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Chapter VIII
General principles of law

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1. Text of the draft conclusion

1. The text of the draft conclusion provisionally adopted by the Commission at its seventy-third session is reproduced below.

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Determination of the existence of a principle common to the various legal systems of the world

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

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

3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.

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

2. The text of the draft conclusion, together with commentaries, provisionally adopted by the Commission at its seventy-third session, is reproduced below.

Conclusion 5
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3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.

Commentary

(1) Draft conclusion 5 addresses the first step of the two-step methodology for the identification of general principles of law derived from national legal systems set out in draft conclusion 4, that is, the determination of the existence of a principle common to the various legal systems of the world. Paragraph 1 of the draft conclusion provides that, to determine the existence of such a principle, a comparative analysis is required. Paragraph 2 qualifies the comparative analysis by indicating that the latter must be wide and representative, including the different regions of the world. Paragraph 3 clarifies which materials are relevant for purposes of this methodology.

(2) Paragraph 1 of draft conclusion 5 states that a "comparative analysis of national legal systems" is required to determine the existence of a principle common to the various legal systems of the world. This formulation is based on a general approach that is found in practice and in the literature, whereby national legal systems are assessed and compared in order to establish that a legal principle is common to them. The "comparative analysis" referred to in the draft conclusion does not require that particular methodologies that exist in the field of comparative law be employed. While the latter may, when appropriate, provide some guidance, a degree of flexibility is generally maintained in practice. What is relevant for purposes of draft conclusion 5 is that a common denominator is found across national legal systems.[1]

[1] See, for example, International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 178; and

(3) The characteristics that a legal principle should have to be considered "common" to the various legal systems of the world is not specified in draft conclusion 5. The Commission considered that, since the content and scope of general principles of law derived from national legal systems may vary, it was appropriate not to be overly prescriptive in this regard, thus allowing for a case-by-case analysis. In many cases, the result of the comparative analysis may be a legal principle of a general and abstract character.[2] In other cases, however, the comparative analysis can lead to the ascertainment of legal principles with a more concrete or specific character.[3]

(4) The second paragraph of draft conclusion 5 indicates that the comparative analysis for the determination of the existence of a principle common to the various legal systems of the world must be "wide and representative, including the different regions of the world". This qualification is aimed at clarifying that, while it is not necessary to assess every single legal system of the world to identify a general principle of law, the comparative analysis required must nonetheless be sufficiently comprehensive and take into account the principle of sovereign equality, in accordance with which all States must be regarded as having an equal participation in the formation of general principles of law. The term "different regions of the world" was included to emphasize that it does not suffice to show that a legal principle exists in legal systems representing certain legal families (such as civil law, common law and Islamic law), but that it is also necessary to show that the principle has been recognized widely in the various regions of the world[4] or, as the International Court of Justice indicated

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Prosecutor v. Dragoljub Kunarac, Radomir Kunac and Zoran Vuković, Nos. IT-96-23-T & IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, para. 439.

[2] A general principle of law that is often referred to in practice and in the literature, and which may be considered to be of a general and abstract character, is the principle of good faith.

[3] Examples of general principles of law that have been invoked or applied in practice, and which may be considered to be of a more specific character (because they present, for instance, precise conditions for their application), include the principles of *res judicata* and *lis pendens*, and the right to lawyer-client confidentiality.

[4] Examples of State practice where a wide and representative comparative analysis may be considered to have been conducted include International Court of Justice, *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, Observations and Submissions of Portugal on the Preliminary Objections of India, annex 20, pp. 714–752, and Reply of Portugal, annexes 192, pp. 858–861 (including the legal systems of Argentina, Australia, Austria, Belgium, Bolivia (Plurinational State of), Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, France, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Ireland, Italy, Japan, Mexico, Myanmar, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Saudi Arabia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United States of America, Uruguay, Venezuela (Bolivarian Republic of), Yemen and Zambia, and Czechoslovakia and the Soviet Union); International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, Memorial of Nauru, appendix 3 (including the legal systems of Argentina, Australia, Bangladesh, Belgium, Canada, Chile, China, Colombia, Cyprus, Denmark, Ethiopia, Finland, France, Germany, Ghana, Greece, Hungary, India, Ireland, Italy, Japan, Liechtenstein, Mexico, Netherlands, New Zealand, Nigeria, Pakistan, Romania, Senegal, South Africa, Spain, Sri Lanka, Sweden, Switzerland, the United Kingdom and the United States); International Court of Justice, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 147, Memorial of Timor-Leste, annexes 22 to 24 (including the legal systems of Australia, Austria, Belgium, Brazil, Bulgaria, China, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Indonesia, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Singapore, South Africa, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Turkey, United Kingdom and the United States, and the European Union, and Hong Kong, China) and Counter-Memorial of Australia, annex 51 (covering the legal systems of Australia, Belgium, Denmark, France, Germany, India, Indonesia, Mexico, Morocco, New Zealand, Russian Federation, Slovakia, Switzerland, Timor-Leste, Uganda, United Kingdom and United States of America). Similar examples are found in the case law. See, for example, International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Delalić* et al., No. IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, paras. 584–589 (Australia, Bahamas, Barbados, Croatia, Germany, Italy, Japan, Russian Federation, Singapore, South

in the *Barcelona Traction* case, that a principle has been "generally accepted by municipal legal systems".[5]

(5) Paragraph 3 of draft conclusion 5 provides additional guidance by listing, in a non-exhaustive manner, the sources of national legal systems that may be relied upon to carry out the comparative analysis. The terms "national laws" and "decisions of national courts" are to be understood in a broad way, covering the whole range of materials in national legal systems that can be potentially relevant for the identification of a general principle of law, such as constitutions, legislation, decrees and regulations, as well as decisions of national courts from different levels and jurisdictions, including constitutional courts or tribunals, supreme courts, courts of cassation, courts of appeal, courts of first instance, and administrative tribunals. The term "and other relevant materials" was included so as not to preclude other sources of national legal systems that may also be relevant, such as customary law or doctrine.

(6) In preparing draft conclusion 5, paragraph 3, the Commission was mindful that national legal systems are not identical and that each legal system must be analysed in its own context, taking into account the characteristics of the latter. In certain legal systems, for

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Africa, Turkey, United States, England, Scotland, and former Yugoslavia, and Hong Kong, China); International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Pavle Strugar*, No. IT-01-42-A, Judgment, Appeals Chamber, 17 July 2008, paras. 52–54 (Australia, Austria, Belgium, Bosnia and Herzegovina, Canada, Chile, Croatia, Germany, India, Japan, Malaysia, Montenegro, Netherlands, Republic of Korea, Russian Federation, Serbia, United Kingdom and United States); International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dražen Erdemović*, Judgment, Appeals Chamber, Case No. IT-96-22-A, Judgment, 7 October 1997, para. 19, referring to the Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras. 59–65 (Australia, Belgium, Canada, Chile, China, Ethiopia, Finland, France, Germany, India, Italy, Japan, Malaysia, Mexico, Morocco, Netherlands, Nicaragua, Nigeria, Norway, Panama, Poland, Somalia, South Africa, Spain, Sweden, Venezuela (Bolivarian Republic of), and England, and former Yugoslavia); *Furundžija* (see footnote 1 above), para. 180 (Argentina, Austria, Bosnia and Herzegovina, Chile, China, France, Germany, India, Italy, Japan, Netherlands, Pakistan, Uganda, Zambia, and England and Wales, former Yugoslavia, and New South Wales (Australia)); *Kunarac* (see footnote 1 above), paras. 437–460 (Argentina, Australia, Austria, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Canada, China, Costa Rica, Denmark, Estonia, Finland, France, Germany, India, Italy, Japan, New Zealand, Norway, Philippines, Portugal, Republic of Korea, Sierra Leone, South Africa, Spain, Sweden, Switzerland, Uruguay, United Kingdom, United States and Zambia).

[5] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 38, para. 50. See also Philippines, Supreme Court, *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC*, Decision of 8 March 2016 (G.R. No. 221697; G.R. Nos. 221698-700), pp. 19, 21; International Centre for Settlement of Investment Disputes, *El Paso Energy International Company v. The Argentine Republic*, Case No. ARB/03/15, Award, 31 October 2011, para. 622; International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 675, para. 104; Permanent Court of Arbitration, *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Case No. 2008-7, Award, 22 July 2009, *Reports of International Arbitral Awards* (UNRIAA), vol. XXX, pp. 145–416, at p. 299, para. 401; Germany, Constitutional Court, Judgment, 4 September 2004 (2 BvR 1475/07), para. 20; International Criminal Tribunal for the Former Yugoslavia, *Kunarac* (see footnote 1 above), para. 439; *Delalić* (see previous footnote), para. 179; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, No. IT-94-1-A, Judgment, 15 July 1999, Appeals Chamber, para. 225; International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, No. ICTR-96-4-T, Judgment, 2 September 1998, para. 46; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnil Delalić* et al., No. IT-96-21-T, Decision on the motion to allow witnesses K, L and M to give their testimony by means of video-link conference, Trial Chamber, 28 May 1997, paras. 7–8; Inter-American Court of Human Rights, *Aloeboetoe* et al. *v. Suriname*, Judgment (Reparations and Costs), 10 September 1993, Series C, No. 15, para. 62; Iran-United States Claims Tribunal, *Questech, Inc. v. Iran*, Case No. 59, Award No. 191-59-1, 20 September 1985, *Iran – United States Claims Tribunal Reports* (IUSCTR), vol. 9, pp. 107 et seq., at p. 122; Iran-United States Claims Tribunal, *Sea-Land Service, Inc. v. Iran*, Award No. 135-33-1, 20 June 1984, IUSCTR, vol. 6, pp. 149 ff., at p. 168; International Court of Justice, *Corfu Channel case, Judgment of April 9th 1949: I.C.J. Reports 1949*, p. 4, at p. 18; *Fabiani* case (1896) (reproduced in H. La Fontaine, *Pasicrisie internationale 1794–1900*: *Histoire documentaire des arbitrages internationaux* (Berlin, Stämpfli, 1902)), p. 356; and the Queen case between Brazil, Norway and Sweden (1871) (*ibid.*), p. 155.

example, the decisions of national courts may be more relevant to determine the existence of a legal principle, while in others written codes and doctrine may have prevalence. The Commission was also in agreement that all branches of national law, be it private or public law, are potentially relevant for the identification of a general principle of law derived from national legal systems.[6]

(7) It should be highlighted that determining the existence of a principle common to the various legal systems of the world is not sufficient to establish the existence and content of a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. As noted in draft conclusion 4, the ascertainment of the transposition of that principle to the international legal system is also required. This second step of the methodology is addressed in draft conclusion 6.

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[6] See, for example, International Court of Justice, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 100, at p. 125, para. 58 (applying the principle of *res judicata*, derived from civil procedure); International Court of Justice, *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 38, para. 50 (applying the principle of separation between companies and shareholders, derived from corporate law); World Trade Organization, Appellate Body, *United States – Tax Treatment for "Foreign Sales Corporations"*, Appellate Body Report, 14 January 2002 (WT/DS108/AB/RW), para. 143 (applying a principle relating to taxation of non-residents, derived from tax law); *Questech, Inc. v. Iran* (see previous footnote), p. 122 (applying the principle *rebuc sic stantibus*, derived from contract law); *Sea-Land Service, Inc. v. Iran* (see previous footnote), p. 168 (applying the principle of unjust enrichment, derived from civil law or the law of obligations); *Furundžija* (see footnote 1 above), paras. 178–182, and *Kunarac* (see footnote 1 above), paras. 439–460 (applying a definition of "rape" derived from criminal law); *Aloeboetoe v. Suriname* (see previous footnote), para. 62 (applying a principle relating to succession for purposes of compensation, derived from laws on inheritance or succession); Philippines, Supreme Court, *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC* (see previous footnote), p. 21 (applying a principle of nationality of foundlings, derived from laws on nationality). See also International Centre for Settlement of Investment Disputes, *El Paso Energy International Company v. The Argentine Republic* (see previous footnote), para. 622 ("'general principles' are rules largely applied *in foro domestico*, in private or public, substantive or procedural matters"); International Court of Justice, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1996*, p. 6, Dissenting Opinion of Judge Tanaka, p. 250, at p. 294 ("So far as the 'general principles of law' are not qualified, the 'law' must be understood to embrace all branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc.").