draft conclusion 10 stated that general principles of law were not in a hierarchical relationship with treaties and customary international law. On one possible understanding of the term "hierarchical relationship", that went without saying, though actually saying it might lead readers to think it was not so obvious. As the matter had been addressed in the Conclusions of the Work of the Study Group on the Fragmentation of International Law, which paragraphs 77 to 79 of the report relied on, the Commission might not need to revisit it. The two relatively minor issues raised in paragraphs 80 to 82, could, if necessary, be covered in the commentary. Draft conclusion 10 might also prove confusing to readers because, in practice, consideration seemed to be given to possible general principles of law only where no applicable conventional or customary rule had been identified. While the order in which the three sources appeared in Article 38 was not determinative, it did reflect actual practice.

The analysis regarding proposed draft conclusion 11 could also, if necessary, be dealt with in the commentary. The meaning of the phrase "parallel existence" in the context of the draft conclusion was unclear.

With respect to proposed draft conclusion 12, he doubted whether the relationship of general principles of law with rules of the other sources of international law addressing the same subject matter was necessarily governed by the *lex specialis* principle. The report stated that general principles of law could be regarded as less specific in reflecting the intent of States when compared with treaty provisions or a rule of customary international law, and that general principles of law would therefore normally be the "general law" in relation to treaty and customary rules applicable to the same subject matter; the assumptions behind those statements were questionable, as was the conclusion drawn. Furthermore, the inclusion of *lex specialis* raised the question of why other potentially relevant principles, such as *lex posteriori*, should not also be addressed. The answer presumably was that to do so would go well beyond the scope of the topic and bring the Commission once again into the world of the report of the Study Group on fragmentation. The Commission should perhaps simply recall the Study Group's work. He therefore had some sympathy with Mr. Forteau's suggestion that draft conclusion 12 did not need to be referred to the Drafting Committee.

His main concern was with proposed draft conclusions 13 and 14. To begin with, he did not find the distinction made between "essential" and "specific" functions of the general principles of law to be helpful. Perhaps it was thought that enquiring into the "functions" of general principles of law would shed light on their scope or on their formation or on the methodology for their identification. For example, there might be a connection between the so-called "gap-filling" function and the compatibility test for purposes of transposition; insofar as the function of general principles of law was to fill gaps, they obviously could not contradict the rules of international law that they complemented. The Special Rapporteur also referred to the need to avoid a *non liquet*, which could be one of the consequences of a "gap". In doing so, however, he wisely avoided discussing the theoretical questions of a possible prohibition of a *non liquet*. According to draft conclusion 13, the essential function of general principles of law was "to fill gaps" – a term that seemed to refer to the use of general principles of law as a source of rules, when appropriate and possible, to complete or clarify rules found in treaties or customary international law. Although such gap-filling did seem to occur often, as illustrated by the decisions described in paragraphs 42 to 68 of the report, and in that sense might be the main function of general principles of law, it reflected a practical matter from which the Commission should not necessarily extract generalizations. Moreover, although widely used, the term "gap-filling" was an unfortunate one, as it was not only colloquial but also ambiguous and misleading. And the word "essential" was an odd one for what was a predominant though not sole function.

If the Commission used the term "gap-filling", it would need to explain more clearly how the notion of "gaps" and "gap-filling" were to be understood in the system of international law. The possible absence of a rule on a particular matter should come as no surprise. As the Commission had stated in connection with customary international law, where the existence of a general practice accepted as law could not be established, the conclusion would be that the alleged rule of customary international law did not exist. And it was obvious that treaties – even those with broad subject matter and/or participation – left

gaps. There were many possible reasons for the absence of conventional or customary rules of international law on a particular matter, including an unwillingness on the part of States to be bound by rules on the matter or an inability to agree on what the rules should be. It should not be assumed that all such "gaps" could or should be filled by general principles of law, which themselves only existed if they were recognized as such by the community of nations. As rightly stated in paragraph 71 of the report, general principles of law performed a gap-filling role only to the extent that they existed and could be identified, and not all lacunae in the law could necessarily be remedied by a general principle of law. That important point should be made in the commentary. If a court or tribunal found that a situation was not governed by a rule of international law, it could decide the case before it on the basis that there was no such rule, a situation distinct from a finding of *non liquet*.

The report suggested that general principles of law had three "specific" functions: they served as an independent basis for primary rights and obligations, as a means to interpret and complement other rules of international law, and as a means to ensure the coherence of the international legal system. The report noted that, in principle, all sources of international law had those specific functions but, in paragraph 109, suggested that, in the case of general principles of law, the functions should be understood in the light of their gap-filling role. He wondered, however, to what extent those specific functions, especially the first one listed, could be said to fit under an essential function of gap-filling.

It could be argued that the first specific function listed was the basic function of general principles of law as a source of international law. The second and third specific functions begged a number of questions and it was doubtful whether they needed to be explored in the context of the present topic. However, certain points raised in the report with respect to the specific functions – such as the observation that there were fewer cases in which primary rights and obligations had been based on general principles of law than cases in which general principles of law had served as a basis for procedural or secondary rules – could be reflected in the commentary.

If the Commission decided to include a conclusion on the functions of general principles of law, it might be preferable to have a single draft conclusion containing a non-exhaustive list, albeit one emphasizing the principal task of gap-filling, rather than to distinguish between one essential function and other functions, regardless of whether they were called "specific".

He would prefer not to refer draft conclusions 10, 11, 12 and 14 to the Drafting Committee. He would, however, not object if the Commission wished to refer them, on the understanding that, as usual, the Committee could decide to address the relevant matters as part of the commentary rather than in draft conclusions.

He looked forward to seeing the draft bibliography promised by the Special Rapporteur; if it was selective, it would be a useful tool for international lawyers.

Mr. Park said that, while the point of departure for the topic of general principles of law was, of course, Article 38 (1) (*c*) of the Statute of the International Court of Justice, the scope of the topic extended, *ratione materiae*, to all issues relating to general principles of law as a result of the Commission's decision to adopt "*Principes généraux du droit*" as the French title of the topic – the term which appeared in the French version of article 21 (1) (c) of the Rome Statute of the International Criminal Court – rather than "*Principes généraux de droit*", which was used in the Statute of the International Court of Justice.

Regarding proposed draft conclusion 6, discussed in part one of the report, he had doubts as to whether the use of the word "ascertainment" in its title was appropriate. According to one dictionary, "to ascertain" meant to discover something or to make certain of something. In other words, "to ascertain" was to determine what "was", rather than what was merely possible. However, the two requirements set out in the proposed draft conclusion dealt with issues of possibility or compatibility. He was left wondering how compatibility could bring certainty. In his view, one could not ascertain that the rules in question had been transposed just because such transposition was possible. By contrast, the Commission had used the word "ascertain" in conclusions 2, 3 and 16 of its conclusions on identification of customary international law in the context of determining what actually "was". In the context

of proposed draft conclusion 6, the word “ascertainment” was not accurate and should be avoided.

In addition, for the sake of clarity and on the basis of article 21 (1) (c) of the Rome Statute, he proposed that the phrase “compatible with fundamental principles of international law” in draft conclusion 6 (a) should be replaced with “compatible or consistent with internationally recognized norms and standards”.

Part two of the report addressed general principles of law formed within the international legal system, in connection with proposed draft conclusion 7. Paragraph 19 referred to the positions taken by Commission members with respect to the possible existence of a second category of general principles of law, namely those formed within the international legal system. The paragraph associated him with those who had expressed doubt as to the existence of such a category. However, it would be more accurate to say that he had strong doubts, which resulted mainly from the insufficient relevant practice, the vague relationship of any such category with treaties and customary international law, and the risk, if the existence of a second category was accepted, of blurring the distinction between general principles of law and principles of general international law. In that regard, while Mr. Murphy had referred at the Commission’s previous meeting to the principle of non-intervention under the Charter of the United Nations as an example of the second category of general principles of law, it could be argued that it was simply a treaty obligation.

Furthermore, by limiting itself to the identification of general principles of law that had already been formed within the international legal system, proposed draft conclusion 7 seemed to take a consequentialist approach. How and on what grounds general principles of law could be formed within the international legal system as a source of law remained unclear and should be explained. While some might argue that proposed draft conclusion 7 (c) provided guidance on that issue, it seemed to him to be quite abstract.

The last point that he wished to make regarding part two of the report was that, while paragraph 25 stated that there was less practice relating to general principles of law formed within the international legal system, paragraph 27 said that there was, in the Special Rapporteur’s view, sufficient practice, case law and literature supporting a second category of general principles of law. Those two statements seemed contradictory.

He agreed with the basic argument on the gap-filling function presented in paragraph 70, in part three of the report. However, the argument, referred to in paragraph 82, that the gap-filling role of general principles of law did not relate to the issue of a hierarchy between general principles of law and treaties and custom needed further explanation. Although, the argument in itself did not seem controversial, since Article 38 of the Statute of the International Court of Justice did not place treaties, customary international law and general principles of law in a hierarchical legal order, he wondered whether a primary/secondary distinction was not implicit in the very concept of the gap-filling role. As indicated in paragraph 72 of the report, two States could agree bilaterally to have a general principle of law take precedence over treaties or customary international law; however, treaties and customary international law would, under normal circumstances, be applied first, with any remaining legal vacuum possibly being filled by general principles of law. That order of application was recognized in paragraph 68 of the report. General principles of law were generally not, therefore, applied in preference to customary international law or treaties.

In order to explain the interrelationship between sources of international law in terms of legal theory while not accepting a hierarchy of sources, the report used the principle of *lex specialis*, stating in paragraph 82 that the gap-filling role of general principles of law could be better understood from the point of view of the *lex specialis* principle. However, viewing the relationship of general principles of law to treaties and customary international law in terms of the *lex specialis* principle led to a misunderstanding of the nature of principles.

The report used the terms “rules” and “principles” without distinction and indicated that article 31 (3) (c) of the Vienna Convention on the Law of Treaties had been applied to general principles of law, even though the word used in the article was “rule”. In his view, rules and principles were alike in some, but not all, ways. Most provisions of treaties and customary international law constituted rules, and the functions of principles differed slightly from those of rules. In addition, while rules had to be applied fully, with no room for partial

application, a principle could still be meaningful even if it could not be fully realized, because it pointed in a certain direction. Principles such as good faith, proportionality, necessity and humanity set standards that should be considered in terms of degree and could not always be viewed as rules requiring all-or-nothing application. Rules and principles had legally distinct meanings and specific roles and should be distinguished. Through the interpretive lens of a specific principle, the meaning of a rule could be expanded or limited. The *lex specialis* approach suggested in the report should therefore be reconsidered.

The view that general principles of law were a transitory source was rejected in paragraph 83 of the report, and it was argued in paragraph 85 that, even if a general principle of law was transformed into a conventional or customary rule, the general principle of law continued to have a separate and distinct applicability. While he could agree with the logic, one should avoid overestimating the role of general principles of law, given their limited practical applicability. As he had indicated on previous occasions, he viewed the transitory and recessive nature of general principles of law as one of the attributes of that source of international law. General principles of law could therefore not be considered to enjoy the same dominant legal status as international treaties or customary international law in their application. While it was true that the Advisory Committee of Jurists had not, in 1920, proposed a formal hierarchy of sources of law in the draft Statute of the Permanent Court of International Justice, the general principles of law referred to in Article 38 (1) (*c*) of the Statute were now secondary to treaties and customary international law in terms of practical relevance because they played a gap-filling role.

Like Mr. Forteau and Sir Michael Wood, he did not support proposed draft conclusion 12. In the interests of time, he would provide comments on proposed draft conclusions 13 and 14 in writing. He supported the time frame proposed in part four of the report for conclusion of the work on the topic. The bibliography referred to in paragraph 149 would be very useful, provided that it contained a variety of references from the various legal systems of the world.

The meeting rose at 1 p.m.