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International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3545th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 21 July 2021, at 11 a.m.

Contents

General principles of law (*continued*)

Present:

Chair:	Mr. Hmoud
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. 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 a.m.

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

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he wished to thank the members of the Commission for their valuable contributions and comments. As in 2019, the debate had been extremely rich in content. The discussions had shed light on various issues central to the topic and provided an excellent basis for the continuation of the Commission's work. In his statement, he would summarize the debate and would address the main points that had emerged. Due to time constraints, he would not be able to respond to all the arguments, observations and suggestions that had been put forward, but he assured members that he had paid great attention to all the points raised and that any concerns not addressed at the present meeting would be addressed in due course.

Beginning with some general observations about the scope of the topic, he reaffirmed that, as agreed previously by Commission members and the Sixth Committee, the point of departure for the Commission's work was Article 38 (1) (*c*) of the Statute of the International Court of Justice, analysed in the light of practice and jurisprudence and relevant doctrine. As he understood it, that meant that the Commission's work should not extend beyond the general principles of law expressly mentioned as formal sources of international law in Article 38 (1) (*c*).

While the purpose of Article 38 (1) (*c*) of the Statute was to establish the different sources of law that should be applied by the Court, as Mr. Murase had noted, it was clear from State practice and jurisprudence that the article was referring to sources of international law. Indeed, various international courts and tribunals, including the European Court of Human Rights, the Inter-American Court of Human Rights, the Appellate Body of the World Trade Organization and international investment arbitration tribunals, expressly invoked Article 38 (1) (*c*) in their reasonings. Some members of the Commission, including Mr. Argüello Gomez, Mr. Hmoud, Mr. Murase, Mr. Petrić and Mr. Rajput, had expressed doubt as to whether the second report respected that key aspect of the topic, questioning, in particular, the analysis of the second category of general principles of law that it contained. He believed that, as Sir Michael Wood had mentioned, one of the key tasks inherent in the topic, and also one of the challenges, was to determine what exactly was covered by Article 38 (1) (*c*) of the Statute, or, in other words, to define the scope of general principles of law. The Commission's work could not be considered complete if that question, which had long preoccupied legal experts, was not duly examined.

An issue related to that point, which had been raised by Mr. Forteau and by Sir Michael Wood, was the terminology used in the French and Spanish versions of the report to refer to general principles of law. Article 38 (1) (*c*) of the Statute of the International Court referred to "*principes généraux de droit*" and "*principios generales de derecho*", respectively, in the French and Spanish versions, while the title of the topic, as adopted in the different languages and as reflected in the report, was "*principes généraux du droit*" and "*principios generales del derecho*". He found it difficult to agree with Mr. Forteau's view that using the original French language of the Statute would limit the topic to general principles of law derived from national legal systems. Furthermore, that position appeared to have been adopted only by certain French commentators.

State practice and jurisprudence since the adoption of the Statute of the Permanent Court of International Justice in 1920 had varied. Sometimes the original language of the Statute had been used, but more often it had not. Furthermore, such language disparities could be observed not only in references to general principles of law, but also, for example, in references to customary international law. The terminology used in the work of the Commission and elsewhere differed from the terminology used in Article 38 (1) (*c*) of the Statute, which, for example, referred not to "customary international law" but to "international custom as evidence of a practice generally accepted as law". Moreover, Article 38 (1) (*c*) did not use the term "*opinio juris*" when referring to one of the two constituent elements of customary international law, yet that term had been used by the International Court of Justice and other tribunals and had been taken up in the Commission's conclusions on identification of customary international law, without there having being any discussion as to whether the substance of Article 38 (1) (*c*) had changed. Whatever terminology was

used in the topic, he shared Sir Michael Wood's view that the formulation ultimately adopted by the Commission would be without prejudice to the different possible origins and categories of general principles.

The Spanish "*principios generales del derecho*" and the French "*príncipes généraux du droit*" were the formulations used most frequently in international practice, albeit interchangeably with the formulation used in the Statute. They were used, for example, in article 67 of the Fourth Geneva Convention of 1949, in the Rome Statute of the International Criminal Court, and in the statutes of the international criminal tribunals and their jurisprudence. The same formulations had been used by the Commission in its commentaries to the conclusions on identification of customary international law, a topic concluded only recently, in 2018. Furthermore, no State had asked for the wording used in the current topic to be changed, and such a change, particularly when it affected the French and Spanish language versions only, might be thought to have implications for the content of the text. Moreover, if the Commission was obliged to reproduce Article 38 (1) (*c*) verbatim, without taking relevant international practice and jurisprudence into account, it would likewise be obliged to retain the anachronistic term "civilized nations", for example, solely because it also appeared in the Statute.

A majority of Commission members appeared to be in favour of replacing the term "civilized nations" with the term "community of nations". However, the Commission should not overlook the valid concerns that Ms. Escobar Hernández and Mr. Zagaynov had raised regarding the differences between the authentic versions of the International Covenant on Civil and Political Rights in the various languages, not all of which used the term "community of nations". That fact could cause confusion; the Spanish text of the Covenant, for example, referred to the "*comunidad internacional*" (international community). Some additional proposals had been made during the debate, as in 2019. For example, the terms "States", "community of States", "international community" or "community of nations as a whole" had all been proposed as possible alternatives. All those issues could be discussed in the Drafting Committee.

Some members, notably Mr. Gómez-Robledo, Mr. Saboia and Mr. Tladi, had highlighted the importance of recognizing the legal systems through which indigenous, autochthonous and original peoples were governed in the context of the methodology used to identify general principles derived from national legal systems. As a South American, he was obviously sensitive to that proposition. Since there was generally a link – for example, at the constitutional level – between the normative systems of indigenous peoples and the normative system of the State within which the indigenous systems operated, it might be relevant to include those systems. However, that matter could be dealt with in the commentaries.

Another consideration of a general nature, which had been mentioned by Mr. Forteau and Ms. Oral, *inter alia*, was the need to strike a balance between flexibility and rigour in the methodology used to determine general principles of law. Given that general principles of law were a source of law intended to provide answers to questions that were either insufficiently regulated by treaties and customary international law or not regulated at all, a degree of flexibility in their determination was required. That consideration – to which he would return subsequently – permeated all discussions and concerns associated with the identification of general principles of both categories.

He wished to also address briefly the relationship between general principles of law and other sources of international law. Several members had alluded to that relationship, drawing attention to the supplementary nature of general principles of law and their role in filling legal *lacunae* and preventing situations of *non liquet*. He intended to examine that aspect of the topic in 2022 but, in the meantime, a general observation seemed appropriate. Mr. Park and Mr. Argüello Gómez had stated that, when a general principle became customary international law, it could no longer be considered a general principle of law. Based on that approach, general principles ceased to exist once they had been transformed into customary rules. However, practice showed otherwise: a general principle of law and rules of other sources of international law could exist in parallel. For example, although the principle of good faith had been codified in the 1969 Vienna Convention on the Law of Treaties and the relevant articles of the Convention had been transformed into customary

international law, that principle remained a general principle of law, as the Appellate Body of the World Trade Organization and the investment arbitration tribunals, *inter alia*, had noted. In his next report, he would consider situations in which general principles of law continued to have a complementary or interpretative role in relation to customary or treaty rules that dealt with the same subject matter.

Another related point, which had met with consensus among Commission members, was the fact that there was no hierarchy between the three sources of international law. As he would explain in more detail in his next report, the "gap-filling" function performed by general principles of law meant that the *lex specialis* principle prevailed over any other subsidiary characteristic inherent to general principles of law, as had been confirmed in the report of the Commission's Study Group on the fragmentation of international law.

His last general observation was related to the proposal, made by Ms. Escobar-Hernández and Mr. Grossman Guiloff, that a draft conclusion containing a definition of general principles of law should be added. He saw the merit of that proposal, as a draft conclusion along those lines would help to make the scope of the Commission's work was as clear as possible. However, the question of a definition could be addressed after the purpose of general principles had been analysed in detail and the issues related to general principles of law formed in the international legal system had been clarified.

Turning his focus to general principles of law derived from national legal systems, he said that there was a consensus among Commission members regarding the basic approach to the identification of those general principles. That approach consisted of a two-stage process of analysis designed to ascertain, firstly, whether a principle was common to the principal legal systems of the world and, secondly, whether that principle had been transposed into the international legal system. A number of questions had been raised and several suggestions had been made regarding that methodology.

A clear majority of members had agreed with the use of the term "principal legal systems of the world" to describe the scope of the comparative analysis to be undertaken to determine the existence of a general principle of law. However, Mr. Forteau and Mr. Grossman Guiloff had stated that it was sufficient for that analysis to be "representative"; it did not also need to be "broad". Other members, including Ms. Escobar Hernández, Ms. Galvão Teles and Ms. Lehto, had suggested that the analysis needed only to be "sufficiently" broad and representative, in line with the approach taken by the Commission in conclusion 8 (1) of the conclusions on identification of customary international law. He agreed with the suggestion that the qualifier "sufficiently" should be added, as its addition would lend a little more flexibility to the methodology.

Also in pursuit of greater flexibility, Mr. Murase had suggested that, in draft conclusion 5 (1), the word "analysis" should be replaced with the word "review", so that the phrase would read "comparative review". That suggestion could be considered in the Drafting Committee, but, in his view, Mr. Murase went too far in suggesting, in the name of flexibility, that draft conclusion 5 (2) and (3) should be deleted and should be reflected only in the commentaries. Without those paragraphs, the draft conclusion would not provide the intended guidance for legal practitioners.

Some members had questioned the possibility of using comparative law methodologies to carry out the analysis required to determine the existence of general principles of law. On that point, he thought it appropriate to clarify that the intention of the second report was not to argue that such methodologies should necessarily be used in all cases, but rather to indicate that comparative law could provide useful tools that might be used where appropriate, without there being any obligation to do so. In addition, some members had suggested that the reference to "legal families" in draft conclusion 5 (2) might be replaced with a reference to the principal legal systems, and that the commentary could elaborate on the type of analysis required to determine a general principle of law. That suggestion could also be discussed in the Drafting Committee.

Certain members had pointed up the practical difficulties that might arise when a principle common to national legal systems was identified, whether for accessibility, language or other reasons. Such difficulties were not peculiar to the identification of general principles of law but existed in other areas as well, notably in the identification of customary

international law. They represented an ongoing challenge for international lawyers who wished to establish an international legal system that was truly representative and did not just reflect the positions of a few States only. Mr. Forteau had suggested that the analysis should not be considered to be necessarily cumulative or in-depth, either in respect of national legislation or of jurisprudence. That suggestion, if adopted, would render draft conclusion 5 (3) a little more flexible; it could therefore be discussed in the Drafting Committee. In contrast, other Commission members, notably Mr. Valencia-Ospina and Mr. Rajput, had stated that the examples of materials from national legal systems that could be consulted in any given case should be expanded to include, *inter alia*, executive orders. That proposal could also be considered by the Drafting Committee.

Other members, notably Ms. Oral and Mr. Tladi, had asked how "general" or "abstract" a principle should be. His view, as he had mentioned when introducing the topic, was that the Commission should not be too prescriptive; each principle should be analysed on a case-by-case basis with a due degree of flexibility. Some examples of general principles of law, as he had noted in the first report, appeared to have a certain degree of specificity. That issue could be explored further in the next report, in which he would analyse the purpose of general principles.

Opinions varied as to the possible role of international organizations in the analysis carried out to ascertain the existence of a general principle of law. That question was related to the question of how exactly the terms "civilized nations" and "community of nations" should be understood. Commission members had agreed with the analysis set forth in the second report, at least in general, although, as was noted therein, there was not much practice relevant to the matter. He wished to emphasize that, in the report, he was not claiming that international organizations with the power to issue rules to be directly and automatically applied in the domestic legal orders of their member States could replace those States. The fact that relevant practice had always tended to analyse the legal systems of States when seeking to identify a general principle could not be ignored; rules issued by an international organization could serve as a complementary or additional means to determine general principles but not as an alternative.

Opinions related to the second stage of the process of analysis required to determine general principles of law derived from national legal systems – namely, the transposition stage – also varied. Mr. Reinisch had raised a point that was, in his view, fundamental. The second report used the term "transposition" to describe that stage of the methodology. Mr. Reinisch, however, had asked whether "transposability" would not be a more appropriate term, arguing that the term "transposition" implied some sort of formal act on the part of certain actors whereas the requirements set forth in draft conclusion 6 seemed to be objective requirements that were not dependent on any formal act of transposition. That issue was connected to the questions raised by Ms. Escobar Hernández, Mr. Valencia-Ospina, Sir Michael Wood and Mr. Zagaynov, and also by Mr. Murphy in the 2019 debate, regarding the role of recognition in the context of transposition.

He shared Mr. Reinisch's concern because it related to the question of how the point at which a general principle could be considered to emerge and to become part of international law might be determined. If a general principle of law emerged after being broadly recognized by States in their domestic law, it was possible to speak of "transposability". Transposability in that context would not be a criterion necessary for the identification of a general principle *strictu sensu*, but rather a criterion used to determine whether a principle that was already part of international law was applicable in a specific case. In other words, "transposability" would simply mean applicability and recognition would appear to play no part.

On the other hand, if a general principle had not only to be recognized *in foro domestico* but also to have been transposed into the international legal order in order for it to become a part of international law, it seemed more appropriate to speak of "transposition". That scenario gave rise to various questions. What exactly was the role of recognition? Who performed the act of transposition, and what form did it take? In any case, the requirements for the determination of a general principle of law using that approach would arguably be more rigorous. As mentioned by Ms. Escobar Hernández, however, there might be a certain contradiction between stipulating a requirement for a formal act of transposition in order for

a principle to become a general principle of law, on the one hand, and the fact that such principles, like rules of international customary law, were part of unwritten law and no formal act was necessary for their formation, on the other.

He shared the view, expressed by certain members, that objective evidence should provide the basis for determining the content of general principles. He had chosen to use the term "transposition" in the report because transposition was part of the process of determining the content of general principles of law applicable at the international level. The term "transposability", on the other hand, might suggest that a general principle applicable at the international level was, in all contexts, exactly the same as the corresponding general principle derived from domestic legal systems, and that determining a principle's "transposability" was simply a question of determining whether or not the principle, as it existed in domestic law, could be applied directly as international law. While some general principles derived from domestic legal systems could be applied at the international level exactly as identified at the national level, other general principles of domestic law required adjustment at the time of their transposition into international law. In those cases, the end product of the transposition was not exactly the same as the general principle of domestic law identified in the comparative analysis.

In the *Barcelona Traction* case, Judge Sir Gerald Fitzmaurice had highlighted the importance of bearing in mind "that conditions in the international field are sometimes very different from what they are in the domestic, and that rules which these latter conditions fully justify may be less capable of vindication if strictly applied when transposed onto the international level". Judge Sir Arnold McNair had made a similar observation in the case concerning the international status of South West Africa, opining that: "The way in which international law borrows from [domestic law] is not by means of importing private law institutions 'lock, stock and barrel' ... the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions." When the principle of estoppel and the principle of legality, for example, were transposed into international law, certain elements of the domestic legal principles were incompatible with the conditions and requirements of the international legal system and, accordingly, could not be transposed to the international level. Thus, the general principles of estoppel and legality applicable in international law were distinct from the corresponding domestic principles of law.

Clearly, those were complex issues that were not just theoretical. They could have a considerable impact on the manner in which the Commission approached the subject as a whole. On the basis of relevant practice, the second report took an intermediate position according to which transposition was necessary to determine the existence of a general principle of law and would occur implicitly when the principle satisfied certain conditions: firstly, it must be compatible *in foro domestico* with the fundamental principles of international law; and, secondly, conditions suited to its application must exist within the international legal system.

One transposition-related aspect that had given members cause for concern was the use of the language "fundamental principles of international law" in draft conclusion 6 (a), on compatibility. He wished to point out, first and foremost, that that part of the methodology for identifying general principles of law seemed to be closely linked to the question of the functions of those principles. Mr. Hmoud had stated that, if the function of general principles was to fill legal gaps and avoid situations of *non liquet*, then it must be concluded that some test of compatibility of a principle *in foro domestico* with rules already existing in international law must be carried out, as relevant practice showed.

The second report posited that principles *in foro domestico* should be compatible with the fundamental principles of international law, which he understood to include the principles laid down in the Charter of the United Nations, as developed by the Declaration on Principles of Friendly Relations and Cooperation among States – in short, the basic elements of the international legal system. However, it had been suggested during the debate that that formulation might not be the most suitable and that other formulations could be explored. In particular, some members, including Mr. Zagaynov, Mr. Forteau, Mr. Grossman Guiloff, Mr. Hmoud and Mr. Ouazzani Chahdi, had taken the position that the compatibility test should

be broader, relating not only to fundamental principles of law but also to other rules of international law, in particular those in the context of which a general principle was to be applied. That issue could be discussed further in the Drafting Committee and, the following year, in the light of the third report. However, as mentioned previously, the gap-filling role of general principles of law resulted from the principle of *lex specialis* and not from any formal hierarchy among the three sources of international law. As explained in the report, the identification of general principles of law should not be subordinated to any rules of conventional or customary international law, as to do so would only serve to establish a hierarchy between the three sources of international law.

As for the second requirement for transposition, namely, that conditions must exist for the adequate application in the international legal system of a principle recognized *in foro domestico*, some members had stated that the terminology used in draft conclusion 6 (b), was not entirely clear, and had questioned why the difficulty of applying a principle should be an obstacle to the identification of a general principle of law. He wished to point out that the rationale behind the above requirement for transposition, which was also borne out in practice and doctrine, was that there were essential differences between the international legal system and national legal systems, with the result that a principle that was recognized *in foro domestico* was not necessarily suitable for application at the international level. In other words, an analogy was drawn between different systems to ensure that a principle that existed in one system could be appropriately applied in another so as to avoid possible distortions or abuses. As some members had suggested, the draft conclusion could be simplified slightly to read: “The conditions exist for its application.” The related commentary would then have to provide more detail on that point.

Mr. Tladi and Mr. Valencia-Ospina had both asked whether the two requirements for transposition in draft conclusion 6 were cumulative. In his view, they were two different requirements, which followed different lines of reasoning. While it was true that, in practice, both requirements were not analysed in all cases, as Mr. Tladi had pointed out, that did not necessarily mean that both requirements were not applicable. It was not unusual that, in practice, sometimes not each and every condition for the existence of a rule was examined. If one condition was not met, the analysis might, in principle, end there.

Some members had also suggested that draft conclusion 6 could be simplified. For example, Mr. Tladi had proposed that the draft conclusion should simply state that a principle *in foro domestico* should be transposable, and that the conditions for that could be explained in the commentary. Although that proposal appeared not to have gained much support during the debate, it could be discussed in the Drafting Committee. In his view, the Commission could make a greater contribution to the topic if it could reach consensus on the conditions for the transposition of a principle derived from national legal systems to the international legal system. He had taken note of Mr. Forteau’s suggestion regarding the need to analyse the precise nature of the subjects of law to whom the general principles of law were intended to apply, in other words, whether the principles applied only between States or whether they also applied, for example, between States and individuals, and what impact that would have on the context of transposition. That question could be explored in his next report.

Several members had commented on the distinction made in the report between the methodology for the identification of general principles of law derived from national legal systems and the methodology for the identification of customary international law. Some of those members had also stated that the relevant explanation was not sufficiently clear. While it was true that chapter IV of part two of the report was relatively short, that was because he did not find it difficult to distinguish between the two methodologies. Admittedly, there might be some overlap in the materials relevant for the identification of either source: after all, domestic State practice, such as legislation and decisions of national courts, might also be relevant for the identification of a customary rule. However, in the case of custom, such internal practice must be accompanied by *opinio juris*, that was to say, the belief that action was being taken in conformity with an international obligation, which, in his view, limited the relevant internal practice in qualitative terms. Moreover, the transposition requirement was specific to general principles of law. The functions of such principles would appear to be distinct from those of customary law, a point which would be addressed in his next report.

The second category of general principles of law discussed in the report, namely, those formed in the international legal system, had undoubtedly been the one that, as in 2019, had generated the largest number of divergent views in the Commission, and therefore deserved cautious and careful treatment.

Members had reaffirmed the need to distinguish clearly between the second category of general principles and other sources of international law, in particular custom. Many of the concerns expressed in relation to draft conclusion 7 had been based on the view that the second report failed to make a sufficiently clear distinction between the different sources. He agreed that a clear distinction was needed. At the same time, as Ms. Escobar Hernández had pointed out, the very real difficulty in making that distinction should not lead the Commission to conclude that there were no general principles formed in the international legal system, but to examine in detail the relationship between treaty, custom and general principles of law, in addition to, where appropriate, the interaction between those three sources of law, bearing in mind that there was no hierarchical relationship between them, and to examine the functions that they fulfilled in the international legal system.

The discussions in plenary had suggested that there was a need to strike a balance between the function of general principles of law and their identification. Several members had mentioned that, on the one hand, the criteria for identification must be strict enough to avoid excessive discretion on the part of those identifying that source and, on the other, that the criteria must be flexible enough to allow that source to fulfil its function, in other words, to provide a legal response when certain situations were either unregulated or not sufficiently regulated by treaties and custom, a view which he shared.

Based on that premise, as Ms. Escobar Hernández had also mentioned, there was no reason why "gaps" in the international legal system could only be filled by general principles derived from national legal systems. That could not be inferred from Article 38 (1) (*c*) of the Statute of the International Court of Justice, which did not refer to domestic law as the sole origin of general principles of law, and there was no historical evidence to show that that was the case. Account must be taken of what had been said by Lord Phillimore and other members of the Advisory Committee of Jurists, such as Mr. de Lapradelle or Mr. Fernandes, in 1920. As Ms. Escobar Hernández had rightly said, there was no reason to conclude that general principles of law could not exist in the international legal system, and to conclude otherwise would be inconsistent with the very conception of international law as a system, and would be tantamount to recognizing that that system could not make use of abstract categories, which existed in every legal system, to guarantee the fulfilment of one of the essential functions of law: the settlement of disputes and the maintenance of social peace.

Likewise, Ms. Galvão Teles had mentioned that general principles of law formed within the international legal system could be seen as a sign of the increasing maturity and growing complexity of international law. Furthermore, situations could arise at the international level that had no parallel in national legal systems. As pointed out by Mr. Cissé and Ms. Oral, examples included common but differentiated responsibilities between developed and developing States.

According to some members, there was insufficient practice to arrive at sound and clear conclusions with regard to the second category of general principles of law. That issue was related to the imprecise and inconsistent terminology often used in practice and the difficulties that it created with regard to the selection of materials relevant for the study of the topic. The debate had shown that there could be very different interpretations in each case. In fact, several members had indicated that some of the examples provided in the report were not relevant, since, in those examples, a customary or conventional rule, or a general principle derived from national legal systems, was being applied or invoked, and not a general principle of law formed in the international legal system.

As for the question of State practice, one important aspect of such practice that the Commission must take into account in its work on the topic was the opinions of States. The majority of States that had taken the floor during the consideration of the topic in the Sixth Committee in 2018 had declared themselves to be in favour of considering the existence of general principles of law formed in the international legal system. He failed to understand

why Mr. Hmoud wished to ignore the views of States – perhaps because they did not coincide with his own?

Regarding judicial practice, it was important to examine each individual case in its context, bearing in mind the methodology used to identify the relevant legal rule. What was noticeable about the examples provided in the report was that, when the relevant rules had been applied, it could hardly be said that a customary rule existed in all cases, at least if the methodology for identifying custom clarified by the Commission in 2018 was followed. It was precisely in such cases that certain principles were invoked or applied without there being a general practice accepted as law (*opinio juris*), which required a more in-depth analysis. While he did not exclude the possibility that such principles had subsequently become customary rules, it was their origin and the first instances of their application to which members should pay more attention.

Regarding the examples of practice mentioned in the second report, Mr. Rajput seemed to reject the legal force of the General Assembly resolution affirming the Nürnberg Principles in 1946. Interestingly, his reason for doing so was the fact that, at the time, the international community had consisted of only 55 States and, more importantly, that India had not yet become an independent State. He wondered if Mr. Rajput wished to question the legal validity of all the rules and instruments, perhaps even the Charter of the United Nations, whose adoption had preceded the culmination of the decolonization process. In his dissenting opinion in *United States v. Araki et al.*, Judge Radhabinod Pal had objected to the majority decision on the basis of the supposed justice meted out by the victors and the retroactive application of the law, not the fact that the international community was not yet complete in the 1940s. He advised a more careful reading of the opinion. Mr. Rajput had criticized the reference to the Nürnberg Principles because the Commission, while seeking to remove the term “civilized nations”, was, at the same time, seeking to perpetuate what those nations had done. He wondered whether Mr. Rajput wished to reject the legal validity of the Nürnberg Principles just because they had been adopted too early.

He did not agree with such a view. To his mind, the Nürnberg Principles were already part of the general international law applicable to existing members of the international community at that time. When those principles had been adopted, State practice was insufficient to give them customary status. However, that had not prevented the principles from subsequently developing into customary international law. Recognizing that fact did not carry a risk of downgrading those principles. On the contrary, like many other customary rules, they had initially been general principles and had gradually become custom when followed by sufficient State practice accompanied by *opinio juris*.

In addition, as had been recalled by Ms. Escobar Hernández, article 53 of the Vienna Convention on the Law of Treaties established as one of the elements of the definition of *jus cogens* norms that they were norms of general international law “accepted and recognized by the international community of States as a whole”, which might include not only custom but also general principles of law.

Members’ reactions to the third part of the report had varied greatly. Some members had supported draft conclusion 7 as a whole. Other members, despite having expressed some doubts, had found that some of the paragraphs of the draft conclusion might be relevant to the topic, although they had pointed out that parts of the text would need to be reworked. Other members had disagreed with the draft conclusion in general or had not been convinced by the arguments contained in the report, although they had not ruled out the existence of general principles of law formed in the international legal system. Lastly, some members had opposed the draft conclusion’s referral to the Drafting Committee. He saw it as part of the Commission’s work on the topic to examine, in detail, the possible existence of general principles of law specific to the international legal system, which did not derive from national legal systems. If the Commission could clarify that question, it would likely be able to make a great contribution to international law.

Several questions had been raised with regard to draft conclusion 7 (a). Some members, such as Ms. Escobar Hernández, had stated that the difference between paragraphs (a) and (b) was not clear. Other members had pointed out that there was a problem in that the proposed methodology could result in rules in treaties being applied to States that were not

parties to the treaties in question. Some members had also expressed the concern that, if the draft conclusion was accepted as it stood, then all sorts of rules incorporated in treaties of a general nature, such as the United Nations Convention on the Law of the Sea, or in bilateral treaties on issues such as investment, double taxation or extradition, could be considered general principles of law, which would be unreasonable and run counter to existing practice. As Mr. Reinisch had remarked, the Commission's previous work on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities should indeed be further analysed. Ms. Escobar Hernández's suggestion that it was more fitting to speak of general principles of law that were reflected in other customary or conventional rules or in international instruments had also been useful.

With regard to draft conclusion 7 (b), several members, such as Mr. Hmoud and Mr. Rajput, had criticized the deductive approach proposed therein on the grounds that it would be too subjective. Another pertinent question raised was why a principle underlying a conventional or customary rule should be treated as a distinct source of international law, and not simply as part of the relevant conventional or customary rule.

Regarding draft conclusion 7 (c), members had made many valuable comments. He understood the doubts expressed by several members regarding the terminology used, which they had not found to be sufficiently clear, and hoped that that shortcoming could be remedied in the Drafting Committee. Some members had pointed out that the report did not offer a real methodology for identification. As in the case of draft conclusion 7 (b), several members had expressed concern about the deductive method proposed in the report, which, they claimed, offered no guarantee that the identification process would be sufficiently rigorous and did not explain how "recognition" took place.

Some members, such as Ms. Escobar Hernández, Mr. Forteau and Mr. Šturma, had also expressed the view that the principles inherent in the international legal system, as described in the report, were in fact logical principles of law and not general principles within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice. Those principles were applied in concrete cases and had normative content. It was difficult to see why and on what basis they should be regarded as anything other than legal principles derived from a source of law.

He was, however, aware that the second category of general principles of law discussed in the report was still the subject of significant controversy. The issues at hand ranged from whether such principles really formed part of Article 38 (1) (*c*) of the Statute of the International Court of Justice and thus fell within the scope of the present topic, to how to determine the precise manner in which such principles could be identified in an objective and clear manner. He had taken note of the suggestion by several members that certain issues needed to be further explored with a view to achieving consensus within the Commission.

It seemed that members generally agreed with the approach to subsidiary means for the determination of general principles of law proposed in the report. At the same time, some members, such as Ms. Escobar Hernández, Mr. Argüello Gómez, Mr. Murase, Mr. Park and Mr. Valencia-Ospina, had expressed some doubts in relation to draft conclusion 8, since, according to them, the role of international courts and tribunals could be broader than just to serve as subsidiary means. As he had indicated in the 2019 debate, recognizing that international courts and tribunals had a role in the formation of general principles of law beyond that established in Article 38 (1) (*d*) of the Statute of the International Court of Justice should be approached with extreme caution. To his mind, the "rules of law" referred to in that provision clearly covered general principles of law, and he saw no reason to take a different view. More generally, the Commission should be cautious in entertaining any suggestion that international courts and tribunals had some power to create legal rules, something which might be received negatively by States in the Sixth Committee.

Regarding future work on the topic, as mentioned in the second report, he intended to address the question of the functions of general principles of law in his next report. It perhaps bore repeating that such a study could have an impact on the methodology for the identification of general principles of law. Concerns raised during the debate could also be duly addressed in his next report. Once again, he wished to thank members for their valuable contributions and comments, and for the proposals that they had put forward in relation to the draft conclusions, which would be given due consideration by the Drafting Committee. He wished to request that the six draft conclusions contained in the second report should be referred to the Drafting Committee, taking into account the debate in plenary.

The meeting rose at noon.