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International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3543rd meeting

Held at the Palais des Nations, Geneva, on Monday, 19 July 2021, at 11 a.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Jalloh
	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. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 11.05 a.m.

General principles of law (agenda item 7) (*continued*) (A/CN.4/741 and Corr.1)

Mr. Ruda Santolaria, speaking via video link, said that he welcomed the interesting approach taken by the Special Rapporteur in his second report on general principles of law. He agreed that the Commission's work on the topic should focus on clarifying in practical terms how the existence of a general principle of law under Article 38 (1) (*c*) of the Statute of the International Court of Justice could be demonstrated. To do so, it was necessary to examine the evidence that the principle had been recognized by what were described as "civilized nations" – a term that should be replaced with "community of nations", as proposed by the Special Rapporteur.

He agreed with the distinction drawn in the report between general principles of law derived from national legal systems and those formed in the international legal system. The proposed two-step approach to the former was relevant to determining the existence of a principle common to the principal legal systems of the world and ascertaining its transposition into the international legal system. As highlighted in the report, as many national legal systems as possible should be consulted in order to ensure that a principle had been effectively recognized by the community of nations. Comparative analyses must cover different legal traditions and families, as well as the various regions of the world; the reference to "principles common to the principal legal systems of the world" was therefore appropriate.

One important detail highlighted in paragraph 72 of the report was that the practice of international organizations could be relevant for the purposes of identifying a general principle of law, especially in the case of organizations like the European Union which had been given the power to issue rules that were binding on and directly applicable in the legal systems of their member States.

He agreed that the transposition of a principle from the national sphere into the international legal system occurred if the principle was compatible with the fundamental principles of international law and the conditions existed for the adequate implementation of the principle in the international legal system. As emphasized in paragraph 106, the fact that a principle common to the principal legal systems of the world was reflected at the international level in treaties or other international instruments might serve as evidence of the transposition of that principle into the international legal system. It should be noted, as explained in paragraph 111, that ascertainment of transposition was unique to that source of international law.

He agreed with the idea expressed in paragraph 119 that the methodology for identifying general principles of law formed within the international legal system was different, in that the determination of the existence of a principle required its recognition by the community of nations. To that end, it must be ascertained that the principle was widely acknowledged in treaties and other international instruments, that it underlay general rules of conventional or customary international law or that it was inherent in the basic features and fundamental requirements of the international legal system. The recognition must be wide and representative, reflecting a common understanding of the community of nations. It was important to realize that the three forms of recognition mentioned in paragraph 121 were not mutually exclusive and might coexist in some cases.

Noting that principles were recognized in the sense of Article 38 (1) (*c*) of the Statute of the International Court of Justice through treaties and customary norms, he agreed that a principle thus identified could be applied independently of, and even in the absence of, the relevant rules of conventional or customary international law. The discussion in paragraph 146 *et seq*. was particularly relevant: that section of the report considered the identification of general principles of law falling under the second category – those formed within the international legal system – by ascertaining that they were inherent in the basic features and fundamental requirements of the international legal system, which was a creation of the community of nations. The references to the position of Portugal in the case concerning the *Right of Passage over Indian Territory (Portugal v. India)* were pertinent, in that general principles of law within the meaning of article 38 (1) (*c*) of the Statute also included general

principles inherent in the international order, as well as the principle of *uti possidetis iuris* as a general principle connected to or inherent in the phenomenon of gaining independence, wherever it occurred. As highlighted in paragraph 152, that principle had acquired the status of customary international law; he agreed that a rule could be both a general principle of law and a rule of customary international law. Although general principles of law must be recognized by the community of nations, treaties or other international instruments could reflect such recognition while, at the same time, serving to determine the existence of a rule of customary international law, as pointed out in paragraph 161.

Also with regard to the second category of general principles of law, Article 2 of the Charter of the United Nations and article 3 of the Charter of the Organization of American States should also be mentioned, together with General Assembly resolution 2625 (XXV) of 24 October 1970, containing the Declaration on Principles of Friendly Relations and Cooperation among States. The Declaration referred specifically to certain basic principles of international law concerning: abstention from the threat or use of force against the territorial integrity or political independence of any State; settlement of international disputes by peaceful means; non-intervention in matters within the domestic jurisdiction of other States; cooperation between States; equal rights and self-determination of peoples and the sovereign equality of States; and good faith in the fulfilment of obligations assumed by States in accordance with the Charter.

He agreed that the Special Rapporteur's next report on the topic should deal with functions of general principles of law and their relationship with other sources of international law, and supported referring draft conclusions 4 to 9 to the Drafting Committee.

Mr. Zagaynov said that "General principles of law" was one of the most interesting and complex topics on the Commission's agenda. He had looked at the approaches taken to it in the literature in Russian: a first group of authors found that general principles of law were principles of international law recognized by States in international treaties and international custom; a second considered them to be principles common to international law and national legal systems; and a third saw them as principles derived from national legal systems. Almost all the literature was based on States recognizing the principles either in treaties or in customary law; they should thus not be seen as a separate source of international law.

The history of Article 38 (1) (*c*) of the Statute of the International Court of Justice was frequently referred to in the Commission's work on the topic. The article had been drafted more than a century previously and was based on even older ideas about the sources of international law. He agreed with other members who had called the term "civilized nations" an anachronism. The whole subparagraph should be carefully evaluated through the prism of history and the enormous changes that had taken place in international law. For example, Lord Phillimore, the author of the proposal that had finally been approved, had said that it concerned principles adopted by all nations, but as there had originally been only 44 States members of the League of Nations, an analysis of all their legal systems at the time would have been quite feasible.

The key purpose of general principles of law was to fill gaps in order to avoid situations of *non liquet*, but without giving courts a law-making function. Regulation had progressed greatly in all spheres of international life in recent years, and was now at a qualitatively different level. The risk of a situation arising in which a court would not be able to pronounce a judgment due to a lack of applicable rules of law had been drastically reduced. The thinking in the early twentieth century had been that general principles of law should encompass certain principles of procedure, the principle of good faith and the principle of *res judicata*, as well as a set of well-known maxims, as the Special Rapporteur had noted in paragraph 101 of his first report. At the current time, when both courts and subjects of international law were in a completely different situation, there was no need or reason for a broad interpretation of the scope of the concept of general principles of law, and it was no coincidence that international courts were rarely required to address the topic. An objective assessment was needed of the place and role of that category of legal norms, which, in his view, was quite limited. It would be important to avoid any bias towards natural law or any unjustified departure from the principle of the consent of States to the binding norms of international law.

He could not object to the Special Rapporteur's assertion that there was no formal hierarchy between treaties, customary law and general principles of law. However, the relationship between them had already been a subject of discussion in the Advisory Committee of Jurists and was still being considered in the literature. He shared the view expressed in court rulings and scholarly writings that courts resorted to general principles of law in situations where the provisions of contract and customary law did not meet their needs, an approach that was in line with the original purpose of general principles of law. That approach was adopted in a number of international treaties which contained provisions related to the functioning of the relevant international courts, referring to the compatibility of general principles of law with the provisions of treaties. He considered that to be a sign of the subsidiary function of general principles of law in the system of sources of international law, even if no hierarchy had been established. As Sir Humphrey Waldock had noted, there would always be a tendency for a general principle of national law recognized in international law to crystallize into customary law. Indeed, if a general principle of law was formed, it established a norm binding on States; they would thus, in communication with each other, be guided by it, thereby creating general practice, which was accepted as law. If that were not the case, it would be a principle that was not relevant in international relations, or some dead or dormant rule. The opinion was expressed in the literature that general principles of law were in a latent state in the system of international law, since they had not yet had the opportunity to manifest themselves in international practice. Clearly, they became customary law once they were sufficiently proven in practice.

One important question was whether it should be assumed that, in such cases, a rule would continue to exist in parallel as a general principle of law: the Special Rapporteur was of the view that general principles of law formed within the international legal system must be clearly distinguished from customary international law. His position on general principles of law deriving from national legal systems was less clear, although he stated in paragraph 107 of his second report that the distinction was clear and no confusion should exist between the two sources, and in paragraph 152 that there appeared to be nothing preventing a norm from being both a general principle of law and a rule of customary international law at the same time. The Commission had previously concluded, in its work on the identification of customary international law, that a rule of customary international law might continue to exist and be applicable separately from a treaty. He questioned whether a similar approach would be justified in the case of general principles of law and whether States and courts could use completely different methodologies to derive the same rules, as the Special Rapporteur repeatedly stated. One practical question would be whether the "persistent objector" rule could be circumvented. If, on the contrary, a general principle of law, after transposition into a customary rule, was assumed to be absorbed by the rule and used only to show its historical provenance, that might, *inter alia*, help to address the issue of recognition by States. As many other members had noted, that was a key issue and the current approach to it was problematic.

The general considerations raised in respect of the relationship between general principles of law and other sources of international law were pertinent to the identification of general principles of law. He supported the rejection of the term "civilized nations" but was uncertain as to how the concept of a "community of nations", taken from the International Covenant on Civil and Political Rights, would relate to the concept of an "international community of States as a whole", which had been much discussed under the topic of peremptory norms of general international law (*jus cogens*). Moreover, the terms used in the Russian and Spanish versions of the Covenant, which were equally authentic, were the equivalents of "international community" in English. Sir Michael Wood's suggestion of using the term "States" merited attention.

Regarding terminology, the word "principles", as Ms. Galvão Teles and others had noted, was used in very varied contexts in the second report, not all of which related to the topic at hand. In a number of cases, it concerned principles related to customary international law, which had been noted in the conclusions on identification of customary international law. Furthermore, not all principles in international relations were principles of law. It would be a useful outcome of the Commission's work if order could be brought to the terminology used and a solution proposed to States, for instance, in the commentary.

The second report proposed, as a first step, a comparative legal analysis to determine the existence of a principle common to the principal legal systems of the world. While that was probably the most logical step, it should be borne in mind that, in cases where the International Court of Justice had applied general principles of law, it did not appear to have conducted any such analysis. For example, in its advisory opinion on the *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, the Court had referred to "the principles governing the judicial process", without confirming the content of those principles with any outcome of a study of national legal systems. Similarly, in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, the Court had stated: "It is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact." Nor did the prior practice of the Court on the issue covered in the judgment contain any reference to national law. For it to be considered sufficiently broad and representative, the scope of the comparative legal analysis needed to be expanded.

The ascertainment of transposition into the international legal system raised serious questions. The Special Rapporteur spoke of the "applicability" of principles, or principles that "can be transposed", which seemed to indicate only the potential rather than the actual transposition of a general principle of law into the international legal system. Draft conclusion 6 was concerned with actual transposition where a general principle of law was compatible with fundamental principles of international law and the conditions existed for its adequate application in the international legal system. Thus, recognition by States of a general principle of law as a norm of international law was reduced to clarification by a court of only the potential applicability of such a principle to international legal relations or, in other words, the absence of obstacles to its application in international law. The compatibility of a general principle of law that existed in national legal systems with the nature of the international legal order was really a necessary condition for its transposition, but it was not sufficient, as it did not demonstrate the will of States to use a given principle of law in international relations. The report appeared to imply that the issue would be decided by the courts, but such an approach would be very close to giving the courts a law-making function.

Meanwhile, in the *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, the International Court of Justice had noted that: "Although a right of this kind may be known to certain municipal systems of law, it is not known to international law; nor is the Court able to regard it as imported by the 'general principles of law'." That wording clearly showed that the Court was referring to the need for confirmation of the transposition of the principle and not simply the possibility of its transposition.

Regarding recognition, he agreed with Sir Michael Wood that the issue should not be simply recognition that a general principle existed, but also recognition that the principle had been transposed into the international legal system or otherwise recognized as part of international law. There was no mention of recognition or practice in the draft conclusions proposed in the report; a starting point could be the absence of any objections from States. Furthermore, although the Special Rapporteur did not consider State practice as one of the constitutive elements of the identification of general principles of law derived from national legal systems, it could be seen as evidence of the formation of a general principle of law and its recognition by States. Forms of practice could probably be taken largely from the conclusions on identification of customary international law.

In respect of fundamental principles, the Special Rapporteur pointed in paragraphs 83 and 84 of the report to the need for a principle *in foro domestico* to be compatible only with fundamental principles of international law, and not with other general rules of international treaty and customary law. Like other members, he had questions about the choice and wording of the proposed fundamental principles. Also, in his opinion, since the main purpose of general principles of law was to fill gaps, they should not emerge if there were applicable rules in treaty or customary law governing the issue. He did not therefore think that compatibility only with the fundamental principles of international law was a sufficient criterion in that regard. Judge Gaja of the International Court of Justice had said that: "When the Court finds that there is convergence in the relevant aspects of municipal law, an additional test should concern the compatibility of the principle emerging from municipal laws with the framework of the principles and rules of international law within which the

principle would have to be applied." The parameters of the test were thus not reduced to fundamental principles alone, but included other rules.

Regarding general principles of law formed within the international legal system, he shared the questions and doubts expressed by other members of the Commission. While the approaches to the topic required further development, the Commission should not give up its consideration of the topic.

Lastly, he agreed with Mr. Rajput, who, if he had understood correctly, had said during the Commission's seventy-first session in 2019 that the purpose of the Commission's work was not to permit a theoretical dispute between different approaches but to provide practical solutions for the application of general principles of law. He thought it would be possible to achieve a good quality outcome on that basis, and was ready to contribute to the work of the Drafting Committee on the topic.

Ms. Escobar Hernández said that the Special Rapporteur's treatment of the identification of general principles of law in his second report appropriately reflected the debates on the topic in the Commission and the Sixth Committee in 2019. She largely supported his reasoning for proposing that "civilized nations" should be replaced with "community of nations", as used in article 15 (2) of the International Covenant on Civil and Political Rights. It was a positive step that a human rights instrument had been taken as a point of reference. However, she was concerned that the various language versions of the Covenant used different expressions. For example, while the English version used "community of nations", the Spanish used "*comunidad internacional*" and the French "*l'ensemble des nations*". If the Commission took the expression used in one of the language versions of the Covenant and translated it literally into the other languages in the draft conclusions, uncertainties could arise as to the meaning of the expressions in both the Commission's draft conclusions and in the Covenant. The Commission should therefore consider the choice of expression more carefully. The Drafting Committee could perhaps review the terms used by the Human Rights Committee in its recent work to see whether there had been any harmonization of the three expressions mentioned. If not, the Commission should either not mention article 15 (2) of the Covenant as the source of the expression "community of nations" and its literal translations into the other languages, or else it should use in each language version of the draft conclusions the expression used in the corresponding language version of the Covenant.

The term "principles" appeared in a variety of formulations in the report – such as "general principles of law", "general principles", "principles of international law", "fundamental principles of international law" and, to a lesser degree, "structural principles of international law" – that referred to distinct legal concepts and categories. The exclusive focus of the topic before the Commission was "general principles of law", understood as the source of law set out in Article 38 (1) of the Statute of the International Court of Justice. Despite the Special Rapporteur's attempts to avoid the confusion that resulted from such a variety of usage, the term "principles" was not always used with the same meaning in the report. In addition, the expression "fundamental principles of international law" had been introduced into draft conclusion 6 (a). To provide some clarity, at least three categories of principles should be distinguished in the draft conclusions: first, general principles of law, in the strict sense of the term, as a source of law; second, fundamental – that is, basic or structural – principles of contemporary international law of a clearly substantive nature; and, third, principles used in the international legal system largely, although not exclusively, for purposes of interpretation. General principles of law, in the strict sense of the term, should also be distinguished from seminal rules that, while not themselves principles, did reflect principles. She therefore agreed with other members that there should be an additional draft conclusion setting out the essential elements of "general principles of law" as a source of law, which would help define the scope of the topic. The proposal could perhaps be addressed in greater detail after the Special Rapporteur submitted his analysis of the functions of general principles of law in his third report.

There had been disagreement among Commission members as to whether general principles of law as a source of law could only be derived from national legal systems or could also be formed within the international legal system. If legal practitioners such as judges, when faced with cases where there was no specific rule to be applied, sought to

resolve the disputes before them by identifying abstract elements common to the various rules of the relevant legal system, and if general principles of law could be conceptualized as that process, there seemed to be no reason to conclude that abstract principles could not be extracted from international legal rules and that general principles of law could not exist in the international legal system. Such a conclusion would imply that the international legal system could not avail itself of the abstract categories used by all legal systems to fulfil one of the essential functions of the law: settling disputes and maintaining social peace. At a time when institutional dispute settlement was on the rise in international law, situations of *non liquet* could be averted through the application of general principles of law of either national legal systems or international law itself.

Although she did not entirely agree with the Special Rapporteur's reasoning in the second report or the draft conclusions as drafted, she fully agreed that there were two types of general principles of law, one derived from national legal systems and one formed within the international legal system. In response to arguments made by other members of the Commission against the existence of the second type, she wished to note that, regardless of whether or not the *travaux préparatoires* relating to Article 38 (1) of the Statute of the International Court of Justice indicated that the authors intended to provide only for principles *in foro domestico*, the text of Article 38 (1) itself contained no mention of domestic law as the sole source of general principles of law and referred only to general principles of law "recognized by civilized nations", language that had to be understood in the historical context in which it had been adopted. Given that the international legal system had had little structure and had still been in developing in the early twentieth century, it was not unusual that national legal systems had been the point of reference. Not to allow for an evolving interpretation of a treaty provision such as Article 38 (1) would go against the Commission's previous work on the interpretation of treaties in the light of later agreements and subsequent practice.

She found unconvincing the arguments against the existence of the second category of general principles of law that were based on the difficulty of distinguishing general principles of law formed within the international legal system from international rules based on custom or treaties. That difficulty, which was real, had to be addressed through a detailed examination of the relationships between treaties, custom and general principles and, to the extent applicable, the interaction among them, keeping in mind the lack of a hierarchy among them and the different function of each in the international legal system. She was also not convinced that the identification of general principles of international law could undermine *jus cogens* norms, in particular because the definition of such norms in article 53 of the Vienna Convention on the Law of Treaties indicated that they were accepted and recognized by the international community of States as a whole, a description that could include not only custom but also general principles of law formed within the international system.

Turning to the draft conclusions, she said that she supported the two-step analysis set out in draft conclusion 4 for the identification of general principles of law derived from national legal systems. However, that conclusion should be redrafted so as to incorporate the concept of recognition, which was essential for the definition of that category of general principles of law. In addition, the phrase "its transposition to the international legal system" should be reformulated so that it could not be interpreted as requiring a formal act of transposition. She had a similar concern with respect to draft conclusion 6.

She was concerned by the use of "legal families" as a category in draft conclusion 5. Although that category was applied in comparative law, it was uncommon in international law. As noted by other members, experts in comparative law did not agree on what those "legal families" were. She would suggest that "legal families" should be replaced with "principal legal systems of the world" [*principales sistemas jurídicos del mundo*], a formulation used in both the Statute of the International Court of Justice and the Statute of the International Law Commission. The commentary should state clearly that the expression did not refer only to the common law and civil law systems. Ensuring representativeness, including both at the regional and subregional levels, was a key factor in reviewing the national legal systems that formed part of the "principal legal systems of the world". She supported the insertion of the word "sufficiently" before the phrase "wide and representative" in draft conclusion 5 (2), as proposed by Ms. Galvão Teles and supported by Ms. Lehto.

Draft conclusion 6 was the most problematic of the draft conclusions addressing general principles of law derived from national legal systems, largely because its formulation reinforced the idea that transposition was a formal act. In addition, a reading of the two paragraphs of the draft conclusion together suggested that a general principle of law derived from national legal systems did not exist until it had been transposed to international law. Such a view was incompatible with the nature and functions of general principles of law, which were, by definition, identified over the course of a non-formalized process, in the context of resolving a specific dispute. The phrase "fundamental principles of international law", about which members had expressed significant concerns, should be removed from draft conclusion 6 (a) and replaced with a formulation that better reflected the criterion that, she believed, the Special Rapporteur had wanted to set out: that there should be no conflict between the general principle of law derived from national legal systems and the basic elements of the international legal system. In addition, the reference in subparagraph (b) to the conditions for the adequate application of the principle in the international legal system seemed rather general and imprecise.

She had serious doubts about draft conclusion 7 as it was drafted. The distinction between the three categories of principles described in subparagraphs (a), (b) and (c) – particularly the first two subparagraphs – was not clear. In her view, when describing the relationship of a principle to other rules of international law in subparagraphs (a) and (b), it would be more appropriate to say that the principle was "reflected" [*encuentre su reflejo*] in the other rule rather than to say that it was "recognized" in treaties and other international instruments or "underlay" rules of conventional or customary international law. Furthermore, the reference to conventional or customary international law required clarification. It was difficult to understand what general principles of law would fall under the category described in subparagraph (c); the explanation provided in the report was not sufficiently clear. It was clear that the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (the Nürnberg Principles) and the Martens clause, which were both included in the Special Rapporteur's analysis of practice in his report, reflected general principles of law formed within the international legal system. There should be a more detailed examination of that category of general principles of law.

While she did not object to the Special Rapporteur's decision to reproduce almost verbatim the conclusions on subsidiary sources included in the Commission's conclusions on identification of customary international law, the Drafting Committee should review the language used in detail in order to determine any changes that might be necessary and to identify the key elements that should be included in the commentaries to the two draft conclusions.

With regard to Mr. Valencia-Ospina's observation that the decisions of international courts and tribunals were assigned a secondary role even though their decisions constituted a key source of the practice referred to in the second report, it would be helpful if that point could be addressed in the third report. She did not object to the Special Rapporteur's proposal to deal with the functions of general principles of law and their relationship with other sources of international law in the third report. However, as noted by Mr. Grossman Guiloff, addressing those issues without taking account of how general principles were formed, seemed an extremely difficult task. The formation of general principles of law should therefore also be addressed in the third report.

She supported the referral of all the draft conclusions to the Drafting Committee, on the understanding that the Drafting Committee would consider them together with the comments and suggestions made by Committee members.

Mr. Gómez-Robledo said that the Special Rapporteur had taken into account many of the comments made at the seventy-first session of the Commission regarding the need to distinguish between the identification of customary international law and the recognition of general principles of law and to avoid confusing the criteria required for doing so. He generally supported the line of reasoning followed by the Special Rapporteur in the report and the draft conclusions proposed. However, the phrase "community of nations", used in draft conclusion 2, was perhaps not the most appropriate alternative to "civilized nations", an expression the Commission had agreed to discard. The debate had demonstrated that there was no consensus around the phrase proposed by the Special Rapporteur. He would propose

that the words "as a whole" – "*en su conjunto*" in Spanish and "*dans son ensemble*" in French – should immediately follow the phrase "community of nations". If the Commission did not look more deeply at the expression to be used in draft conclusion 2, it would be extremely difficult to make progress on the identification of criteria for the recognition of general principles of law.

On the basis of Georges Scelle's discussion of Article 38 of the Statute of the International Court of Justice, it could be said that general principles of law were norms that were necessary and universal in nature. The universality of a general principle of law could be seen in the fact that it had arisen from the principal legal systems of the world or had been formed within the international legal system, and that universality reflected the position of the community of nations as a whole.

The community of nations was not exclusively made up of States: it must include the original or first nations on which many States, such as Mexico and Ecuador, were based. Such States had recognized the customs and traditions of their indigenous peoples, which were translated into their own legal systems. Therefore, the concept of *jus gentium*, which came from Spanish theologian Francisco de Vitoria, comprised an intermediary entity between the State and the individual: the nation. That concept was inseparable from the one that conferred equal dignity on indigenous nations and European nations. However, "nation" was not synonymous with "State", as its use in English might suggest. In Spanish, the nation was a condition of the State. That being the case, the term "community of nations" chosen by the Special Rapporteur did not meet the criteria of universality and necessity. In his view, the only expression that would meet those criteria was "community of nations as a whole". Another advantage of that expression was that the Commission had already used the qualifier "as a whole" in conclusion 7 on the topic "Peremptory norms of general international law (*jus cogens*)". Paragraphs 5 and 6 of the commentary to that draft conclusion were of particular relevance to the current discussion.

It was in that context that the opinion of Judge Cançado Trindade should be understood; he had considered general principles of law to be those principles that "confer to the legal order (both national and international) its ineluctable axiological dimension", insofar as they embodied "important or fundamental values". If general principles of law ought to apply in the relations between subjects of international law generally – which were not restricted to States, although the Commission's work was primarily concerned with them – judges could have recourse to what the European Union, as cited in the Special Rapporteur's first report, called the "interaction between international law, national law and the dictates of reason, common sense or moral considerations". That was perhaps why recourse to principles of Roman law to draw on general principles of law was so frequent: not only did Roman law constitute a legal system adopted by numerous States far removed from the Mediterranean basin, but it was also generally recognized as written reason – *ratio scripta, ratio legis*.

The Special Rapporteur had been very rigorous in making a distinction from the methodology followed for the identification of customary international law, yet, importantly, had avoided making comparisons that could have a reductionist effect on the general principles of law. Undoubtedly, a rule of customary international law could designate a rule that was also contained in a general principle of law, but they had different origins and different forms of identification and were therefore equal and independent sources of international law.

He was therefore surprised that, in the second report, the Special Rapporteur had not dealt with the question of the relationship between the general principles of law and *jus cogens* norms. He hoped that the third report, which would focus on the functions of the general principles of law, would address that question and enable the Commission to make progress on the definition of the term to be used in draft conclusion 2. In conclusion, he supported sending all the proposed draft conclusions to the Drafting Committee.

Mr. Argüello Gómez, speaking via video link, said that the Special Rapporteur's second report was an extensive and well-documented study of the interpretation of Article 38 (1) (*c*) and (*d*) of the Statute of the International Court of Justice as a source of international law. The length and level of detail contained in the report contrasted, for

example, with the four pages devoted to the topic in the very extensive and detailed ninth edition of *Oppenheim's International Law*.

The fact that the study of general principles of law as a source of international law focused on Article 38 of the Statute of the International Court of Justice was somewhat problematic. First, that article did not aim to identify the sources of international law, but rather the rules that the Court must apply in order to reach its decisions. However, the purpose of the Commission's study could not be to explain to the Court how it should interpret Article 38; rather, it should be to present the correct meaning of the relevant part of Article 38 as applied in any field of international law. Indeed, the Rapporteur indicated in paragraph 10 of his report that the purpose of the topic at hand was "to provide practical guidance to all those who may be called upon to apply general principles of law". In reality, the topic was supposed to be confined to the study of the necessary conditions that a general principle of law must fulfil in order to fall within the scope of Article 38. In his view, the relationship between the topic and Article 38 of the Statute made it all the more necessary to come up with a universally applicable definition of the concept of general principles of law, as had been suggested by several members of the Commission.

As for the term "civilized nations", most speakers had pointed out that it was an anachronism that needed to be corrected. He stood by the comments he had made on that point in his statement on the Special Rapporteur's first report at the seventy-first session. However, he believed that there were other aspects of Article 38 that were also anachronistic. When the Article had been drafted by the Advisory Committee of Jurists in 1920, the international law accepted by States had been very limited. After all, the United Nations had not existed then, much less the law of the sea, the law of treaties or human rights law, for example. It was clear from the *travaux préparatoires* of Article 38 that the fear that, in the absence of a clear rule of law, the Court would have to issue a verdict of *non liquet* had led the members of the Committee to consider sources other than treaties and custom, which in turn had led to the inclusion of subparagraphs (*c*) and (*d*). In his opinion, the paucity of international law at the time had also led to the references to "civilized nations", judicial decisions and the teachings of publicists.

In practice, in the hundred years since its establishment, the International Court of Justice had never found itself in the position of having to avoid a *non liquet* verdict by having recourse to the general principles of law, much less to the teachings of publicists or even its own judicial decisions. Were the same issues to be discussed by a committee of jurists today, surely most members would see no need for the inclusion of subparagraphs (*c*) and (*d*). While useful, those subparagraphs needed to be brought up to date. Not only did the expression "civilized nations" need to evolve, but the resolutions of international organizations, particularly the United Nations, and the work of specialized bodies, such as the International Law Commission, must also be incorporated into those two subparagraphs.

It might be argued that a United Nations resolution could not be given the force of a general principle of law if it had not been adopted unanimously. However, if a judicial decision or arbitral award, which was not necessarily unanimous and was issued by judges or arbitrators often chosen by the parties, was considered a subsidiary form of evidence, one might wonder why a decision most often issued by the great majority of the nations of the world was not given equal treatment. Could it be that the majority were not civilized nations? If unidentified publicists were granted certain powers as subsidiary means for the determination of the rules of law, then where did the members of a commission created by the United Nations precisely to examine those issues fit in? The Commission had always considered it of the utmost importance to take into account the views expressed by States in the Sixth Committee on its work, even though the States that expressed those views generally did not represent even 20 per cent of the membership of the United Nations. The Commission was pleased, for example, that four States had responded to its questionnaire on the topic at hand, yet it appeared to accept that the United Nations and all of its entities, including the Sixth Committee and the Commission, could be ignored in favour of publicists and arbitrators.

In addressing the issue of which nations should be included in a new term to replace "civilized nations", some speakers had indicated that geographical location should be taken into account in order to get as close as possible to universality. For the election of judges to

the International Court of Justice, Article 9 of the Statute – similar to article 8 of the Commission's own Statute – provided that "the main forms of civilization and of the principal legal systems of the world" should be represented, but in practice the only criterion that really prevailed was the regional one. Thus, the Court currently did not have a single judge from a Spanish-speaking country, with the cultural and legal background that that implied, although there was technically a judge from the region. In that case, the geographical regions into which the United Nations had divided the world were represented, but he did not believe that the great civilizations and the main legal systems of the world were adequately represented. That reality must be taken into account when proposals were made to include all regions of the world. Finally, in his view, any departure from the criteria set out in Article 9 of the Statute of the Court and article 8 of the Commission's Statute should be considered with great caution.

The Special Rapporteur had made a pertinent observation concerning the different expressions used in Article 38; reference was made to conventions that must be "recognized" by the contesting States, custom that must be "accepted" as law and general principles of law that must be "recognized" by civilized nations. He wished to focus on the differences in determining the existence of a customary rule and a general principle of law in the context of General Assembly resolutions. In conclusion 10 of the conclusions on identification of customary international law, the Commission had stated that forms of evidence of acceptance as law (*opinio juris*) included the conduct of States in connection with resolutions adopted by an international organization. In other words, the adoption by the United Nations of a resolution or declaration did not entail acceptance by a State that the norm to which it referred constituted customary law; nor did it prove the existence of that norm as such or that it was applicable to a State that had not accepted it. In the case of general principles of law, it was not necessary for States to express a conviction that the principles were binding: they must simply recognize them. In that case, the declaration itself was an important form of evidence, which also implied that the principles were accepted as binding. If a general principle of law was acknowledged to exist, it was acknowledged to be binding, otherwise it would be a moral principle or principle of some other kind.

The different ways of determining the existence of a customary rule and a general principle of law also highlighted the special significance that General Assembly resolutions dealing with or pointing to general principles of law could have. If a General Assembly resolution declared the existence of a principle, it was simply recognizing it. It was not necessary for United Nations members to express their approval and act accordingly.

In Article 38, there was another important difference between subparagraphs (*a*) and (*b*) and subparagraph (*c*). Subparagraphs (*a*) and (*b*) referred to the application of "international conventions" and "international custom", respectively, whereas in subparagraph (*c*) the word "international" did not appear, and the reference was simply to "general principles of law". The most obvious explanation for that difference was that the authors of Article 38 had not been thinking of general principles of international law but rather of the domestic law of States.

With regard to the existence of two categories of general principles of law – those arising from the domestic law of States and those formed directly in the international system – the comments he had made on the second category during the debate on the Special Rapporteur's first report at the seventy-first session remained valid. The existence of the second category had not been accepted by a significant number of members, himself included. The existence of the second category could not be deduced from Article 38 or the *travaux préparatoires*. Given the developments in the law over the past hundred years and the fact that the Court had never had to use subparagraphs (*c*) and (*d*) for their intended purpose – to avoid a finding of *non liquet* – it was hardly justifiable for the Commission to now seek to increase the categories of general principles of law.

It was claimed that the second category of principles was based on international law alone and not on the domestic law of States. Principles that did not derive from domestic law could only derive from treaty and customary norms and were therefore either the very same norms under another name or logical constructions on the basis of those same norms. If it were to be accepted that those logical constructions based on pre-existing norms were principles emanating from international law itself, then it could be concluded that the entire

international legal system was nothing more than a logical deduction that had been made from fundamental principles such as sovereignty.

As other speakers had already noted, the examples given by the Special Rapporteur of principles formed within the international legal system were basically derived from the general principles of the domestic law of States. With respect to the Nürnberg Principles, for example, all the atrocities committed during the Second World War had already been considered as crimes under the legal systems of the vast majority of States. The principles had already existed and had simply been transposed to the international level at Nürnberg in order to be applied in the trial of criminals.

Environmental rules had also been derived from the domestic law of States and transposed to the international level. The prohibition of environmental damage to the detriment of others was a rule known at least since Roman times. Contemporary law had simply equated the consequences of damage to a particular individual caused within a national jurisdiction with the consequences if that damage were caused to the individual by another State. Similarly, international law had extrapolated the consequences of damage caused between private individuals in one State to damage caused to all "private individuals" in the world.

In his statement on the Special Rapporteur's first report at the seventy-first session, he had noted that the *Corfu Channel* case was similar in nature to the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. In the latter case, one of the main issues had been the mining of Nicaraguan ports by the United States in peacetime and without prior notice. In that case, although the Court had not been able to resort to existing treaty norms, it had not considered it necessary to have recourse to general principles of law, instead declaring that: "The United States of America, by failing to make known the existence and location of the mines laid by it … has acted in breach of its obligations under customary international law in this respect."

He did not agree with the Special Rapporteur's assessment that *uti possidetis juris* was a general principle of law that had been created at the international level. *Uti possidetis juris* was a Roman law institution whose rules had been incorporated into many domestic legal systems, including that of the Latin American colonies. At the time of their independence, those colonies had transposed the traditional rules of domestic law to the international level.

However, even if it was accepted that there was a category of general principles of law that were formed directly at the international level, what that would really involve was a process of formation of rules of customary law. Principles originating in domestic law did not disappear when they were transposed into international law, but subsisted in domestic law. Principles created in international law would presumably subsist at that level but would have the force of binding rules, in other words customary law rules. For that reason, he did not believe that that category should be included in a study on the formation of general principles of law, as it involved the formation of a class of customary law rules. With regard to the Special Rapporteur's claim that there appeared "to be nothing preventing a norm from being both a general principle of law and a rule of customary international law at the same time", he agreed with Mr. Park that when a general principle of law had evolved into customary international law, such a norm could no longer be considered a general principle of law.

With regard to distinguishing between general principles of law formed in the international legal system and customary law, in paragraph 165 of the report the Special Rapporteur explained that in the case of such general principles of law, one did not need to look for a "general practice and its acceptance as law (*opinio juris*)" but that what mattered was the "clear acknowledgement" of the existence of a legal principle of general scope of application. That distinction was unclear to him. If a principle had been recognized as generally applicable in the international field then, like custom, it reflected a general practice or recognition which was accepted as law in the same way as custom was.

Concerning the transposition of rules, it was important to make clear how transposition was carried out and, in particular, by whom. He generally agreed with the view expressed by Mr. Murase that transposition occurred only through the active role of the Court and that it was the transposition to the level of "application of law to a specific dispute".

Bearing in mind that the ability to be transposed was a fundamental condition for a general principle of law to be considered applicable at the international level, the requirements it must fulfil could essentially be found in case law. A principle might be recognized in the domestic law of all nations, but it was the judge or arbitrator who would decide whether it could be transposed to the international level. That being the case, judicial practice was particularly important when analysing the requirements for a general principle of law to be transposed to the international level. Those considerations must be taken into account in the analysis of the evidence of transposition.

With regard to the proposed draft conclusions, in his view they should be reviewed in the light of the comments made in the plenary at the current session and at the seventy-first session. In particular, attention should be paid to draft conclusion 3, which included among the general principles of law those formed in the international legal system, and draft conclusion 7, which contained rules for the identification of those principles. Substantive elements of draft conclusion 7 had been called into question and it was thus not ready for discussion in the Drafting Committee.

While draft conclusions 4 to 6 could be sent to the Drafting Committee, he wished to make a number of comments on them. Although it was generally accepted that general principles of law formed and applied at the regional level could exist, that fact was not reflected in the draft conclusions. Perhaps a reference to that point could be included in draft conclusion 5; certainly, there was no need for a wide and representative analysis of the "different legal families and regions of the world" to determine the existence of a regional principle. Otherwise, that point could perhaps be addressed in a later draft conclusion dealing specifically with the issue. The comparative analysis mentioned in draft conclusion 8 to determine the existence of a principle common to the principal legal systems of the world should also include a broader analysis of acts of government. For example, the declaration by President Truman concerning the continental shelf could not be classified as a simple legislative act, much less a judicial act, but it was an act that had had a major impact in the United States and at the international level.

In his view, draft conclusion 8 should not merely reproduce the content of Article 38 (1) (*c*), as that formulation reflected the situation in 1920. Rather, it should refer, among other things, to the acts and resolutions of the United Nations concerning the existence and content of general principles of law.

Draft conclusion 9 also needed to be updated. In 1920, reference had been made to the "teachings of the most highly qualified publicists" because international law had been so underdeveloped. At the time, if one wanted to study the law of the sea, it was necessary to consult the teachings of publicists like Grotius, whereas today the United Nations Convention on the Law of the Sea meant that there was no longer the same reliance on such teachings. Moreover, Article 38 did not take into account the establishment of specialized bodies for the study and development of international law, such as the Commission. It was anachronistic to continue referring to publicists and to ignore the current situation where the entities created by the "civilized nations" – the States Members and observer States of the United Nations – did exist. As Sir Ian Brownlie, who could rightly be recognized as a highly qualified publicist, had said: "Sources analogous to the writings of publicists, and at least as authoritative, are the draft articles produced by the International Law Commission."

In conclusion, he believed that the draft conclusions proposed in the second report, with the exception of draft conclusion 7, should be sent to the Drafting Committee.

The meeting rose at 12.50 p.m.