Chapter VIII
General principles of law

A. Introduction

166. The Commission, at its seventieth session (2018), decided to include the topic "General principles of law" in its programme of work and appointed Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur. The General Assembly, in paragraph 7 of its resolution 73/265 of 22 December 2018, subsequently took note of the decision of the Commission to include the topic in its programme of work.

167. At its seventy-first session (2019), the Commission considered the Special Rapporteur's first report (A/CN.4/732), which set out his approach to the topic's scope and outcome, as well as the main issues to be addressed in the course of the Commission's work. Following the debate in plenary, the Commission decided to refer draft conclusions 1 to 3, as contained in the Special Rapporteur's first report, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee regarding draft conclusion 1, provisionally adopted by the Committee in English only, which was presented to the Commission for information.[417]

168. Also at its seventy-first session, the Commission requested the Secretariat to prepare a memorandum surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for its future work on the topic.

B. Consideration of the topic at the present session

169. At the present session, the Commission considered the Special Rapporteur's second report (A/CN.4/741 and Corr.1). In his second report, the Special Rapporteur addressed the identification of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, and proposed six draft conclusions. He also made suggestions for the future programme of work on the topic. The Commission also had before it the memorandum it had requested from the Secretariat surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for its future work on the topic (A/CN.4/742).

170. The Commission considered the Special Rapporteur's second report at its 3536th, 3538th, 3539th, and 3541st to 3546th meetings, from 12 to 21 July 2021.

171. At its 3546th meeting, on 21 July 2021, the Commission decided to refer draft conclusions 4 to 9, as contained in the Special Rapporteur's second report, to the Drafting Committee, taking into account the views expressed in the plenary debate.[418]

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[417] The interim report of the Chair of the Drafting Committee is available under the analytical guide to the work of the International Law Commission: http://legal.un.org/ilc/guide/1_15.shtml.

[418] The draft conclusions proposed by the Special Rapporteur in his second report read as follows:

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

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

(a) the existence of a principle common to the principal legal systems of the world; and

(b) its transposition to the international legal system.

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

1. To determine the existence of a principle common to the principal legal systems of the world, a comparative analysis of national legal systems is required.

172. At its 3557th meeting, on 3 August 2021, the Commission considered the report of the Drafting Committee (A/CN.4/L.955 and Add.1) on draft conclusions 1 (in French and Spanish), 2, 4 and 5, provisionally adopted by the Committee at the present session.[419] At the same meeting, the Commission provisionally adopted draft conclusions 1, 2 and 4 (see sect. C.1 below), and took note of draft conclusion 5. At its 3561st and 3563rd meetings, on 5 and 6 August 2021, the Commission adopted the commentaries to draft conclusions 1, 2 and 4 provisionally adopted at the present session (see sect. C.2 below).

1. Introduction by the Special Rapporteur of the second report

173. The Special Rapporteur recalled the complexities of the topic, stating that general principles of law were one of the three principal sources of international law and therefore their analysis required careful and extensive treatment. He indicated that his second report dealt with the methodology for identifying general principles of law. He recalled the fruitful debates in the Commission, as well as in the Sixth Committee of the General Assembly, and highlighted six main points from them.

174. First, he recalled that there was general consensus regarding the topic's scope and the form of the final output of the Commission's work. In the Special Rapporteur's view, members of the Commission and States in the Sixth Committee widely agreed that the topic should deal with the legal nature of general principles of law as one of the sources of international law, their scope, their functions and their relationship with other sources of international law, as well as the method for identifying them. He also noted agreement that the Commission's output would take the form of draft conclusions accompanied by commentaries.

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2. The comparative analysis must be wide and representative, including different legal families and regions of the world.

3. The comparative analysis includes an assessment of national legislations and decisions of national courts.

Draft conclusion 6
Ascertainment of transposition to the international legal system

A principle common to the principal legal systems of the world is transposed to the international legal system if:

(a) it is compatible with fundamental principles of international law; and

(b) the conditions exist for its adequate application in the international legal system.

Draft conclusion 7
Identification of general principles of law formed within the international legal system

To determine the existence and content of a general principle of law formed within the international legal system, it is necessary to ascertain that:

(a) a principle is widely recognized in treaties and other international instruments;

(b) a principle underlies general rules of conventional or customary international law; or

(c) a principle is inherent in the basic features and fundamental requirements of the international legal system.

Draft conclusion 8
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of general principles of law are a subsidiary means for the determination of such principles.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of general principles of law, as a subsidiary means for the determination of such principles.

Draft conclusion 9
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of general principles of law.

[419] The corresponding statement of the Chair of the Drafting Committee is available under the analytical guide to the work of the International Law Commission: http://legal.un.org/ilc/guide/1_15.shtml.

175. Second, the Special Rapporteur recalled that there was general agreement that the starting point for the Commission's work should be Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, analysed in the light of State practice and jurisprudence.

176. Third, he recalled that there was broad consensus that recognition was the essential condition for the existence and identification of general principles of law.

177. Fourth, there was general agreement both within the Commission and the Sixth Committee that the term "civilized nations" contained in Article 38, paragraph 1 (*c*), of the Statute of the Court was anachronistic and should be avoided.

178. Fifth, the Special Rapporteur recalled that there was virtually unanimous support for the category of general principles of law derived from national legal systems, as well as for the basic methodology for their identification.

179. Finally, with regard to the second category of general principles of law proposed in the first report, namely, those formed within the international legal system, the Special Rapporteur noted that, while members of the Commission and States in the Sixth Committee supported that category, some members and delegations had expressed doubts.

180. The Special Rapporteur indicated that the second report was divided into five parts: Part One addressed certain general aspects in relation to the identification of general principles of law; Parts Two and Three dealt with the methodology for identifying general principles of law derived from national legal systems and those formed within the international legal system, respectively; Part Four examined the subsidiary means for the determination of general principles of law; and Part Five briefly addressed the Commission's future programme of work on the topic. The Special Rapporteur proposed six draft conclusions in his second report.

181. In his introduction to Part One, the Special Rapporteur focused on three observations, namely that: (*a*) the Commission's approach should be limited to clarifying the methodology by which the existence of general principles of law, and their content, could be determined at a specific point in time; (*b*) there was general agreement among the members of the Commission and States in the Sixth Committee that recognition was the essential condition for determining the existence of general principles of law; and (*c*) the term "community of nations", included in article 15, paragraph 2, of the International Covenant on Civil and Political Rights[420] referring to general principles of law, should be used instead of "civilized nations".

182. Part Two addressed the identification of general principles of law derived from national legal systems. Chapter I briefly set forth the basic approach to the issue, namely that to identify general principles of law derived from national legal systems, a two-step analysis was required. Chapters II and III dealt with each of those steps in detail. Chapter IV addressed the distinction 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.

183. The Special Rapporteur noted that, both in practice and in the literature, a two-step analysis was followed to identify general principles of law: (*a*) first, the existence of a principle common to the principal legal systems of the world must be determined; (*b*) second, the transposition of that principle into the international legal system must be ascertained.

184. He highlighted specific findings concerning the first step, namely: (*a*) a comparative analysis must be conducted of national legal systems, demonstrating that a principle was common to them; (*b*) it was necessary to cover as many national legal systems as possible to ensure that a principle had effectively been generally recognized by the community of nations; (*c*) it was not necessary to examine every single national legal system of the world; (*d*) the use of the phrase "principal legal systems of the world" was proposed, as was used in the Statute of the International Court of Justice and the statute of the Commission, to describe the scope of the analysis covering different legal families and regions of the world; (*e*) the test of commonality was relatively straightforward, consisting of comparing existing rules in

[420] New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

national legal systems and identifying the legal principle common to them; (*f*) the materials relevant to the analysis were the domestic legal sources of States, such as legislation and decisions of national courts, taking into account the particular characteristics of each national legal system; and (*g*) it was possible to argue that if an international organization was given the power to issue rules that were binding on its member States and directly applicable in the latter's legal systems, those rules might be taken into account when carrying out the comparative analysis.

185. With respect to the second step, the Special Rapporteur noted that the transposition of a principle common to the principal legal systems of the world to the international legal system was not automatic. He highlighted two requirements: (*a*) the principle must be compatible with the fundamental principles of international law; and (*b*) conditions must exist for the adequate application of the principle in the international legal system. The Special Rapporteur also noted that compatibility with any conventional or customary international law rule was not a requirement for transposition, given the absence of hierarchy between the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice. He also noted, in that sense, that any conflict that might arise among norms of the three sources should be resolved by resorting to principles such as *lex specialis.*

186. Part Three of the report concerned the identification of general principles of law formed within the international legal system. Chapter I recalled the main issues raised during the 2019 debate within the Commission at its seventy-first session and the Sixth Committee at the seventy-fourth session of the General Assembly, and set forth the Special Rapporteur's general approach in that regard. Chapter II addressed the methodology to determine the existence of general principles of law formed within the international legal system. Chapter III dealt with the distinction between the methodology for identification of customary international law and the one for identification of general principles of law formed within the international legal system.

187. The Special Rapporteur recalled that, although members of the Commission and States in the Sixth Committee had expressed support for the second category of general principles of law, and the analysis thereof contained in his first report, some divergent opinions had also been expressed in both forums. He noted that the main concerns were: that there would not be sufficient or conclusive practice to reach conclusions regarding that category of general principles of law; the difficulty of distinguishing those principles from customary international law; and the apparent risk that the criteria for identifying general principles in that category would not be sufficiently strict, which could render them too easy to invoke.

188. Part Four addressed the subsidiary means for the identification of general principles of law. The Special Rapporteur stated that his approach in that part was based on the conclusions reached by the Commission in its work on identification of customary international law.[421] The Special Rapporteur noted that, in principle, there was no difference as to how Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice applied in relation to customary international law or general principles of law. In his view, the "rules of law" to which that provision referred clearly applied to the three sources of international law listed in the preceding subparagraphs of Article 38.

189. Part Five briefly set forth the Special Rapporteur's proposed future programme of work. He stated his intention to address the functions of general principles of law and their relationship with other sources of international law in his next report. Furthermore, he stated that his next report would also provide an opportunity to examine issues that might arise in relation to his second report during the debate at the Commission's seventy-second session.

190. To conclude, the Special Rapporteur recalled his proposal that the Commission provide at the end of its work a broadly representative bibliography of the main studies

[421] General Assembly resolution 73/203 of 20 December 2018, annex. The draft conclusions adopted by the Commission and the commentaries thereto are reproduced in *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), paras. 65–66.

relating to general principles of law and noted that the proposal had received support from members at the seventy-first session.

2. Summary of the debate

(a) General comments

191. Members generally welcomed the second report of the Special Rapporteur and expressed appreciation for the memorandum prepared by the Secretariat. Some members noted the importance of the topic and highlighted the need to take a careful approach when discussing issues related to the sources of international law.

192. Regarding the methodology of the report, several members commended the Special Rapporteur's survey of relevant State practice, jurisprudence and teachings. Caution was expressed regarding the use of opinions of States on general principles of law expressed in the course of litigation, and it was noted that, in any event, the different views of the parties to a dispute should be properly weighed.

193. Some members reiterated their agreement with the Special Rapporteur that the scope of the topic should include the legal nature of general principles of law as a source of international law; the scope of general principles of law, which refers to the origins and corresponding categories of general principles of law; the functions of general principles of law and their relationship with other sources of international law; and the identification of general principles of law. As for the outcome, support was reiterated for draft conclusions accompanied by commentaries.

194. Several members recalled that the starting point of the work of the Commission was Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. A view was expressed that the title of the topic should have a specific and clear reference to Article 38, paragraph 1 (*c*). Several members noted that general principles of law were an autonomous source of international law and that, while the list of sources in the Statute was not hierarchical, general principles of law played a subsidiary or supplementary role. Some members noted that the function of general principles of law, as envisaged by the drafters of the Statute of the Permanent Court of International Justice,[422] was to fill gaps in international law and to avoid situations of *non liquet*. Several members agreed with the Special Rapporteur's general approach that the criteria for identifying general principles of law must be sufficiently strict to prevent them from being used as a shortcut to identify norms of international law, and at the same time sufficiently flexible so that identification would not amount to an impossible task.

195. There was unanimous support among those who spoke in the plenary debate for abandoning the term "civilized nations" contained in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. While several members supported the use of the term "community of nations" proposed by the Special Rapporteur and based on article 15, paragraph 2, of the International Covenant on Civil and Political Rights, others expressed doubt as to its use. Some members stated that there was a need to reflect on the meaning of the word "nations" in the context of the topic. Some members highlighted that the term "nations" was appropriate, as it would provide a more diverse source of legal systems and traditions than the word "States". Concerns were raised that article 15, paragraph 2, of the Covenant utilized varying terms in the different authentic languages. Suggestions were made to use instead the terms "international community", "international community of States", "States", or "community of nations as a whole".

196. With respect to the terminology to be used in French ("principes généraux 'de/du' droit") and Spanish ("principios generales 'de/del' derecho"), the view was expressed that it would be important not to depart from the wording contained in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. Attention was drawn to the need to adapt the terminology used to current usage of the expression in each of the official languages. On the other hand, it was said that the appropriate terminology would eventually depend on the

[422] Geneva, 16 December 1920, League of Nations, *Treaty Series*, vol. 6, No. 170, p. 379.

scope given by the Commission to the topic. It was also stated that, regardless of the terminology used, it should not affect the meaning of that provision.

197. Several members agreed that recognition was the essential requirement for the identification of general principles of law. There was also general agreement that the topic covered general principles of law derived from national legal systems. However, while several members expressed support for general principles of law formed within the international legal system, others expressed doubt regarding their inclusion in the topic or their existence as a source of international law. Some members highlighted that the term "principle" and its relationship to "rule" might need to be clarified.

198. Several members expressed caution as to the imprecise use of terminology. It was noted that several distinct terms, such as "general international law", "general principles of international law" and "fundamental principles of international law", were often used interchangeably in practice and teachings. Some members expressed the need to distinguish between "principles", "general international law" and "general principles of law under Article 38, paragraph 1 (*c*)". It was also noted that there was a need to differentiate between the notion of principles as a source of law and principles as a subcategory of customary or conventional rules of international law.

(b) Draft conclusions 4 to 6

199. With respect to draft conclusions 4 (identification of general principles of law derived from national legal systems), 5 (determination of the existence of a principle common to the principal legal systems of the world) and 6 (ascertainment of transposition to the international legal system), members generally agreed with the two-step analysis proposed by the Special Rapporteur. Doubt was expressed, however, as to whether the two steps could be applied as a single combined operation, as suggested by the Special Rapporteur.

200. Regarding the first step, namely, the determination of the existence of a principle common to the principal legal systems of the world, it was observed that in draft conclusion 5, paragraph 1, it was not necessary to refer to the methods and techniques of comparative law in the analysis of national legal systems; rather, focus should be placed on basic notions that those systems might have in common. It was also suggested that the process would be better described as a "comparative examination".

201. Regarding paragraph 2 of draft conclusion 5, several members agreed with the Special Rapporteur that the comparative analysis must be wide and representative, which translated into a requirement to cover as many national legal systems as possible. That included ensuring representativeness of the various legal systems of the world, including, as appropriate, of indigenous, autochthonous or first peoples. Some members considered the requirement too strict, and it was noted that in practice such comparative analysis was not always wide and representative. A view was expressed that the requirement for breadth and representativeness necessarily meant that the assessment did not have to be very deep. The view was also expressed that the matter of accessibility to national legal materials was not addressed in the draft conclusions.

202. Drafting suggestions were made to draft conclusion 5, paragraph 2, to the effect of including a requirement analogous to the one used in the Commission's conclusions on identification of customary international law, namely that the comparative analysis must be sufficiently wide and representative. It was also suggested that the Commission might wish to include in draft conclusion 5 the notion that a significant number of national legal systems should recognize the principle in question. Other drafting suggestions were made to reflect that the analysis should be flexible and conducted on a case-by-case basis.

203. Some members expressed doubt as to using the concept of "legal families" to describe the scope of the comparative analysis. It was suggested that geographical representation and language should also be criteria for recognition. It was noted that national legal systems within a legal family might or might not share a principle. While several members supported the use of the phrase "principal legal systems of the world" proposed by the Special Rapporteur, it was noted that such wording might suggest that the recognition of a principle by legal families themselves could be considered determinative, rather than the recognition

by national legislations within those families. The view was expressed that the word "principal" was not needed.

204. As to the proposal that the comparative analysis should include an assessment of national legislation and decisions of national courts, reflected in paragraph 3 of draft conclusion 5, some members considered that such a requirement was too stringent, while others suggested that the draft conclusion did not reflect the broad range of materials relevant for the identification of principles of law in domestic legal systems referred to in the report of the Special Rapporteur. Some members suggested that the draft conclusion should also include reference to constitutional, administrative or executive practice.

205. While several members supported the inclusion of the practice of international organizations in the analysis in cases where those organizations were given the power to issue rules that were binding on their member States and directly applicable in the legal systems of the latter, some members expressed caution in that regard. The view was expressed that such inclusion would require justification, as Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice did not refer to international organizations.

206. Regarding the second step of the analysis, as reflected in draft conclusion 6, namely the ascertainment of transposition to the international legal system, some members concurred with the Special Rapporteur that it was a necessary step and expressed support for the two elements listed as required for transposition. It was also stated, however, that those elements seemed too complicated and that the Commission should simply enunciate the requirement of transposition. It was further noted that none of the cases referred to by the Special Rapporteur in his report supported the premise that the two elements were cumulative. Some members were of the view that transposition was not a requirement for recognition, but rather the concretization of a principle as applicable law to a dispute. It was also noted that transposition was not contained in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, and therefore was not necessarily part of the requirement of recognition as suggested by the Special Rapporteur. The view was expressed that the term "transposability" might be considered as an alternative to "transposition".

207. With regard to the first element required for transposition according to draft conclusion 6, subparagraph (*a*), namely, compatibility with fundamental principles of international law, some members supported the use of that expression, while several others requested clarification as to the meaning and content of the expression "fundamental principles of international law". Some members suggested that compatibility should also be considered in the light of more specific and precise rules of international law. Drafting suggestions were made to the effect that principles would need to be compatible with "fundamental principles and values of international law", with the "exigencies of the international legal order" and with the "basic elements of the international legal order".

208. As to the second element for transposition, which was reflected in draft conclusion 6, subparagraph (*b*), namely, that conditions existed for the principle's adequate application in the international legal system, some members agreed with the logic behind it, while others expressed the view that the difficulty of application would not preclude transposition.

209. It was suggested that further consideration should be given to the exact nature of the subjects to whom a given principle would apply as an element to take into account in the process of transposition. The view was also expressed that the requirement of transposition, as reflected in the draft conclusions, did not account for the will of States to apply a given general principle of law to their legal relations.

(c) Draft conclusion 7

210. With respect to draft conclusion 7, some members supported the Special Rapporteur's views concerning the existence of general principles of law formed within the international legal system, and concurred that their legal basis was in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. It was stated that the need to avoid a *non liquet* could find answer not only in general principles of law derived from national legal systems, but also in general principles of law that had their origin in the international legal system itself. The view was also expressed 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, which thus came to depend less on gap-filling sources from domestic law. Some members stated that the text of Article 38, paragraph 1 (*c*), together with its *travaux préparatoires*, as well as case law, showed that the provision did not limit general principles of law to those derived from national legal systems and supported the existence of general principles of law formed within the international legal system. It was noted that the existence of the category of general principles of law formed within the international legal system was clear from the need to identify certain overarching features of that system and that those principles could provide appropriate solutions to situations that did not arise in domestic legal systems, which would otherwise be left unresolved.

211. Other members reiterated doubt as to the inclusion of such principles in the scope of the topic or as to whether the Statute of the International Court of Justice supported their existence. A view was expressed that the *travaux préparatoires* of the Statute of the Court reflected that only general principles of law developed in *foro domestico*, that is, domestic law, were included in Article 38, paragraph 1 (*c*), and none of the cases made a reference to Article 38, paragraph 1 (*c*), which were cited as evidence for creation of general principles at the international level. Some members stated that the general principles described under that category in the second report of the Special Rapporteur were in fact rules of conventional or customary law, and that general principles of law under Article 38, paragraph 1 (*c*), were exclusively those derived from national legal systems. It was noted that if a principle was incorporated in an international convention or customary international law, it would become a rule of international law under the respective source and not a general principle of law. The view was expressed that, given the subsidiary role of general principles of law, the application of principles of the second category was subject to two preconditions: (*a*) the appearance of the specific matter in international law that required regulation; and (*b*) that no general principle of law derived from national legal systems was identified. Clarification was sought as to the difference between general principles of law formed within the international legal system and customary international law.

212. As to the method for identifying general principles of law formed within the international legal system, various concerns were expressed about the three forms of recognition suggested by the Special Rapporteur in each of the three subparagraphs of draft conclusion 7. With regard to the first form, namely principles widely recognized in treaties and other international instruments, several members questioned whether a principle recognized in such form was truly a source of obligations independent from the rules that purportedly evidenced its recognition. In that connection, it was questioned whether a principle identified through that form could bind States that had not yet consented to be bound by the relevant conventional rules. It was also noted that a general principle of law formed within the international legal system could be reflected in treaties and other instruments and not recognized in them. Some members questioned the Special Rapporteur's approach of considering other instruments, such as General Assembly resolutions, as potential forms of recognition. Other members queried whether a principle widely recognized in treaties and other international instruments should have special characteristics or whether any principle could become a general principle of law in that manner.

213. As for the second form of recognition, namely principles identified by establishing that they underlay general rules of conventional or customary international law, the view was expressed that the terminology used was not sufficiently clear to provide a basis for identification of such principles, and that the deductive approach suggested by the Special Rapporteur appeared to be too subjective. The view was also expressed that such form of recognition confused the process of identification of rules of customary international law with that of recognition of general principles of law. The point was made that it was still not clear how identifying principles recognized by treaties or underlying them was an exercise distinct from giving meaning to the treaty rules in question as part of the process of their application or interpretation. A concern was also expressed regarding how the persistent objector rule would apply in that context.

214. With regard to the third form of recognition, namely principles inherent in the basic features and fundamental requirements of the international legal system, it was emphasized that there would be difficulty in identifying the content of the "basic features and fundamental requirements of the international legal system" from which the principle would be deduced.

It was also noted that the terminology appeared to confuse the process of identification of peremptory norms of general international law (*jus cogens*) with that of recognition of general principles of law. Other members supported that form of recognition, considering that there were general principles of law inherent in the international legal system.

215. The view was expressed that the second category of general principles of law must not be constructed too broadly and that it must be clearly distinguished from existing rules of customary international law, to avoid the risk that it would become a shortcut to identifying customary norms where general practice had not yet emerged.

(d) Draft conclusions 8 and 9

216. In relation to draft conclusion 8 (decisions of courts and tribunals), several members supported the notion that subsidiary means for the determination of rules of international law, as contained in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, applied to general principles of law. However, a question was raised as to whether that would be equating "principles" to "rules". While several members supported maintaining consistency with the previous work of the Commission and thus using text similar to that of the conclusions on identification of customary international law, others expressed doubt regarding the formulation employed in draft conclusion 8. It was noted that, in the case of general principles of law, domestic judicial decisions were not subsidiary means, but direct means for the determination of the principles in question.

217. Regarding draft conclusion 9 (teachings), it was noted that teachings of scholars had often been relied upon to prove the widespread recognition of a principle in national legal systems, rather than the existence of general principles of law.

218. Finally, it was suggested that resolutions of the United Nations or international expert bodies could also serve as subsidiary means for the determination of general principles of law.

(e) Future programme of work

219. Members generally supported the proposal by the Special Rapporteur to address the functions of general principles of law and their relationship with other sources of law in his third report. However, the view was expressed that it would be difficult for the Commission to address the matter if it did not consider the processes through which general principles of law emerged, changed or ceased to exist.

220. Several suggestions were made for the future work of the Special Rapporteur on the topic, including the relationship of general principles of law with: each other; the fundamental principles of international law enshrined in the Charter of the United Nations; soft international law; and peremptory norms of general international law (*jus cogens*). The view was also expressed that the issue of general principles of law of a regional character, and whether the concept of universality of general principles would be inconsistent with such principles, should also be addressed.

221. Some members suggested that there might be a need to introduce a section in the draft conclusions for definition of terms used therein. There was also support for a draft conclusion defining or describing the essential elements of general principles of law as a source of international law.

3. Concluding remarks of the Special Rapporteur

222. In his summary of the debate, the Special Rapporteur expressed his gratitude to the members of the Commission and welcomed the interest that the topic had received.

223. The Special Rapporteur reiterated the agreement among members of the Commission and among States at the Sixth Committee of the General Assembly that the starting point for the work of the Commission on the topic should be Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, in light of State practice, jurisprudence and relevant teachings. In his view, that limited the work of the Commission to general principles of law as a source of international law, as referred to in the aforementioned article.

224. With regard to the terminology used in Spanish and French to refer to general principles of law, the Special Rapporteur highlighted that the Spanish formulation "principios generales del derecho" and the French formulation "principes généraux du droit", had been used by the Commission as recently as 2018 in its conclusions on identification of customary international law. The Special Rapporteur also recalled that certain treaties, such as the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War,[423] the Rome Statute of the International Criminal Court[424] and statutes of international criminal courts and tribunal, used "principios generales del derecho" and "principes généraux du droit" in Spanish and French, respectively.

225. The Special Rapporteur noted that a majority of members were in favour of replacing the expression "civilized nations", as contained in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, with "community of nations" as contained in the International Covenant on Civil and Political Rights. He also noted, however, concerns expressed by some members regarding the varied terminology used in the authentic text in different languages of that Covenant. As to comments made by members highlighting the importance of the legal systems of indigenous, autochthonous or first peoples in the context of the methodology for the identification of general principles of law, the Special Rapporteur suggested addressing those matters in the commentaries.

226. Regarding comments by some members to the effect that once a general principle of law became part of customary international law, it could no longer be considered a general principle of law, the Special Rapporteur clarified that practice confirmed that a general principle of law and norms derived from other sources of international law could exist in parallel.

227. The Special Rapporteur also indicated that a definition of general principles of law could be useful to clarify the scope of the Commission's work on the topic and suggested that the Commission could consider such a definition after addressing the functions of general principles of law.

228. Regarding the identification of general principles of law derived from national legal systems, as reflected in draft conclusion 4, he noted that there was consensus regarding an analysis in two steps: the determination that a principle was common to the principal legal systems of the world, on the one hand; and the ascertainment of the transposition of said principle to the international legal system, on the other.

229. The Special Rapporteur observed that several members agreed with the use of the term "principal legal systems of the world" to describe the scope of the comparative analysis that must be carried out in order to identify general principles of law under draft conclusion 5. He agreed with the suggestion made in plenary to include in paragraph 2 of draft conclusion 5 the term "sufficiently", as that term would allow a level of flexibility, while reflecting the fact that the analysis had to be "sufficiently wide and representative".

230. Regarding the differing views on the role of international organizations in determining the existence of a general principle of law, the Special Rapporteur stated that the relevant practice had always favoured the analysis of the legal systems of States to identify a general principle of law. He noted that the rules issued by an international organization could serve as complementary and not alternative means.

231. With regard to the second step of the analysis for the identification of general principles of law derived from national legal systems, namely, transposition into the international legal system, the Special Rapporteur addressed the drafting suggestion made during the debate to replace "transposition" with "transposability". He stated that it was not a mere terminological issue, but a substantive one. The Special Rapporteur explained that "transposability" would not play a role in the process of identification, rather it would describe the criteria for determining whether a recognized general principle of law could be applied in a specific case. The Special Rapporteur used the term "transposition" in the report to mean forming part of the process of determination of the content of general principles of

[423] Geneva, 12 August 1949, United Nations, *Treaty Series*, vol. 75, No. 973, p. 287, art. 67.

[424] Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 21, para. 1 (c).

law in the international legal system. In certain cases, the principles found in national legal systems could be applied in the international legal system as they were identified after the comparative analysis. In other cases, some elements of the principle identified at the domestic level were not transposed to the international legal system.

232. The Special Rapporteur recalled the two requirements for the transposition of general principles of law set forth in draft conclusion 6. Pursuant to the first requirement, principles *in foro domestico* should be compatible with the fundamental principles of international law, which he understood as the principles enshrined in the Charter of the United Nations, developed by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[425] In his view, the identification of general principles of law should not be subject to the authorization of any conventional or customary norm of international law, otherwise it would establish a hierarchy of sources. He added that principles on the conflict of norms, such as *lex specialis* would apply. At the same time, the Special Rapporteur acknowledged the different views that were expressed on the matter, which could be further discussed in the Drafting Committee.

233. Regarding the second requirement for transposition, namely, the existence of adequate conditions for the application of the principle *in foro domestico* in the international legal system, the Special Rapporteur agreed with members that draft conclusion 6, subparagraph (*b*), could be simplified to clarify that its purpose was to ensure that a principle could be applied without distortion or misuse in the international legal system.

234. With respect to the range of different views by members on general principles of law formed within the international legal system, the Special Rapporteur noted that it was part of the work of the Commission on the topic to examine in detail their possible existence. In his view, doing so would be an important contribution to international law. With respect to the various issues raised by members on the subparagraphs of draft conclusion 7, the Special Rapporteur indicated that they could be discussed in the Drafting Committee.

235. The Special Rapporteur stated that he was aware that the category of general principles of law formed within the international legal system remained controversial. He also stated that he had taken note of the suggestion, made by several members, to further examine the issue in order to achieve consensus in the Commission and indicated his willingness to work with members on that issue.

236. As for the subsidiary means for the determination of general principles of law, the Special Rapporteur observed that members were in general agreement with the approach proposed in his second report that subsidiary means for the determination of rules of international law, as contained in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, applied to general principles of law. He reiterated that recognizing the role of international courts and tribunals in the formation of general principles of law, beyond the scope of Article 38, paragraph 1 (*d*), of the Statute, was a question that needed to be handled with extreme caution.

237. With regard to the future programme of work, the Special Rapporteur indicated his intention to address in his third report the question of the functions of general principles of law and their relationship with norms from other sources of international law. He noted, however, that the results of the analysis contained in the upcoming report could have an impact on the methodology for identifying general principles of law. He also indicated that he would take into account the views of members on his second report and address the various issues raised during the debate.

[425] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

C. Text of the draft conclusions on general principles of law provisionally adopted by the Commission at its seventy-second session

1. Text of the draft conclusions

238. The text of the draft conclusions provisionally adopted by the Commission at its seventy-second session is reproduced below.

Conclusion 1
Scope

The present draft conclusions concern general principles of law as a source of international law.

Conclusion 2
Recognition

For a general principle of law to exist, it must be recognized by the community of nations.

…

Conclusion 4
Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

(*a*) the existence of a principle common to the various legal systems of the world; and

(*b*) its transposition to the international legal system.

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its seventy-second session

239. The text of the draft conclusions, together with commentaries, provisionally adopted by the Commission at its seventy-second session, is reproduced below.

Conclusion 1
Scope

The present draft conclusions concern general principles of law as a source of international law.

Commentary

(1) Draft conclusion 1 is introductory in nature. It provides that the draft conclusions concern general principles of law as a source of international law. The term "general principles of law" is used throughout the draft conclusions to refer to "the general principles of law recognized by civilized nations" listed in Article 38, paragraph 1 (*c*), of the Statute of International Court of Justice, analysed in the light of the practice of States, the jurisprudence of courts and tribunals, and teachings.[426]

(2) Draft conclusion 1 reaffirms that general principles of law constitute one of the sources of international law. The legal nature of general principles of law as such is confirmed by their inclusion in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, together with treaties and customary international law, as part of the "international law" that shall be applied by the Court to decide the disputes submitted to it. The predecessor of that provision, Article 38, paragraph 3, of the Statute of the Permanent Court of

[426] Taking into consideration recent practice of States and jurisprudence, the French and Spanish texts of draft conclusion 1 refer, respectively, to "*principes généraux du droit*" and "*principios generales del derecho*". It was understood that the use of "*du droit*" and "*del derecho*" 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.

International Justice, was the result of lengthy discussions in 1920 within the League of Nations, and in particular the Advisory Committee of Jurists established by the Council of the League, which sought to codify the practice that existed prior to the adoption of the Statute. Since then, general principles of law as a source of international law have been referred to in State practice, including in bilateral and multilateral treaties, as well as in the decisions of different courts and tribunals.[427]

(3) The term "source of international law" refers to the legal process and form through which a general principle of law comes into existence. The draft conclusions aim to clarify the scope of general principles of law, the method for their identification, and their functions and relationship with other sources of international law.

Conclusion 2
Recognition

For a general principle of law to exist, it must be recognized by the community of nations.

Commentary

(1) Draft conclusion 2 reaffirms a basic element of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, namely, that for a general principle of law to exist, it must be "recognized" by the community of nations.

(2) Recognition features widely in the practice of States, the jurisprudence of courts and tribunals and in teachings as the essential condition for the emergence of a general principle of law. This means that, to determine whether a general principle of law exists at a given point in time, it is necessary to examine all the available evidence showing that its recognition has taken place. The specific criteria for this determination are objective and are developed in subsequent draft conclusions.

(3) Draft conclusion 2 employs the term "community of nations" as a substitute for the term "civilized nations" found in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, because the latter term is anachronistic.[428] The term "community of nations" is found in article 15, paragraph 2, of the International Covenant on Civil and Political Rights, a treaty to which 173 States are parties and which is thus widely accepted.[429] The term used in the authentic languages of the Covenant is replicated in the different language versions of draft conclusion 2. For example, "l'ensemble des nations" in French and "communidad internacional" in Spanish. By employing this formulation, the draft conclusion aims to stress that all nations participate equally, without any kind of distinction, in the formation of general principles of law, in accordance with the principle of sovereign equality set out in Article 2, paragraph 1, of the Charter of the United Nations.

(4) The use of the term "community of nations" is not intended to modify the scope or content of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. In particular, the term does not seek to suggest that there is a need for a unified or collective recognition of a general principle of law, nor does it suggest that general principles of law can only arise within the international legal system. Furthermore, the term "community of nations" should not be confused with the term "international community of States as a whole" found in article 53 of the Vienna Convention on the Law of Treaties,[430] relating to peremptory norms of general international law (*jus cogens*).

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[427] See, for example, A/CN.4/732 (first report) and A/CN.4/742 (memorandum by the Secretariat).

[428] Other terms considered included "States", "community of States", "the international community", "nations", "nation States" and "nations as a whole".

[429] The provision reads: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171. See United Nations, *Status of Multilateral Treaties*, chap. IV.4.

[430] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

(5) The use of the term "community of nations" does not preclude that, in certain circumstances, international organizations may also contribute to the formation of general principles of law.

Conclusion 4
Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

(a) the existence of a principle common to the various legal systems of the world; and

(b) its transposition to the international legal system.

Commentary

(1) Draft conclusion 4 addresses the requirements for the identification of general principles of law derived from national legal systems. It provides that, to determine the existence and content of a general principle of law, it is necessary to ascertain: (*a*) the existence of a principle common to the various legal systems of the world; and (*b*) the transposition of that principle to the international legal system.

(2) This two-step analysis is widely accepted in practice and the literature and is aimed at demonstrating that a general principle of law has been "recognized" in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. It is an objective method to be applied by all those called upon to determine whether a given general principle of law exists at a specific point in time and what the content of that general principle of law is.

(3) Subparagraph (*a*) addresses the first requirement for identification, that is, the ascertainment of the existence of a principle common to the various legal systems of the world. This exercise, which is essentially inductive, is necessary to show that a legal principle has been generally recognized by the community of nations. The use of the term "the various legal systems of the world" is aimed at highlighting the requirement that a principle must be found in legal systems of the world generally. It is an inclusive and broad term, covering the variety and diversity of national legal systems of the world. This requirement is further developed in draft conclusion 5.

(4) Subparagraph (*b*) addresses the second requirement for identification, that is, the ascertainment of the transposition of the principle common to the various legal systems of the world to the international legal system. This requirement, which is further elaborated on in draft conclusion […], is necessary to show that a principle is not only recognized by the community of nations in national legal systems, but that it is also recognized as applicable within the international legal system.

(5) Subparagraph (*b*) employs the term "transposition", understood as the process of determining whether, to what extent and how a principle common to the various legal systems can be applied in the international legal system. The use of this term is not intended to suggest that a formal or express act of transposition is required.

(6) The term "transposition" was preferred to "transposability", which is sometimes used in this context. Transposition necessarily encompasses transposability; the latter term refers to whether or not a principle identified through the process indicated in subparagraph (*a*) can be applied in the international legal system, but does not cover the whole process of ascertainment of transposition.

(7) Owing to the differences between the international legal system and national legal systems, a principle or some elements of a principle identified through the process indicated in subparagraph (*a*) may not be suitable to be applied in the international legal system. Therefore, "transposition" encompasses the possibility that the content of the general principle of law identified through this two-step analysis may not be identical to the principle found in the various national legal systems.