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# *GENERAL PRINCIPLES OF LAW FORMED WITHIN THE INTERNATIONAL LEGAL SYSTEM: FOGGY OR FORGOTTEN CONCEPT?*[**]

***Abstract*:** *The UN International Law Commission (ILC) has been codifying various sources of international law for decades. Thus far, its activities on the codification of general principles of law have resulted in three reports from the Special Rapporteur, where two categories of general principles of law have been identified in light of their different origins. The first category of general principles of law stem from municipal legal systems, while the second one stems from the international legal system itself. In the provisional conclusions adopted on the first reading in May 2023, the latter have been defined as "general principles of law that may be formed within the international legal system". The aim of this paper is to examine the controversial category of general principles of law. It has to be noted that there are conflicting views among scholars, members of the ILC itself and states regarding to general legal principles that may derive or may be formed within the framework of the international legal order. Hence, the paper will predominantly focus on these research questions: Do general principles of law formed within the international legal system have the potential to exist as an autonomous source of international law? Does the linguistic interpretation of Art. 38 paragraph 1 c) of the Statutes of both the Permanent Court of International Justice and the International Court of Justice (ICJ) support the arguments in favour of the standpoint that this category of principles has always been incorporated in the notion of general principles of law? The paper also focuses on the questions pertaining to the "recognition" of the general principles of law formed within the international legal order, and the subsequent question as to whether that amounts to consent of states.*

***Keywords:*** *general principles of law, general principles of law formed within the international legal system, codification, International Law Commission.*

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## 1. Introduction

The United Nations International Law Commission (ILC) has been diligently working on the codification of sources of international law in the past decades. After completing its work on the codification of international treaty and international customary law, it focused on the topic of *General principles of law*.[1] The results of the six-year work have so far produced three reports of the Special Rapporteur[2] and the first reading within the ILC.[3] Although it may seem that this time period is relatively short compared to the decades-long ones in the cases of international treaty and customary law codification, it has been hurdled with many challenges.

The codification of general principles of law has proven to be rather challenging for numerous reasons: the unclear and ambiguous practice of both states and international justice, lack of unity of academic opinion, as well as terminological inconsistencies (Đorđević Aleksovski, 2022: 15). However, the most controversial is the Special Rapporteurs idea on the "two-category" approach which entails the dual origin of general principles of law (Vázquez-Bermúdez, Crosato, 2020: 158, Shao, 2021: 220-221). The first (widely accepted) category of general principles of law is the one stemming from municipal legal systems. The second (controversial) category of general principles of law entails the principles formed within or stemming from the international legal system. There are and have always been conflicting views among scholars,[4] members of the ILC, as well as states, about this controversial category – which will be the focus of this paper.

It should be noted that the idea about the existence of the second category of principles was not engendered by the Special Rapporteur, but had already existed in academic literature (Cherif Bassiouni, 1990:768, 771; Rosenne,

1 Report of the International Law Commission, 69th session of the ILC in 2017, A/72/10.

2 First report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, A/CN.4/732, 71st session of the ILC, 2019 (First report); Second Report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, A/CN.4/741, 72nd session of the ILC, 2021, (Second Report); Third Report of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, A/CN.4/753, 73rd session of the ILC, 2022 (Third report).

3 ILC (2023). General Principles of Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee on First Reading, 74th session of the ILC, UN Doc A/CN.4/L.982, Geneva, 2023 (hereinafter: ILC GPL Draft Conclusions, 2023), https://documents.un.org/doc/undoc/ltd/g23/100/48/pdf/g2310048.pdf (accessed on 10. 10. 2024)

4 Pomson recommended that the ILC concentrate on the uncontroversial category of principles derived from national legal systems, avoiding all together recognition of principles formed within the international legal system as a valid source of international law, believing that this approach would prioritize a more grounded and universally accepted understanding of general principles of law, ensuring clarity and consistency within the international legal framework (Pomson, 2022).

2006:1549). This notion is a starting point for this research, aimed at addressing the dilemma or question contained in the title: are general principles of law stemming from the international law system a foggy concept, which cannot be properly defined by the Special Rapporteur in an effort to contribute to the progressive development of international law, or are they an old but long-forgotten concept, which dates way back to the process of drafting the Statute of the Permanent Court of International Justice in 1920?

Following this introduction, the second section of the paper will analyze the evolution of the ILC's approach to general principles of law (2018-2023), with specific reference to Conclusions 3 and 7. After providing the backgound and an overview of today's stance of the ILC, the next three sections of the paper analyze and discuss the principal research questions: Do general principles of law generated within the international law system have the potential to exist as an autonomous source of international law? Does the linguistic interpretation of Art. 38 paragraph 1 c) of the Statutes of both the Permanent Court of International Justice and the International Court of Justice (ICJ) support the arguments in favour of the standpoint that this category of principles has always been incorporated in the notion of general principles of law? In addition, the paper also focuses on the questions pertaining to the "*recognition*" of the general principles of law formed within the international legal order, and the subsequent question as to whether that amounts to consent of states. The sixth and the final section will provide concluding remarks.

## 2. The evolution of the ILC's approach to general principles of law (2018-2023)

Between 2018 and 2023, the ILC's approach to general principles of law underwent a significant evolution, particularly concerning the second category of principles *that originate from the international legal system itself*. While initially embracing this category, the ILC adopted a more cautious and restrictive stance in its 2023 Conclusions.

The ILC's initial work on the topic, reflected in the Special Rapporteur's first report (2019)[5] and second report (2021)[6], showed a willingness to accept general principles formed within the international legal system as a distinct category under Art. 38(1)(c) of the ICJ Statute. In his third report (2022), the Special Rapporteur argued that sufficient practice, case law and legal scholarship supported the existence of this category.[7] This view was echoed by

5 First Report of the Special Rapporteur, 2019: 67-73.

6 Second Report of the Special Rapporteur, 2021: 36-38.

7 Third Report of the Special Rapporteur, 2022: 8-14.

some ILC members,[8] who highlighted the need for the international legal system to generate its own principles rather than solely rely on principles imported from domestic legal systems. In addition, the examples in judicial decisions[9] and state practice support the existence of general principles formed within international law[10] (Bjorge, 2023: 852-864), as well as a steady body of academic literature (Anzilotti, 1929/1999: 117; Boas, 2023: 125-126; Bonafé, Palchetti, 2016:162; Cançado Trindade, 2013: 55-86; Fitzmaurice, 2017: 193; Gaja, 2019: 37; Gaja, 2020: paras. 17-20; Lammers, 1980: 67; Reuter, 1961: 466-467; Schachter, 1982: 75, 79-80; Wolfrum, 2010: para. 28; Yusuf, 2019: 450).

Several *methodologies* for identifying such principles were proposed, including examining their widespread recognition in treaties and other international instruments, their status as necessary corollaries of existing international legal rules (both conventional and customary), and their deductive derivation from fundamental principles of international law.[11] However, opposing views were also presented, echoing the view that (although stemming from international law) they are in essence still principles derived from municipal legal orders (D'Aspremont, 2011: 97-98, 171; Biddulph, Newman, 2014: 292, Ellis, 2011: 953; Murphy, 2020: 68).[12]

Thus, the ILC's stance had shifted by 2023, and the ILC became more cautious, mainly due to concerns that these principles are too similar to customary international law. Despite the raised concerns, the proposals of the Special Rapporteur found their place in the articles of draft conclusions provisionally adopted by the ILC in the first reading (2023). The prevailing

8 Third Report of the Special Rapporteur, 2022: 8 (ft. 41).

9 International Court of Justice, *Corfu Channel case*, Judgment of 9 April 1949, I.C.J. Reports 1949, p. 22; International Court of Justice, *Reservations to the Convention on Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 23; International Court of Justice, *Case of the monetary gold removed from Rome in 1943* (Preliminary Question), Judgment of June 15th, 1954, I.C.J. Reports 1954, p. 32; International Court of Justice, *Frontier Dispute*, Judgment, I.C.J. Reports 1986, p. 565, paras 20-21; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998 (IT-95-17/1-T), para. 183; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zoran Kupreškić et al.*, No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, para. 738.

10 First Report of the Special Rapporteur, 2019: 68-73, paras. 235–253.

11 Second report of the Special Rapporteur, 2021: 38-50.

12 Biddulph and Newman stated that *there is a purely "domestic approach" and a "hybrid approach" to analyzing general principles, with most deriving general principles from domestic legal systems and some also taking account the structure of the international system itself* (Biddulph, Newman, 2014: 292). Ellis explained that "*general principles of international law are today understood as principles derived from municipal law*" (Ellis, 2011: 953).

thinking within the Commission at this stage is apparent from Conclusions 3 and especially 7 (ILC GPL Draft Conclusions, 2023).

This shift was driven by two major factors: 1) concerns about overlap with customary international law; 2) emphasis on codification over progressive development. First and foremost, numerous ILC members and states expressed concerns that recognizing a broad category of general principles formed within international law could *blur* the lines between this source and international customary law. They argued for a *clearer distinction* to ensure the integrity of both sources. Also, both the Special Rapporteur and the ILC made it clear that emphasis must be put on *codification* rather than progressive development when dealing with sources of international law.[13] The emphasis on codification aligns with the concerns expressed by some ILC members and states about exceeding the Commission's mandate and inadvertently creating new law (Bjorge, 2023: 845).

The ILC's shift towards a more restrictive approach is evident in several aspects of the ILC GPL Draft Conclusions, 2023; the manifestations of this approach are: 1) less certain language manifesting hesitancy in recognizing international law principles as a distinct category of general principles of law, 2) restrictive methodology for identifying them; and 3) room for future recognition of a broader category if supported by more evidence.

Firstly, the language used is different compared to the initial wording. While Draft conclusion 3 indeed recognizes two categories of general principles of law: those derived from national and those that may be formed within the international law (Draft Conclusion 3), it introduces a degree of flexibility regarding principles formed within the international legal system by using the phrase *"may be formed"*, as opposed to a more definitive statement. Instead of mimicking the linguistic formula used in the first category of general principles that stem from national legal systems, instead of using the syntagm "*derived from*", the phrase "*may be formed*" was used to describe and identify the second category. This acknowledges the ongoing debate about whether or not the second category of principles truly exists as an autonomous source of international law. This hesitant language reflects a shift from the more assertive stance in earlier ILC reports and discussions, which more readily embraced the idea of general principles emanating from the international legal system itself.

Futhermore, the ILC *streamlined the methodology for identifying* general principles formed within international law, focusing on a single criterion: *recognition by the community of nations as intrinsic to the international legal system* (Draft conclusion 7). This represents a departure from the multiple methodologies proposed in previous ILC reports, such as widespread reco-

13 Third report of the Special Rapporteur, 2022: 12, para 26.

gnition in treaties and other international instruments, that these principles are a necessary corollary of existing international legal rules, or that they are deduced from fundamental principles of international law. This more restrictive approach aims to address concerns about the potential overlap with customary international law and the risk of introducing principles not genuinely accepted by states. Concerns exist not only about the potential overlap but also about the possibility of using (and abusing) general principles to circumvent the more rigorous requirements for establishing international customary norms.[14] The ILC suggests that the methodology for identifying general principles formed within the international legal system is similar to that used for identifying principles derived from national systems. This involves: 1) an inductive analysis of existing norms, including relevant resolutions adopted by international organizations or at intergovernmental conferences and statements made by states; 2) consideration of the reception of the identified principle by states and subsequent decisions of courts and tribunals.[15] The crucial aspect of the ILC's approach is the second requirement: *recognition by the community of nations* (Draft conslusion 2), which will be further discussed in more detail in section 5 of this paper.

Finally, Draft conclusion 7, entitled "*Identification of general principles of law formed within the international legal system*,"[16] explicitly states that this process is "*without prejudice to the question of the possible existence of other general principles of law formed within the international legal system*". This acknowledges the ongoing debate and leaves room for recognizing a broader category in the future, pending further study and evidence of state practice.

Draft conclusion 7 deliberately embraced a narrow approach. The first paragraph aims to highlight the distinction between intrinsic and non-intrinsic general principles of law. *Intrinsic* general principles of law are the ones that are specific to and regulate the international legal system. The intrinsic principle is "*specific to the international legal system and reflects and regulates its*

14 Even the ICJ uses general principles of law in order to distance themselves from the strict requirements of identifying international customary norms (Besson, 2010: 41).

15 Second Report of the Special Rapporteur, 2021: 38-51.

16 Conclusion 7: *1) To determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to the international legal system. 2) Paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system.* Conclusion 7, Report of the International Law Commission, Chapter IV: General Principles of Law, UN Doc A/78/10, p. 22.

*basic features*".[17] This narrow category includes principles such as: consent to jurisdiction, *uti possidetis juris*[18], and respect for human dignity[19]. [20]

Paragraph 2 of Draft conclusion 7 can be seen as a *savings clause* or *"without prejudice" clause*, considering that it aims to acknowledge the potential for other general principles to exist outside this narrow definition. It is in fact this broader category where the controversy lies.

Despite the opposing views among the ILC members, the ILC eventually adopted (by consensus) the Draft conclusion 7 on general principles of law formed within the international legal system based on three main arguments. First and foremost, the text of Art. 38(1)(c) as well as the drafting history do not limit general principles of law to those that only derive from national legal systems.[21] The second argument for the justification of the existence of the said second category of general principles of law was that both the state and judicial practice supports it. Lastly, the third argument *pro* is that international law, as any legal system, has to be able to generate its own general principles, which is also crucial for maintaining a coherent legal system capable of addressing evolving international challenges. This perspective highlights the *functional* necessity of such principles within the international legal framework, that is their functional role of coherence.

There is a need to clarify the relationship between the two categories because, in Draft conclusion 7, there is an unclear connection between the conditions in paragraph 1 (defining "intrinsic" principles) and the broader scope allowed in paragraph 2. It is possible that paragraph 2 acts as a placeholder, recognizing the theoretical potential for non-intrinsic principles but acknowledging the need for further clarification on their identification and application.

Having in mind all the complexities surrounding general principles of law stemming from the international system, it is important to further analyze

17 Conclusion 7, comment 4, ILC Report of the International Law Commission, Chapter IV: General Principles of Law, UN Doc A/78/10, p. 23; https://legal.un.org/Ilc/reports/2023/english/a_78_10_advance.pdf (accessed on 10. 10. 2024)

18 *Frontier Dispute* (Burkina Faso/Mali), 1986 ICJ. Rep. 554, 565, para. 20 (Dec.22): "*Uti possidetis…is not a special rule which pertains solely to one specific system of international law. It is a general principle which is logically connected with the phenomenon of the obtaining of independence*"; it establishes that newly independent states inherit the pre-existing boundaries established by the former colonial power (ILC Report, 2023: 23).

19 This principle, recognized by the International Criminal Tribunal for the former Yugoslavia in the *Furundžija* case, is considered fundamental to international humanitarian law and human rights law (ILC Report, 2023: 23).

20 Conclusion 7, comment 6, Report of the International Law Commission, UN Doc A/78/10, 2023, p. 23.

21 Conclusion 7, comment 2, Report of the International Law Commission, UN Doc A/78/10, 2023, pp. 22-23.

three key aspects: 1) the linguistic and historical interpretation of Art. 38 (1)(c) of the ICJ Statute; 2) to demystify whether they are an autonomous source of law; and 3) to understand what represents *recognition*.

### 3. Back to the basics: the linguistic and historical interpretation of Article 38(1)(c) ICJ Statute

The linguistic interpretation of Art. 38(1)(c) in the Statutes of both the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) offers arguments both for and against the view that general principles of law have always encompassed principles that originate from the international legal system. This *dual* argument refers to the text or wording of Art. 38(1)(c), which in fact does not explicitly limit the source of general principles, leaving room for interpretation.

On the one hand, there are a couple of arguments supporting the *inclusion* of general principles of law formed within the international legal order within the meaning and scope of the phrase "general principles of law". First of all, the history and *travaux préparatoires* of Art. 38(1)(c) point towards a broader interpretation that encompasses both domestic and international sources of general principles. If we go back nearly a century ago and analyze the *travaux préparatoires* of the Statute of the PCIJ, one of the drafters of Art. 38, Anzilotti, who later became a judge of the Court, wrote that "*not only were general principles of law formed within the international legal system part of the category of Art. 38(1)(c), but that the rubric referred first and foremost to such principles, giving only second place to principles recognized in domestic legal systems*" (Bjorge, 2023: 850). Politis (in 1934) and Hudson (in 1943) also *explicitly* recognized the possibility of the existence of these principles (Bjorge, 2023: 852), as well as De Lapradelle as early as 1920 (Fitzmaurice, 2017: 186, Wang, 2022: 569). "*On the basis of the wording of Art. 38(1)(c) ICJ Statute, its legislative history, as well as its object and purpose, the view seems to be more tenable that general principles may be derived not only from municipal law, but also from international law. This reasoning is enforced by Art 21 ICC Statute, which clearly distinguishes between general principles derived from international and those from national law*" (Wolfrum, 2010: para. 28). Secondly, the wording of Art. 38(1)(c) is quite general, referring to "*the general principles of law recognized by civilized nations*", a phrasing that does not explicitly limit the origin of these principles. Thirdly, the focus is in fact on states' *recognition* of the principles, which could apply to principles recognized in both domestic and international contexts. Fourthly, the structure of Art. 38(1) places general principles of law alongside treaties and customary international law as sources

of international law applied by the Court. This placement could imply a broader scope for general principles than merely those drawn from domestic law.

However, due to the lack of precision in the wording of Art. 38(1) ICJ Statute, there are also arguments against the inclusion of such principles deriving from the international order into the notion of general principles of law (Tunkin, 1974: 199). First, while not directly based on linguistic interpretation, the dominant understanding of Art. 38(1)(c) has historically been limited to principles found in domestic legal systems. This perspective of focusing on domestic law often draws on the views of Root and Lord Phillimore during the drafting of the PCIJ Statute (Bjorne, 2023: 849). Second, although it is now considered outdated and potentially discriminatory, the reference to "*civilized nations*" in Art. 38(1)(c) was initially seen by some as pointing toward domestic legal systems as the primary source of general principles. However, this argument weakens when considering that even principles found in domestic law are ultimately incorporated into international law through a process of recognition *by the international community* (Bjorge, 2023: 866). Third, during the drafting process of Art. 38,[22] the used phrase was criticized "*because it could be treated as an open door for judges to install particular legal values specific to their own national legal systems*" (Ochi, 2023: 171).

As seen, the linguistic interpretation of Art. 38(1)(c) of the ICJ Statute is not conclusive. The wording is broad enough to allow for different interpretations. Ultimately, understanding the intended scope of general principles of law requires considering not only the historical context and drafting debates but also the subsequent practice of states and international courts and tribunals. This aligns with the ILC's current approach which, while acknowledging the possibility of general principles formed within international law, sets a *high bar* for their identification and emphasizes the need for evidence of state recognition.

## 4. Questioning general principles of law formed within the international legal system as an autonomous source of international law

The question of whether general principles of law formed *within* the international legal system can stand as an independent source of international law is a contested concept, having in mind that it is still the subject matter of ongoing debates.

There are a couple of arguments in favor of autonomy, such as: 1) systemic necessity; 2) historical practice; and 3) the notion of implied consent. Scholars

22 League of Nations Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee, June 16-July 24, 1920, with Annexes, The Hague, Van Langenhuysen, 1920, pp. 293, 308-310.

argue that general principles of law are essential for a functioning international legal system (Cheng, 1953: 390;[23] Andenas, Chiussi, 2019: 10). It is contended that, just as domestic legal systems rely on general principles to fill gaps and ensure coherence, the international legal order needs its own set of guiding principles to maintain order and address novel situations (Besson, 2009: 22; Kozlowski, 2017: 227).[24] Bjorge challenges the traditional view that early jurists were solely focused on incorporating *national* legal principles into Art. 38(1)(c). He argues that the historical practice indicates a clear acceptance of general principles formed within international law as a legitimate source (Bjorge, 2023: 865-857). Shao introduces the concept of *implied consent* as a way to reconcile general principles with the consent-based nature of international law (Shao, 2021: 229). He posits that general principles, regardless of their origin, reflect what states would likely have agreed to if faced with a specific legal issue. This implied consent arises from the need for a workable international legal system (Shao, 2021: 233). The ILC itself stated that general principles of law formed within the international legal system "*could be seen as a sign of the increasing maturity and growing complexity of international law, which thus came to depend less on gap-filling sources from domestic law"* (ILC Report, 2021).[25]

On the other hand, arguments against their autonomy are: 1) overlap with customary international law; 2) fear of a "custom lite" path; and 3) lack of clear methodology. One of the primary concerns is the potential for general principles formed within the international legal system to become *indistinguishable* from customary international law (Đorđević Aleksovski, 2022: 19-21). This could generate confusion and blur the lines between different sources of law, potentially weakening the established framework of international lawmaking. Further, there is some fear that recognizing a broad category of general principles could lead to a *custom lite scenario* (Shao, 2021: 240-246), where these principles become a less stringent path to establishing new international legal norms, thus circumventing the traditional emphasis on the requirement of *explicit state consent*. Finally, there are difficulties in establishing a clear and objective methodology for identifying these principles. Without a robust framework for distinguishing general principles from other sources, the risk of subjective interpretation and potential abuse by international courts and tribunals increases[26] (Shao, 2021: 240).

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23 A famous quotation states that: General principles of law "*lie at the very foundation of the [international] legal system and are indispensable to its operation*" (Cheng, 1953: 390).

24 Third report of the Special Rapporteur, 2022: 52, para. 144.

25 Report of the International Law Commission, 72nd session, 2021, Un Doc A/76/10, para. 210.

26 Third report of the Special Rapporteur, 2022: 10-11, paras 22-23.

The ILC has grappled with these arguments. Its position has evolved over time. The ILC's current stance acknowledges the possibility of the existence of principles stemming from the international order as an autonomous source of law but sets a high threshold.

## 5. Recognition of general principles of law originating from the international system

The notion of *recognition* of general principles of law formed within the international legal order is a complex and contested issue. Generally speaking, it can be established through: 1) state practice, including treaty practice and diplomatic exchanges; 2) judicial decisions of international courts and tribunals; and 3) writings of the most qualified scholars. Determining whether a principle *qualifies* as a general principle of law under Art. 38(1)(c) of the ICJ Statute involves three key questions: 1) how recognition is manifested; 2) what evidence is required; and 3) what actors contribute to this process.

Answering the question of what actually constitutes recognition is a complex one, having in mind that there is a distinction between *explicit* recognition, where states or international courts and tribunals *directly* invoke a principle as a general principle of law, and *implicit* recognition, which can be inferred from state practice, treaty provisions, or judicial decisions that apply the principle *without explicitly* labelling it as such. The implicit recognition poses challenges for identifying these principles and raises concerns about subjective interpretations by adjudicators. Some argue that the recognition of general principles, even those formed within international law, ultimately rests on a form of *implied consent* by states (Shao, 2021: 229, 233). This argument rests on the idea that, by *participating* in the international legal system and *acknowledging* the need for principles to address gaps and ensure coherence, states *implicitly accept* the binding nature of such principles. This consent is inferred from their participation in the international legal system and their acceptance of the need for principles to address gaps and ensure coherence. However, the concept of "implied consent" remains contested and raises questions about how to determine when it is sufficient to create binding legal obligations.

Several challenges arise regarding the notion of "implied consent". Firstly, it can be difficult to determine precisely when and how this "implied consent" is manifested, leading to concerns about subjective interpretations and potential overreach by international courts. Secondly, the idea that states consent to be bound by principles *simply by participating* in the international legal system can be seen as undermining state sovereignty and the traditional emphasis on explicit consent in international lawmaking. The central tension revolves around balancing the need for international law to function as a *coherent system*

with the traditional emphasis on *state consent* as the foundation of international legal obligations. States are traditionally seen as the primary actors in international law, and their consent is often considered the foundation of their legal obligations.

Secondly, the evidence required to satisfy the recognition requirement is also not clear cut. Namely, it is still not clear whether recognition requires a collective act by the international community as a whole, or whether it could also be based on the actions of an individual state. This further raises questions about how to determine *when* a general principle of law has achieved sufficient recognition to be considered part of general international law. Academic literature identifies various *types* of evidence that can support the recognition of general principles formed within international law. These include: 1) treaty provisions, which use terms such as "general principles of international law" and "generally recognized principles of international law"; 2) state practice, including diplomatic exchanges, statements by state representatives and national legislation that reflect the application of these principles; 3) judicial decisions from international courts and tribunals invoking or applying the principle in their judgments (even without explicitly citing Art. 38(1)(c)); 4) scholarly writings, including not only analysis but also *support* for the existence and application of principles within the international legal order. Unfortunately, establishing a *clear methodology* for identifying these principles is challenging, as states and courts often apply them *without explicitly stating their source or linking them* to Art. 38(1)(c) of the ICJ Statute. This ambiguity can make it difficult to determine whether a principle has achieved sufficient recognition to be considered part of general international law.

Not only states but also international courts and the ILC itself are involved in answering the third posed question regarding *actors who contribute to the process* of creating, identifying and recognizing general principles formed within international law. Ultimately, States, as the primary subjects of international law, play a central role in the recognition process. Their actions, individually and collectively, through treaty-making, diplomatic practice and domestic legislation, contribute both to the formation and recognition of these principles. International courts and tribunals contribute to the identification and development of general principles through their judgments and interpretations of international law. The ILC also plays a significant role in clarifying the concept of general principles of international law and developing methodologies for their identification. However, its work is not binding on states, and its recent shift towards a more restrictive approach reflects the complexities and controversies surrounding this source of law.

## 6. Concluding remarks

The ILC's approach to general principles of law has evolved between 2018 and 2023, moving from an initial openness to a more restrictive stance regarding the second category of general principles of law, the principles originating from the international legal system. This evolution reflects the ongoing debate and complexities surrounding this type of general principles, the need to maintain clear distinctions between different sources, and the ILC's commitment to codification over progressive development.

While the 2023 ILC Draft conclusions provisionally adopted in the first reading acknowledge the potential existence of this category, they reflect a more cautious approach, seeking to address concerns about distinction from other sources and potential abuse, as well as pending further clarification and evidence of state practice. While acknowledging their existence, the ILC adopts a more restrictive methodology for identification.

In essence, the debate regarding the inclusion of general principles of international law in Art. 38(1)(c) of the ICJ Statute highlights a tension between a *positivist* view of international law (focused on state consent) and a more *naturalist* approach that acknowledges the need for a coherent legal system. Despite the controversy, the ILC has provisionally accepted the existence of general principles formed within the international legal system, although with a narrow scope in the ILC Draft conclusions 3 and 7.

The potential for general principles of law formed within the international legal system to exist as an autonomous source remains a point of contention. While arguments based on systemic necessity, historical practice and implied consent support their recognition, concerns about overlap with custom, the "custom lite" scenario, and methodological challenges persist. The ILC's evolving stance underscores the need for further clarity and a robust framework for identifying and applying these principles. The future development of this area of international law will likely depend on the emergence of compelling State practice and jurisprudence that solidify the contours and legitimacy of this potentially powerful source of legal norms.

In response to the question of whether general principles formed within the international legal system are a foggy or a long-forgotten concept, the conclusion would be that they are both, (notably, in that particular order). Even though some academic literature rightfully reminds that principles originating from the international order were always meant to be included within the scope of Art. 38 (1)(c), the main problem is of a different kind: its "fogginess", i.e. the lack of a clear-cut definition and identification. It remains to be seen whether the majority of states will be inspired by the work of the ILC and its delicate wording and high threshold when it comes to general principles originating

form the international system, or whether they will oppose such a view. Remembering that states have a deadline until 1st December 2024 to submit information and provide their comments, the final say remains to be seen.

Unfortunately, it has to be noted that the Republic of Serbia has not been very active in the work of the ILC since it became an independent state in 2006. In the period 2006-2024, the ILC has tackled numerous topics and some activities are still underway,[27] with very little input from Serbia.[28] Having in mind the vital importance of the principle of territorial integrity[29] (as a general principle that may be formed in international system) to the Serbian foreign policy, the Republic of Serbia would be expected to submit a comment.

The Special Rapporteur is expected to issue a fourth and final report on general principles of law in 2025, which will focus on analyzing the feedback received from governments regarding the ILC's conclusions and commentaries on the topic (Jalloh, 2024: 128). Based on governments' feedback, the report might propose adjustments to the conclusions and commentaries adopted by the ILC during the first reading of draft conclusions. The ILC intends to com-

27 The following topics were completed or are still in progress: *Identification of customary international law, Peremptory norms of general international law, Subsequent agreements and subsequent practice in relation to interpretation of treaties, Effects of armed conflicts on treaties, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Subsidiary means for the determination of rules of international law, Non-legally binding international agreements, Succession of States in respect of State responsibility, Immunity of State officials from foreign criminal jurisdiction, Responsibility of international organizations, Settlement of disputes to which international organizations are parties, Protection of persons in the event of disasters, Crimes against humanity, Immunity of State officials from foreign criminal jurisdiction, Protection of the environment in relation to armed conflicts, Protection of the atmosphere, Shared natural resources (oil and gas), Sea-level rise in relation to international law, International liability in case of loss from transboundary harm arising out of hazardous activities.* See: ILC (2024). Analytical Guide to the Work of the International Law Commission; https://legal.un.org/ilc/guide/gfra.shtml (accessed on 10. 10. 2024).

28 The Republic of Serbia provided information or submitted comments on 3 issues only: a) Serbia's comment on *Provisional application of treaties* (https://legal.un.org/ilc/sessions/68/pdfs/english/pat_serbia.pdf); b) Serbia's comment on *Expulsion of aliens*, (https://legal.un.org/ilc/documentation/english/a_cn4_628.pdf, p. 282); and c) Serbia's comment on *Obligation to extradite or prosecute (aut dedere aut judicare)*, (https://legal.un.org/ilc/documentation/english/a_cn4_579.pdf, pp. 91-92) (accessed on 10. 10. 2024)

29 In the ILC debate, the examples of general principles of law that may be formed within the international system included: the principle of sovereign equality of states, the principle of territorial integrity, the principle of *uti possidetis juris*, the principle of non-intervention in the internal affairs of another State, the principle of consent to the jurisdiction to international courts and tribunals, elementary humanity considerations, respect for human dignity, the Nürnberg Principles and principles of international environmental law (ILC Report 2023, Un Doc A/78/10, ft. 34).

plete a second reading in 2025 and submit the conclusions to the UN General Assembly with a recommendation for further action. Based on similar projects, the ILC's recommendation to the General Assembly will include one or more of the following scenarios: 1) General Assembly formally acknowledging the ILC's work on general principles of law; 2) annexing the conclusions to a General Assembly resolution, increasing their visibility and potential influence; 3) bringing the conclusions to the attention of relevant stakeholders, most notably states; 4) encouraging widespread dissemination within the broader international legal community.

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## *ОПШТИ ПРИНЦИПИ ПРАВА СТВОРЕНИ У МЕЂУНАРОДНОМ ПРАВНОМ СИСТЕМУ – МАГЛОВИТИ ИЛИ ЗАБОРАВЉЕН ПОЈАМ?*

### *Резиме*

*Комисија за међународно право (КМП) већ деценијама кодификује различите изворе међународног права. Рад на кодификацији општих принципа права до сада је произвео три извештаја Специјалног известиоца у којима су идентификоване две категорије општих принципа права, с обзиром на њихово различито порекло. Прва категорија општих принципа права потиче из националних правних поредака, док друга проистиче из самог међународноправног система. Потоњи су до сада дефинисани као „општа правна начела која се могу формирати у оквиру међународног правног система" у закључцима усвојеним на првом читању из маја 2023. године. Циљ рада је испитивање поменуте контроверзне категорије општих принципа права. У вези са општим правним принципима који могу проистећи или се формирати у оквиру међународног правног поретка треба истаћи да међу теоретичарима, члановима саме КМП, као и државама постоје опречни ставови. Стога ће се рад претежно фокусирати на следећа истраживачка питања: Да ли општи принципи права формирани у оквиру међународног правног система могу постојати као самостални извор међународног права? Да ли на основу језичког тумачења члана 38 (1) в) Статута Сталног суда међународне правде и Међународног суда правде постоји аргумент у корист става у да је таква категорија принципа одувек била укључена у појам општих принципа права? У раду ће се, такође, анализирати појам „признавања" општих принципа права формираних у оквиру међународног правног поретка, и довести га у везу са концептом сагласности држава.*

***Кључне речи:*** *општа начела права, општа начела права створена у међународноправном поретку, кодификација, Комисија за међународно право.*