Provisional

For participants only

5 August 2022

Original: English

International Law Commission

Seventy-third session (second part)

Provisional summary record of the 3587th meeting

Held at the Palais des Nations, Geneva, on Monday, 4 July 2022, at 3 p.m.

Contents

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 3.20 p.m.

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

Mr. Vázquez-Bermúdez (Special Rapporteur), introducing his third report on general principles of law (A/CN.4/753), said that the report dealt with the functions of general principles of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice and the relationship between those principles and the other two sources of international law listed in Article 38 – treaties and international custom. The report also revisited certain aspects relating to the identification of general principles in the light of the debates in the Commission and in the Sixth Committee in 2021.

Paragraph 4 of the report summarized the positions taken by States speaking in the Sixth Committee at the seventy-sixth session of the General Assembly. Various delegations had agreed with the use of the term "community of nations" instead of "civilized nations". Many delegations had also agreed with the two-step analysis methodology for the identification of general principles of law derived from national legal systems, as reflected in draft conclusion 4 as provisionally adopted by the Commission. Some States had agreed with the existence of general principles of law formed within the international legal system and had called upon the Commission to clarify how such principles could be identified. Other States had expressed openness regarding the existence of such general principles and had stated that the matter should be further studied and that a clear distinction must be made between such general principles and international custom. Lastly, some delegations had expressed the view that general principles of law within the meaning of Article 38 (1) (*c*) of the Statute could only originate in national legal systems.

Part one of the third report dealt with the issue of the transposition of the first category of general principles to the international legal system, taking into consideration the debates at the Commission's seventh-second session and in the Sixth Committee. The objective of that part of the report was to respond to the doubts raised by some members of the Commission and delegations in the Sixth Committee concerning draft conclusion 6. Among the main issues raised was the idea that draft conclusion 6 was overly complex and that a provision stating simply that a principle common to the various legal systems of the world must be transposable to the international legal system would suffice. It had also been argued that the issue of transposition did not appear in Article 38 (1) (*c*), and that recognition within the meaning of that provision might not therefore play a role in the analysis of the transposition of a principle common to the various legal systems of the world. Others had questioned whether or not a formal act of transposition was required for the transposition of a general principle to the international legal system. As for compatibility, the term "fundamental principles of international law" had been questioned by some who considered it ambiguous. The same concern had been expressed in relation to the phrase "adequate application" in paragraph (b) of draft conclusion 6.

Paragraphs 13 to 17 of the report addressed those concerns. He agreed that draft conclusion 6 could be simplified so as to avoid being overly prescriptive. As for recognition within the meaning of Article 38 (1) (*c*), his position was that recognition at the national level did not suffice and that recognition that a principle was also applicable to the international legal system was also necessary. As to how recognition in the context of transposition could be ascertained, no formal act of transposition was necessary, as was evident from judicial and State practice; recognition was thus implicit. The specific criteria for ascertaining transposition could be discussed in more detail in the Drafting Committee, but it was necessary at least to ascertain the compatibility of the principle *in foro domestico* with the international legal framework in which it was to operate. Bearing in mind the comments and proposals made, he would present a revised version of draft conclusion 6 to the Drafting Committee.

Part two of the report summarized the divergent views expressed in relation to the second category of general principles of law, namely those formed within the international legal system. His own view remained that there was sufficient practice and literature to support a draft conclusion on that category of general principles. Various members and States had expressed their support for such a provision. In addition, nothing in Article 38 of the Statute of the International Court of Justice indicated that the provision was limited to general

principles of law derived from national legal systems. Of course, the Commission must handle the issue with caution, taking into account in particular the concern raised by various States and members of the Commission that a clear distinction should be made between the second category and customary international law.

The main challenge facing the Commission was to clearly and precisely formulate the methodology for the identification of general principles formed within the international legal system. He would submit to the Drafting Committee a revised version of draft conclusion 7 and would also welcome other suggestions.

Part three of the report dealt with the functions of general principles of law and their relationship with other sources of international law, in particular treaties and international custom, and included five proposed draft conclusions. In chapter I of part three, he addressed the role of general principles of law in filling gaps in treaty and customary law. That gap-filling role was well established in practice and in the literature, as illustrated in paragraphs 39 to 68 and recognized by various members of the Commission and States in the Sixth Committee. As noted in paragraph 41 of the report, that gap-filling function essentially meant that a general principle of law could be resorted to when a legal issue was not regulated, or not clearly regulated, in treaties or customary law. As noted in paragraph 71, not all lacunae in the law could necessarily be remedied by a general principle of law. A general principle of law could only perform a gap-filling role to the extent that its existence could be identified.

In paragraph 70, it was clarified that the gap-filling function was not necessarily unique to general principles of law. Indeed, in some cases, a treaty rule or a customary rule could perform that function. However, practice seemed to suggest that the essential gap-fulling function was inherent in general principles of law. By its nature, a general principle could be applied in cases where other rules of international law either did not exist or were ambiguous. The gap-filling function indicated a relationship between general principles of law and other sources of international law. It was not a hierarchical relationship, rather one governed by the principle of *lex specialis*.

Paragraph 72 briefly addressed the concept of *non liquet*, which had been raised by various Commission members and delegations in the Sixth Committee in previous debates. He did not consider it necessary for the Commission to enter into a discussion of the capacity of general principles of law to prevent situations of *non liquet*, for two reasons. First, the analysis of the gap-filling function of general principles of law already sufficiently addressed that question. Second, the concept of *non liquet* applied only in a judicial context, where a court or tribunal could not decide on a case due to a lacuna in the law. As he had previously stated, however, general principles of law should not be regarded in a purely court-centric manner; on the contrary, like rules of international law, general principles applied generally to relations between States and other subjects of international law.

Chapter II of part three of the report addressed the relationship between general principles of law and the other sources of international law, namely treaties and international custom. As noted in paragraph 75, that relationship was a complex matter, and it was not necessary for the Commission to pay attention to all aspects of it. He therefore identified in the report three specific issues to be addressed: the absence of hierarchy between the different sources of international law; the possible parallel existence of general principles of law and other rules of international law with identical or similar content; and the operation of the principle of *lex specialis* in the context of general principles of law.

The absence of hierarchy between the sources of international law was generally accepted in international law. As explained in paragraph 81 of the report, such a hierarchy was also absent in the compatibility test for the purposes of transposition of general principles common to the legal systems of the world to the international legal system. As noted in paragraph 82, the essential gap-filling function of general principles of law did not create a hierarchical relationship between those principles and other rules of international law.

Paragraphs 83 to 94 addressed the possible parallel existence of general principles of law and other rules of international law. An analysis of practice showed that general principles of law could indeed exist alongside identical or similar conventional and customary rules and that coexistence did not affect the applicability and specificity of those principles.

Paragraphs 95 to 107 addressed the operation of the *lex specialis* principle in the context of general principles of law, with special reference to the work of the Study Group on fragmentation of international law. The main conclusion reached in the report was that general principles of law were normally considered to be the "general law" in relation to other rules of international law due to the way in which they emerged. However, as the general law, general principles of law could continue to play an interpretative or complementary role with regard to the rules from other sources.

Chapter III of part three of the report dealt with certain specific functions of general principles of law. As stated in paragraph 109, those functions were not necessarily unique to general principles of law, but pertained in principle to all sources of international law. In the case of general principles, however, they should be understood in the light of their gap-filling role. The report addressed three particular functions. First, it was demonstrated that general principles of law could be an independent basis for rights and obligations. As noted in paragraph 121, however, general principles of law had been invoked or applied in that manner in relatively few cases; more commonly, they had served as a basis for procedural or secondary rules. They could also be used as a means to interpret or complement other rules of international law, as evidenced in practice. In addition, they could serve as a means to ensure the coherence of the international legal system.

Mr. Murase said that, regrettably, as on previous occasions, he had found much to be critical of in the Special Rapporteur's third report. He hoped that his remarks on the topic would be taken as constructive criticism.

The main argument of the third report, as set out in part three, seemed to be that there was no hierarchy between the three sources of international law listed in Article 38 (1) of the Statute of the International Court of Justice, that the parallel existence of those sources was recognized and that general principles of law were thus part of the international legal system.

Unfortunately, that argument was based on a false assumption and a groundless assertion. First, Article 38 (1) did not specify the sources of international law; it referred only to the applicable law of the International Court of Justice. The order of subparagraphs (*a*), (*b*) and (*c*) was generally understood to be the order of priority for how the law was to be applied. The Court was normally expected to try to apply international conventions first. Customary international law was to be applied if no appropriate international convention could be found. And, lastly, the Court could apply general principles of law as appropriate. Although the Special Rapporteur seemed to employ the word "hierarchy" to mean "legal status or validity", there was absolutely no suggestion in Article 38 of a hierarchy, in the sense of higher or lower forms of law. In any case, the Special Rapporteur's discussion of "hierarchy" was irrelevant, since Article 38 was not concerned with that issue.

The Special Rapporteur asserted that, in the absence of a hierarchy, the parallel existence of general principles of law and conventions and customs was possible. However, the Commission was not engaged in a general discussion on the sources of international law. The question was whether the parallel or overlapping existence of the three forms of law was possible when it came to interpreting Article 38 of the Statute. The Special Rapporteur had only given an example of the parallel existence of conventions and customs but not of the parallel existence of general principles of law and the other two applicable forms of law. There was an obvious gap in the logic of his argument.

Consequently, the Special Rapporteur's assertion that general principles of law were formed within the international legal system was inaccurate. As he had previously stated, the Special Rapporteur's interpretation of Article 38 (1) was contrary to the established rule of treaty interpretation. The effect and meaning of each provision of that article must be interpreted in such a way as not to overlap with the other provisions: there should be no overlaps between subparagraphs (*a*), (*b*) and (*c*). In other words, general principles of law must not be interpreted in such a way as to make them overlap with international conventions or custom. Consequently, the general principles of law referred to in Article 38 (1) (*c*) must be domestic law principles.

The fundamental flaw in the current project lay in the unfounded premise that general principles of law were a source of international law, as stated in draft conclusion 1. Although he had repeatedly asked what was meant by the word "source", he had not yet received a

satisfactory answer. At the seventy-second session of the Commission, the Special Rapporteur had proposed a clarification that referred to “formal sources” and “material sources”. However, in the face of strong criticism from Commission members, he had withdrawn that proposal and instead provided the ambiguous and, to his mind, nonsensical explanation: “The term ‘source of international law’ refers to the legal process and form through which a general principle of law comes into existence.” When the topic had first been proposed, Sir Michael Wood had suggested that the title should be “General principles of law as a source of international law”. He had opposed that suggestion and the Special Rapporteur had agreed with him at the time. He hoped that the Special Rapporteur would return to his original position and that the misleading phrase “as a source of international law” would be deleted on second reading.

Another question was whether the topic concerned only the general principles of law referred to in Article 38 (1) (*c*) of the Statute of the International Court of Justice, or whether it also concerned general principles of law applicable to other courts and tribunals. In paragraph 2 (a) of his third report, the Special Rapporteur stated that Article 38 (1) (*c*) was the point of departure for the work of the Commission, but he did not indicate what destination he was hoping to reach. For most of the report, the Special Rapporteur discussed general principles of law in relation to the Statute of the International Court of Justice. However, the statute of each court or tribunal had its own provisions on applicable law, which could not be extended to other courts or tribunals or made generally applicable.

Some inter-State arbitral agreements, as well as some investment agreements, identified general principles of law as a source of applicable law and stated that such general principles were the same as those referred to in Article 38 (1) (*c*). If the statute of a court or tribunal included such a clause on applicable law, then it was possible that it had assimilated the general principles of law referred to in Article 38 (1) (*c*). Unfortunately, the Special Rapporteur did not indicate which arbitral tribunals had such provisions in their statutes.

The Rome Statute of the International Criminal Court and the statutes of other criminal tribunals contained provisions on applicable law that were entirely different from those of the Statute of the International Court of Justice. However, in paragraphs 49 to 62 of the third report, the Special Rapporteur treated such provisions as though they referred to the same general principles of law as the Statute. It was difficult to accept such a far-fetched conclusion.

Perhaps the Special Rapporteur overestimated the role played by general principles of law in filling gaps. General principles of law did not have a monopoly on the function of gap-filling; treaties and custom played a similar role. For example, article 31 (3) (c) of the Vienna Convention on the Law of Treaties, on the systemic and harmonious interpretation of relevant rules, performed a gap-filling function. Customary international law also performed such a function, because of its general and ambiguous character.

The Commission should reconsider the scope of the current topic and determine how best to approach it. The crucial question was whether it should deal with general principles of law from the perspective of the sources of international law in general, or whether it should address the question specifically in terms of the interpretation of Article 38 (1) (*c*) of the Statute of the International Court of Justice. He suggested that a working group should be established to resolve that basic problem.

Mr. Murphy said that the Special Rapporteur’s third report contained a very interesting and useful discussion of three issues, namely transposition, the question of whether general principles of law were formed within the international legal system, and the functions of general principles of law and their relation to other sources of international law. He would address each issue in turn.

The Special Rapporteur’s analysis, in part one of the report, of the transposition of general principles of law to the international legal system was very helpful and thoughtful. In particular, he agreed with the Special Rapporteur’s conclusion, in paragraph 13, that the requirement of recognition was pertinent both to the principle’s existence across national legal systems and to the principle’s transposition.

He also agreed with the Special Rapporteur's suggestion, in paragraph 12 of the report, that the Drafting Committee should simplify draft conclusion 6 to maintain a degree of flexibility in the identification of general principles of law derived from national legal systems. Draft conclusion 6 could simply state that: "A principle common to the principal legal systems of the world is transposed to the international legal system if it is recognized as compatible with that system." The commentary could then explain what was meant by such compatibility, and explain that such recognition was not a formal or express act, but arose implicitly and in context. If the Commission did more with draft conclusion 6, it would run the risk of establishing a test that made the identification of such principles unduly difficult.

He also supported the Special Rapporteur's conclusions on the process of recognition of a general principle, which were discussed in paragraphs 13 and 14 of the third report. While recognition by States that a principle common to national legal systems was transposable did not occur by a formal or express act, there must nevertheless be some implicit agreement by the community of nations that the principle should apply in the international sphere. Paragraphs 15 to 17 of the third report discussed the precise criteria for ascertaining transposition. In that regard, the simplification of draft conclusion 6 would allow the Commission to avoid the difficulties inherent in developing precise criteria.

With respect to part two of the report, he supported the Special Rapporteur's conclusion that general principles of law could emanate from within the international legal system. However, that category of general principles was a relatively narrow one, and the Commission should be very cautious in indicating the circumstances in which such principles arose. The practice discussed by the Special Rapporteur in support of such a category was relatively limited, and it was not always clear that a general principle of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice was present in each example of practice put forward. The International Court of Justice itself had never cited Article 38 (1) (*c*) of its Statute in relation to the identification of principles of law formed within the international legal system. Hence, the existence of such a second category had been denied by a number of scholars, who often took the view that principles of law existed within the international legal system but that they were not "general principles of law" within the meaning of Article 38 (1) (*c*).

To address such concerns, the Special Rapporteur suggested, in paragraph 29 of the third report, that the methodology for the identification of such principles should be clearly explained. However, the Special Rapporteur did not set forth a clear methodology in paragraphs 30 to 32. As far as he could tell, the "methodology" consisted of, firstly, determining that no customary rule existed; secondly, engaging in vague acts of inductive and deductive reasoning; and, thirdly, ascertaining whether the principle in question was recognized as independent of any particular treaty regime or customary rule. Such a methodology was not likely to resolve existing concerns about the second category, and ran the risk of encouraging decision-makers to identify miscellaneous principles as general principles of law that overwhelmed the other sources of international law, as well as the risk of dissipating the requirement for State consent to international obligations – perhaps even at the risk of unravelling the system of international law.

He therefore generally supported the Special Rapporteur's suggestion that the Drafting Committee should simplify draft conclusion 7. However, in doing so, it should craft the text narrowly, anchoring general principles formed within the international legal system to the requirement that they should be inherent in that system. Perhaps draft conclusion 7 could simply read: "To determine the existence and content of a general principle of law formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to that system." The evidence that should be relied upon when making such a determination – such as, for example, acceptance by all Member States of the United Nations of the principle of non-intervention as set forth in the Charter of the United Nations – could be explained in the commentary, as part of a carefully delineated methodology for identifying such principles.

The main thrust of the third report was in part three, which concerned the functions of general principles of law and their relation to other sources of international law. Draft conclusion 10 indicated that there was no hierarchy between treaties, customary international

law and general principles of law as sources of international law. As a formal matter, he agreed with that position, which was well supported by State practice and scholarly writings. There was, however, tension between draft conclusion 10 and draft conclusion 13, which indicated that the essential function of general principles of law was to "fill gaps". The Special Rapporteur appeared to be suggesting that, generally speaking, when an issue arose that concerned international law, one should look first to treaties and custom to address the matter, and only afterwards turn to general principles of law as a residual source of law; and, likewise, that if there was a conflict between a treaty or customary rule and a general principle of law, the treaty or customary rule would prevail. Such a position implied a hierarchical relationship, with treaties and custom as the primary sources and general principles operating only as needed to fill any gaps.

Similarly, as a practical matter, if there was an available treaty or customary law rule that resolved the legal question at hand, a judge or other legal practitioner was likely to apply that rule rather than consider whether a relevant general principle of law also existed. Again, such a position suggested a hierarchical relationship. On the other hand, if the general principle of law was *jus cogens*, a possibility that the Commission had recognized in its project on that topic, then that principle would be hierarchically superior to any conflicting rule of treaty or custom. The Commission should bear such points in mind when discussing draft conclusion 10 and its commentary.

As a formal matter, he agreed with draft conclusion 11 regarding the parallel existence of identical or analogous general principles and treaty or customary rules. However, he was not sure whether the draft conclusion was really needed or helpful. It would make sense to merge the concept laid out in draft conclusion 11 into draft conclusion 10, such that it was indicated in a single conclusion, or in its commentary, that the three sources operated in parallel and without any formal hierarchy.

Draft conclusion 12 highlighted one particular method for resolving conflict between the three main sources of international law, stating that the *lex specialis* principle applied to the relationship between general principles of law and rules drawn from the other sources of international law that addressed the same subject matter. However, there was no explanation in the third report as to why that particular method was proposed; it could equally be explained, for example, that the later-in-time rule applied, or that a peremptory norm (*jus cogens*) superseded a general principle of law. Moreover, it was problematic to view the three main sources as having the same quality of law. General principles of law were not just another source of law; they advanced more abstract legal concepts than were generally found in treaties or custom. Given their abstract and fundamental nature, general principles of law were arguably *lex generalis*. The Commission's 2006 report on the fragmentation of international law (A/CN.4/L.682) referred to *lex specialis* as a principle used to resolve a conflict between two different treaties, or between a treaty and a custom; however, in no instance did it refer to a general principle of law as being *lex specialis* in relation to a rule of treaty or custom. To the contrary, the report indicated that it could perhaps be assumed that customary international law had primacy over general principles of law as a natural aspect of legal reasoning.

Draft conclusions 13 and 14 identified "essential" and "specific" functions of general principles of law. While he had enjoyed reading the report's discussion of how general principles of international law had arisen, he was unsure as to whether it was helpful to attempt to identify the functions that they served. First, it was not obvious that the functions mentioned were the only functions or even the most important functions that such principles performed. For instance, providing procedural canons for international courts and tribunals was a specific and important function that they served. Second, the purpose of contrasting "essential" functions with "specific" functions was unclear; the term "general", for example, might be more appropriate than "essential". In any event, if those ideas were retained, draft conclusions 13 and 14 should be combined into a single draft conclusion that addressed "functions".

Draft conclusion 13 suggested that general principles of law essentially served as gap-fillers. As he had previously noted, such a proposal was at odds with the idea that there was no hierarchy among the main sources of international law. Moreover, the function of being a gap-filler might suggest that there could be, or should be, no lacunae, or *non liquet*, in

international law, notwithstanding the recognition in paragraph 71 of the third report that lacunae might exist. Finally, the terms “gap-filling” and “fill gaps” were unwieldy and thus unhelpful; if what was meant was that the essential function of general principles of law was to provide a source of law, if possible, where no relevant treaty or customary rule existed, then it should be clearly stated as such.

With regard to draft conclusion 14, in addition to his concerns about the three “specific functions” listed, he was also somewhat sceptical about the emphasis placed on general principles as an “independent basis for rights and obligations”, as stated in subparagraph (a). Even if operating independently of treaty or custom, general principles of law often did not establish an independent right or obligation. To give an example, the International Court of Justice had held in multiple cases that the general principle of good faith did not give rise to new obligations, and that good faith only related to the fulfilment of obligations that already existed. While he was not taking the position that general principles of law could never serve as an independent source of rights and obligations, he believed that the Commission should avoid unduly emphasizing such a function, in part because it was not common, and in part because the Commission’s work should not encourage attempts to turn to general principles of law to find rights and obligations that did not appear in treaties or arise from customary international law.

He was in favour of sending draft conclusions 10 to 14 to the Drafting Committee for further development in the light of the current debate.

The meeting rose at 4.20 p.m.