

ILC WORK ON THE CODIFICATION OF GENERAL LEGAL PRINCIPLES

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Abstract. *The codification of sources of international law is a monolith and lengthy project. After many decades of codifying international treaty law and international customary law, the International Law Commission has finally decided to tackle the topic of General principles of law as late as 2018. The codification of general legal principles is challenging for many reasons: the unclear or ambiguous practice of states and international justice, lack of unity of opinion in the doctrine, and terminological inconsistency. However, in the current debate within the International Law Commission, the most controversial issue is the idea of the “two-category” approach which entails their dual origin. Namely, they can be derived not only from national legal systems but also from the international legal order itself. The paper provides an overview of the work of the International Law Commission accomplished so far, with the aim to shed light on certain aspects of the proposed course of action.*

Key words: *general principles of law, codification, International Law Commission*

1. INTRODUCTION

According to Article 38 (1) (c) of the Statute of the International Court of Justice, “*general principles of law recognized by civilized nations*” are explicitly listed as a *separate and independent* formal source of international public law.¹ Despite the fact that it is a source

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¹ It should be noted that this definition dates back to 1920, i.e. the identical wording of Art. 38(1)(c) of the Statute of the Permanent Court of International Justice. However, today it is considered to be pejorative and both politically and essentially incorrect to refer to “*civilized nations*”. Therefore, there is a consensus that this definition (i.e. the syntagm) should no longer be used, not only by the ILC (First Report, para. 19, para. 243) but also in academic literature (Pellet, Müller, 2019: 927; Yee, 2014: 21-35; Yusuf, 2019: 449-450; Bogdan, 1977: 45; Cheng, 1953: 25). Hence, it was suggested that the term “*civilized nations*” should be replaced with one of the following terms: 1) “*international community of States*”, Statement by Mr. Hmoud (A/CN.4/SR.3489, p. 15); 2) “*international community*”, Statements by Ms. Galvao Teles (A/CN.4/SR.3489, p. 21); Mr. Hassouna (A/CN.4/SR.3490, p. 24); Mr. Nguyen (A/CN.4/SR.3491, p. 14); see also statement by Belarus (A/C.6/74/SR.31, p. 14, para. 95); 3) “*international community as a whole*”, Statement by Mr. Gomez-Robledo (A/CN.4/SR.3492, p. 10); 4) “*community of nations*”, Statements by Mr. Nolte (A/CN.4/SR.3492, p. 18); Mr. Ruda Santolaria (A/CN.4/SR.3492, p. 13); Mr. Sturma (A/CN.4/SR.3493, p. 15);

noted over a century ago, its origin and scope still represents a controversial issue.² Having in mind that general legal principles exist in most legal systems, regardless of their geographical or historical background,³ it can only be said with certainty that they are unwritten legal principles common to a majority of national legal systems that represent the common thread of the legal *acquis* of civilization.⁴ They represent basic rules which are of an abstract and general nature. They are undoubtedly a significant formal source, constructively serving as gap-fillers in the ever-evolving international public law with numerous legal lacunas. General legal principles, as the main but *subsidiary* source, have played a substantive role in resolving *non-liquet* situations throughout history and contemporary international law (Andenas, Chiussi, 2019: 10, 14; Anzilotti, 1999: 117; Blondel, 1968: 202, 204; Bogdan, 1977: 37; Lammers, 1980: 64; Pellet, Müller, 2019: 923; Raimondo, 2008: 7; Redgwell, 2017: 7; Thirlway, 2019: 125-130). Being a *residual* source of international public law, general principles of law play a crucial complementary role and constitute an interpretative aid to international treaty and/or customary law. Although Article 38 of the ICJ Statute represents a starting point in the understanding of general principles of law, their existence is found in State practice, in international instruments, in the jurisprudence of international courts and tribunals, as well as in the previous work of the ILC.

It is believed that the significance of general principles of law will naturally fade away as legal lacunas will be filled. Due to the increased regulation of relations between subjects of international public law, the importance of general principles is undoubtedly diminishing. The fact is that international customary law and general legal principles have historically “lost the battle” with international treaties, as the most numerous, represented and important formal source of contemporary international public law. However, due to the fragmentation and expansion of international law, and considering their flexibility due to their unwritten nature, there are doubts whether general principles of law will ever be marginalized as a formal source.

Ever since the adoption of the Statute of the Permanent Court of International Justice in 1920, there have been numerous theoretical and practical dilemmas regarding the general principles of law. In former doctrine, it was disputed whether general legal principles are an independent formal source, what their legal nature is, and what their role is in the system of formal legal sources of international law (Janković, Radivojević, 2019: 31-33). However, despite their subsidiary character, today there is no doubt that they represent an *independent* source of international law. This claim is supported by the fact that not only is it singled out as a independent formal source in the statutes of the Permanent Court of

Statement of Germany (A/C.6/74/SR.28, p. 18, para. 105); Statement of Sierra Leone (A/C.6/74/SR.31, p. 16, para. 110), 5) “*international community of States as a whole*”, Statement by Mr. Nolte (A/CN.4/SR.3492, p. 18). The Special Rapporteur's proposed to use the phrase “*community of nations*” instead; Second report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, 72nd session of the ILC (2021), A/CN.4/741, para. 13.

² “*The rubric 'general principles of international law' may alternately refer to rules of customary international, to general principles of law... or to certain logical propositions underlying judicial reasoning on the basis of existing international law. This shows that a rigid categorization of sources is inappropriate*”, (Crawford, 2012: 37).

³ Schachter, O., *International law in theory and practice: General course in Public International Law*, Collected Courses, The Hague Academy of International Law, 178, 1982-V, pp. 74-75.

⁴ We find a kind of counterpart in the literature marked as the so-called wandering topics, i.e. universal topics on which there are works from all cultures, religions and civilizational epochs.

International Justice and the International Court of Justice but also by the fact that this is also the position of the ILC Special Rapporteur currently in charge of its codification.⁵

Unfortunately, the codification of general legal principles is challenging predominantly for two reasons: the unclear or ambiguous practice of states and international justice,⁶ and the lack of unity of opinion in the doctrine.

Another significant challenge is terminological inconsistency, employed both in academic literature and in practice.⁷ The lack of uniformity regarding used terms contributes to the confusion, considering the plurality of terms and phrases used to denominate this source: “*principles*”, “*rules*”, “*general principles*”, “*general legal principles*”, “*general principles of law*”, “*general principles of international law*”, “*principles of international law*” and even “*generally accepted legal principles*”. Unfortunately, different terms are not always used in order to denote the same notion.⁸ As a member of the ILC fairly noted, “*every general principle of law was a rule, but not every rule was a principle*”.⁹ Also, there is frequent confusion as to whether international customary law and general principles of law are *jointly* understood under the syntagm *general international law*. On the other hand, general international law sometimes means international treaties and international customary; but, in other situations, it can mean international customary law and general principles of law.¹⁰

The mere fact that the codification of general principles of international public law started as late as 2018 illustrates the insufficient knowledge about this formal source. It is interesting to note that codification started the same year before a double expert forum. First, the International Law Association (ILA) adopted a report titled “*The Use of Domestic Law Principles in the Development of International Law*”.¹¹ As the name clearly states, a tried-out and tested, indisputable but at the same time *narrow* approach was adopted, which focused only on invoking general principles of law derived from domestic legal systems. The Study group explicitly focused on general principles derived from national law,¹² without entering into an analysis of whether they could possibly derive from other origins, although not ruling out such a possibility. “*The Study Group has concluded its work but, considering the complexity and continuing relevance of the topic, it would recommend that the Association considers establishing a Committee with broader representation to contribute to the work of the UN International Law Commission on the broader topic of general principles of law (including other potential sources from which general principles could be derived)*.”¹³

The second forum which tackled the codification of general legal principles in 2018 is the International Law Commission (ILC), whose work is still in progress. After decades of work on codifying international treaty and customary law, the ILC had finally turned its

⁵ First Report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, A/CN.4/732, 71st session of the ILC, 2019, para. 14.

⁶ First Report, 2019, p. 5.

⁷ As noted and analyzed in paras. 150-152 of the First Report, both the ICJ and the ILC usually use “rules” and “principles” interchangeably.

⁸ First Report, para. 161.

⁹ Statement by Ms. Galvao Teles (A/CN.4/SR.3489, p. 20).

¹⁰ This view was expressed by the Special Rapporteur in the First Report on the Formation and Evidence of Customary International Law, A/CN.4/663, paras 36, 42. A more detailed explanation of the confusion created by inconsistent terminology can be found in the last part of the Special Rapporteur’s First Report on General Legal Principles (A/CN.4/732, paras. 254-258).

¹¹ ILA Draft Report; https://www.ila-hq.org/images/ILA/DraftReports/DraftReportSG_DomesticLawPrinciples.pdf (20.11.2021).

¹² ILA Draft Report, paras 106-181.

¹³ ILA Draft Report, p. 70.

attention to the third formal source of international law on its seventieth session.¹⁴ Thus far, two reports of the Special Rapporteur have been adopted.¹⁵ Due to the pandemic of the Covid-19 virus, further discussions have been postponed. Three key and somewhat problematic issues of the discussions regard the legal nature of general principles of law as a source of international law, the identification of two origins of general principles of law, and the relationship of general principles of law to other main sources of international law (international treaty and customary law) (Vázquez-Bermúdez, Crosato, 2020: 158).

Unlike the International Law Association, the ILC has stated that there is a dual origin of general principles of law, and that there should be a distinction between the ones that derive from national legal orders and the ones rooted in international law itself. Thus, they are not limited to those originating only from national legal systems (Lammers, 1980: 67), which has been a tacit position of doctrine and even professional associations so far. Having in mind such a dual origin, it is pointed out that that general legal principles are a “heterogeneous concept”, (Lammers, 1980: 74-75), meaning that their nature and manner of identification may differ depending on the category in question. This idea, taken from the doctrine, represents a significant step forward into the realm of progressive development of the law rather than staying in the circle of “pure” codification.

The ILC work on general legal principles has come to a common understanding that codification should not go into their substance,¹⁶ nor try to draw up a *numerus clausus* list. It should only give references in the function of *exempli causa*.

¹⁴ Report of the International Law Commission, Seventieth session (A/73/10), para. 363.

¹⁵ First Report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, A/CN.4/732, 71st session of the ILC (2019); Second Report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, A/CN.4/741, 72nd session of the ILC (2020).

¹⁶ It should be noted that there are a number of general legal principles in international public law, which are generally divided into substantive and procedural principles. Many of them originate from Roman law, while others are taken from national legal orders. Substantive general legal principles include: *pacta sunt servanda*, *bona fides*, *nemo plus juris ad alium transferre potest quam ipse habet*, *pacta tertiis nec nocent nec prosunt*, *inadimplendi non est adimplendum*, *restitutio in integrum lost profits (damnum emergens and lucrum cesans)*, principles relating to free consent and lack of will, principles relating to abuse of rights and obsolescence, *force majeure*, state of emergency, unjust enrichment (Janković, Radivojević, 2019: 32-33). Procedural general legal principles include: *jura novit curia*, *res iudicata*, *nemo iudex in causa sua*, *ejus est interpretare legem cujus condere, audiatur et altera pars*, the principle of independence and impartiality of the court, the rule that notorious and negative facts are not proven, the principle of the exception of judges, or the principle that the judgment must be reasoned, the principle of *lis pendens*, the principle that the court itself decides on its jurisdiction, the principle of indirect proof (Janković, Radivojević, 2019: 32-33). For example, the International Court of Justice pointed out that the *bona fides* principle is one of the “basic principles that regulate the creation and execution of legal obligations”; ICJ, Nuclear Tests Cases (*Australia v France; New Zealand v France*), ICJ Reports 1974, p. 268. The principle of equity is also invoked relatively often; PCIJ, River Meuse Case (*Netherlands v Belgium*) PCIJ Reports Series A/B No 70, p. 76; ICJ, Case Concerning the Frontier Dispute (*Burkina Faso v Republic of Mali*) (Judgment), ICJ Reports 1986, p. 567; ICJ, North Sea Continental Shelf cases, (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*), ICJ Reports 1969, p. 46-50. The concepts of estoppel and justice were also used in resolving international disputes. For example, if a State, by its conduct, encouraged another State to believe in the existence of a certain legal or factual situation and to rely on that belief, it cannot claim or act contrary to it; ICJ, North Sea Continental Shelf cases, (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*), ICJ Reports 1969, p. 26; ICJ, Case Concerning the Temple of Preah Vihear (*Cambodia v Thailand*) (Merits), ICJ Reports 1962, p. 32-33.

2. GENERAL PRINCIPLES OF LAW DERIVED FROM NATIONAL LEGAL SYSTEMS

The ILC reaffirmed that general principles of law derive from domestic laws, which is not problematic given the fact that they have always been defined by this origin. However, in order to demonstrate that such principles are *recognized* and that they are part of *international* and not only municipal law, a specific analysis must be carried out. As Sir Fitzmaurice rightly warned 50 years ago: “the concept of the general principles is so fluid that a quasi-legislative element would often be introduced into the Court’s decisions by any ‘bold’ application of them, and... considerable harm might be done to the desideratum of increased resort to the Court unless a reasonable predictability as to the basis of its decisions can be maintained.” (Fitzmaurice 1973: 325).

Therefore, the ILC proposed *method of identification* of the general principles of law derived from national legal systems is twofold. First, it is necessary to identify the principles of law common to most national legal systems,¹⁷ subsequently moving on to the determination of whether the principle in question is *at all applicable in international law*.¹⁸ Therefore, they must be “*derived from*”, “*accepted in*”, “*found in*”, “*applied in*” or “*borrowed from*” national legal systems. However, one should bear in mind that the sheer existence of one general legal principle in national systems is insufficient. In other words, there is *no automatic transposition* of general principles from national to international public law, due to their numerous and essential differences.

As with international customary law, there is no impediment to the formation of regional or individual, or even local general legal principles. However, the attribute of “generality” implies a wider number of national legal systems sharing a common principle. The general principles of law are “*general*” in the sense that their content has a certain degree of abstraction and “*basic*” in the sense that they represent the basis of certain rules or embody important values. Therefore, the principles of national law should be viewed only as *sources of inspiration*, and not as a formal source of law directly applicable in international law.¹⁹ In other words, *not all general principles of law* from national legal orders have the potential to be of importance for international law, but only the ones that meet the above requirements and, as such, represent a common thread that connects a large number of national legal systems.

In order for such principles to be *applied* in international law, it is necessary that: 1) they are harmonized with the basic principles of international law, and 2) the preconditions for their adequate application in the international legal order are met. In addition, it is necessary that there is *evidence* confirming the *transposition* of a general principle of law from the domain of national to international law, whereby international treaties most often serve as evidence.

¹⁷ For more details, see the Second Report of the Special Rapporteur (A/CN.4/741, paras. 23-72).

¹⁸ The question of the applicability of general legal principles is explained in detail in the Second Report (A/CN.4/741, para. 73).

¹⁹ ICJ, International Status of South-West Africa (Advisory Opinion) [1950] ICJ Reports, p. 148.

3. GENERAL PRINCIPLES OF LAW FORMED WITHIN THE INTERNATIONAL LEGAL ORDER

The most controversial issue in the work of the ILC relating to general legal principles is the proposed idea of including a second category according to their origin. It should be noted that this idea was not born by the Special Rapporteur himself but had already existed in academic literature (Cherif Bassiouni, 1990: 768, 771; Rosenne, 2006: 1549).

When it comes to general legal principles that have been formed within the framework of international law, it has to be noted that there are conflicting views, not only in literature but also within the ILC itself. Therefore, it remains to be seen whether such a proposal of the Special Rapporteur will find its place in the final draft.

Some authors support the idea of this particular separate source of general legal principles, while others believe that (even then) they are in essence still principles derived from national legal orders.²⁰ Hence, their separation is unnecessary since such an origin does not have the potential to constitute an independent legal source. Arguments against the extrication of this particular source of general principles of law are numerous: 1) insufficient and/or incoherent practice; 2) substantial difficulties or even inability to distinguish two main formal sources of international public law, i.e. international customary law from general principles of law; 3) the inherent risk that the criterion for identifying these general principles of law will not be too lenient, making the application threshold too lowered.²¹ However, some argue that the danger of rendering this source an easier route to create obligations for States is overrated (Shao, 2021: 241-246). Hence, there is understandable concern that this specific category of general principle of law cannot be objectively identifiable.

Having in mind that the same legal rule is understood as a general principle of law that originates from national legal systems, but at the same time from international law as well, there is no encumbrance for the so-called *parallel tracks* to exist. The best illustration in this regard is the principle of *pacta sunt servanda*.

The *identification* of general legal principles derived from the domain of international law logically does not imply a two-step identification process, which is the case with the ones found in *foro domestico*. The essential condition is that their “recognition”²² exists, which can be achieved in three ways: 1) through wide recognition in international treaties and other international instruments; 2) deductively; given that general rules of international treaty or customary law can be based on general principles, the fact of recognition and acceptance of given international treaties and customary law will be considered to have recognized the general principles of law they contain; 3) if the general legal principle is inherent in the so-called *basic characteristics* and/or basic requirements of the international legal order, it will automatically be recognized. To put it simply, they are either “*deduced from international legal materials or the structure of the international legal system*” (Shao, 2021: 233). Since the forms of recognition are not mutually exclusive, they often coexist.

Therefore, it is noted that the identification of general legal principles in the field of international law is somewhat more complex (Vázquez-Bermúdez, Crosato, 2020: 168), and resembles the identification method of international customary law, where it is also necessary to carefully examine available evidence. As noted in the First Report, “*to identify a general principle of law, a careful examination of available evidence showing that it has*

²⁰ For more details, see footnotes 177 and 178 of the Second Report.

²¹ Recognition as a term is dealt in paras 163-175 of the First Report.

²² Recognition in terms of Art. 38 (1) (c) of the Statute of the International Court of Justice.

been recognized is required".²³ In order to establish the existence of general principles of law derived from international law, two conditions must be met: 1) to establish that the principle is generally recognized in treaties and other international instruments; and 2) to establish that the given principle lies: a) in the basis of the general rules of treaty or customary international law, or b) is inherent in the basic characteristics and basic requirements of the international legal order.

For a better understanding of the newly proposed category of general legal principles, examples are given in the Second Report. For instance, one example is the Nuremberg principle of *nullum crimen sine lege, nulla poena sine lege* found in the Charter of the International Military Tribunal which represented an "*expression of international law existing at the time of its creation*".²⁴ In the Right of Passage case, Portugal relied not only on the first and undisputed category of general principles of law but it also strengthened its case by referring to "principles inherent in the international legal order" with the aim of proving its right to access the enclaved territory.²⁵ Another example is the principle of *uti possidetis* as applied in Frontier Dispute between Burkina Faso and Mali,²⁶ as well as the famous Martens clause, to name just a few.

4. THE DEMARCATION BETWEEN GENERAL PRINCIPLES OF LAW AND INTERNATIONAL CUSTOMARY LAW

Having in mind that there is no obstacle to the existence of parallel tracks, i.e. that the same legal rule can be contained in several legal systems (national and international law) or in several main formal sources of the international public law, one of the key issues in the current debate referring to the codification of general principles of law is their differentiation from other sources of international public law. The major issue of controversy is the difficulty in disentangling international customary law from general legal principles. It is argued that the need for international public law to achieve the level of a coherent legal system is intrinsic to the different understanding of general principles of law as compared to international treaty and customary law (Shao, 2021: 224, 229). Not having a clear distinction could have a potential to reflect negatively on both said unwritten formal sources of international law.²⁷ However, some emphasize that a clear-cut distinction between the two is unnecessary (Gaja, 2019: 43).

It is interesting to point out that the existence of parallel tracks between international treaties and international customary law is not seen as a problem. On the contrary, the codification of customary law is perceived in a positive light. Since an international rule can coexist in an international treaty and international customary law, it is considered by analogy that there would also be no obstacle to its parallel existence in an international treaty as a general principle of law, or in international customary law as well as a general

²³ First Report, para. 165.

²⁴ Judgment of the International Military Tribunal, Official Documents of Trial of the Major War Crimes before the International Military Tribunal (Nuremberg, 14 November 1945 – 1 October 1946), vol. 1, 218.

²⁵ ICJ, Right of Passage over Indian Territory (*Portugal v. India*), Reply of the Government of the Portuguese Republic (VII 58), paras. 335-348.

²⁶ ICJ, Frontier Dispute (*Burkina Faso/Republic of Mali*), Judgment of 22 December 1986, ICJ Reports 1986, 554, 565, paras 20-21.

²⁷ Statement by Mr. Wood (A/CN.4/SR.3490, p. 5); Statement by Mr. Rajput (A/CN.4/SR.3490, p. 20).

principle of law.²⁸ The *fluid* relationship between international customary law and general legal principles *derived from international law* is particularly emphasized.²⁹ It is considered that their relationship may be chronologically determined, in the sense that the first formed and recognized general principle of law born within the framework of international law can “pave the way” for the same rule that can be transformed³⁰ into an international customary rule (Simma, Alston, 1989: 104). Hence, it is believed that general principles of law may in fact “harden” into treaty or customary rules (Shou, 2021: 253). In this regard, an example is the evolution of the principle of notification of possible dangers in territorial water from the PCIJ Corfu Channel case, which was later incorporated in 1958 Geneva Convention³¹ and further on in the United Nations Convention on the Law of the Sea;³² today, it constitutes a rule of international customary law (Palchetti, 2019: 51).

Reflecting on such a situation, an ILC member queried whether general principles of law could be described by the formula “*customary international law minus opinio juris, or customary international law based purely on practice*”.³³

Certainly, it should be quite clear that this is only a *potential* that can but *does not have* to be realized, which ultimately depends on the will and behavior of the subjects of international public law, primarily States. In this sense, we may refer to the EC-Hormones dispute conducted before the WTO Appellate Body between the USA and the then EC, today EU.³⁴ Namely, the then EC invoked the *precautionary principle* in its defense, emphasizing that in case the Appellate Body does not determine that it is an international custom, it should at least be considered a general legal principle, recognized in both domestic and international law. According to their logic, general principles of law express principles articulated in domestic and international law, which do not necessarily meet the stricter conditions set for the existence and maintenance of international customary law (practice and *opinio iuris*).³⁵ In its oral submission on appeal, the EC also pointed out that the precautionary principle in any case constitutes a general principle of law, within the meaning of Article 38 (1) (c) of the Statute of the ICJ. “*These are principles which often emerge as an interaction between international law, national law and the dictates of reason, common sense or moral considerations.*”³⁶

²⁸ An example is *res iudicata*, which is claimed to be a general legal principle but which is also contained in Articles 59, 60 and 61 of the ICJ Statute. In that sense, *Scelle* pointed out that “any principle of international law had its origin in custom... Before becoming a principle of international law, therefore, any principle was first a general principle of municipal law and at both stages of its development it could be applied by the Court in international matters.” UN Yearbook of the International Law Commission, 1949, United Nations, New York, 1956, p. 206, para. 81, available at: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1949_v1.pdf (20.11.2021)

²⁹ Para. 233 of the First Report.

³⁰ It is observed that an analogous relationship exists or may exist between *ius cogens* norms of international law and general principles of law, emphasizing that general principles of law can also be the basis for the formation of peremptory norms; Second report on jus cogens, A/CN.4/706, paras 48-52.

³¹ Convention on the Territorial Sea and the Contiguous Zone (29 April 1958), 516 UNTS 205, Article 15 (2).

³² United Nations Convention on the Law of the Sea (10 December 1982), 1833 UNTS 3, Article 24(2).

³³ Statement by Mr. Tladi (A/CN.4/SR.3489, p. 4).

³⁴ It is also interesting to consider the position externally represented by the EU on relations between general legal principles and international customs.

³⁵ EC-Measures concerning meat and meat products (Hormones) (AB-1997-4), Appeal of the European Communities, 6 October 1997, para. 91.

³⁶ There is a similarity in the formulation of the second part of this kind of definition with the *Martens clause*. EC-Measures concerning meat and meat products (Hormones) (AB-1997-4), Oral Submissions of the European Communities, 4 November 1997, para. 18.

Other authors, however, believe that it is virtually *impossible* to distinguish between general principles of law that derive from international law from international customary law³⁷ (Yee, 2016: 490; Raimondo, 2008: 42; Degan, 1997: 83; Bogdan, 1977: 42; Lammers, 1980: 67-69).

The ILC stated that the parallel existence of a legal rule in an international treaty, and in the form of a general legal principle, represents a more favorable situation due to the written form of international treaties, which significantly facilitates proving the existence and content of general principles of law. In contrast, in the second case, when there is a parallel between international customary law and general legal principles, the lack of written form of both sources continues a significant aggravating factor. Even if there is an identical rule of international law in the spirit of both international customary norm and general principle of law, in both cases it is very difficult to prove their existence, and even more so their precise content. The consequences of the said *parallel tracks* are the invisibility and excessive absorption of general principles of law in other formal sources of international public law.

Despite the existing fluidity between international customary law and general legal principles, they still represent separate and independent formal sources.³⁸ Although general principles of law can influence the formation of international customary law,³⁹ the specific issue of their mutual relationship has not yet been clarified in the work of the ILC, nor in academic literature. While working on the codification of international customary law, the ILC focused only on the issue of their *identification*, and not on the process of formation and evidence as initially planned.⁴⁰ On the other hand, thus far, the ILC has not addressed the issue in the two mentioned reports related to general principles of law. What has been processed and what represents an important basis for differentiation is the *method* of identifying international customs and general legal principles.⁴¹

5. CONCLUDING REMARKS

It is positive that the most mysterious and controversial main formal source of international law has finally become the subject of codification. This process in itself will undoubtedly bring clarity to many questions surrounding general principles of law, hence providing necessary guidance among subjects of international law, as well as international adjudicators.

The subsidiary nature of general principles of law is the central thread connecting its two categories. By introducing a new category of general principles of law, found within the realm of international law itself, the ILC stepped into the field of progressive development with a noble aim of significantly enhancing the gap-filling function of general legal principles.

³⁷ Statement of the Czech Republic, 74th Session of the General Assembly, Report of the International Law Commission, Cluster III, 5; Statement of Iran, 74th Session of the General Assembly, Report of the International Law Commission, Cluster III, 2; Statement of Mr. Rajput, A/CN.4/SR.3490; Statement of Mr. Murase, A/CN.4/SR.3490.

³⁸ First report, Report, p. 8, para. 28: “*The relationship between general principles of law and customary international law, sometimes described as unclear, deserves particular attention. Nevertheless, the fact that a rule of customary international law requires there to be a “general practice accepted as law” (accompanied by opinio juris), while a general principle of law needs to be “recognized by civilized nations”, should not be overlooked. This suggests that these two sources are distinct and should not be confused.*” UN Yearbook of the International Law Commission, 2013, vol. I, 3183rd meeting, United Nations, New York, Geneva, 2018, p. 92, para. 14.

³⁹ Para. 71 of the First Report.

⁴⁰ Initially the topic of the codification work was called “Formation and evidence of customary international law”. However, at its sixty-fifth session in 2013, the ILC decided to change the title to “Identification of Customary International Law”, which automatically narrowed down the scope of codification.

⁴¹ For more details: Second Special Rapporteur's Report, para. 107-111.

However, it remains to be seen whether such an approach will be widely accepted, due to concerns that recognizing the latter category of general principles of law may lead to a “slippery slope” for the establishment of binding international law norms.

Hence, the following arguments against the extrication of general principles of law formed within international law are put forward: 1) insufficient and/or incoherent practice; 2) substantial difficulties or even inability to distinguish two main formal sources of international public law, that is international customary law from general principles of law; and 3) the inherent risk that the criterion for identifying these general principles of law will not be too lenient, making the application threshold too lowered. There is understandable concern that this specific category of general principle of law cannot be objectively identifiable.

The major issue of controversy is the difficulty in disentangling international customary law from general legal principles derived from international law. The fluidity of this relationship makes it hard to delineate between them and, therefore, separate them as independent formal sources of international law.

Finally, despite the obstacles and difficulties linked to the task of codification of such an unwritten source, one must also acknowledge the interconnectedness between this and other works of the ILC which bring a systematic quality not only to the process itself but also to international law as a whole, thus contributing to its much needed coherence.

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RAD KOMISIJE ZA MEĐUNARODNO PRAVO NA KODIFIKACIJI OPŠTIH NAČELA PRAVA

Kodifikacija formalnih izvora međunarodnog prava predstavlja monolitan i dugotrajan projekat. Nakon više decenija posvećenih kodifikaciji međunarodnog ugovornog i običajnog prava, Komisija za međunarodno pravo je najzad pristupila obradi teme Opštih principa prava tek 2018. godine. Kodifikacija opštih pravnih principa je izazovan zadatak iz višestrukih razloga: usled nejasnoće ili dvosmislene praksa država i međunarodnog pravosuđa, nedostatka jedinstvenog stava u doktrini, ali i zbog terminološke nedoslednosti. Međutim, u aktuelnoj debati u okviru Komisije za međunarodno pravo, najkontroverznije pitanje predstavlja ideja o postojanju „dve kategorije“ opštih principa prava usled njihovog koji dvostrukog porekla. Naime, oni mogu biti izvedeni ne samo iz nacionalnih pravnih sistema, već i iz samog međunarodnog pravnog poretka. U radu je dat pregled dosadašnjeg rada Komisije za međunarodno pravo, sa ciljem da se rasvetle pojedini aspekti predloženog pravca delovanja.

Ključne reči: *opšta načela prava, kodifikacija, Komisija za međunarodno pravo*