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GENERAL PRINCIPLES OF LAW

Statement of the Chair of the Drafting Committee

Ms. Patrícia Galvão Teles

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Mr. Chairperson,

It is my pleasure to introduce the seventh and final report of the Drafting Committee for the seventy-second session of the International Law Commission, concerning the topic "General principles of law". This report is contained in document A/CN.4/L.955, which reproduces the text of draft conclusions 1, 2 and 4, as well as in document A/CN.4/L.955/Add.1, which reproduces the text of draft conclusion 5, which have all been provisionally adopted by the Drafting Committee so far. At the outset, allow me to clarify that, at this stage, the Commission is being requested to take action on draft conclusions 1, 2 and 4. With respect to draft conclusion 5, the Commission is being requested to take note.

Mr. Chairperson,

You will recall that in 2019, at its seventy-first session, the Commission referred draft conclusions 1, 2 and 3 to the Drafting Committee, as contained in the Special Rapporteur's first

report (A/CN.4/732). Due to a lack of time, the Drafting Committee only considered draft conclusion 1 during that session. Draft conclusion 1 was subsequently provisionally adopted by the Committee, in English only, at that session. At the present session, the Commission referred draft conclusions 4 to 9, as proposed by the Special Rapporteur in his second report (A/CN.4/741 + Corr.1) to the Drafting Committee.

Mr. Chairperson,

The Drafting Committee devoted 5 meetings, from 21 to 27 July 2021, to its consideration of the draft conclusions on this topic. It continued its consideration of draft conclusions 1 and 2 initially proposed by the Special Rapporteur in his first report, together with some suggested reformulations presented by the Special Rapporteur to the Drafting Committee in response to suggestions made, or concerns raised, during the Plenary debate. The Drafting Committee did not take up draft conclusion 3 entitled "Categories of general principles of law" at the request of the Special Rapporteur. He explained, and the Drafting Committee agreed, that it would be appropriate to return to draft conclusion 3 at a later stage so that it can be considered together with draft conclusion 7 regarding "Identification of general principles of law formed within the international legal system", and that would also allow to hear the views of the Sixth Committee of the General Assembly.

The Drafting Committee also commenced consideration of the draft conclusions proposed by the Special Rapporteur in his second report, together with some suggested reformulations presented by the Special Rapporteur to the Committee in response to suggestions made or concerns raised during the debate in Plenary.

At the present session, the Drafting Committee provisionally adopted a total of four draft conclusions on this topic.

Before commencing, allow me to pay tribute to the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, whose mastery of the topic, guidance, and cooperation greatly facilitated the work of the Drafting Committee. I also thank the other Members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its

invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

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Mr. Chairperson,

I shall introduce in turn the four draft conclusions provisionally adopted by the Drafting Committee.

Let me turn first to draft conclusion 1.

Draft conclusion 1 – Scope

As I stated at the beginning of my report, draft conclusion 1, entitled "Scope", was adopted by the Drafting Committee in English only at the seventy-first session in 2019. In the interest of time, I shall refrain from repeating the comments made at that session, however I draw the Commission's attention to the statement of the Chair of the Drafting Committee at the seventy-first session, which is available on the Commission's website.

At the present session, the debate in the Drafting Committee concerning draft conclusion 1 was limited to the terminology to be used in the Spanish and French versions to refer to "general principles of law". It is to be recalled that this debate commenced at the seventy-first session and, accordingly, I draw your attention again to the statement of the Chair of the Drafting Committee at that session.

Mr. Chairperson,

There was agreement among the members of the Drafting Committee that the scope of the draft conclusions was Article 38, paragraph 1 *(c)* of the Statute of the International Court of Justice, analyzed in the light of the practice of States and the jurisprudence of international courts and tribunals, and that the expression "general principles of law" was to be understood in the sense of

Article 38, paragraph 1 *(c)*. A discussion took place as to whether the Spanish version of draft conclusion 1 should refer to "*principios generales de derecho*" and the French to "*principes généraux de droit*", in order to replicate the exact language of Article 38, or to "*principios generales del derecho*" and "*principes généraux du droit*", as proposed by the Special Rapporteur. The Drafting Committee took into account the practice of States as well as the jurisprudence of international courts and tribunals, which did not necessarily reflect a reproduction of Article 38. In particular, recent practice, using the expressions "*del derecho*" and "*du droit*", was taken into consideration. The Drafting Committee also noted that, for consistency purposes, the translation of the title of the topic in Spanish and French employs the expressions "*del derecho*" and "*du droit*", respectively.

The Drafting Committee decided to use the expressions "*del derecho*" in Spanish and "*du droit*" in French. Draft conclusion 1 in Spanish, as adopted, reads: *"[e]l presente proyecto de conclusiones se refiere a los principios generales del derecho como fuente del derecho internacional"*, while draft conclusion 1 in French, as adopted, reads: *"[l]es présents projets de conclusion portent sur les principes généraux du droit comme source du droit international"*. Draft conclusion 1 in Spanish is entitled "*Ámbito*", while in French is entitled "*Champ d'application*".

It was understood that the use of "*del derecho*" in Spanish and "*du droit*" in French did not change, nor imply a change to, the substance of Article 38, paragraph 1 (c) of the Statute of the International Court of Justice. The use of these expressions was aimed at adapting the wording rather than changing it and was without prejudice to the question of the scope of the draft conclusions.

Mr. Chairperson,

Allow me now to address draft conclusion 2, which is entitled "Recognition".

Draft conclusion 2 – Recognition

The purpose of this draft conclusion is to present the essential requirement of recognition. It reflects the vital element contained in Article 38, paragraph 1 (*c*), of the Statute of the

International Court of Justice, that for a general principle of law to exist, or to form part of international law, it must be "recognized" by the community of nations. It was discussed whether this provision should serve as a definition or whether it should illustrate a requirement for the existence of a general principle of law. It was agreed that the draft conclusion should remain a condition, as originally proposed by the Special Rapporteur.

Bearing in mind the need to replace the anachronistic expression "civilized nations" found in Article 38 of the Statute of the International Court of Justice, the Special Rapporteur in his first report had originally proposed to replace it with the word "States". At the present session, further to the debate in Plenary at the seventy-first session, the Special Rapporteur presented a revised proposal replacing the word "States" with the term "community of nations", which he explained was based on article 15, paragraph 2, of the International Covenant on Civil and Political Rights (ICCPR) and received support in the Plenary at the current session. An extensive discussion took place in the Drafting Committee as to whether "community of nations" was the most appropriate term for the purposes of the topic. In this regard, the Committee considered different expressions to replace "civilized nations", such as "States", "community of States", "the international community", "nations", "nation States" and "nations as a whole". It was eventually decided that the expression "community of nations" was preferable, given that it was grounded in the widely ratified ICCPR, and on the understanding that, by using such expression, the Commission did not intend to alter the meaning and substance of Article 38, paragraph 1 *(c)* of the Statute of the International Court of Justice. At the same time, it was agreed that by using the expression "community of nations", the Commission was not making a statement on the need for a unified or collective recognition of a general principle of law by States and was not expressing a view that a general principle of law only arises within the international legal system. It was understood that this expression reflects the equality among nations and that it should not be analogized to the expression "international community of States as a whole" as used in article 53 of the Vienna Convention on the Law of Treaties in the context of peremptory norms of general international law (*jus cogens*). It was further understood that the expression "community of nations" does not exclude international organizations from the process of recognition. Furthermore, a view was expressed that word "nations" does not encompass groups that may exist within a State, such as ethnic groups. These considerations will be made clear in the commentary.

Lastly, it was also agreed that the expression used in the authentic languages of the ICCPR should be replicated in the different language versions of draft conclusion 2, rather than literal translations of "community of nations". For example, "*l'ensemble des nations*" in French and "*communidad internacional*" in Spanish.

Members of the Drafting Committee also had a thorough discussion on the use of the word "generally", as originally proposed by the Special Rapporteur, and whether it was necessary to qualify the word "recognized". The express inclusion of the word "generally" was deemed not to be necessary since the following draft conclusions will address the recognition. It was also stated that it was not contained in Article 38 of the Statute of the International Court of Justice. The Drafting Committee also considered amending the wording so that a general principle of law must be recognized "as such" by the community of nations. The Drafting Committee decided, however, that this qualification was not necessary because the specific requirements to show recognition would be addressed in subsequent draft conclusions.

Mr. Chairperson,

Allow me now to address draft conclusion 4.

Draft conclusion 4 – Identification of general principles of law derived from national legal systems

Draft conclusion 4 is entitled "Identification of general principles of law derived from national legal systems", as proposed in the second report. The purpose of this draft conclusion is to address the basic methodology for the identification of general principles of law derived from national legal systems.

This draft conclusion, as the *chapeau* indicates, covers both the determination of the *existence* and *content* of a general principle of law. The sub-paragraphs list the requirements to ascertain the existence and content of a general principle of law derived from national legal systems.

A discussion took place as to the necessity of determining the "content" of a general principle of law, as contained in the *chapeau* of this draft conclusion. The Drafting Committee agreed that the identification of a general principle of law derived from national legal systems included the determination of the *existence* and *content* of that principle as the result of the two-step analysis, that is, the ascertainment of the existence of a principle common to the various legal systems and its transposition to the international legal system. It was stated that principles common to the various legal systems are not transposed "lock, stock and barrel". Some elements of the principle common to the various legal systems, whose existence has been determined, may not be suitable to be applied in the international legal system and may not be transposed. Thus, there is the possibility that the content of a general principle of law identified through this two-step analysis may not be identical to the principle found in national legal systems. It was considered that, for a general principle of law to be applied in the international legal system, its content ought to be determined. The Drafting Committee thus deemed appropriate to retain the word "content".

A discussion also took place regarding the use of different terms ("identification" in the title; "determine" and "ascertain" in the *chapeau*), and whether they had the same meaning for the purposes of the draft conclusion. It was recalled that, in the previous work of the Commission, namely in the topic "Identification of customary international law", the words "identification" and "determination" were used interchangeably.

There was some debate regarding the expression "derived from national legal systems" in the *chapeau*. A view was expressed that this formulation should not be used because, by using this expression in draft conclusion 4, one could be prejudging the outcome of the Commission's consideration of the remaining draft conclusions on the topic by presupposing the existence of a category of general principles of law other than those derived from national legal systems. Other members disagreed with that view. Some members raised concerns that the use of this expression could give the wrong impression that a general principle of law is automatically transposed to the international legal system. The terms "arising from" and "originating" were also considered by the Committee. The Special Rapporteur explained that the expression "derived from national legal systems" was the most appropriate, as it conveyed the idea of general principles of law in the sense of Article 38, paragraph 1 *(c)*, of the Statute of the International Court of Justice. He also

emphasized that the word “derived” did not imply automaticity. The Drafting Committee settled to keep the expression “derived from national legal systems”.

Turning now to sub-paragraph (a), the Drafting Committee deemed it appropriate to replace the word “principal” in the expression “the principal legal systems of the world”, as originally proposed in the second report, with the word “various”. The need for a qualifier such as “principal” was discussed and other terms proposed included “different”, “main” legal systems, and “legal systems of the world as a whole”. While the word “principal” had its origins in the Statute of the International Court of Justice, it was understood that its use in the context of the present topic could raise the same connotation as those relating to the anachronistic expression “civilized nations”. It was agreed that the expression adopted, that is, “the various legal systems of the world”, is to be interpreted as an inclusive and broad expression, covering the variety and diversity of national legal systems of the world. It was highlighted that the requirement contained in sub-paragraph (a) is further elaborated in draft conclusion 5.

Sub-paragraph (b) introduces the concept of transposition of a general principle of law to the international legal system. The Drafting Committee agreed that this sub-paragraph dealt with the manner and point in time when a general principle of law came to existence in the international legal system. There was general agreement among members of the Committee that there was no formal act required for transposition. Further to the debate in Plenary, the Drafting Committee discussed whether the word “transposition”, as originally proposed, should be kept, or whether the concept of “transposability” was more appropriate. The Drafting Committee concluded that the word “transposition” was preferable. It was considered that the term “transposability” was inadequate for the purpose of the draft conclusion since, while it might describe the potential character of a norm, it did not address the question of whether a general principle of law in fact existed at a given point in time. Moreover, it was acknowledged that the term “transposability” was encompassed in the term “transposition”, and that it is dealt with in more detail in draft conclusion 6, as proposed by the Special Rapporteur in his second report. Sub-paragraph (b) was thus adopted as originally proposed in the second report, on the understanding that the commentary would explain the difference and relationship between transposition and transposability and the reasons for the use of the word “transposition” in the draft conclusion.

Mr. Chairperson,

I will now turn to draft conclusion 5.

Draft conclusion 5 – Determination of the existence of a principle common to the various legal systems of the world

Draft conclusion 5 is entitled "Determination of the existence of a principle common to the various legal systems of the world". The only change to the title originally proposed by the Special Rapporteur was the replacement of the word "principal" in the expression "principal legal systems of the world" with the word "various", following the discussion on sub-paragraph (a) of draft conclusion 4. I should note that the word "principal" was also replaced with the word "various" in paragraph 1 of this draft conclusion.

The purpose of this draft conclusion is to address the first step of the two-step methodology of identification of general principles of law derived from national legal systems. It is a further elaboration of sub-paragraph (a) of draft conclusion 4. Draft conclusion 5 comprises three paragraphs. Each of the paragraphs is meant to provide guidance to practitioners regarding the analysis that must be conducted to identify a general principle of law which is common to the various legal systems of the world. I will address each paragraph in turn.

With regard to paragraph 1, there was a discussion as to whether the term "content" should be repeated in the same way that draft conclusion 4 referred to "existence and content" of general principles of law. It was agreed that the term "content" should not be included in draft conclusion 5 because this draft conclusion addresses the first step of the two-step methodology, as contained in paragraph (a) of draft conclusion 4, which requires the ascertainment of "the existence of a principle common to the various legal systems of the world".

There was also an extensive discussion on whether the "analysis" described as part of the process to determine the existence of a general principle of law should be called a "comparative analysis". The Committee considered whether the phrase "comparative analysis" suggested an excessively rigorous review employing the methodology of comparative law, which might create too high a threshold of review for the purpose of the draft conclusion. The Committee discussed

whether the word “survey” would be more appropriate, to distance paragraph 1 from the methodology used in comparative law. While the Committee deemed important that paragraph 1 allow for flexibility to practitioners, it concluded that the word “survey” might be too casual which might in turn produce too low of a threshold of review. The Committee decided therefore to retain the expression “comparative analysis”, as originally proposed by the Special Rapporteur. It was understood that the commentaries would explain that the analysis should neither entail a casual assessment nor a strict application of comparative law methodology.

It was also discussed whether paragraph 1 was sufficiently explicit in expressing that the objective of the comparative analysis was to find a common denominator among the various national legal systems. The Committee concluded that such an objective was already contained in the draft conclusion and that the commentary could clarify that the purpose of the comparative analysis was indeed to find a common denominator among the various national legal systems.

With respect to paragraph 2, the Drafting Committee held an extensive debate as to whether the adjectives “wide and representative”, as originally proposed, were to describe the process of the comparative analysis itself or whether they aimed at describing the object of the analysis, that is, the legal systems analysed. The Committee also considered to add the word “sufficiently” before “wide and representative”, following comments and suggestions made by members in the Plenary. The purpose of adding the word “sufficiently” was to clarify that the comparative analysis did not require an analysis of every single national legal system of the world, but rather, that it should be sufficiently wide and representative in taking into account a variety of national legal systems. The Committee was concerned however that such a formulation might allow a survey of just a few representative jurisdictions. The Drafting Committee eventually decided not to include the word “sufficiently”, on the understanding that the commentaries would explain that the analysis envisaged in the provision should strike a balance between flexibility and rigour.

The Committee also considered whether the substance of the second part of paragraph 2, that is, the part that reads “including different legal families and regions of the world”, as proposed by the Special Rapporteur, would be more appropriately dealt with in the commentaries, where it could be explained in detail. The Committee concluded that it was important to expressly refer to different regions of the world in the draft conclusion itself to ensure that they were covered in the

analysis. The reference to “legal families”, originally proposed, was not retained because the expression “wide and representative, including the different regions of the world” was considered to be sufficient. It was also noted that reference to “legal systems” was already contained in paragraph 1. It was agreed that the commentaries would explain in detail the scope of the comparative analysis and that the reference to “the different regions of the world” does not preclude practitioners from considering existing legal systems.

Turning now to paragraph 3, an extensive discussion took place as to whether this paragraph was explicitly needed or whether its content would be more appropriately placed in the commentaries to draft conclusion 5. A debate was also held as to whether this paragraph provided the necessary guidance on the relevant sources for the assessment of the various national legal systems to determine the existence of a general principle of law derived from national legal systems. It was agreed that the guidance was explicitly needed to signal to practitioners the sources that should be reviewed in the comparative analysis. It was understood that such guidance should be useful, yet not restrictive, as national legal systems may accord different weight to different sources. For example, decisions of national courts may have different standing in different jurisdictions and doctrine may be accorded different weight depending on the jurisdiction.

The debate in the Committee concentrated on two main issues: first, the level of detail as to the various sources listed in the draft conclusion, and second, whether to reformulate the paragraph to expressly state that the list of sources enumerated therein was not exhaustive.

With regard to the first issue, the Drafting Committee considered whether to add a reference to constitutions, administrative or executive orders, and doctrine. The Committee determined that a detailed enumeration was not preferable, as the paragraph would thus be rendered overly prescriptive. It was agreed that the possible sources to be assessed in the comparative analysis would be more appropriately dealt with in the commentaries. Furthermore, the term “national legislations”, initially proposed by the Special Rapporteur, was replaced with “national laws”. The Committee concluded that the term “national laws” was appropriate, as it encompassed more than “national legislations”, capturing the wide variety of legal instruments within national legal systems, thus affording a higher degree of flexibility to practitioners when conducting the comparative analysis. It was understood that the commentary would make it clear

that “national laws” may include national constitutions, decisions from national courts and tribunals (for example, administrative tribunals), and all other sources that are part of the legislative body of national legal systems. Lastly on this first issue, the Committee decided to add the phrase “and other relevant materials” at the end of paragraph 3 following a lengthy debate. This phrase was added to emphasise the flexibility to be enjoyed by practitioners when conducting the comparative analysis, on the understanding that the commentary would provide guidance as to the broad range of materials relevant for the identification of principles of law in the various national legal systems.

In relation to the second issue, the Committee retained the word “includes”, as originally proposed by the Special Rapporteur. Terms such as “*inter alia*”, “must include”, “as appropriate”, and “in particular” were also discussed. The Committee eventually concluded that the term “includes” was widely used as being non-exhaustive and appropriate in this case to provide flexibility and encompass other sources not expressly mentioned in paragraph 3.

Mr. Chairperson,

The Drafting Committee also held an initial exchange of views on draft conclusion 6, as proposed by the Special Rapporteur in his second report. However, due to a lack of time, the Committee was not able to conclude its discussion and decided to continue consideration of draft conclusion 6 in the next session.

Mr. Chairperson,

This concludes my introduction of the seventh report of the Drafting Committee for the seventy-second session. It is my sincere hope that the Commission will adopt draft conclusions 1, 2 and 4 as presented, contained in document A/CN.4/L.955. As I mentioned at the beginning of my statement, the Commission is being requested to take note of draft conclusion 5 at this stage, contained in document A/CN.4/L.955/Add.1.

Thank you, Mr. Chairperson.