Provisional

For participants only

14 September 2021

Original: English

International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3544th meeting

Held at the Palais des Nations, Geneva, on Monday, 19 July 2021, at 3 p.m.

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General principles of law (*continued*)

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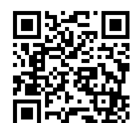

***Present*:**

Chair:	Mr. Hmoud
Members:	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	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. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

***Secretariat*:**

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

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

Mr. Petrič said that the topic of general principles of law was of great practical and theoretical interest. In his comments on the Special Rapporteur's second report (A/CN.4/741 and A/CN.4/741/Corr.1), which had stimulated a highly engaging debate in the Commission, he would at times play the role of devil's advocate in a bid to clarify some of the issues at stake.

The Commission's task was to develop a better understanding of the nature and role of general principles of law and the methodology for their identification. General principles of law had been recognized as an independent source of international law, on the same level as treaties and custom, in Article 38 of the Statute of the Permanent Court of International Justice, which had served as the basis for Article 38 of the Statute of the International Court of Justice. Those three sources were recognized by all subjects of international law, as shown in particular by State practice. His basic position was that general principles of law were an independent source of international law defined in Article 38 (1) (*c*) of the Statute of the International Court of Justice, which should serve as the point of departure for the Commission's work on the topic.

From the history of the concept, which was covered in depth in the Special Rapporteur's first and second reports and in the memorandum by the Secretariat on general principles of law (A/CN.4/742), it was clear why general principles of law had originally been recognized as a source of international law. At the time, international law had consisted essentially of customary rules, since so little had been codified at the international level. There had consequently been many gaps in the international legal system. General principles of law had been recognized as a further source of international law in order to avoid situations of *non liquet*. Such principles had been understood to be those that had been generally accepted in the legal systems of all the sovereign States then in existence. In fact, they were the principles without which no legal system could be imagined. Principles such as *pacta sunt servanda*, *ex injuria jus non oritur* and *nemo plus iuris transferre potest quam ipse habet*, for example, were fundamental to any organized legal system, including the international legal system. In that sense, general principles of law shared a basic common feature: they had been developed and were present and generally accepted *in foro domestico* and had subsequently been integrated into the international legal system as an accepted independent source.

In contemporary international law, there were many examples of general principles of law, within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice, that had been derived from national legal systems. They could be found in various branches of law, including international criminal law, in particular its procedural aspects, and international environmental law.

In 2019, following the debate on the Special Rapporteur's first report, it had been concluded that the topic was to cover the legal nature of general principles of law as a source of international law. The Commission should therefore focus on those general principles that constituted sources of international law in accordance with Article 38 (1) (*c*), which made explicit that such principles were derived from national legal systems. That category of general principles of law was covered in part two of the report. He supported the Special Rapporteur's approach in that part, in particular the proposed two-step analysis for the identification of general principles of law derived from national legal systems. He also shared the Special Rapporteur's views on the term "civilized nations", which should be replaced.

Consequently, he considered that draft conclusions 4, 5, 6, 8 and 9 offered a solid basis for further work in the Drafting Committee. Those draft conclusions helped to clarify the nature and role of general principles of law and the process by which they were to be identified on the basis of State practice. In that sense, general principles of law were an independent, formal source of general international law that operated *erga omnes*. It seemed that most members of the Commission and, judging by their comments in the Sixth Committee in 2019, most States largely agreed with the Special Rapporteur's views in that

regard. The draft conclusions proposed in the second report had already contributed to the furtherance of the Commission's wider aim of promoting clarity, stability and the principle of *lex certa* in international law.

As for the future programme of work, the Special Rapporteur should consider the relationship between general principles of law and other categories of norms, in particular the other two sources of international law, the fundamental principles of international law derived from the Charter of the United Nations, norms of *jus cogens* and norms of "soft" international law.

Turning to part three of the report and draft conclusion 7, he said that he shared the reservations that had been expressed by several members of the Commission, if not the majority, and by States. Those reservations largely concerned the Special Rapporteur's decision to treat certain principles formed within the international legal system as general principles of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice. In particular, he shared the reservations that had been expressed regarding the use of a deductive methodology in the context of the topic and of international law in general. As the international legal system lacked a central legislative organ, it was based on State practice. Treaties, custom and general principles of law were a reflection of such practice. For the purposes of identifying general principles of law within the meaning of Article 38 (1) (*c*), an inductive methodology that took the actual practice of States as its point of departure was the most appropriate. That point had been made several times during the debate, including by Mr. Rajput.

With commendable intellectual curiosity, the Special Rapporteur had not wanted to overlook the contemporary reality that treaties, customary international law and "soft" international law such as General Assembly resolutions and declarations often referred to "principles", using expressions such as "principles of international law", "basic principles" or "fundamental principles of international law". Nevertheless, he did not agree that principles formed within the international legal system could constitute general principles of law within the meaning of Article 38 (1) (*c*). In his view, such principles were something altogether different. The Special Rapporteur had provided various examples of principles formed within the international legal system, including the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles), the Martens clause and the principle of *uti possidetis juris*. Yet such principles were lacking one of the constitutive elements of general principles of law within the meaning of Article 38 (1) (*c*), namely the fact of having been formed and being present *in foro domestico* and being widely recognized in contemporary national legal systems. He doubted that the Commission had a mandate to alter the clear meaning of that provision.

As was evident from State practice, a principle that was present in a treaty or treaties was binding only *inter partes*, while a general principle of law within the meaning of Article 38 (1) (*c*) was binding *erga omnes*. Even if a principle was present in several treaties, to transform it from a principle of treaty law into a general principle of law within the meaning of Article 38 (1) (*c*) would be to transform a treaty obligation into a norm that was binding *erga omnes*, which would be difficult to accept.

Various legal principles were mentioned in treaties. Although they might even have a *jus cogens* character, they ultimately originated in and formed part of treaty law and were distinct from general principles of law within the meaning of Article 38 (1) (*c*). The "fundamental principles of international law" were a good example. They had originally formed part of treaty law, having been set out in the Charter of the United Nations. Several of them had since become customary law or *jus cogens* norms. However, although they had been widely recognized in other international instruments, they were not considered to be general principles of law within the meaning of Article 38 (1) (*c*). The Commission would be undermining legal security and the principle of *lex certa* if it reshaped the concept of general principles of law to include principles present in treaties, customary international law and even "soft" international law that did not meet the criteria set out in that provision. Such an approach would open the door to claims that various types of principles should be accepted as general principles of law.

It seemed that the members of the Commission were divided with regard to only one of the proposed draft conclusions, namely draft conclusion 7. The central question was whether, under the conditions set out in that draft conclusion, principles present in treaties, customary international law and even “soft” international law could be recognized as general principles of law within the meaning of Article 38 (1) (*c*). That question should certainly be discussed by the Commission, but it should ultimately be decided by States. Their decision should not be rushed. Further research should be undertaken to clarify the role and functioning of the various principles – however they were designated – that were present in treaties, customary international law and “soft” international law, the relationship among them and their relationship to general principles of law derived from national legal systems. The Special Rapporteur should be given the time to consider the reservations expressed by members of the Commission and States. In addition, the Commission should seriously consider specifically requesting States to express their views on that aspect of the topic. That said, he would not object to a discussion of draft conclusion 7 in the Drafting Committee.

The Chair, speaking via video link, and as a member of the Commission, said that the Special Rapporteur, in the second report on general principles of law, had taken a comprehensive and deeply analytical approach to the question of the identification of general principles of law. The report was well structured and contained a thorough overview of relevant doctrine and jurisprudence. The Special Rapporteur’s analysis, in particular of State practice and of the pronouncements of international and national courts and tribunals, would allow the Commission to reach conclusions regarding the rules underlying the process of identification. While divergent views had been expressed on the methodology for that process, the report nevertheless served as a solid basis on which the Commission could clarify its position regarding the draft conclusions proposed by the Special Rapporteur.

He could be brief in his statement, as most of the points that he wished to raise had already been addressed by other members of the Commission during the debate. Beginning with some general comments, he said that the first category of general principles of law, those derived from national legal systems, had met with consensus in the Commission, whereas the second, those formed within the international legal system, remained contentious. The report made clear that the first category was a source of international law as established in Article 38 (1) (*c*) of the Statute of the International Court of Justice, practice and case law. By contrast, support for the second category could be found mainly in the writings of publicists, the literature, and the arguments formulated by a few States in contentious cases. While the support expressed for the second category in the Sixth Committee should certainly be taken into account, it amounted neither to recognition by the international community that such a category existed nor to support for the content of the proposed draft conclusions that concerned the methodology for the identification of principles falling into that category. In its work on many other topics, the Commission’s mandate was to codify existing rules of international law and to develop new ones, as *lex ferenda*. However, for topics that concerned the sources of international law, its mandate was limited to codifying existing rules and facilitating the process of identification through an appropriate methodology. Even then, the Commission should refrain from inventing new methodologies. A rigorous approach should be maintained at all times.

During the debate on the Special Rapporteur’s first report, he and several other members of the Commission had expressed the view that, when it came to determining the existence of, and identifying, general principles of law formed within the international legal system, the Commission should not put the cart before the horse. Yet, in both the first and the second reports, the Special Rapporteur seemed to have done precisely that, by setting out conclusions about that second category before formulating the necessary arguments, conditions and methodology. The Special Rapporteur had not established a causal link between the analysis of case law in the report and draft conclusion 7, which undermined his proposed methodology for the identification of general principles falling into the second category and could result in cases of miscategorization and overlaps between sources.

When the Commission had included the topic of general principles of law in its programme of work, there had been an understanding that the scope of the topic would be limited to general principles of law within the context of Article 38 (1) (*c*) of the Statute of the International Court of Justice. However, the Special Rapporteur seemed to believe that

Article 38 (1) (*c*) was merely a starting point. There were in fact no recognized sources of public international law beyond those listed in that provision. Even if the intention was to assert the existence of a category of general principles of law formed within the international legal system, such an assertion must be based on Article 38 (1) (*c*).

In addition, the scope of the topic should be limited to general principles of law; other rules, such as the general principles of international law, should be excluded, and rules of general international law or *jus cogens* should not be mischaracterized as general principles of law. If a court or tribunal had indeed identified a particular principle as a general principle of law in the period since the adoption of the Statute of the Permanent Court of International Justice, it would have explicitly said so. The Commission should not reinterpret the decisions and *dicta* of courts and tribunals by mischaracterizing the sources or body of rules to which they referred as being general principles of law formed within the international legal system.

Commenting on specific aspects of the report, he said that, with regard to part one, he agreed with the Special Rapporteur that the purpose of the topic was to provide practical guidance. In that regard, practicality should go hand in hand with rigour and a solid grounding in State practice and the methodology of international courts and tribunals, even if precedents were scant.

It was important to clarify exactly what was meant by the "recognition" of general principles of law and, more importantly, what distinguished that process from the determination of the acceptance of custom as law. The threshold for such "recognition" seemed to be lower than that for the determination of *opinio juris*. One example was the deductive methodology proposed in part three, chapter III, of the report for the identification of general principles of law formed within the international legal system.

With regard to part two and the identification of general principles of law derived from national legal systems, he supported the Special Rapporteur's proposed two-step approach, which consisted, first, in determining the existence of a principle common to the principal legal systems of the world and, second, in ascertaining its transposition to the international legal system.

There had been much debate over the phrase "principal legal systems of the world". In his view, the Special Rapporteur was correct to conclude that it encompassed the different legal families and regions of the world. The case law cited in the report showed that, while some judges and courts had analysed only certain legal families, the majority had carried out a wide and representative comparative analysis of different legal families and regions. He therefore supported the explicit reference, in draft conclusion 5 (2), to "different legal families and regions of the world". It should be made clear in the commentary that a comparative analysis of national legal systems entailed an analysis of both legal families and regions of the world, without emphasizing one over the other. At the same time, a case-by-case approach was needed, as certain principles might not be present in certain legal families. The fact that a principle was not present in all legal families should not undermine its value as a general principle of law, provided that the principle enjoyed wide and representative recognition.

He agreed with the Special Rapporteur that the interpretation of the term "civilized nations", which was used in Article 38 (1) (*c*), was evolving. As he had noted in 2019, that term should be taken to mean "the community of nations", which was a more comprehensive and inclusive expression than "the community of States". In any case, the matter could be resolved in the Drafting Committee.

Concerning the use of the word "common", the case law cited in the report showed that the principle in question should be a common denominator among different legal systems and families and that there should be no divergence or fundamental differences with regard to its existence and content. That requirement was an important safeguard to ensure that the process was practical and rigorous without overburdening practitioners and courts called upon to identify such principles.

He agreed that the practice of international organizations could play an important evidentiary role in certain contexts and should therefore be considered, albeit alongside material from national legal systems.

He was not sure that there was sufficient support for the two conditions proposed by the Special Rapporteur, in draft conclusion 6, for the ascertainment of the transposition of a principle to the international legal system, despite the fact that, as noted in paragraph 74 of the report, reference was often made to those conditions in the literature. Concerning the first condition, namely that a principle must be compatible with the fundamental principles of international law, his view was that transposition also required compatibility with other rules and principles of international law. Other members had explained why the word "fundamental" was problematic and was not based on practice and a sound analysis of jurisprudence. Moreover, the requirement of compatibility arose from the fact that the function of general principles of law was to fill gaps in order to avoid situations of *non liquet*. Even if a principle did not fill a gap, transposition to international law required compatibility with other rules and principles, as the jurisprudence seemed to indicate. Concerning the second condition, namely that conditions had to exist for the adequate application of the principle in the international legal system, what was key was that the principle should be adaptable for the purpose of its application in that system. Draft conclusion 6 (2) should thus be reformulated to provide that the principle must be capable of being applied in international law.

The distinction between the methodology for the identification of general principles of law and that for the identification of customary international law was not adequately explained in paragraph 110 of the report. It would be helpful if the Special Rapporteur could provide further explanation in summing up the debate. He was also concerned that paragraphs 110 and 111 seemed to lower the threshold for identification to such an extent that a principle that did not meet the conditions for the identification of customary international law could nevertheless be elevated to the status of international law in the form of a general principle of law.

With regard to part three of the report, he remained very hesitant about the existence and content of the category of general principles of law formed within the international legal system. As other members of the Commission had explained, the case law cited in the report did not seem to support the conclusions drawn by the Special Rapporteur, including with regard to the three forms of recognition proposed in draft conclusion 7. Neither the case law nor the *travaux préparatoires* relating to Article 38 (1) (*c*) of the Statute of the International Court of Justice supported the assertion that a second category of general principles of law existed independently of the first category or of the rules of customary international law. Many of the examples of such general principles of law provided in the report were in fact rules of customary international law. He did not object to the proposed category in principle, but there was scant material to support its existence. That was a problem, despite the Special Rapporteur's assurances to the contrary. The Commission should not allow certain principles to be elevated to the status of binding international law without following a rigorous and strict process. As several members of the Commission had explained, deductive reasoning was neither rigorous nor strict. More importantly, it did not demonstrate a recognition of the existence of that category on the part of the community of nations.

With regard to the first form of recognition, ascertainment that the principle was widely recognized in treaties and other international instruments, the examples cited in the report could be described as rules of customary international law or *jus cogens* that had been codified in treaties and other instruments. In that connection, other members of the Commission had already commented on the Nürnberg Principles, the prohibition of genocide, the Martens clause and the polluter pays principle; that last principle was a general principle of law derived from national legal systems. It seemed clear that wide recognition in treaties and other international instruments was not a suitable form of recognition to include in the draft conclusion.

Concerning the second form of recognition, it was stated in paragraph 138 of the report that, in the case of general principles that underlay general rules of conventional or customary international law, the recognition required for the existence of such principles appeared to be inferred from the general acceptance of the rules which they underlay. In his view, that statement betrayed a confusion between the process of identifying customary international law and the process of recognizing general principles of law. That use of inference or deduction also undermined the suitability of that method of ascertainment. Three

examples of jurisprudence were mentioned in the report, but none of them, in his view, supported the Special Rapporteur's conclusion regarding that form of recognition and the associated methodology. It was stated in paragraph 144 of the report that principles thus identified could "be applied independently of the relevant rules of conventional or customary international law, and even in the absence of the latter". He did not understand how a general principle of law could be deduced from a rule of conventional or customary international law if the latter was absent.

The third proposed form of recognition, namely ascertainment that a principle was inherent in the basic features and fundamental requirements of the international legal system, was difficult to understand even on a doctrinal basis. What were those basic features and fundamental requirements? When were they formed? How were they transposed by deduction? How did the international community of nations create them? He shared the concern expressed by other members of the Commission that the Special Rapporteur was equating or conflating that third proposed form of recognition with norms of *jus cogens*. Thus, if a norm of *jus cogens* was created, it would automatically become a general principle of law, by deduction. In addition, in the example cited from the jurisprudence of the International Court of Justice, namely the judgment in *Frontier Dispute (Burkina Faso/Mali)*, the Court was affirming the generality of the principle of *uti possidetis juris*; in other words, the fact that it was not a special rule pertaining to a specific system of international law or to a specific region. The Court had not considered the question of whether that principle embodied the basic features and fundamental requirements of the international legal system.

In conclusion, he said that the Commission should leave open the possibility that general principles of law could be formed within the international legal system. However, there was scant material to support the assertion of positive rules and conditions for that category of principles. He therefore suggested that the proposed draft conclusions that concerned general principles of law formed within the international legal system, including draft conclusion 7, should be replaced with a "without prejudice" clause, which would read: "The draft conclusions are without prejudice to any possible formation of general principles of law within the international legal system."

Despite his criticisms of draft conclusion 7, he recommended the referral of all the draft conclusions to the Drafting Committee.

The meeting rose at 3.55 p.m.