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Contents

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

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

Mr. Grossman Guiloff said that the Special Rapporteur, in his third report on general principles of law, dealt with many of the comments and questions to which previous reports had given rise and handled a complex topic with commitment, dedication and flexibility.

Paragraph 2 of the report summarized the main general conclusions that the Special Rapporteur had reached in the light of debate in the Commission and the Sixth Committee of the General Assembly to date. He fully supported taking Article 38 (1) (*c*) of the Statute of the International Court of Justice as the basis for the Commission's work; however, the question had arisen as to whether general principles of law could be considered a true source of international law or whether they only applied in the case of international courts and tribunals by virtue of specific provisions authorizing their use. In particular, Mr. Murase had maintained that Article 38 (1) (*c*) set out only the law applicable to disputes brought before the International Court of Justice, rather than rules that applied to international law in general, which was not a view he shared. It went against the consensus that general principles of law were a source of international law and that the international legal order was systemic in nature, rather than merely a number of treaty and customary rules taken together. The Commission had already recognized general principles of law as a source of international law; moreover, the International Court of Justice had explicitly espoused that position in, *inter alia*, the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, in which it had referred to the "sources of law enumerated in Article 38 of the Statute". As a source of law, general principles of law applied not only before international tribunals, but also among States and other subjects of international law in their ordinary international relations, and could have a decisive influence on their conduct; the sovereign equality of States and good faith were undeniable examples of such principles. The Commission should not limit its analysis of practice to the application of general principles to judicial decisions.

Mr. Forteau had referred to the Court's rejection of the application of the principle of legitimate expectations in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*; however, the supposed principle had been rejected not because general principles of law could not be considered a source of international law but because the Court did not accept the argument that there existed in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. The principles of estoppel and acquiescence had been ruled inapplicable to the case on the grounds that the conditions for their application had not been met.

The agreement not to use the anachronistic and unacceptable term "civilized nations" any longer, as referred to in paragraph 2 (b) of the report, was very welcome. Despite some initial doubts, he was fully prepared to support replacing it with the term "community of nations", in line with the wording of the International Covenant on Civil and Political Rights, as a compromise solution.

In paragraph 2 (e) of the report, reference was made to the category of general principles of law formed within the international legal system. While he fully accepted the existence of such a category, he agreed with other members of the Commission that a clear methodology for identifying such principles was needed so as to avoid them being used as short-cuts in identifying rules that were in fact customary in nature.

With regard to the function of general principles of law and their supplementary nature, mentioned in paragraph 2 (g) of the report, he agreed that their role in "gap-filling" was important, but it was far from their only role. More careful wording would be needed in that respect in future reports.

General principles of law had been used as sources of law by international courts and tribunals even when they did not explicitly mention them in their decisions. The Inter-American Court of Human Rights had drawn on them on numerous occasions, invoking the best interests of the child in the *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala* and the *Case of Bulacio v. Argentina*. It had also applied the *pro homine* principle

and used it as a tool for interpretation. In the *Case of López Soto et al. v. Venezuela*, the Court had recalled the general principle of law that a wrongful act under international law entailed reparation, while in the *Case of Aloeboetoe et al. v. Suriname* it had explicitly applied general principles of law to determine who a person's successors might be for the purposes of compensation, concluding that rules "generally accepted by the community of nations" should be applied in the case.

The Inter-American Juridical Committee had provided valuable insight into the application of 13 general international principles, including proportionality, necessity and legitimate aim, on the basis of a 2016 report of the Electronic Frontier Foundation urging States to apply international human rights standards to communications surveillance in the digital age. He encouraged the Special Rapporteur to broaden his analysis beyond the application of general principles in judicial decisions.

With regard to the issue of transposition, he agreed with the suggestion in paragraph 12 of the report that draft conclusion 6 should be simplified so as to avoid being overly prescriptive. The final formulation should avoid giving the impression that transposition was automatic or required any formalized process. He would favour a simple draft conclusion requiring a principle to be "transposable", as suggested by other members, with further guidance provided in the commentary. Like others, he remained unconvinced by the phrase "fundamental principles of international law", which was somewhat confusing. During the debate in the Sixth Committee, various States had also requested clarification of that phrase.

The contention, set out in paragraph 13 of the report, that the requirement for a principle to be recognized implied not only the existence of the principle across national legal systems but also recognition that it could be applied at the international level presented serious obstacles to applying principles for the first time in international law, including in the case of procedural principles. To overcome those obstacles, the Special Rapporteur suggested that the recognition required under Article 38 of the Statute of the International Court of Justice was implicit and must be established by determining the suitability of a principle to be applied in the international legal system. While he agreed that the applicability of a principle at the international level must be determined on the basis of its compatibility with the structure and nature of the international legal system, he did not believe that it was a matter of recognition. Indeed, a determination of compatibility between a proposed principle and the international legal system was not reached by assessing the individual opinions of States, but rather by analysing its relationship with the overall elements of the system. Moreover, the word "recognition" suggested an active process. Although the Special Rapporteur suggested it might be implicit, there was no explanation of how it could be demonstrated in practice. Consequently, he took the view that the issue of transposition should be kept separate from the requirement of recognition, which would be met if a principle was shared by the various legal systems of the international community.

With regard to the criteria to be used to ascertain whether transposition had occurred, he agreed that the emergence of a general principle should not be dependent on compatibility with all rules of international law, as that would create an unjustified hierarchy between general principles of law and custom as sources. Fundamentally, a principle must be transposable to the international legal system, bearing in mind the structure and nature thereof. He also agreed with the need to strike a balance between rigour and flexibility when it came to determining whether a principle had been transposed, and he would therefore not support drawing up detailed criteria on the subject. Given the complexity of the issue, it would be better dealt with in the commentary.

While he firmly supported the existence of a category of general principles of law formed within the international legal system, he shared the concerns of other members regarding ambiguities and the breadth of the criteria proposed by the Special Rapporteur in draft conclusion 7. There was a risk of such principles being invoked in place of supposed customary rules whose requirements were not met or treaty rules that did not apply between the parties concerned. Developing a single methodology for identifying principles that fell into that category, based on the fact that they were generally recognized by the community of nations, might allay those concerns. Mr. Murphy's proposal in that regard had merit; the suggestions made by Mr. Hmoud and Mr. Jalloh were also of interest. In any event, the

Commission should not express doubt about the existence of that category of general principles within the international legal system.

As Mr. Murphy had observed, the reference in paragraphs 38 and 39 to gap-filling as the "essential function" of general principles of law would not sit easily with the notion of hierarchical equality with treaties and customary law, as it suggested that a general principle would apply only if the other sources did not deal with a particular legal issue or aspect thereof. As such, general principles of law would be serving as subsidiary rules. While he agreed that an important function of general principles of law was to resolve legal issues not covered by other rules, as well as to provide guidance on applying and interpreting those rules, it was far from their only function. As the Special Rapporteur acknowledged, they could also serve as an independent source of rights and obligations – and even of peremptory norms of international law – and care must be taken to avoid any suggestion to the contrary. The assertion in paragraph 70 of the report that gap-filling appeared to be inherent in general principles of law might be taken to imply that a general principle would apply only if it did not contradict other treaty or customary rules, which would be incompatible with the concept of hierarchical equality among the three sources. Alternative wording should be sought when the gap-filling function was referred to, with appropriate explanations given in the commentary.

He also had doubts about some of the terminology used by the Special Rapporteur, as expressions such as "gap-filling" and "lacunae" suggested that the dispositive international law constituted by the main sources thereof was incomplete and that its incompleteness justified recourse to general principles of law to resolve the issue. Other members of the Commission had expressed the same concern. General principles of law, however, were part of dispositive international law; by regulating various aspects of the international legal order, they avoided gaps being created in the first place. More than filling gaps, they contributed to the systemic integration of existing rules into the international legal order. If, despite that, an issue was not duly regulated or was not covered by any rule, it was not that a gap existed, but rather that the conduct in question was neither expressly prohibited nor permitted under international law. He agreed with Sir Michael Wood that the temptation to conclude that the role of general principles of law was to fill every such alleged gap should be avoided.

The report posited that the relationship between general principles of law and other sources was governed by the *lex specialis* principle. While he would agree with that proposition in many cases, it was not always clear which rule should prevail where two or more norms dealt with the same subject matter, as other members had pointed out. A general principle of international law might attain the status of *jus cogens*, in which case it would take precedence over competing norms of treaty or customary law, even if they were of a more specific nature. The principle of *lex specialis*, while important, was only one of a number of criteria that must be taken into account in resolving potential conflicts between different sources of international law if the complexity of such interactions was to be properly captured.

He agreed with the doubts expressed by other members as to whether draft conclusions on the functions of general principles of law were necessary, especially as such provisions had not been included in the Commission's earlier work on sources of international law. If the Commission decided to do so for the topic at hand, it would need to justify the difference in its approach. Another possibility would be to address the issue in an introductory commentary, as Sir Michael Wood had suggested. Given that the functions dealt with in part three of the report were common to all sources of international law, referring to them as "specific", including in the text of the draft conclusion, might cause confusion; moreover, in certain circumstances, other sources of international law might also have a specific role to play. In general, he supported the Special Rapporteur's approach to the functions of the general principles of law, but the wording of paragraph 146 of the report could be taken to suggest that their "gap-filling" function was equivalent to ensuring coherence. While that was often the case, further clarification was needed. The complexity of that and other issues meant that the commentaries to the draft conclusions would be of great importance.

With regard to the text of draft conclusion 10 as proposed in the report, he would favour altering it to state simply that there was no hierarchy among treaties, customary

international law and general principles of law. Regarding draft conclusion 11, he fully supported the content but suggested that the words "and evolve" should be added after "exist". In line with his comments regarding *lex specialis*, he did not think it should be the only principle mentioned in draft conclusion 12; that said, it might be better to omit that draft conclusion altogether, which would obviate the need to cover each principle separately and in detail.

Regarding draft conclusion 13, he believed that general principles of law played an important role in resolving cases that were not explicitly addressed by other rules of conventional or customary law, but the role of general principles was not limited to "gap-filling". Moreover, the provision as worded could result in a predisposition to legislate on the basis of those principles. Draft conclusion 13 seemed to relegate them to an auxiliary function, whereas in fact they could form the basis for primary rights and obligations. In any case, he considered it unnecessary to include a draft conclusion on the essential function of general principles; if it was to be retained, he would recommend that it should be merged with draft conclusion 14, as others had suggested. He supported referring all the draft conclusions to the Drafting Committee.

Mr. Huang said that the Special Rapporteur's third report on general principles of law was informative and clearly structured and set out solid and convincing arguments. The report and the five draft conclusions proposed therein laid a good foundation for the Commission's consideration of the topic at the current session.

He would begin by stating his general position. While he had no objection to the referral of proposed draft conclusions 10 to 14 to the Drafting Committee, he was critical of the description given in the report of the relationship between general principles of law, on the one hand, and treaties and customary international law, on the other, and of the corresponding draft conclusions. Nevertheless, past experience suggested that the divergent views of members of the Commission on that point could be resolved in the Drafting Committee.

The nature of general principles of law as a source of international law was a fundamental issue. If the Commission could reach an agreement on that issue, it would be able to resolve some of the other controversial issues raised by the topic, such as the hierarchy among the different sources of international law and the functions of general principles of law, with much greater ease.

As one of the sources of international law, general principles of law had been the focus of considerable attention in the international law community, but they continued to give rise to many disagreements on points of theory. He shared the view of many scholars that, unlike treaties and customary international law, general principles of law were not an independent source of international law. They were subsidiary and complementary in nature, and their existence was premised on a requirement of recognition. As noted in draft conclusion 2, as provisionally adopted by the Commission: "For a general principle of law to exist, it must be recognized by the community of nations." Recognition by States was manifested either in the express form of treaties or in the tacit form of customary international law. General principles of law were themselves integrated into treaties and customary international law and played a complementary role in the absence of clear guidance from those two main sources of international law, as had been the case during the trials held in Nuremberg and Tokyo after the Second World War. That seemed to have been the view taken by the Study Group on fragmentation of international law. Treaties and customary international law, as the main sources of international law, and general principles of law, as the subsidiary source, had distinct functions in the international legal system. Taken as a whole, they represented the *status quo* of the international legal system, underpinning international relations in their current form. It was therefore important not to overstate the role of general principles of law in that system.

If the Commission accepted that understanding of the nature of general principles of law, it might not need to dwell on the question of whether there existed a hierarchy among the different sources of international law. While it had long been his conviction that the relationship between general principles of law and other sources of international law needed to be discussed, the real value of the topic lay not in determining whether there existed a

hierarchy among the different sources of international law but in carrying out a comparative analysis to identify which general principles of law were common to all the legal systems of the world and thus constituted a supplementary source of international law that could be applied within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice.

In fact, owing to the development of legal theory and practice, some legal principles, such as equality before the law, *pacta sunt servanda*, the presumption of innocence, *nullum crimen sine lege*, *res judicata*, *ex aequo et bono*, prescription and promissory estoppel, existed in the national legal systems of various States. He could see great theoretical and practical value in identifying and confirming the specific content of general principles of law, if only in the form of an indicative list. That should be the main thrust of the Commission's work on the topic. Regrettably, it seemed from the three reports submitted so far that the Special Rapporteur had no intention of carrying out an in-depth analysis of that kind. As a result, Member States might not receive an answer to the question of greatest interest to them in the context of the Commission's work on the topic, namely the question of which general principles of law could be regarded as a source of international law at the current time. He hoped that the Special Rapporteur would address that point in his concluding remarks.

With regard to the issue of transposition, he was in favour of examining general principles of law from both a national and an international perspective. Although national legal systems and the international legal system were interrelated and influenced each other, they belonged to two different categories. Therefore, the general principles of law common to the national legal systems of various States needed to be identified and confirmed before they could be elevated to the status of general principles of law within the meaning of international law. In that connection, further work was needed to determine whether a process of transposition was in fact necessary. If a specific general principle of law was common to all legal systems, recognition of its status as a source of international law and of the role that it played in the international legal system might not require any kind of transposition, since such recognition resulted from a natural transformation or interaction between international and national law. If a legal principle existed only in the practice of certain States or only in a certain region, its elevation to the status of a general principle of international law would require a prior step of international law-making: it would first have to be integrated into the law of treaties or customary international law. However, the conclusion of a treaty or the formation of an international custom would seem to transcend the concept of transposition. In any case, in the Chinese version of the report, the translation of the word "transposition" needed to be reconsidered.

He agreed with the Special Rapporteur's assertion, in paragraph 17 of the report, that a balance needed to be struck between rigour and flexibility so that the methodology for identification was based on objective criteria, but without making it overly burdensome to identify general principles in such a way that they could not perform their functions. Flexibility needed to be coupled with an appropriate degree of caution and a rigorous methodology for identification. Any ascertainment of transposition based solely on such forms of evidence as special arrangements between certain States or controversial judicial decisions should be avoided.

In addition, recognition by a State that a particular principle of law formed part of its national law did not necessarily amount to acceptance of that principle as a general principle of law. To identify a general principle of law, it was necessary to determine objectively whether the relevant *opinio juris* existed in the State concerned. The Special Rapporteur made a similar point in paragraph 13 of the report. The Drafting Committee might wish to address that point and consider whether it should be reflected in draft conclusion 6 or in the commentary thereto.

To determine whether the category of general principles of law formed within the international legal system existed, it was necessary to trace the concept back to the Statute of the Permanent Court of International Justice. As members were well aware, Article 38 of the Statute of the International Court of Justice was regarded as an authoritative statement of the sources of international law. That provision, in turn, had been based on Article 38 of the Statute of the Permanent Court of International Justice. In his first report, the Special Rapporteur had provided a historical overview of the formation and development of the

concept of general principles of law as a source of international law. The drafters had clearly understood general principles of law to be a source of international law that could be applied directly in the context of international justice. First, in the context of efforts to rebuild the international legal order in the aftermath of the First World War, it had been necessary to rely on general principles that were prevalent and well developed across legal systems for the purpose of settling international disputes. Second, to prevent situations of *non liquet*, general principles of law could play an important supplementary role in situations in which no clear guidance could be found in treaties and customary international law. Third, general principles of law could serve as a means of striking an important balance between realizing procedural justice and preventing judges from making law.

To assess the role of general principles of law, it was necessary to reflect on the historical origins of the concept. Under the Statute of the International Court of Justice, general principles of law were limited to those that were common to the national legal systems of the community of nations. The situation had not changed since the adoption of the Statute. The rapid increase in the making and compiling of international law after the Second World War had led to improvements both in substantive law governing the rights and obligations of States and in the procedural rules of international dispute settlement. As a result, general principles of law had less of a role to play as a complementary source of international law. Relative to treaties and customary international law, their importance had weakened as contemporary international law had developed.

He therefore did not agree with the Special Rapporteur's division of general principles of law into two categories, namely those derived from national legal systems and those formed within the international legal system. There was insufficient theory and practice in support of the existence of the second of those categories.

On a theoretical level, it could not be ruled out that general principles of law formed within the international legal system might exist. However, as practice had yet to yield empirical evidence in support of their existence, international jurists should proceed with caution. In particular, it was important to clarify the relationship between general principles of law, on the one hand, and customary international law and the basic principles of international law, on the other. While interconnected, those categories were distinct, although the line between them was not well defined. Importantly, whether the Commission recognized only general principles of law derived from national legal systems or those formed within the international legal system as well, they all had to meet the fundamental requirement of universal recognition by the community of nations.

As the role of general principles of law as a source of international law was one of the core issues of the topic, draft conclusion 14 was one of the most important provisions of the entire set. Judging by the debate so far, it had also proved to be one of the most controversial.

There was currently insufficient empirical support for subparagraph (a), which stated that general principles of law could serve as an independent basis for rights and obligations. First, the third report included many examples of cases in which States had attempted to invoke general principles of law to argue for the existence of a substantive obligation. However, those examples concerned either claims made by a State in the context of a dispute and challenged by another party, claims that had not been upheld or claims that were not sufficiently positive to be persuasive. Second, the Special Rapporteur cited the judgments of the International Court of Justice and other international courts and tribunals as evidence of the independent rights and obligations arising from such principles as estoppel and *uti possidetis*. However, the judgments in question did not necessarily have the intended probative effect. For example, in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, the International Court of Justice had described estoppel as an "established rule of law" rather than as a general principle of law. In its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court had stated that the principles underlying the Genocide Convention were "recognized by civilized nations as binding on States, even without any conventional obligation" and that the object of the Convention was "to confirm and endorse the most elementary principles of morality". In the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, the Court had applied the principle of *uti possidetis* from the perspective of customary international law and not that of "general principles of law". In its judgment of 9 April 1949

in the *Corfu Channel Case*, the Court had found that, on the basis of "certain general and well-recognized principles", Albania had been under an obligation to warn ships passing through its territorial waters of the existence of mined areas, but it appeared from the pleadings filed by the parties that the Court had invoked that principle from the perspective of customary international law, without reference to general principles of law within the meaning of Article 38 (1) (*c*) of its Statute.

There was also inadequate practice in support of draft conclusion 14 (b), which stated that general principles of law could serve to interpret and complement other rules of international law. First, most of the examples provided in the report were drawn either from cases heard before international judicial bodies such as the Appellate Body of the World Trade Organization, regional human rights courts, international criminal tribunals or investment arbitration tribunals or from the individual or dissenting opinions of judges of the International Court of Justice, which were insufficiently wide-ranging and representative. Second, the cases cited were based mostly on article 31 (3) (c) of the Vienna Convention on the Law of Treaties. As a result, the discussion was focused more on the function of general principles of law with regard to jurisprudence than on any function that they should enjoy under positive law. Rather than arguing that general principles of law had an inherent supplementary interpretation function, it would be better to provide an explanation in terms of the basic rule of treaty interpretation as set forth in the Vienna Convention on the Law of Treaties. The international community had long since reached a consensus regarding the rules of treaty interpretation, and he saw no need to provide for a specific treaty interpretation function in the draft conclusions. On the contrary, from the perspective of positive law, the role performed by general principles of law was essentially one of filling gaps, as was broadly reflected in draft conclusion 13. Lastly, at the current time, there seemed to be insufficient international practice to support the view that general principles of law could interpret and complement customary rules.

Draft conclusion 14 (c) stated that general principles of law could serve to ensure the coherence of the international legal system. To begin with, the ambiguity of the word "coherence" made it unclear whether the reference was to an understanding of the international legal system from the perspective of natural or positive law. There was a risk that, owing to that ambiguity, the subparagraph might cause confusion. Moreover, as general principles of law touched on some of the most fundamental aspects of the international legal system, at a time when many issues relating to their application had yet to be resolved, he could not but harbour reservations regarding their role in ensuring the coherence of the international legal system.

While he was grateful to the Special Rapporteur for his dedicated work on the topic, many specific issues remained unresolved. For example, States might not agree on their understanding of such principles as promissory estoppel and good faith and how to apply them in practice. Those issues were worth exploring, and he hoped that they would be clarified further in the commentaries.

The meeting rose at 11 a.m.