General Principles of Law: Way Forward
AALCO Webinar
Thursday, 6 April 2023

1. I thank Dr Uma Sekar, President of 60th Annual Session of AALCO and Additional Secretary, Ministry of External Affairs, Government of India, AALCO Secretary-General Ambassador Kamalinne Pinitpuvadol, distinguished panel members including my current and former colleagues of the ILC, for giving me this opportunity to share my views and suggestions on the topic of ***General Principles of Law: Way Forward***.

2. Having studied the reports of the Special Rapporteur and comments of the states in the 76th Session of the 6th Committee, these are issues and questions which, I believe may be discussed by the ILC. While congratulating my distinguished colleague, Ambassador Vazquez-Bermudez, I am reminded how difficult and complex is the task for him to clarify the law on this topic.

3. We can observe several substantial and procedural controversies concerning the general principles formed within the international legal system. It is expected that taking into consideration state practice, case-law and even additional review of teachings from different regions, the Commission will have adequately examined, elaborated and clarified issues relating to this particular category. It is also essential to conduct a more thorough examination of the case law of international courts and tribunals, in order to determine whether this second category can truly be deemed to exist.

4. It is essential to distinguish the *lex specialis* versus *lex generalis* nature of treaties and customary international law and general principles of law respectively. The case law including the ICJ case-law shows that general principles of law are rarely applied. Taking this aspect into consideration, one may conclude that there is no hierarchy but certainly *principle of speciality* and this should apply in

relation to two rules of same source. [1] Is it not the case that a norm of positive law (convention or customary) cannot be invalidated by a general principle of law – although a general principle will have to give way before a positive norm not because they are inherently in an hierarchical relationship, but because the positive norm will be *lex specialis* in relation to the general principle?

5. Another important point is that the draft conclusions in their current format need to sufficiently distinguish between general principles formed within the international legal system, on the one hand, and rules of customary international law, on the other.

6. The draft conclusions, certainly, have reached high level of clarification and explanation, however, the discussions in the 6th Committee Session of 2022 show that there is genuine concern on part of several states that instead of sufficient clarification and clarity, the existing draft conclusions may actually blur the line between different sources of international law. The Special Rapporteur has been eloquently addressing all the concerns and will continue to do so, especially, overwhelming states believe the need for stating the law in this regard.

7. It is in this regard that the Commission and Special Rapporteurs are often reminded to exercise cautions against engaging in an exercise of progressive development in a topic concerning one of the sources of international law. One hears a voice whether the current project, should aim to clarify rather than develop this area of law.

8. There is ambiguity or one can say lack of clarity as some states believe that the draft conclusions are hinting at some sort of hierarchy between the sources of law and others do not believe so and therefore, an explanation will be helpful to emphasise that there is no hierarchy between these sources of law.

9. The establishment of a specific method is in fact essential to clarify if a distinction exists between general principles of law and customary international

[1] Rosenne Shabtai, *The Perplexities of Modern International Law* (Brill: 2002), p. 64

law. As the Commission recently worked upon the topic of peremptory norms of international law *jus cogens* where the attempt has been made to identify and locate the *jus cogens*, is it possible to learn the methodology from that topic?

10. A number of member States have shared the view that the process of ascertaining the transposition of principles of domestic law into the international legal system should be made taking into due account the risk to override the will and consent of States in the creation of norms of international law.[2]

11. Few examples mentioned in the reports of the Special Rapporteur are argued as essentially examples of customary rules which are confused as general principles of law due, in part, to the language used by courts and tribunals to describe them; such as "general principles of international law" or "general international law" or "principles of international law."[3]

12. A state has expressed concern on the criteria of determination of general principles of law formed within the international legal system. Such a criteria under conclusion may lead to "further confusion with the identification of customary rules and will open the doors wide open for legal activism to advance certain principles as being recognized by the community of nations as intrinsic to the international legal system". In this regard, it is argued that the "novel methodology for the identification described in the commentary as inductive and deductive, purports to confuse customary rules with General Principles of Law, and there are concerns that this may be used as means to bypass the stringent identification process for customary international law to declare such principles as GPL formed within the international legal system".[4]

13. It is to be stressed that general principles of law in practice play a subsidiary role, mainly as a means of interpretation, filling gaps or avoiding situations of *non liquet*. In fact, my extensive studies on the ICJ - World Court Reference Guide 1 (2002) and 2 (2014) since 1922 till 2010 allow me to affirm that the

[2] See Statements of Viet Nam, Singapore, USA at the 76th Session

[3] UN GA/L/3674, 2 November 2022.

[4] Statement of Jordan at the 76th Session

Court has only rarely referred explicitly to principles of international law and, primarily, in the context of procedural obligations, evidence and the machinery of judicial process rather than substantive law obligations. For example of a judicial process, one can cite what the Court in the *Right of Passage* case stated that, it is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seized of a dispute, unilateral action by the respondent state in terminating its Declaration [i.e. accepting the jurisdiction of the Court], in whole or in part, cannot divest the Court of jurisdiction.[5]

14. In another case, namely reservations to the *Genocide Convention*, the Court pointed out that it was a generally recognised principle that a multilateral treaty is the result of an agreement freely concluded, and that this principle is linked to the notion of the integrity of the treaty as adopted. "this concept, which is directly inspired by the notion of contract, is of undisputed value as a principle", however, when applied in a concrete case it would be proper to refer to a variety of circumstances that would lead to a more flexible application of the principle.[6] I am afraid that with the existence of many international courts and tribunals and applicability of vast expansion of positive international law and the fact that ICJ mainly and other tribunals too have shown hesitation in utilising the general principles of law, general principles are losing some of the earlier significance and can be considered to have a fairly limited scope.

15. Several countries have stressed the- "importance of distinguishing clearly and systematically between practice supporting the existence of a general principle, or general principles as a source of law, and cases where invocation of the term 'principle' may not be intended or justifiable as a reference to a general principle" within the meaning of article 38 (1) c of the Statute of the ICJ.[7] This is a very valuable observation. In this regard, it is worth noting that ICJ has regarded the terms 'principles' and 'rules' as essentially the same within

[5] *Right of Passage*, ICJ Report 1957, pp. 125, 141-2.

[6] See Rosenne above, p. 63

[7] See Statement of Norway at the 76th Session

international law.[8] Introducing the adjective 'general' however shifts the meaning to a broader concept.

16. "International community of States" is preferable to the term "community of nations". Term international community of states as a whole has been used in the final report concerning peremptory norms of international law *jus cogens*. It is interesting to see why one study on the source of international law has been using one term while another study at the same time using a different term.

17. A drafting issue is whether it would be better to highlight the particular traits identified in draft conclusion 10, paragraph 2, letter a and b, in the commentaries, rather than identify them in the text of a draft conclusion, as these traits are common to all primary sources.

18. There is widely prevalent view that the ICJ Statute sets an informal hierarchy between sources of international law. But the ICJ case-law gives no indication whatsoever about this informal hierarchy prevalence.

19. General Principles of Law set the "ethical-normative scene for other norms and have a supplementary function of filling the gaps and avoiding rulings of *non liquet"*, this is what one delegation said and I believe this is the function of the general principles of law as far as international law is concerned.[9]

20. Whether there is sufficient State practice, jurisprudence or teachings to support fully the existence of the second category and to determine clearly the methodology for their identification? In this regard, what I understand is that the Commission will attempt to reconcile the gap-filling function of general principles described under paragraph 1 of draft conclusion 10, with the need to resort to "generally accepted techniques of interpretation and conflict resolution in international law" to resolve conflicts between a general principle of law and a

[8] Gulf of Maine case, ICJ Report 1984, pp. 246, 288-90.

[9] Statement of Portugal at the 76th Session

treaty rule or customary international law rule under paragraph 3 of draft conclusion 11.

21. A very pertinent point was raised by UK when it stated in the 76th Session of the 6th Committee that it would like to inquire "what would be suggested to be evidence of the transposition when general principles of law assume the role of "gap-filling that might exist in conventional and customary international law" and secondly, clarification as regards the phrase "international instruments, rules and principles of international law accepted by States". Like many states, the UK noted that the question of the existence of the second category of general principles - those formed within the international legal system - remains contentious, both within the Commission and among States.

22. As far as relations between the customary international law and general principles of law are concerned, one widely held view among the states is that the examples of general principles of law formed within the international legal system referred to by members of the Commission during the debate appear to be principles existing within customary international law.

23. As far as the methodology to reconcile the transposition is concerned, the US suggested that a "determination of compatibility is necessary and that it was not persuaded that it is sufficient".[10] It further stressed that a "critical element that should be maintained is a role for recognition by States that a rule has transposed to the international plane and that it eventually did not agree that State recognition can be deemed "implicit" if a domestic rule is compatible with international law. US made a proposal there should be a determination that the proposed general principle is not in conflict with relevant existing rules of international law. A conflicts analysis is appropriate given the high bar that should exist for the finding and application of a new general principle, commensurate with the application of any new rule of customary international law. A conflict-based model is also consistent with draft conclusion 12 which incorporates the lex specialis" principle. [11]

[10] See the UK Statement at the 76th Session.

[11] See the US Statement at the 76th Session

24. It is critical that the state consent required to find a general principle is on par with that required for treaties and customary international law, even if it is not identical. With an independent existence, their validity in international law does not derive from any consent of the parties or from state practice as such, provided that they are norms that state should recognise.

25. Referring to *Sempra v. Argentina* decision, US mentioned that "far from being a good example to show how general principles of law are formed, this arbitral award instead may instead serve as a cautionary tale of the risks of too loose a standard for identifying a principle of law" (the third report cited this as an example).

26. **A way forward** - Given the differing views on the question of whether general principles may be formed within the international legal system, even within the ILC itself, the better course of action may be to include a "without prejudice" article, so that the issue can be addressed in the future if state practice were ever to support it more conclusively

27. With respect to the widely recognized characteristic of these principles, it is to be emphasised that those general principles, even identified in treaties and other international instruments, shall not automatically render binding effects upon other States that have not consented to be bound by the relevant instruments.[12]

28. While shared concepts of internal law can be used as a fall-back, there are severe limits to that because of the characteristic differences between international and the internal law of any state, between the law of coordination and the law of sub-ordination.[13]

29. In the setting of AALCO, one can observe that many AALCO members states may have borrowed heavily from the experience of colonizers in their

[12] Viet Nam Statement at the 76th Session

[13] See Rosenne above at p. 63.

earlier efforts to modernise the structure administering the state, including the general principles of law but the evolving doctrines, case-law and state practice of these states suggest separation (delinking) from these earlier held views and forming their own concepts as adaptable to their own environment and needs. In this regard, a general principle of law observed across African-Asian region in 1960s or 1970s, remain the same or has given a way to more inductive system. I would be curious to know how the ICJ would read its own dictum in this context which its predecessor in the *German Settlers in Poland* case observed, that, private rights acquired under existing law do not cease on a change of sovereignty…it can hardly be maintained that, although the law survived, private rights acquired under it perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice. This principle in the current scenario where African-Asian states have become independent may contest the validity of the principle as this principle, like several principles, are product of colonial times. Similarly, the often-cited principle based on ICJ verdict in the *Corfu Channel* case, while referring to circumstantial evidence, it pointed out in 1949 that 'this indirect evidence is admitted in all systems of law and its use is recognised by international decisions'. I believe that with the evolution of state doctrine, precedence and practice among African-Asian states, the ICJ may resist to further consolidate this view or even refrain from using its own precedent.

30. Let me cite *ELSI* case (1989) and what the Court had to say regarding the principle of *estoppel*. Whether the Court would hold similar views today? It stated, although it cannot be excluded that an estoppel could in certain circumstances arise from a silence when something ought to have been said, there are obvious difficulties in constructing an *estoppel* from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges.

31. As far as tribunals and especially arbitral tribunals are concerned, one has to be extremely cautious what it says. For example, the tribunal in *AMCO v Republic of Indonesia* case stated 'the full compensation of prejudice, by awarding to the injured party the *damnum emergens* and *lucrum cessans*, is a principle common to the main systems of municipal law, and therefore a general principle of law which

may be considered as a source of international law.[14] I believe this statement would be resisted by several investment host countries especially developing countries in this century. In this regard, one principle comes to my mind, namely, *ex injuria jus non oritur*, basically, facts flowing from wrongful conduct cannot determine the law. Putting these two principles as applicable for current state and evolving international relations would generate a heated debate among courts, doctrines and certainly state practice. Can we call them as general principles of international law based on the assumption that as applicable to the international community of states as a whole? I am not sure whether the ICJ or tribunals and many investment tribunals would hold these applicable unless they want to lose touch with reality.

32. Perhaps the most cited general principle of international law is *pacta sunt servanda* or that the idea that international agreements are binding, but when these agreements themselves were unequal in form, process and content, whether this applies to all types of international agreements and across all the time periods is something requires rethinking. Although I firmly believe that the whole concept of binding international agreements can only rest upon the presupposition that such instruments are commonly accepted as possessing that quality. Good faith is another important general principle of international law, but here, the intrinsic value of the principle is different than when we compare the *pacta sunt servanda* intrinsic value for equal or unequal treaties. But good faith is not in itself a source of obligation, it is a background principle informing and shaping the observance of existing rules of international law.

33. I hope the above observations and suggestions would be helpful in further deliberations in the Commission. At the same time, state practice, doctrine and jurisprudence of AALCO member states as well as teaching of scholars will be important to supplement the work of the Commission.

34. Thank you.

[14] Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1