

Provisional

For participants only

2 October 2019

Original: English

International Law Commission
Seventy-first session (second part)

Provisional summary record of the 3494th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 30 July 2019, at 10 a.m.

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Present:

Chair: Mr. Šturma

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

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10.05 a.m.

General principles of law (agenda item 7) (*continued*) (A/CN.4/732)

The Chair invited the Special Rapporteur to sum up the debate on his first report on general principles of law (A/CN.4/732).

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he wished to thank all the members of the Commission for their valuable comments during the rich debate on his first report on general principles of law. Although opinions had been divided on some aspects of the topic, which was unsurprising given its complexity, the consensus which had existed on various fundamental points would permit further substantive progress. Owing to time constraints, he would not be able in his statement to refer to all the points that had been raised in the debate; however, he had taken note of all the statements made and would address any outstanding concerns in due course.

There had been wide agreement on the scope and form of the final outcome of the Commission's work. Members had concurred that the topic should cover the legal nature of general principles of law as a source of international law, the origins, or categories, of those principles, their functions and their relationship with other sources of international law, in particular customary international law, and the identification of general principles of law. There had also been wide agreement that the final outcome should take the form of conclusions accompanied by commentaries. That form was appropriate, since the purpose of the Commission's current work was to clarify various aspects of one of the main sources of international law and it would also be consistent with the form taken by its work on the identification of customary international law, subsequent agreements and subsequent practice in relation to the interpretation of treaties, and peremptory norms of general international law (*jus cogens*).

Various proposals had been made to alter the title of the topic. For example, it had been suggested that it should be amended to read "General principles of law as a source of international law" or "Identification of the general principles of law". However, most members did not appear to have any difficulty with the current title. A reference to general principles of law as a source of international law was already contained in draft conclusion 1 and, for that reason, there should be no uncertainty about the subject matter. The addition of the words "Identification of" would be too restrictive and would not reflect the topic's true scope. Moreover, States in the Sixth Committee had no problem with the title as it stood.

Draft conclusion 1 had received broad support. Nonetheless, a number of amendments had been proposed, which could be discussed in the Drafting Committee. He wished, however, to respond briefly to proposals put forward by Mr. Aurescu and Mr. Murase: the former had suggested the deletion of the phrase "as a source of international law", while the latter had proposed the replacement of that phrase with "as applied by competent international courts and tribunals". Those proposals reflected the doubts of both members, in particular Mr. Murase, about the legal nature of general principles of law as one of the sources of international law. It was unnecessary for the Commission to embark on such a theoretical debate, since Article 38 (1) (c) of the Statute of the International Court of Justice made it absolutely clear that general principles were a separate source of international law in addition to treaties and custom, which was amply borne out by practice. He agreed with Mr. Nolte's definition of "source" as "the legal process and the form by which a legal rule comes into existence". In other words, the Commission was dealing with the formal sources of international law. He therefore suggested that the Commission should continue its work on that understanding and he hoped that the concerns of Mr. Aurescu and Mr. Murase would be dispelled as work on the topic progressed.

The wording of draft conclusion 1 had been proposed in order to make plain in a clear and concise manner that the purpose of the topic was to consider various aspects of that source of international law. The scope of the topic went beyond that of the topic of identification of customary international law, which had been confined to the methodology for such identification. It would be appropriate for the various aspects of the topic to be explained in the commentary to draft conclusion 1.

Mr. Hmoud had proposed the inclusion in draft conclusion 1 of a reference to Article 38 (1) (c) of the Statute of the International Court of Justice. Although that provision was the starting point of the Commission's work, it was not for the Commission to write a commentary on it; no reference to Article 38 (1) (b) of the Statute had been included in the conclusions on the identification of customary international law. It would be sufficient to mention Article 38 (1) (c) in the commentary to the conclusion. Apart from those proposed amendments, most members had supported draft conclusion 1.

Mr. Murphy's suggestion for a new draft conclusion 2 that would basically reaffirm that the general principles of law were a source of international law in language similar to that of Article 38 (1) (c) of the Statute of the International Court of Justice would be repetitive. A reference to the general principles of law as a source of international law was already contained in draft conclusion 1, whereas draft conclusion 2 covered the recognition requirement. The commentary to draft conclusion 1 would explain that it referred to general principles of law within the meaning of Article 38 (1) (c). It was therefore unnecessary to try to arrive at a definition which might be different.

Most members of the Commission had considered that the general principles of law formed part of general international law, but some, including Ms. Oral, Sir Michael Wood and Messrs. Huang, Murphy and Ruda Santolaria, had expressed doubts about the existence of regional or bilateral general principles, or their relevance to the topic. It had been generally thought that they could be studied at a later date. He personally considered that those principles should not be excluded at such an early stage of the Commission's work. A future report could tackle that question and determine whether general principles of law which were not universal in scope might form part of the topic.

Moving on to methodology, he said that there was general agreement that the point of reference was Article 38 (1) (c) of the Statute of the International Court of Justice, analysed in the light of the practice of States and the jurisprudence of international courts and tribunals. As Mr. Huang and Sir Michael Wood had rightly stated, the Commission's work should focus on the source of international law referred to in that provision, but it should not be restricted by the Court's application thereof. Some members had expressed doubts about the relevance of other international instruments which apparently referred to the general principles of law without using the exact language of Article 38 (1) (c). Those instruments should be examined in order to ascertain their relevance to the topic. Simply to ignore them would leave a yawning gap in the Commission's work and would entail the risk that its treatment of the topic would be incomplete.

Other members, including Mr. Murphy, Mr. Rajput and Sir Michael Wood, had drawn attention to the scarcity of practice in the matter. Mr. Murphy had asked some pertinent questions about how to find State practice related to certain granular or specific questions, such as the functions of general principles of law or the rules for their identification. It was true that such practice was not plentiful, but it did exist in the form of written and oral pleadings of States before international courts and tribunals. Moreover, as Mr. Laraba and Sir Michael Wood had suggested, the fact that the Commission was concerning itself with the topic might encourage States in the Sixth Committee to express an opinion on those questions. Even if States failed to do so, a thorough investigation of general practice might give some indication of their implied understanding of the more specific aspects of the subject. One example mentioned by Mr. Reinisch was the case concerning *Certain Property (Lichtenstein v. Germany)* and its possible implications for the question of whether or not regional or bilateral general principles of law existed. The Commission should pursue its work carefully and transparently. It would obviously be important to take account of the practice of Latin America and other regions.

Diverse opinions had been expressed about the relevance of the practice of international organizations to the topic. He considered that it could not be automatically disregarded and should be studied in tandem with the question of the identification of general principles of law.

Drawing up an illustrative list of general principles of law would be inadvisable, as it would distract the Commission from the central aspects of the topic and any such list was bound to be incomplete. Any references to specific general principles of law should be

placed in the commentary, purely for illustrative purposes and without adopting a position on their merits. On the other hand, he was prepared to annex to his second report a preliminary bibliography to which members could suggest additions.

When adopting the draft conclusions, it would be best to follow the Commission's usual practice of referring the draft conclusions which had been adopted by the Drafting Committee to the Commission in plenary session for their adoption with commentaries. That could be done as from 2020. That procedure would enable the Sixth Committee to react to each stage of the Commission's work, and its comments could then be taken into account before the adoption of the draft conclusions on first reading.

In keeping with the general consensus that the topic should be approached cautiously and rigorously, he would abide by that method and would heed members' comments during debates.

Moving on to the more substantive aspects of the debate, he said that it had yielded some valuable pointers to the direction for future study. One question that was related to that of the legal nature of general principles of law was the possible role of international courts and tribunals in the formation or identification of those principles. That question should be investigated on the understanding that the decisions of international courts and tribunals were a subsidiary means of determining the rules of international law, in accordance with Article 38 (1) (d) of the Statute of the International Court of Justice.

Most members seemed to share his opinion that the general principles of law were supplementary and that one of their functions was to fill in gaps in international law and to avoid findings of *non liquet*. Mr. Reinisch, supported by Mr. Nolte, had expressed the viewpoint that, since there was no hierarchy between the general principles of law and other sources of international law, all sources were at the same level and fulfilled the same functions. It would not therefore be the alleged supplementary character of general principles of law which led to priority sometimes being given to treaties or custom, but the principles of *lex specialis* and *lex posterior*. Mr. Tladi had raised the interesting point of whether general principles of law really fulfilled a different function to that of other sources of international law. The Commission would have to give serious consideration to those issues in future. There had also been general consensus on the need clearly to differentiate between general principles of law and other sources of international law, in particular custom. Future reports would deal rigorously with that matter. Clearly, the parallel existence of general principles of law, rules of customary international law and general principles of law codified in international agreements could not be ignored.

With regard to the elements of Article 38 (1) (c) of the Statute of the International Court of Justice, he noted that several members had queried the meaning of the term "general principles of law" and most had focused on the question of whether that term, in particular the word "principle" was indicative of the characteristics, functions, origins or other aspects of that source of international law, or whether principles could be considered "general" or "fundamental" in the manner described in the report. Some members had maintained that a distinction should be drawn between "principles", "rules" and "norms", and Ms. Galvão Teles had held that "every general principle of law is a rule, but not every rule is a principle". Several other members had emphasized that general principles of law were not necessarily always general or fundamental, since existing practice demonstrated that reliance had been placed on a wide variety of principles of law, including principles with a specific content and principles which might not be fundamental. Mr. Nolte had drawn attention to the fact that it was not the content or wording of general principles of law which distinguished them from other sources of international law, but the form in which they emerged.

Some members had raised important issues regarding the meaning of "general" and "law" in the context of the topic. It had been suggested that the word "general" referred to the degree of recognition which a principle required in national legal systems in order to become a general principle of law within the meaning of Article 38 (1) (c). Other members had been of the opinion that the word "law" could be construed as referring to both municipal and international law. Those were indeed complex matters which required in-depth analysis in the light of existing practice. It would be necessary to ascertain whether

the term “general principles of law” might be simply a term of art used to denote that source of international law without any need to impart a specific meaning to each word.

As far as the notion “recognized” was concerned, members had been unanimous in considering that recognition was a *sine qua non* for the existence of general principles of law and that it would form a central aspect of the Commission’s work. He agreed on that point. The main issues which arose in that connection concerned the degree of recognition required for the existence of a general principle of law and the specific forms which recognition could take in each category of those principles. That question would be examined in depth in a forthcoming report. Members’ comments in that respect had been most useful. Recognition would require a cautious approach. Obviously, the criteria for determining the existence of general principles of law must be strict and not seen as an easy shortcut to identifying norms of international law, as that might undermine other sources. At the same time, those criteria must be fairly flexible if the identification of general principles of law were not to prove an impossible task. Finding a suitable balance would be the key to the success of the Commission’s work on the topic.

The term “civilized nations” had triggered a lively debate. Members had agreed that it was anachronistic and had to be avoided in view of the principle of the equal sovereignty of States. The main question was what alternative term should be used to replace it. Some members were happy to use the term “States”; others had expressed the view that the term “States” might be overly restrictive and did not adequately reflect the scope of the term “nations” and that the latter term was therefore preferable. A variety of possible alternatives had been suggested, including “international community of States”, “international community” and “international community of States as a whole”. The Drafting Committee was the best place to consider them, possibly in the context of draft conclusion 2. His own preference would be for the notion of “community of nations”, drawn from article 15 of the International Covenant on Civil and Political Rights.

Other proposed amendments to draft conclusion 2 included the deletion of the word “generally” and clarification of the requisite level of recognition, changing the wording to “recognition is the essential condition for the existence of a general principle of law” or aligning that draft conclusion with conclusion 2 of the draft conclusions on the identification of customary international law. All those proposals could be discussed in the Drafting Committee. The main purpose of draft conclusion 2 was to reaffirm the fact that recognition was the essential condition for the existence of general principles of law and that such recognition must be wide and representative, but must not necessarily come from each and every State. That question would be dealt with in greater detail in a forthcoming report.

The issue which had given rise to most discussion had been the categories of general principles of law. He did not consider it necessary to study other categories such as principles of legal logic, as they were not generally accepted in learned writings and not clearly supported in practice. Furthermore, it would be wise to avoid an unnecessary proliferation of categories. Similarly, the Commission should not embark upon a discussion of the substance of general principles of law, since it was outside the scope of the topic. Mr. Valencia-Ospina had made clear that both substantive and procedural principles could stem from national legal systems and the international legal system.

Members had unanimously accepted the first category of general principles of law, namely those deriving from national legal systems and they had supported the proposal to identify them in a two-step process comprising, first the identification of a norm or principle that was common to national legal systems and second its transposition to the international legal system. Obviously, each step gave rise to numerous significant questions which would require investigation in a future report on identification. One basic question was the degree of recognition required and how to express it properly in the draft conclusions. In order for a principle to be a “general principle of law”, it had to be found in legal systems in general and not just in a numerical majority of them, or in a sufficiently large majority of them. It was not a matter of simple mathematical calculation.

Mr. Tladi had wondered if the method for identifying that category of general principles of law could be superposed on the method of identifying norms of international

customary law, or whether it could be termed “custom minus”, in other words custom without practice or custom without *opinio juris*. In the case of customary international law, State practice at the national level, as reflected in legislation for example, had to be accompanied by *opinio juris*, in other words the view that acts were consistent with an international right or obligation. On the other hand, when it came to general principles of law deriving from national legal systems, *opinio juris* was lacking and what they must reflect were the norms or principles regulating a given situation at the domestic level. General principles of law common to national legal systems obviously had to be transposed to the international legal order. That transposition process had its own characteristics and was specific to the methodology for identifying general principles of law. The methodology for identifying general principles of law derived from national legal systems must not be confused with that for identifying custom.

He agreed with the members who had considered the second step, transposition, to be crucial. As the debate had shown, recognition was also of relevance to the transposition process. Another question had been whether a compatibility test was necessary. The possible answers to that question could lead to very different results. He had noted with interest Mr. Nolte’s idea that when a principle or norm was common to national legal systems, there would be a presumption that it would apply in the international legal order. Clearly that situation would have to be borne out by existing practice. Mr. Grossman Guiloff and Mr. Murphy had suggested that draft conclusion 3 (a) should include a reference to transposition. No such reference was necessary, as the text of that draft conclusion concerned principles or norms common to national legal systems which already formed part of international law, in other words which had already gone through the transposition process. The draft conclusion simply referred to the description of that category without prejudice to the precise methodology for its identification. Transposition would be expressly referred to in the draft conclusions specifically dealing with that category.

The part of the report which had achieved least consensus had been part four (II) (B), on the second category of general principles of law which might be covered by Article 38 (1) (c) of the Statute of the International Court of Justice. Several members had concurred that the practice mentioned at the end of the report demonstrated *prima facie* that that category did exist. Some members had expressed doubts, but were open to the existence of a second category of general principles of law. Several other members seriously doubted their existence owing to a lack of sufficient practice. They were concerned that some of the examples given in the report could be interpreted as referring to conventional or customary norms or principles derived from national legal systems. They were also worried that the forms of recognition of that second category were too flexible and could undermine the stricter conditions for identifying customary international law. They had, however, suggested that the matter should be given closer consideration. He agreed that the existence of general principles of law formed within the international legal system and the forms of their recognition should be determined in a future report in the light of members’ concerns.

The proposals regarding the rewording of draft conclusion 3 (b) and reversing the order of draft conclusions 2 and 3 could be discussed in the Drafting Committee.

When preparing the second report, he would take account of the suggestion that an in-depth study should be made of the recognition requirement, the identification of general principles of law and the categories of those principles covered by Article 38 (1) (c) of the Statute of the International Court of Justice.

It would be useful to receive information from States in the Sixth Committee on their practice concerning general principles of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice. He would therefore circulate a draft questionnaire for that purpose. A Secretariat memorandum would be a valuable contribution to the Commission’s work on the topic. He would carefully consider which aspect could form the subject of such a study.

Having due regard to the comments and suggestions made during the debate, he requested the referral of the three draft conclusions to the Drafting Committee.

The Chair said that he took it that the Commission wished to refer draft conclusions 1, 2 and 3 to the Drafting Committee, taking into account the comments and proposals made during the debate.

It was so decided.

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

Mr. Grossman Guiloff (Chair of the Drafting Committee) said that for the topic “General principles of law” the Drafting Committee was composed of Mr. Argüello Gómez, Ms. Galvão Teles, Mr. Gómez-Robledo, Mr. Hmoud, Mr. Huang, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Tladi, Sir Michael Wood, Mr. Zagaynov, together with Mr. Vázquez-Bermúdez (Special Rapporteur) and Mr. Jalloh (Rapporteur) (*ex officio*).

The meeting rose at 11 a.m.