Statement by Mario Oyarzábal*

on the Fourth Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur (A/CN.4/785, 18 February 2025)

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Thank you, Mr. Chair.

My intervention today will be structured as follows. To begin with, I will make some general observations on the Report presented by the Special Rapporteur (SR) and the comments received by the States on the work of the Commission. Then, I will make some non-exhaustive suggestions on the Draft Conclusions and the amendments proposed by the SR.

Since not all time slots have been covered, I will allow myself to extend a little beyond the recommended 15 minutes.

First of all, I congratulate and thank the SR for his Report. His analysis dealt exhaustively and comprehensively with the comments made by the States, and constructively proposed practical and eloquent recommendations, which are evidence of the great work he has done in consulting the academic world and discussing the draft with various experts in the field.

It seemed to me that the document highlights the existing challenges in this area, and that the discussions described will be of great importance for the Commission's work on this topic. I believe, however, that the SR, in his Report, has adopted a far too progressive position at times. Mr. Vázquez-Bermúdez correctly identifies, in my view, that this project is caught between rigor and flexibility, and that a balance must be found. In any case, it is my opinion that such balance must be found in a position closer to rigor than to flexibility in a subject such as this, relating to the sources of international law. This is so in view of the practicality of the outcome of the Commission's work, its acceptance by the international community and the legitimization of these Draft Conclusions as an expression of the current state of international law, and only, more exceptionally, as a proposal for the progressive development of the law.

Secondly, I would like to highlight the comments sent or formulated by the States in the debate in the Sixth Committee. In general, these States suggested that the Commission should be clearer about the content of the Draft Conclusions and their commentaries. This seems to me to be a very valid concern, which we will have to resolve. In this regard, however, I regret that there was not greater participation by more States, from different legal traditions and cultures. Ultimately, international law is the law of all States, from all parts of the world; the

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greater their expression about our work, the better represented the interests of each will be, and the fairer international law will be.

Thirdly, in line with these first two observations, I consider it important that, in developing this task, the current state of international law be taken into account, specifically, acting with greater caution when referring to the second category of general principles. Certainty must be the guiding light for the work of the Commission, not only in the sense that we must be as clear as possible about the content of the Draft Conclusions, but also that we must be precise in describing those Draft Conclusions that emerge from existing law and in specifying those Draft Conclusions that, on the other hand, are made with a view to developing the law. In any case, I am not suggesting that we should retrace our steps and eliminate the mention of this second category, but rather that we should be cautious in developing the Draft Conclusions that refer to it.

Mr. Chair,

After these general and introductory remarks, I would like once again to thank the SR for his work, and to make a few suggestions to the proposed amendments to the Draft Conclusions that the time allotted allows, in the hope that they may contribute to the work ahead.

Mr. Chair,

Regarding **draft conclusion 2**, first of all, I consider as positive the SR's intention to provide greater clarity on the role of international organizations and other actors in the identification of general principles. However, I suggest not to modify the current text in the way he proposes, and instead, to incorporate such clarifications in the commentary to the draft conclusion. Indeed, I consider that, for the sake of thoroughness, the clarifications belong in the commentary and not in the text of the draft conclusion, but, furthermore, that they should elaborate on under what circumstances international organizations can serve in the identification of principles and to what it refers when referring to "other actors" that may be relevant in providing context and for assessing recognition of principles.

For my part, I would also suggest modifying the text in the English version from "community of nations" to "community of States." Extrapolating the term from a human rights covenant to the context that concerns us in this instance does not, in itself, seem entirely appropriate. I believe that, instead, the reference to States rather than nations promotes the certainty of international law and the rules established by those who are the subjects of international law: States.

During the analysis of this draft conclusion, the SR proposes the inclusion of a new draft conclusion 12 referring to general principles of law with a limited scope of application. I do not oppose, in principle, considering the inclusion of this expression of the rule; however, I consider that the SR should deepen this concept and this possibility.

More precisely, I believe it would be ideal to understand, among other questions, whether the SR is referring here to principles applicable to regional or sub-regional systems, or also to particular principles that may exist in certain specialized areas or fields of international

law, such as international environmental law or international human rights law, or even to particular principles between only two States.

Moreover, I wonder whether the incorporation of a draft conclusion 12 along the lines proposed by the SR would not allow us to delete the "without prejudice" clause at paragraph 2 of draft conclusion 7 relating to the question of the possible existence of other general principles of law formed in the international legal order.

Beyond this question, in light of the inspiration sought in the Commission's Draft Conclusions on Identification of Customary International Law, I consider that the SR, in accordance with his proposal regarding the commentary to draft conclusion 11, should also clarify here the relationship between general principles of law and customary international law, and explain, for example, why some concepts of those Draft Conclusions — such as the one on regional customs — would have their analog here while others, such as the figure of the persistent objector, would not.

Mr. Chair,

As regards **draft conclusion 3**, I must, again, express my reservations about the existence of the second category of general principles of law, i.e., those that could be formed in the international legal system at paragraph (b). In my view, and as pointed out by several States that expressed themselves on the draft, there would not appear to be sufficiently widespread State practice to validate their existence.

I would therefore humbly suggest to the SR to explain more precisely the limits that distinguish this category of principles from the rules of customary international law. In addition, it would seem prudent, as requested by some States, that the commentary to the draft conclusion should refer to the number of States that currently oppose the existence of this second category.

In any case, for the draft conclusion not to lose its force, the commentary should also provide more and clearer examples of principles of the second category, supported by State practice and not, instead, only by judicial decisions affirming their existence. In this sense, continuing to support the examples of principles listed in the commentary through judicial decisions of this type contradicts the subsidiary role that the Commission intends to give to these decisions in draft conclusion 8.

Mr. Chair,

Jumping to the **draft conclusion 5**, I believe it is intuitive, but we are taking for granted a step of the analysis that is not entirely explicit in the text of the draft conclusion. Indeed, I believe it is essential to establish that the comparative methodology in paragraph 3 does not suggest that a comparative study of decisions and rules is sufficient to determine the existence of the principle, but only that the determination includes this step.

What I am trying to convey in this regard is that it is not enough, in order to identify a common principle, to simply compare norms and case law from different states where the

principle may be reflected. Instead, what the exercise requires is, first, to identify, through those norms and decisions, the existence of the principle in the domestic law of the State being observed. Only once the existence of the principle in a given State has been established is it necessary to analyze, by replicating the same process of determination for other States, whether the principle exists as such in different legal systems of the world.

Mr. Chair,

As regards **draft conclusion 7**, my main concern, shared by some of the States that have submitted comments, relates to paragraph 2. I humbly consider that it is not clear what the "without prejudice" clause means, what it implies, and what it contributes to in this context, and this may prove problematic. In line with my interest in promoting the legal rigor of the draft, I can only warn that I foresee that a possible interpretation of this second paragraph implies rendering ineffective the already controversial rule established in paragraph 1 and opening the door to the use of any methodology to identify a general principle of law formed in the international legal system. For this reason, and as I indicated in relation to the new draft conclusion 12, I propose the deletion of the second paragraph of draft conclusion 7.

Mr. Chair,

In relation to **draft conclusion 8**, after studying the comments of the States, I believe that some more precision could be introduced in its text. Indeed, an inattentive reader or one who does not choose to study the version with commentary might find contradictory the content of draft conclusion 8, which states that judicial decisions have a subsidiary role in determining the existence of a general principle of law, with draft conclusion 5, insofar as the latter considers it fundamental to study the judicial decisions of the States to determine the existence of principles common to different systems. Although paragraph 4 of the commentary contains the solution to this false contradiction, I believe that we could anticipate it in the text, for the sake of clarity and certainty.

Therefore, I propose to modify, first, the title of the draft conclusion so that instead of "Decisions of courts and tribunals" it should read "Decisions of courts and tribunals that examine the existence and content of a general principle of law," which is the wording used in paragraph 4 of the commentary to the Draft Conclusions.

I also propose to incorporate, as it appears in paragraph 6 of the commentary to draft conclusion 9, the clarification that the content of this draft conclusion and its commentary is without prejudice to the work of the Commission on the topic on "subsidiary means for the determination of rules of international law."

Mr. Chair,

On **draft conclusion 9**, I wonder whether it would not be appropriate for the formulation of the draft to reflect the progress of the Commission's work on the topic on "subsidiary means for the determination of rules of international law," even though its draft conclusion 5 has only been adopted on first reading.

If so, the text of draft conclusion 9 could read: *"Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, may constitute a subsidiary means for the determination of general principles of law."*

Mr. Chair,

As regards **draft conclusion 10**, I agree with the SR's proposal to reverse the order of the paragraphs. I believe that doing so would indeed result in greater clarity. The current paragraph 1 is merely a description of what happens in practice when the general principles of law are applied for the purposes they serve, in accordance with the current paragraph 2. However, in my opinion, that logic also indicates reversing the order of subparagraphs (a) and (b), in that the current subparagraph (b) deals with the prescriptive role of the principles, while the current subparagraph (a) deals with their interpretative role.

Finally, I have not been able to avoid seeing that the current wording of the draft conclusion generates, according to the comments of the States, confusion on what would appear to be a contradiction between the current paragraph 1 of this draft conclusion and paragraph 1 of draft conclusion 11 which establishes that there is no hierarchy between general principles of law and other sources of international law. Therefore, in order to make both draft conclusions compatible, provide clarity and show greater respect for article 38 of the Statute of the Court, I propose to incorporate in the text of the current paragraph 1 of draft conclusion 10 terms that would make it clear that what the draft conclusion describes is what happens "in practice."

Mr. Chair,

Finally, on **draft conclusion 11**, I agree with the SR's proposal to deepen the distinction between general principles of law and customary international law.

In conclusion, I am deeply grateful to Mr. Vázquez-Bermúdez for his dedicated work on such an important subject. My thanks are extended to you, Mr. Chair, and to the rest of the members of the Commission, for a debate that will surely be rich and fruitful.