



**Statement
on behalf of the Republic of South Africa
by**

**Ambassador, Mathu Joyini, Permanent Representative to the
South African Permanent Mission to the UN
Before the Sixth Committee of the
76th Session of the United Nations General Assembly**

Under Agenda Item No. 82

On the ILC topics: “General Principles of Law”

New York, 01 November 2021

Chair

The Republic of South Africa is pleased that the COVID-19 global pandemic has not stifled the work on the important topic of the general principles of law and we commend the Commission and the Special Rapporteur on the topic, Mr. Marcelo Vázquez-Bermudez, for the progress made in the last year. South Africa remains convinced of the importance of the study and improved understanding of the meaning of Article 38, paragraph 1 (c) of the Statute of the International Court of Justice when it refers to general principles of law as a primary source of international law.

The consideration and adoption of the second report of the Special Rapporteur in July 2021 is noted with appreciation, as is the provisional adoption of texts and titles of various draft conclusions following the report by the chair of the Drafting Committee, Ms Patricia Galvão Teles in August 2021. South Africa follows the work of the Commission on this topic with interest and welcomes the adoption of the commentary to draft conclusions 1, 2, and 4.

South Africa adds its voice to the unanimous voice of other States that qualified the recognition of general principles of law by 'civilized' nations as anachronous, and we welcome references to the 'international community' or the 'community of nations' - as referred to in the International Covenant on Civil and Political Rights - as a more appropriate reading of Article 38, paragraph 1 (c). The Commission is encouraged to continue to explore the most apt and accurate terminology that should be preferred without modifying the scope or content of Article 38, paragraph 1 (c).

Undoubtedly, the terminology that will eventually be preferred by the Commission will change how the world references one of the cornerstones of the sources of international law, and it is not a matter that should be traversed too briefly.

The members of the Commission appear to agree that the topic's scope includes the legal nature of general principles of law as a source of international law; 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. However, in categorizing general principles of law falling under Article 38, paragraph 1 (c), the Commission was brought to the general principles of law derived from national legal systems and general principles of law formed within the international legal system.

While South Africa recognizes that general principles of law formed within the international legal system may be considered as a source of international law, the categorization is not arrived at without challenges. In particular, the distinction between general principles of law formed within the international legal system itself and customary international law or conventional international law has not been adequately explored or determined.

South Africa has noted the views held by others that the process of determination of peremptory norms of international law may serve as a model that could be adapted to determine general principles of law formed within the international legal system itself, and we support views that recognize the potential pitfalls of not making adequate distinction – not only in identifying the different categories, but also in the methods, factors, and processes of doing so. Thus, while supporting 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,

it may 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.

Chair,

On the use of domestic law in determining general principles of law, the words of Lord McNair in the *Status of South-West Africa (Advisory Opinion)* still resonates when he said: *'[t]he way in which international law borrows from this source [of general principles of law recognized by civilized nations] is not by means of importing private law institutions lock, stock and barrel, ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of the "general principles of law". In my opinion, the true view of the duty of international tribunals in this matter is to regard any features of terminology which are reminiscent of the rule and institutions of private law as an indication of policy and principles rather than as direct importing of these rules and institutions'*.

We are reminded of the need to adapt and transpose principles from domestic legal systems when incorporated into international law, and we are reminded that Article 38, paragraph 1 (c) was as much intended to guide States as it was to guide judicial forums in finding law where it was anticipated that law may be sought with difficulty. We are satisfied that the Commission is considering these wise words in the methods adopted by the Commission and the Special Rapporteur on the topic of general principles of law.

Finally, one of the primary tasks of a judicial organ applying international law would be to determine the international law applicable in the case, and it is that judicial organ that should not be relegated to the shadows of States in the present endeavors of the Commission. Thus, the

intended result of the work of the Commission, being conclusions and commentaries, remains appropriate as opposed to draft articles.

South Africa looks forward to the next report of the Special Rapporteur and to follow developments relating to the processes through which general principles of law emerge, change, or cease to exist.

I thank you.