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International Law Commission

Seventy-third session (second part)

Provisional summary record of the 3592nd meeting

Held at the Palais des Nations, Geneva, on Tuesday, 12 July 2022, at 10 a.m.

Contents

Present:

Chair:	Mr. Tladi
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	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
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

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

Mr. Vázquez-Bermúdez (Special Rapporteur), summing up the discussion on his third report on general principles of law, said that the rich debate within the Commission had highlighted the complexity of the topic. Despite some divergence of views, there were many points of agreement that would enable progress to be made. He had carefully considered all the comments made and concerns expressed.

Some general issues had arisen, all of which had been discussed at previous sessions of the Commission. With regard to the scope of the topic, it should be pointed out once more that the Commission's work referred to general principles of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice. Some members had expressed the concern that, especially in discussing the second category of general principles of law – those formed within the international legal system – he had departed from that understanding, but such was not the case. Admittedly, disagreement persisted regarding the existence of that category of principles, and more work would be needed on the question.

He had described Article 38 (1) (*c*) as the starting point for the Commission's work to indicate that the Commission should not limit itself to a literal reading of that article but should also take account of practice, jurisprudence and doctrine. It had never been his intention to deal with principles not covered by Article 38 (1) (*c*), to write a commentary to that article or to impose an interpretation thereof on the International Court of Justice. Although Article 38 reflected or incorporated the sources of international law, those sources existed independently of the Statute. One of them formed the basis for the present topic. No similar concerns had been expressed when the Commission had addressed the topic of the identification of customary international law, or, as Ms. Oral had observed, in its work on peremptory norms of general international law (*jus cogens*), the starting point for which had been the Vienna Convention on the Law of Treaties.

With regard to the nature of general principles of law as one of the sources of international law, it had, in his view, been established that they constituted a formal source of international law alongside treaties and custom. That position emerged clearly from practice and the vast majority of legal writings. Various members of the Commission, as well as Member States in the Sixth Committee of the General Assembly, had pointed out that Article 38 (1) of the Statute of the International Court of Justice reflected those sources of international law that could give rise to rules governing conduct at the international level. As Mr. Grossman Guiloff had said, the Court itself, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, had referred to "the sources of international law which Article 38 of the Statute requires the Court to apply". Almost all Member States in the Sixth Committee had referred to general principles of law as a source of international law, while the Commission, in its commentaries to its conclusions on identification of customary international law, had mentioned the "sources of international law" that appeared in Article 38 (1) of the Court's Statute.

Mr. Murase had again questioned the status of general principles as a source of international law, espousing the view that Article 38 of the Court's Statute did not specify what the sources of international law were but was merely a clause setting out the applicable law, and then only in the context of disputes brought before the Court. That was not a position he could accept. Not only did it go against State practice, jurisprudence and doctrine; it also raised obvious systemic problems. Mr. Murase seemed to be suggesting that there were no general sources of international law and that each international court or tribunal would apply a series of distinct or special sources in accordance with the "applicable law" clause of its own statute. According to that logic, there would be no general methodology for identifying general principles or international custom; each tribunal would be free to apply the methodology it deemed fit. Such a position was untenable. Not only would it lead to inacceptable fragmentation of international law; it would also lead to legal uncertainty incompatible with the proper functioning of any legal order. Of course, States were free to agree that special rules would be applied in resolving particular disputes, as evidenced by practice, but that did not negate the existence of general sources of international law applicable among all States or subjects of international law and to all courts and tribunals in

the absence of an agreement to the contrary. It must be presumed that whenever general principles of law were mentioned in an "applicable law" clause, the principles being referred to were those set out in Article 38 (1) (*c*).

On the question of terminology, which in practice was not always uniform, several members had suggested that some of the examples cited in the third report were irrelevant because the term "general principles of law" had not been used. Ms. Galvão Teles had stressed the need for a rigorous approach to terminology. In his first report, he had explained that, while some variation might be seen in practice and in the literature, the Commission had repeatedly stated that the term "general international law" could refer to general principles of law, depending on the context, as could terms such as "general principle of international law". The key thing, as also explained in the first report, was to consider each case carefully to determine whether or not a general principle of law within the meaning of Article 38 (1) (*c*) had been applied. He had pursued that approach in all three of his reports.

In terms of the relevance of the practice and jurisprudence of international criminal tribunals to the topic, it had been suggested at various points during the Commission's debates at its present and previous sessions that such tribunals were special or unique in nature and that their practice must be used with care. While that was true of any jurisprudence, regardless of the court or tribunal from which it originated, it had been established in the Commission's earlier work that when international criminal tribunals applied general principles of law, they were essentially general principles within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice. The Secretariat's memorandum (A/CN.4/742) was instructive in that regard. When it came to the Rome Statute of the International Criminal Court, he agreed with Ms. Escobar Hernández that it should be viewed as a more specific formulation of the first category of general principles of law – those derived from national legal systems – as mentioned in his first report. In its work on the identification of customary international law, the Commission had based its conclusions, in part, on the jurisprudence of international criminal tribunals, with several mentions thereof in the commentaries. In his view, there was no reason for the Commission to adopt a different approach to the present topic. Mr. Jalloh had provided a useful explanation in that respect. He therefore maintained his opinion that the jurisprudence and practice of international criminal tribunals were relevant to the topic, though the quality and authority of judicial decisions must be considered on a case-by-case basis.

A number of members had suggested that the Commission should draft an indicative list of general principles of law for potential incorporation as a draft conclusion. As he had explained at previous sessions, he did not consider such an exercise necessary, given that the main aim of the topic, as agreed by the Commission and supported by most States, was to clarify the various aspects of general principles of law as a source of international law, including their scope, a methodology for identifying them, and their functions and relationships with other sources of international law. Drafting an indicative list would complicate the Commission's work unnecessarily, requiring, for example, extensive debate on whether certain decisions applying a general principle were correct. Of course, the commentaries to the draft conclusions would refer to the application of individual general principles of law by way of example, which should be sufficient to guide States or anyone else concerned with general principles.

With regard to the transposition of principles common to the various legal systems of the world into the international legal system, members had generally agreed with his suggestion that the Commission should adopt a more flexible approach. Mr. Gómez-Robledo, among others, had expressed the view that a suitable criterion for recognizing a general principle of law would be its *effet utile* on the body of law of which it formed part, which might be relevant to the international legal order. In that sense, the Commission should proceed on the understanding that the second stage of identifying general principles derived from national legal systems should not be overly prescriptive and that any methodology for identifying them should be both rigorous and flexible.

Most members had agreed with the explanation given in the third report to the effect that the requirement of recognition in accordance with Article 38 (1) (*c*) must be met for transposition to occur. It was not enough for a principle to be recognized by virtue of its existence or acceptance in various legal systems around the world; it must also be recognized

as transposable into the international legal system. Such recognition was necessary because of the differences between that system and national legal systems. It could not be assumed that a principle *in foro domestico* – born of the structure, nature and needs of the national legal order – was automatically transposable to international law.

Many members had also expressed support for the proposition that recognition of transposability would be a largely implicit process that occurred when it was finally determined that a particular principle could be applied within the international legal system and was compatible with the essential nature thereof. There was consequently consensus that transposition required no express or formal act.

Some members of the Commission, however, had expressed certain doubts, suggesting in particular that recognition would be limited to the existence of principles *in foro domestico*, and that transposition was more a matter of whether an existing general principle of law could apply in a particular case. Such a view did not appear to take into account the differences between the international legal system and national legal systems: following that logic, one might conclude that the right to access justice, which essentially existed in all legal systems, constituted a general principle of law within the meaning of Article 38 (1) (*c*), but it could never apply in practice at inter-State level because consent to be bound by the decisions of international tribunals was a fundamental principle of the international legal order. Another example was *exceptio non adimpleti contractus*, as discussed in his second report: even if it was assumed to exist in national legal systems across the world, it would be difficult to transpose it to international law because it would be incompatible with the generally accepted rules on termination or suspension of the operation of a treaty in consequence of its breach, as set out in article 60 of the Vienna Convention on the Law of Treaties.

Further evidence of the need for recognition in the context of transposition could be gleaned from the case of norms that could be considered common to the world's legal systems and not at first sight incompatible with the international legal system, but merely irrelevant to it. Such would be the case for the rules of the road, for example, which would hardly be deemed general principles of law within the meaning of Article 38 (1) (*c*). There must be an element of filtering to avoid any rule common to the legal systems of the world automatically being transposable to the international legal system regardless of its compatibility or suitability.

It should be noted, taking into account existing practice, jurisprudence and doctrine, that the issue of transposition related to the identification of general principles of law, not the application of an existing general principle to a specific case. Draft conclusion 4, which had enjoyed broad support from States in the Sixth Committee, indicated that the methodology for identifying general principles of law included transposition. It remained to determine what criteria should be used. The wording of draft conclusion 6, as proposed in his second report, had not been universally supported, but it had emerged clearly from the debate that an examination of compatibility was the minimum required for the transposition of a principle to be ascertained. The key question, in his view, was what the principle must be compatible with. There was no need for a principle to be compatible with all norms of international law, whatever their scope, in order to be transposed. Two States might conclude a bilateral treaty containing rules that would be incompatible with the principle of unjust enrichment. That treaty would not, in and of itself, prevent the principle from existing as a general principle of law within the meaning of Article 38 (1) (*c*), though it could preclude the application of that principle between the States concerned. Compatibility must, however, be examined with respect to rules that were universally accepted and could be considered to reflect the essential structure of the international legal order. Incompatibility between such a rule or norm and a principle *in foro domestico* was not simply a matter of application, but of the very potential for a general principle of law to exist as a rule of international law. Various members of the Commission had made proposals in that vein; they could be considered by the Drafting Committee.

After careful consideration of all the questions asked and statements made, he wished to propose the following alternative wording for draft conclusion 6: "A principle common to the various legal systems of the world is transposed to the international legal system insofar as it is compatible with the basic structure of that system." ["*Un principio común a los*

diferentes sistemas jurídicos del mundo es transpuesto al sistema jurídico internacional en la medida en que es compatible con la estructura básica de ese sistema."]

As in previous years, views had continued to diverge within the Commission on the issue of general principles of law formed within the international legal system. Some members had expressed concerns with regard to draft conclusion 7. The various viewpoints had remained largely unchanged, falling broadly into three groups. Of those who had spoken, the majority had supported the existence of such principles, irrespective of exactly how the Commission might eventually agree to formulate a methodology for identifying them. A second, smaller group was sceptical but had not ruled out their existence altogether, although Mr. Forteau considered that they did not necessarily form part of the third source of international law. A small minority espoused the view that general principles of law referred only to those derived from national legal systems; among them, Mr. Petrič had conceded that the door should be left open to the possibility of general principles being formed within the international legal system. Separate from those three groups, Mr. Murase alone did not consider general principles of law to be a source of international law.

The analysis of practice, jurisprudence and doctrine presented in his three reports on general principles of law had provided evidence for the existence of general principles formed within the international legal system and for their status as principles under Article 38 (1) (*c*) of the Statute of the International Court of Justice. He agreed with Sir Michael Wood that the Commission's task was, to the extent possible, to shed light on the existence of such a category and required examining the issue in detail. Mr. Murphy had noted that the category, which he recognized, was a relatively narrow one and that the Commission should be cautious in indicating the circumstances under which such principles could arise. Ms. Escobar Hernández had reiterated her firm conviction that such principles existed regardless of their small number and the difficulty in identifying them. In general, such principles, like the principle of sovereign equality and the principle of consent to the jurisdiction of international tribunals, governed basic, structural issues in the international legal system. Several members of the Commission had expressed support for his proposal, made in the third report, to streamline draft conclusion 7, make it less prescriptive and have it reflect the consensus that existed – at least among those members who agreed that a second category did indeed exist – on the scope and methodology for the identification of such principles.

With respect to the argument against draft conclusion 7 that, when drafting the Statute of the Permanent Court of International Justice, the Advisory Committee of Jurists had had in mind only principles derived from national legal systems, the correct response seemed to be, as explained in his first and second reports, that the Advisory Committee had taken no definite stance as to the potential existence of principles formed within the international legal system, and the Commission members' divergent views on the issue were, in essence, based on the different possible interpretations of the *travaux préparatoires* of the Statute. Instead of looking to inconclusive *travaux préparatoires*, the Commission should focus on the text of Article 38 (1) (*c*), which did not refer to the possible origins of general principles, and consider existing practice. As Mr. Jalloh had noted, nothing in Article 38 (1) (*c*) indicated that general principles of law were limited to those derived from national legal systems.

A number of members had said that there was insufficient practice to demonstrate the existence of general principles formed within the international legal system or to clearly describe the methodology for their identification, and that the examples of practice included in the reports were limited and inconclusive and involved not general principles within the meaning of Article 38 (1) (*c*) but treaty or customary rules, general principles derived from national legal systems or some other type of principle not corresponding to any of the sources listed in that article. Although the practice relating to general principles belonging to the second category was indeed limited, it was not so limited as to prevent the Commission from addressing the issue – a point that several members had made during the debate. As indicated in the first report, the inconsistent terminology used in practice and the failure in many cases of international courts and tribunals to follow a clear or explicit methodology when identifying rules of international law posed methodological challenges in terms of identifying practice relevant to the topic. Such a situation would, of course, cause disagreements to arise within the Commission about the relevance of any given example.

The main criterion that he had applied in identifying examples of principles from the second category for inclusion in the first and second reports was that a principle could not, at the time that the relevant judgment had been issued, have been considered a treaty or customary rule or a general principle derived from national legal systems. In his second report, he had tackled the difficult task of determining whether a common methodology could be applied to the examples that he had identified. It was worth mentioning that Commission members who found the examples cited in the first and second reports irrelevant generally seemed to presume that the principles in question were customary rules without attempting to demonstrate that that was the case. The fact that some of the principles could now also be considered customary rules did not mean that it had always been possible to consider them as such, at least if following, for example, the methodology for the identification of custom.

Mr. Reinisch had raised a key question in that regard: if a principle that was not reflected in a treaty or customary rule and had not been derived from national legal systems was applied in a decision, was it automatically a general principle of law within the meaning of Article 38 (1) (*c*)? The answer was, of course, that each case had to be analysed in its context. Like several other members, he was of the view that all legal systems, including the international legal system, must be capable of generating certain principles inherent in the system in question, and Article 38 (1) (*c*) provided for that possibility. The fact that such reasoning was in a sense based on an analogy between the international legal system and national or even regional legal systems and to a certain extent applied a functionalist or axiological approach did not mean that the reasoning was flawed. There was case law relevant to the second category, which he had presented in his reports. During the debate, Mr. Petrič had conceptualized the international legal system as a true legal system before then curiously stating that it could include general principles originating only in other legal systems and not in itself.

Some members had expressed doubts regarding the methodology described in the third report as inductive and deductive. The methodology was, in reality, no different from that used for general principles derived from national legal systems. In both cases, existing rules in the relevant legal systems were first subjected to an inductive analysis. The methodology was also, at the same time, deductive for both categories: with respect to the first category, it had to be determined whether general principles derived from domestic law were compatible with the structure of the international legal system; and with respect to the second category, it had to be demonstrated that principles formed within the international legal system were inherent in that system.

With respect to Mr. Forteau's comment that some principles were not, in the strict sense of the term, general principles of law under Article 38 (1) (*c*) but rather legal techniques or maxims characteristic of all legal reasoning or simply rules of common sense, he was unsure whether Mr. Forteau was suggesting that the examples given in the third report fell into any of those categories. Furthermore, as legal maxims produced legal effects – which was why courts and legal practitioners had recourse to them – it was unclear to him why a legal maxim could not be considered a general principle of law. Lastly, it should be noted that the principles without a normative scope referred to by Mr. Forteau would not produce legal effects and would therefore not be relevant in terms of the law.

Mr. Hmoud had proposed that a "without prejudice" clause should be included in draft conclusion 7 so that the Commission could leave open the possibility that a second category existed without having to make a definite statement as to its existence. However, such clauses were generally used for issues that fell outside the scope of a topic, and it was preferable to find a solution that reflected the views of most members. He therefore proposed that the views of members who did not agree that a second category existed should be included in the commentary so as to provide the States on the Sixth Committee with all the relevant information, and that the Commission should adopt draft conclusion 7 on first reading with simplified wording such as the following, a slightly modified version of a proposal made by Mr. Murphy: "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 inherent in that system."

Overall, members had supported the conclusions reached in the third report with respect to the functions of general principles of law; the points on which there was

disagreement could be resolved easily. Members largely agreed that general principles could perform the function of filling gaps in the law. The main question that had arisen during the debate was whether or not general principles of law performed only that function, presented in the third report as the essential function of general principles. On that point, there seemed to be consensus in the Commission that, in practice, it was for practical reasons that general principles were applied or invoked when a certain legal issue was not regulated or was not fully and clearly regulated by a treaty or customary rule and not because gap-filling was an intrinsic function of general principles. Furthermore, the three specific functions of general principles of law presented in the report were not particular to general principles of law and could be performed by any source of international law, and general principles of law could fulfil additional functions as well, such as serving as the basis for procedural rules. The report had addressed the three functions in order to dispel the doubts about them that were present in practice and in the literature. The Commission's debate about the functions of general principles of law could, in conclusion, be summarized as follows: general principles performed the same functions as the other sources of international law mentioned in Article 38 (1) (*c*) but in practice were applied when treaty or customary rules did not regulate or did not fully or clearly regulate a certain legal issue.

Some members had suggested that the functions of general principles of law should be addressed in the commentary instead of in draft conclusions, while others had suggested that draft conclusions 13 and 14 should be merged. Given the confusion surrounding the functions of general principles of law both in practice and in the literature, he was of the view that it would be helpful to have a draft conclusion addressing them. He proposed that the Drafting Committee should consider combining draft conclusions 13 and 14, clarify that general principles of law performed the same functions as any other source of international law and highlight how general principles were normally applied in practice through a formulation such as the following:

1. As a source of international law, general principles of law may serve, *inter alia*:

(a) As an independent basis for primary rights and obligations;

(b) As a basis for secondary and procedural rules;

(c) To interpret and complement other rules of international law;

(d) To contribute to the coherence of the international legal system.

2. General principles of law are often resorted to when other rules of international law do not regulate or do not fully or clearly regulate a legal issue.

[*1. Como fuente del derecho internacional, los principios generales del derecho pueden servir, entre otras cosas:*

(a) Como base independiente de derechos y obligaciones primarios;

(b) Como base de normas secundarias y procedimentales;

(c) Para interpretar y complementar otras normas de derecho internacional;

(d) Para contribuir a la coherencia del sistema jurídico internacional.

2. Los principios generales del derecho son recurridos a menudo cuando otras normas del derecho internacional no regulan o no regulan de manera completa o clara un asunto jurídico.]

Most members had agreed with the basic proposition behind draft conclusion 10: that there was no hierarchal relationship between the different sources of international law. The main criticism of that draft conclusion related to the apparent tension between it and the proposition that the essential function of general principles was to fill gaps in the law, as that function would, in practice, create a hierarchical relationship among the sources. As he had already indicated, he was willing to join the consensus in the Commission that general principles of law performed the same functions as any other source of international law and were not necessarily inherently limited to a gap-filling function.

There had been few differences in members' views on draft conclusion 11, on the possibility of the parallel existence of general principles and other sources of international law with identical or analogous content. While some members had questioned the analogy drawn in the third report with the parallel existence of treaties and custom, such an analogy was, in his view, justified if general principles of law were seen as a source of law that was like any other source of law and did not stand in a hierarchical relationship to the other sources. Other members, such as Mr. Zagaynov, had questioned whether general principles of law could exist in parallel with rules of customary law and whether, in cases where a customary rule arose from a practice accompanied by *opinio juris* that was based on a general principle, the appearance of that customary rule would not cause the general principle to cease to exist. The Commission did not, however, need to take a firm position on that point. He saw no reason why a general principle could not exist in parallel with a customary rule. Situations could arise in which, for example, a customary rule and a general principle only partially overlapped and the principle could prove useful in interpreting or applying the customary rule. He did not believe that there was a risk, as suggested by Mr. Zagaynov, that a general principle of law would be applied rather than a treaty or customary rule with the same content. It had been seen in practice that in such cases it was normally the treaty or customary rule that would be used.

Lastly, several members had questioned the inclusion of only a single principle, that of *lex specialis*, in draft conclusion 12 as a means of resolving conflicts of norms, with some pointing to the potential relevance of the principle of *lex posterior derogat legi priori*, and the absence in the third report of a discussion of peremptory norms of general international law (*jus cogens*), which also played a role in the resolution of conflicts of norms. He had in fact discussed only the principle of *lex specialis* in the third report because it was commonly referred to in practice and in the literature in discussions of the relationship between general principles of law and other sources. However, he agreed that other principles for the resolution of conflicts of norms could also potentially be relevant. The third report had not addressed *jus cogens* norms in depth because the Commission was finalizing its work on that topic. A *jus cogens* norm was obviously hierarchically superior to any other norm, including a general principle of law. It should also be noted that the draft conclusions on *jus cogens* norms recognized that general principles of law could serve as the basis for peremptory norms of general international law. It could be clarified in the draft conclusions on general principles of law and in the commentary thereto that *jus cogens* norms could play an important role in the resolution of conflicts of norms.

Although several members had found draft conclusions 10 to 12 unnecessary and suggested that the issues that they dealt with should be addressed in the general commentary, he was of the view that those draft conclusions would provide a useful guide for States, international courts and tribunals and others needing to apply general principles of law, given the divergent views that existed in practice and in the literature. He supported the suggestion made by other members that draft conclusions 10 to 12 should be combined. The combined draft provision could, for example, be entitled "Relationship of general principles of law to treaties and customary international law" and could read:

> 1. Treaties, customary international law and general principles of law are not in a hierarchical relationship *inter se*.
>
> 2. General principles of law may exist in parallel with treaty and customary rules with identical or analogous content.
>
> 3. Conflicts between general principles of law and treaty or customary rules are solved by employing the generally accepted principles of rule-conflict resolution.

The point made in paragraph 1 was one that had already been stated in the conclusions of the Study Group on fragmentation of international law.

He was certain that with effort and the cooperation of all members, the Commission would be able to complete a first reading of the draft conclusions before the end of the quinquennium. He wished to thank all the members who had participated in the debate on the third report and asked that, in the light of the plenary debate, the draft conclusions set out in the third report be referred to the Drafting Committee, where they could be considered

together with the proposals made by members during the debate and the new wording that he had just put forward.

The Chair said he took it that the Commission wished to refer to the Drafting Committee draft conclusions 10 to 14 as contained in the Special Rapporteur's third report, taking into account the comments and observations made during the debate.

It was so decided.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Park (Chair of the Drafting Committee) said that, for the topic "General principles of law", the Drafting Committee was composed of Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Ms. Lehto, Mr. Murphy, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Petrič, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Tladi, Sir Michael Wood and Mr. Zagaynov, together with Mr. Vázquez-Bermúdez (Special Rapporteur) and Mr. Šturma (Rapporteur), *ex officio*.

The meeting rose at 11.10 a.m.