Advisory Committee
on Public International Law

Advisory report on the draft conclusions of the International Law Commission on general principles of law

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Introduction

On 19 May 2003, the International Law Commission (ILC) adopted 11 draft conclusions on general principles of law, and subsequently added commentaries on the conclusions in its session from 24 to 26 July 2023.[1] The draft conclusions and commentaries were prepared on the basis of three reports by Special Rapporteur Marcelo Vázquez-Bermúdez of Ecuador.[2] By letter of 31 October 2023, the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law (hereinafter: CAVV) to prepare an advisory report on the draft conclusions.

The ILC received and considered the report of the Drafting Committee after the latter had completed its first reading of the draft conclusions. After adopting the 11 draft conclusions referred to above and the commentaries thereto, the ILC decided, in accordance with Articles 16 to 21 of its Statute, to transmit the draft conclusions, through the Secretary-General of the United Nations, to governments for comments and observations.[3]

This advisory report will discuss the general approach adopted by the ILC, the positioning of general principles of law within Article 38 of the Statute of the International Court of Justice (hereinafter: ICJ Statute)[4] and their relationship to the other primary sources of international law, the nature and functions of general principles of law, the categories of principles of law distinguished by the ILC, and the various methods by which general principles of law can be identified. The CAVV has chosen not to discuss the draft conclusions individually, but instead to arrange them on the basis of the substantive themes described above. The relevant draft conclusions are shown in a text block at the start of each section.

The CAVV adopted the advisory report on 31 May 2024, and recommends that the government take account of the following observations when determining its position on the ILC project on general principles of law

Conclusion 1

Scope

The present draft conclusions concern general principles of law as a source of international law.

In draft conclusion 1, the ILC indicates that this project concerns general legal principles as a source of international law. The commentary to draft conclusion[5] states that the term 'source of international law' refers to the legal process and form through which a general principle of law comes into existence.5 It is clear from this that although general principles of law may possibly be derived from national legal systems, they are not simply the inspiration for international law but form an integral part of it. This follows from the opening words of Article 38, paragraph 1 of the ICJ Statute, which state that the function of the ICJ is to decide disputes *in accordance with international law.* Another reason to draw that conclusion is the condition formulated in Article 38, paragraph 1 (c) of the ICJ Statute, namely that the general legal principles that the ICJ applies must be 'recognized by civilized nations'. This condition applies both to principles of law derived from national legal systems and to principles of law formed within the international legal system, thereby indicating their applicability within the international legal system.

Although the ILC indicates the scope of the project in draft conclusion 1, its aim is left unclear. That aim is described in the commentary, namely to clarify the scope of general principles of law, the method for their identification, and their functions and relationship with other sources of international law.[6] The project on general principles of law is therefore in keeping with a number of other ILC projects over the past 25 years, namely those on reservations to multilateral conventions, subsequent agreements and subsequent practice in relation to interpretation of treaties, the provisional application of treaties, identification of customary international law, jus cogens, subsidiary means for the determination of rules of international law, and non-legally binding international agreements. Those projects often concern aspects of the methodology for identifying the existence of a rule and, on occasion, state that they are intended to provide (practical) guidance for those who determine such rules and their content, or their legal consequences, in practice.[7]

However, nothing is said in the commentary about the provision of (practical) guidance on the general principles of law, and the CAVV also has reservations about the practical usefulness and applicability of the current draft conclusions. In effect, the ILC fails to explain the difference between principles and rules,[8] does not address the issue of what distinguishes a principle from a principle of law and disregards the question of how a principle of law qualifies as a 'general' principle of law. Similarly, the distinction between principles of international law (principles formed within the international legal system) and rules of customary international law is not explicitly discussed and the examples given of such principles are often formulated as rules.

The added value of the present project lies in the fact that it specifies the methodology for identifying general principles of law within the meaning of Article 38 of the ICJ Statute. At the same time, that value may possibly be limited, as the ILC considers that the primary sources of international law referred to in Article 38(1) of the ICJ Statute have the same rank and weight,[9] and partly the same functions,[10] as general principles of law. Hence, the distinctive nature of general principles of law, as opposed to rules of customary international law, is not made sufficiently clear.

It is also worth noting that the ILC identifies two categories of general principles of law. On the basis of draft conclusions 3 and 7, the following categories can thus be distinguished:

(a) general principles of law that are derived from national legal systems;

(b) general principles of law that may be formed within the international legal system,[11] including in particular:

- principles intrinsic to the international legal system;
- other principles formed within the international legal system ('without prejudice' clause).

This division into categories has proved controversial, as will be discussed below in sections 5, 6 and 7 on categories and methods.

The ILC has focused on the questions about the different categories of general principles of law and the methodology for their identification by discussing them before examining their functions and their relationship with the other primary sources of international law. The CAVV believes that, in terms of structure, this order should be reversed so that the ILC first addresses the positioning of general principles of law within international law and their functions. This is because the CAVV considers that the positioning and functions determine the applicable methodology and not the other way around.

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The positioning of general principles of law and their relationship with the other primary sources of international law

Conclusion 11
Relationship between general principles of law and treaties and customary international law

1. General principles of law, as a source of international law, are not in a hierarchical relationship with treaties and customary international law.

2. A general principle of law may exist in parallel with a rule of the same or similar content in a treaty or customary international law.

3. Any conflict between a general principle of law and a rule in a treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law.

In draft conclusion 11, the ILC deals with the relationship between general principles of law and the other primary sources of international law (treaties and customary international law). These primary sources are set out in Article 38 of the ICJ Statute.

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Paragraph 1 of draft conclusion 11 states that general principles of law are not in a hierarchical relationship with treaties and customary international law. Paragraph 2 provides that a general principle of law may exist in parallel with a rule of the same or similar content in a treaty or customary international law. Finally, paragraph 3 states that any conflict between a general principle of law and a rule in a treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law.

As it is generally accepted that the sources of international law listed in Article 38, paragraph 1 (a) to (c) of the ICJ Statute are, strictly speaking, not in a hierarchical relationship with treaties and customary international law, this is also laid down in paragraph 1 of draft conclusion 11.[12] In practice, however, it is also generally accepted that treaties take precedence over rules of customary international law.[13] This is logical because treaties often contain particular rules that constitute *lex specialis* as opposed to *legi generali*. Nonetheless, the latter two sources may also exist in parallel, and the inclusion of a rule of customary international law in a treaty having the same or similar content does not mean that the rule of customary law ceases to exist.[14] Similarly, general principles of law too can exist in parallel with the first two sources mentioned in Article 38, paragraph 1 of the ICJ Statute, as confirmed in paragraph 2 of draft conclusion 11 and in the

relevant commentary.[15]

The position taken in the commentary, namely that all sources listed in Article 38, paragraph 1 (a) to (c) have equal status,[16] thus implying that they are due equal weight, is not uncontroversial. For example, Pellet and Müller argue that:

> 'A formal source distinct from both conventions and custom, general principles of law are, without any doubt, a subsidiary or additional source of international law. (...) Yet they are subsidiary in the sense that the Court will usually only resort to them in order to fill a gap in the treaty or customary rules available to settle a particular dispute, and, what is even more apparent, will decline to invoke them when such other rules exist.'[17]

It is therefore far from clear whether the ILC's position in paragraph 3 of draft conclusion 11, to the effect that conflict resolution techniques can be applied in the event of conflict,[18] is correct. The quote above suggests that if a rule is laid down in customary international law or a treaty, a potential conflict can be avoided by simply declining to take a general principle of law into consideration. Whether a potential conflict even exists is therefore not examined, and it may be doubted whether there is a rational basis for considering that conflict resolution techniques can be applied in favour of general principles of law.[19]

On the subject of recognised hierarchical relationships, the ILC also states in the commentary that account must be taken of peremptory norms of international law (jus cogens) and of provisions such as Article 103 of the Charter of the United Nations (hereinafter: UN Charter).[20] In its draft conclusions concerning peremptory norms of general international law, the ILC has argued that general principles of law can possibly form a basis for a peremptory norm. However, the CAVV expressed doubts about this in an earlier advisory report and noted that the ILC itself does not provide a single example of this.[21] On this point too, therefore, there seems to be no reason to assume that a general principle of law should be given precedence over a rule of customary international law or treaty law.

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Conclusion 2

Recognition

For a general principle of law to exist, it must be recognized by the community of nations

Hardly surprisingly, the ILC does not adopt the problematic and anachronistic notion of 'civilized nations' – a painful reminder of the colonialist history of international law. The CAVV naturally agrees with this, but has some reservations about the proposed wording. It may possibly be better to refer to 'the international community' or 'the international community of States and international organisations'. An argument for the inclusion of international organisations is in any event that certain organisations, in particular the European Union, are developing their own general principles of law, which can form the basis for developments at global level.

As noted above, only limited clarification is provided about the distinction between rules of law and principles of law. From a legal point of view, it is clear that both are of a normative nature and as such form part of the international legal system. However, the CAVV is of the opinion that principles of law are norms that have a higher level of abstraction than rules of law.[22] Often the natural or legal persons bound by the norm are not specified in the case of a general principle of law, and it is by no means always clear what specific conduct, acts or omissions are required, prohibited or permitted on that basis. Similarly, it should be noted that certain general principles of law confer a relatively wide discretion to deviate from the norm they express. By way of example, although the UN Charter proclaims the sovereign equality of all its Members in Article 2, paragraph 1, it subsequently grants five States a permanent seat on the Security Council, coupled with the right to veto a resolution by casting a negative vote.[23]

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The functions of general principles of law

Conclusion 10

Functions of general principles of law

1. General principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part.

2. General principles of law contribute to the coherence of the international legal system. They may serve, inter alia:

(a) to interpret and complement other rules of international law;

b) as a basis for primary rights and obligations, as well as a basis for secondary and procedural rules.

In draft conclusion 10, paragraphs 1 and 2, the ILC provides that general principles of law have two principal functions. The first principal function, which is regarded as the primary function, is described in paragraph 1 as being that general principles of law are 'mainly' resorted to when other rules do not provide a resolution. This position is based on the preparatory work of the Statute of the Permanent Court of International Justice, which shows that the inclusion of general principles of law was mainly intended to prevent the Court from reaching a finding of *non liquet* on the basis of a lacuna in the law and thereby being guilty of a denial of justice.[24] As regards the first function, the ILC states that the use of the words 'are mainly resorted to' does not mean that this is the sole way in which general principles of law can be applied, that they can also be applied directly, and thus that they do not merely play an ancillary role.[25]

The second principal function identified by the ILC in paragraph 2 concerns the contribution made by general principles of law to the coherence of the international legal system.[26] This contribution comprises their role in the interpretation of rules of international law and the promotion of the coherence of those rules, and serving as a basis for primary rights and obligations and for secondary and procedural rules. The ILC mentions these two subfunctions merely as examples, as they are prefaced by the term 'inter alia'. According to the ILC, the words 'may serve [to/as]' in paragraph 2 indicate that the functions of general principles of law must be determined on a case-by-case basis depending on their content and scope.[27]

Whether the functions listed in draft conclusion 10 fully reflect the underlying reasons for the inclusion of general principles of law in Article 38 of the ICJ Statute is doubtful. The authors of the provision admittedly had in mind, at the time of the establishment of the Permanent Court of International Justice, that a reference to principles (of law) was necessary to prevent the Court from reaching a finding of *non liquet* on account of a lacuna in the law, but they did not provide for the possibility of acting as a legislator.[28] In view of this, it would not be expected that all primary sources of international law fulfil the same or comparable functions in all respects, as this would eliminate the distinctive capacity of the manifestations of the various sources. It should be noted here that the terms 'rules' and 'principles' are often used interchangeably, and it may therefore be wondered whether a distinction in this sense serves any purpose.[29] Naturally, this is already apparent from the wording of draft conclusion 11 itself, since it mentions general principles of law in relation to 'other' rules.

The issue to which reference has just been made is fully reflected in the ILC's position that general principles of law may serve as a basis for primary rights and obligations and as a basis for secondary and procedural rules.[30] The text of draft conclusion 10 seems to suggest that general principles of law only serve as a source of inspiration for the development of primary rights and obligations and secondary and procedural rules. However, the commentary allows for a different interpretation:

> 'The term "'primary rights and obligations" covers the proposition that, like any other source of international law, general principles of law may give rise to substantive rights and obligations incumbent upon States and other subjects of international law, and that international responsibility may be engaged for a breach thereof.'[31]

This seems to suggest that general principles of law independently give rise to primary rights and obligations, even in the absence of parallel rules of treaty law or customary law. The reasons for hesitation on this point are related to the circumstance to which reference has already been made above, namely that principles of law are (frequently) worded in such an abstract manner and are of such a general nature that it remains unclear what conduct is actually required, prohibited or permitted, and because the examples cited by the ILC exist also, almost without exception, as rules of customary international law and treaty law.[32]

The first reason for hesitancy is connected with the principle of good faith, which is admittedly regarded as fundamental, but from which no concrete course of action can be derived. This explains, in particular, the position of the International Court of Justice in the *Armed Actions* case (no reference to which is to be found in the ILC's commentary), where the Court notes as follows:

> 'The principle of good faith is, as the Court has observed, "one of the basic principles governing the creation and performance of legal obligations" (...); it is not in itself a source of obligation where none would otherwise exist.'[33]

The same can be said of many general principles of law, and the ILC's commentary sheds no light on the circumstances in which this would be otherwise. All that can be inferred from the commentary is that this must be determined on a case-by-case basis depending on their content and scope, but no further criteria are provided that would enable this determination to be made.[34]

The second reason for hesitation is the examples given by the ILC, which tend to be worded more as rules of customary international law or treaty law than as general principles of law. For example, the ILC refers to the prohibition of unjust enrichment, the prohibition of crimes under international law, the obligation of States not to allow their territory to be used for acts contrary to the rights of other States, the obligation to make reparation for breaches of international law, the obligation to pay interest, and so forth.[35] It has been pointed out in the literature that general principles of law are of a transitory nature in that they regularly lead to the formation of rules of customary international law.[36] Needless to say, however, it follows then that potential rights and obligations result from the existence of the rule of customary international law rather than being necessarily generated by the general principle of law concerned.

The CAVV takes a positive view of the principal functions of general principles of law in preventing situations in which a finding of *non liquet* is reached on the basis of lacunae in the law and enhancing the coherence of the international legal system. The CAVV is also convinced of the constructive role of such principles of law in interpreting rules of international law and promoting their coherence. However, the reference in draft conclusion 10 to general principles of law as a basis for primary rights and obligations as well as a basis for secondary and procedural rules raises questions. The CAVV also considers that clarity should be provided as to whether general principles of law can give rise independently to such rights, obligations or rules and, if so, what considerations or criteria can lead to such a conclusion.

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Categorieën van algemene rechtsbeginselen

Conclusion 3
Categories of general principles of law

General principles of law comprise those:

(a) that are derived from national legal systems;

(b) that may be formed within the international legal system.

As already noted, the ILC distinguishes between two categories of general principles of law. First, principles of law that are derived from national legal systems and, second, principles of law that may be formed within the international legal system. According to the ILC, confirmation of the existence of the first category is provided by the jurisprudence of courts and tribunals, teachings

and the *travaux préparatoires* of the Statute.[37] As regards the existence of the second category, the ILC indicates that it appears to find support in the jurisprudence of courts and tribunals and teachings.[38] In the commentary to draft conclusion 7, the ILC adds that the international legal system, like any other legal system, must be able to generate general principles of law that are specific to it, and that nothing in the text of Article 38, paragraph 1 (c) of the ICJ Statute or in its drafting history limits general principles of law to those derived from national legal systems.[39]

As noted above, the inclusion of the category of general principles of law formed within the international legal system has proved controversial.[40] Whatever the case may be regarding the preparatory work of the Statute of the Permanent Court of International Justice (the predecessor of the current ICJ Statute),[41] which can lead to very different interpretations,[42] the CAVV shares the ILC's view that the text of Article 38, paragraph 1 (c) of the ICJ Statute is indeed worded so broadly that it can also encompass the second category. The CAVV therefore agrees with the ILC that international law can generate general principles of law that are specific to it.

The primary example of this is the principle of the sovereign equality of States, as codified in Article 2, paragraph 1 of the UN Charter. This reflects the horizontal structure of the international legal system, in which States, by virtue of their sovereignty, do not tolerate any higher authority over them. This fundamental principle forms the basis of a number of rules of positive customary international law and treaty law.[43] For example, the ICJ held as follows in 2012:

> '... the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order.' [44]

It is apparent from this passage that the doubts of certain ILC members about the existence of general principles of law specific to the international legal system are not justified. The sovereign equality of States is a general principle of law specific to the international legal system. A principle of law resulting from and related to this principle is that the consent of States is required for the settlement of their international disputes, and that no State can be subjected against its will to the jurisdiction of an international tribunal or court.[45]

Although the CAVV can endorse the ILC's position that Article 38, paragraph 1 (c) of the ICJ Statute is couched in sufficiently broad terms to include legal principles formed within the international legal system, the wording of draft conclusion 3 is very cautious. For example, it speaks of legal principles that *may be formed* within the international legal system, as if there could be doubt about whether such legal principles have already developed within that legal system (quod non). In the commentary to draft conclusion 3, the ILC notes as follows in this connection:

> 'The phrase "may be formed" was considered appropriate to introduce a degree of flexibility to the provision, acknowledging that there is a debate as to whether a second category of general principles of law exists.'[46]

However, it is unusual and undesirable for conflicting opinions to be synthesised into the text of a draft conclusion; a mention of them in the commentary, or in the ILC report itself, should be sufficient for this purpose. The CAVV therefore believes that it would be better to speak of general principles *formed* within the international legal system.

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Method for identifying general principles of law derived from national legal systems

Conclusion 4

Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

(a) the existence of a principle common to the various legal systems of the world; and
(b) its transposition to the international legal system.

Conclusion 5

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

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

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

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

Conclusion 6

Determination of transposition to the international legal system

A principle common to the various legal systems of the world may be transposed to the international legal system insofar as it is compatible with that system.

The question of how to establish that the community of nations has recognised a principle of law is answered in draft conclusions 4 to 9. It is immediately apparent that the point is not that international recognition is an act of will on the part of the community of nations as a whole, but that such recognition must be established in two steps through a process of induction and deduction.[47]

To determine the existence and content of a general principle of law derived from national legal systems, the first step (which is essentially inductive) is to ascertain that a principle is common to the various legal systems of the world.[48] To establish this, a comparative analysis of national legal systems is required. This must be wide and representative, covering the different regions of the world, and include an assessment of national laws and decisions of national courts, and other relevant materials.49 The second step (which is essentially deductive) requires the transposition of the principle to the international legal system.[50] It is noted in the commentary to draft conclusion 4 that the requirement of transposition is intended to show that a general principle of law is recognised within the meaning of Article 38, paragraph 1 (c) of the ICJ Statute. The commentary adds that the principle must also be recognised as *applicable* within the international legal system. Lastly, the commentary indicates that a principle, or elements thereof, may not be suitable to be applied in the international legal system and hence that a general principle of law identified through this two-step analysis of draft conclusion 4 may not be identical in terms of content to the principle found in the various national legal systems.[51]

In the commentary to draft conclusion 6, the ILC explains the rationale for the transposition requirement, namely that the international legal system and national legal systems have distinct structures and characteristics.[52] General principles of law that may be common to national legal systems are intended to meet the needs of a particular society and are not necessarily capable of operating at international level. An example given by the ILC is the right of access to the courts; in the absence of a judicial body having universal and compulsory jurisdiction to settle disputes, this principle would be incompatible with the principle of consent by States for the settlement of international disputes.[53] The ILC also notes that transposition can be determined if the relevant principle of law is *compatible* with the international legal system, pointing out at the same time that a principle is deemed compatible if it is *suitable* for application within the international legal system.[54]

The requirement of transposition has no textual basis in the wording of Article 38, paragraph 1 (c) of the ICJ Statute and cannot be clearly inferred from the requirement of recognition by the community of nations. The ILC therefore seems to be more preoccupied with an unduly broad application of the domestic analogy, given its reference to distinct structures and characteristics. In doing so, the ILC may possibly be basing itself on the remarks of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Blaškić* case. In that case, the question arose of whether the Tribunal could subpoena state officials to appear or be found in contempt of court. As regards the domestic analogy, the Tribunal held as follows:

> 'The setting is totally different in the international community. It is known *omnibus lippis et tonsoribus* that the international

> community lacks any central government with the attendant separation of powers and checks and balances. In particular, international courts, including the International Tribunal, do not make up a judicial branch of a central government. The international community primarily consists of sovereign States; each jealous of its own sovereign attributes and prerogatives, each insisting on its right to equality and demanding full respect, by all other States, for its domestic jurisdiction. Any international body must therefore take into account this basic structure of the international community. It follows from these various factors that international courts do not necessarily possess, vis-à-vis organs of sovereign States, the same powers which accrue to national courts in respect of the administrative, legislative and political organs of the State. Hence, the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension. In addition to causing opposition among States, it could end up blurring the distinctive features of international courts.' 55

It goes without saying that caution is required when rules that have developed within a national legal system are applied by analogy within the international legal system. Nonetheless, undue caution should be avoided, since analogies with national law have frequently been used in the past (and still are today) and have served as a useful source of inspiration for the progressive development of international law.[56] Perhaps worth mentioning is the view that '...in neither case [as analogy or a material source] are domestic rules as such applied (or applicable) by the Court.'[57]

In any event, the requirement of transposition seems to the CAVV to be too strict. From a temporal point of view, the wording of draft conclusion 4 seems to presuppose that, in order to be applied, the principle must already have been transposed. However, it is unclear at what moment transposition should occur and by whom it should be carried out. As transposition is intended to express the recognition of a general principle of law by the community of nations, the views of States on this are arguably decisive. But if, as noted in the commentary, transposition does not occur automatically, but also does not require any formal or express act, it would be appropriate for some indication to be given in the commentary of where these views can be found.[58]

In the commentary to draft conclusion 4, the ILC justifies its preference for the term 'transposition' rather than 'transposability'.[59] The CAVV is not convinced about this. Later on in the commentary, the ILC links the transposition of general principles of law with terms such as compatibility, applicability and suitability for application within the international legal system.[60] These standards are indicative of a requirement of transposability rather than transposition. As the ILC does not require a formal or express act of transposition, but also does not (formally) put the matter in the hands of the courts, the CAVV considers that an assessment of transposability and a thorough statement of reasons should be sufficient. Incidentally, it is also not entirely clear to the CAVV who should carry out this assessment in a specific situation (for example in the context of a court case).

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Method for identifying general principles of law that may be formed within the international legal system

Conclusion 7

Identification of general principles of law formed within the international legal system

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.

Draft conclusion 7 concerns the second category of general principles of law that can be formed within the international legal system. In terms of methodology, however, the ILC notes that the first step requires an (inductive) analysis of existing rules within the international legal system and that they must have an autonomous

status. This analysis must take into account all available evidence of the recognition of the principle in question, for example in international instruments, resolutions adopted by international organisations and statements made by States. [61] According to the ILC, for the second step (which is deductive) it is necessary that the community of nations has recognised a principle as intrinsic to the international legal system. However, the ILC specifies in the commentary that such a principle of law is specific to the international legal system and reflects and regulates its basic features.[62]

Two of the examples subsequently discussed by the ILC – the principle of consent of States to jurisdiction and, possibly, the principle of *uti possidetis juris*[63] – can indeed be regarded as general principles of law that have developed (specifically) within the international legal system. What remains unclear in this context, however, is what makes a principle of law general in nature.[64] In the case of principles derived from national legal systems, this can be based on the presence of those principles as established by a wide and representative analysis of those systems.[65] However, this is different in the case of international law, where principles (or principles of law) evolve that have a very limited scope of application or are specific to certain areas of that law. While the principle of consent is generally applicable within the international legal system and all areas forming part of it, the same cannot be said of *uti possidetis juris*, which applies only to the conversion of previously internal administrative borders into the international borders of successor States.[66]

It is less clear in the case of some other examples whether the principles can be described as having been formed exclusively within the international legal system, whether they are merely an abstraction from existing rules, or whether they show conflation with existing rules of customary international law or treaty law.[67] The CAVV can understand the scepticism of certain ILC members on this point, partly because the commentary fails to explain how to determine whether a general principle of law is intrinsic (specific) to the international legal system and therefore has an autonomous status. A general principle of law that is simply abstracted from existing rules (or a system of rules) of customary international law or treaty law is unlikely to support that conclusion.[68]

Moreover, ascertaining how general principles of law differ from rules of customary international law or treaty law is extremely difficult because an analysis of existing rules of international law is the very means by which the existence of these principles must be determined. Moreover, if the functions of general principles of law are comparable to those of the other primary sources, there is a real risk of general principles of law being resorted to as a foundation for primary rights and obligations without States having accepted them as customary international law on legal grounds *(opinio juris)* or having been able to consent to this for treaties.[69]

Paragraph 2 of draft conclusion 7 provides that paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system. In the commentary, the ILC explains that some members considered that paragraph 1 would be too narrow since principles not intrinsic to the international legal system might nonetheless emerge from within that system.[70] Nonetheless, how such 'other' principles of law would or could be formed remains obscure. What is clear, however, is that principles of law which, by their very nature, are not 'generally' applicable have been laid down or have evolved within all kinds of areas of international law.[71] In light of the foregoing observations, the CAVV takes the view that a more extensive taxonomy of general principles of law formed within the international legal system is desirable, as this would make it possible to adopt a more refined system of categorisation and methodology.[72]

Conclusion and advice

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The CAVV recommends that the government take account of the following observations when determining its position on the ILC project on general principles of law.

1. The added value of this ILC project lies in the fact that it specifies the methodology for identifying general principles of law within the meaning of Article 38, paragraph 1 (c) of the ICJ Statute. Nonetheless, that value is possibly limited by the fact that the distinctive nature of general principles of law, as opposed to rules of customary international law, is not made sufficiently clear. The practical applicability of the draft conclusions is uncertain as there is only very limited consideration of the distinction between rules and principles of law, and the examples given merely serve to cause confusion on this point. The CAVV also considers that the draft conclusions should be structured differently, so that the position of general principles of law and their functions are dealt with first and the different categories and associated methodology are described only subsequently.

2. The primary sources of international law laid down in Article 38, paragraph 1 of the ICJ Statute are not in a hierarchical relationship with one another (draft conclusion 11, paragraph 1), although in practice they are often applied in the order in which they are listed. The primary sources will also often result in general principles of law existing in parallel with rules of the same or similar content in a treaty or in customary international law (draft conclusion 11, paragraph 2). It may be doubted whether, in the event of conflict, general principles of law would be applied on the basis of techniques of conflict resolution, thereby ignoring the parallel rules of international customary law or treaty law.

3. The ILC pays only very scant attention to the nature of general principles of law. The CAVV considers that general principles of law involve norms that have a higher level of abstraction, where the target group is not specified and it is often unclear what specific conduct, acts or omissions are prohibited, required or permitted. Certain general principles of law also allow a relatively broad discretion to depart from the norm they embody.

4. The CAVV endorses the way in which the ILC has worded the two principal functions of general principles of law, namely to provide a solution for gaps in international law and to contribute to the coherence of the international legal system. Draft conclusion 10 and the accompanying commentary are not completely clear about the question of whether general principles of law can independently generate primary rights and obligations and secondary and procedural rules. The CAVV has reservations about answering this question in the affirmative, but believes that in that case the commentary should provide clarity about the criteria that allow this to be assessed.

5. The ILC has taken the position that general principles of law under Article 38, paragraph 1 (c) of the ICJ Statute include both principles of law derived from national legal systems and those that may be formed within the international legal system. The CAVV supports this choice, but considers that draft conclusions 3 and 7 have been formulated too cautiously and that it would be better to talk about general principles of law *formed* within the international legal system.

6. The method identified by the ILC for determining a general principle of law derived from national legal systems, with both inductive and deductive elements, can count on the CAVV's support. However, the CAVV does have reservations about the requirement of transposition, which is not a necessary consequence of the requirement of recognition by the community of nations and instead reflects a preoccupation with the issue of the domestic analogy. In the CAVV's opinion, it would therefore be better to use the term transposability. The ILC indicates in the commentary that transposition does not occur

automatically, but also does not require a formal or express act. It thus remains unclear how, when and by whom transposition or transposability should be assessed and/or ascertained.

7. The ILC likewise uses inductive and deductive elements for the method of identifying general principles of law that may be formed within the international legal system, and the CAVV also supports this choice. Nonetheless, there are aspects which require further elaboration. First, it should be noted that the commentary offers limited guidance for determining when a general principle of law is an 'intrinsic' part of the international legal system and thus has 'autonomous' status. Second, it remains unclear what makes a principle of law formed within the international legal system 'generally' applicable.

8. This issue is all the more pressing as principles of law have now evolved within international law that have a very limited scope of application or are specific to particular areas of international law. This explains the 'without prejudice' clause of draft conclusion 7, paragraph 2 regarding principles of law that are not 'intrinsic' to the international legal system. However, the commentary does not provide any indication as to how such 'other' principles of law are formed within the international legal system. That is why the CAVV considers that it is desirable to have a more extensive taxonomy of principles of law, on the basis of which a more refined system of categorisation and methodology can be established.

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Endnotes

1 ILC, Report of the International Law Commission, seventy-fourth session, UN Doc A/78/10 (2023), Chapter IV General principles of law (hereinafter: ILC Report 2023).

2 M. Vázquez-Bermúdez, First report on general principles of law, UN Doc A/CN.4/732 (2019); Second report on general principles of law, UN Doc A/CN.4/741 (2020); Third report on general principles of law, UN Doc A/CN.4/753 (2022).

3 ILC Report 2023, p. 11, para. 38, with a request that the comments and observations be submitted to the Secretary-General by 1 December 2024.

4 Statute of the International Court of Justice, San Francisco, 26 June 1945.

5 ILC Report 2023, p. 13, Conclusion 1, Commentary, para. 3.

6 Ibid.

7 ILC, Report of the International Law Commission, seventieth session, Identification of customary international law, UN Doc. A/73/10 (2018), general commentary to draft conclusions, p. 122, para. 2; ILC, Report of the International Law Commission, seventy-third session, Peremptory norms of general international law *(jus cogens)*, UN Doc. A/77/10 (2022), commentary to draft conclusion 1, pp. 16-17, para. 2.

8 Cf. M. Dordeska, *General Principles of Law Recognized by Civilized Nations (1922-2018): The Evolution of the Third Source of International Law through the Jurisprudence of the Permanent Court of International Justice and the International Court of Justice*, Brill Nijhoff, 2020, pp. 63-82; I. Saunders, *General Principles as a Source of International Law, Article 38(1)(c) of the Statute of the International Court of Justice*, Hart, 2021, pp. 13, 50, 213-220 and 272-273. See also ICJ, 12 October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, pp. 246 and 288-290, para. 79. The ICJ noted as follows: 'In the Chamber's opinion, the association of the terms "rules" and "principles" is no more than the use of a dual expression to convey one and the same idea, since in this context "principles" clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term "principles" may be justified because of their more general and more fundamental character.'

9 Draft conclusion 11 in ILC Report 2023, pp. 12 and 13.

10 Draft conclusion 10 in ILC Report 2023, p. 12.

11 In the original Dutch report we used the term *'internationale rechtsorde'*, which is usually translated as 'international legal order', but we have opted for 'international legal system' in the English translation because this is the term used in the ILC's text.

12 ILC Report 2023, p. 33, Conclusion 11, Commentary, para. 2.

13 A. Pellet and D. Müller, 'Article 38', in: A. Zimmermann and C.J. Tams et al. (eds), *Statute of the International Court of Justice: A Commentary (3rd Edition)*, Oxford University Press, 2019, p. 819, p. 941, para. 296.

14 ICJ, 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment, ICJ Reports 1986*, p. 14, paras. 172-182, particularly paras. 177-179.

15 ILC Report 2023, p. 34, Conclusion 11, Commentary, para. 5.

16 ILC Report 2023, p. 33, Conclusion 11, Commentary, para. 3.

17 A. Pellet and D. Müller, 'Article 38', in: A. Zimmermann and C.J. Tams et al. (eds), S*tatute of the International Court of Justice: A Commentary (3rd Edition)*, Oxford University Press, 2019, p. 819, p. 941, para. 297.

18 *Lex specialis derogat legi generali; lex posterior derogat legi priori; and lex superior derogat legi inferiori*, see ILC Report 2023, p. 35, Conclusion 11, Commentary, para. 7.

19 As regards the precautionary principle and Article 5.7 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), see World Trade Organization (WTO), panel report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/R/USA, Report of the Panel, 18 August 1997, pp. 201 and 221, paras.

8.157 and 8.248-8.249; see also WTO, EC Measures Concerning Meat and Meat Products (Hormones), AB-1997-4, Report of the Appellate Body, WT/DS26/AB/R, 16 January 1998, pp. 48-50, paras. 123-125 and footnote 93.

20 Charter of the United Nations, San Francisco, 26 June 1945; ILC Report 2023, p. 35, Conclusion 11 Commentary, para. 7.

21 CAVV, Advisory report on the draft conclusions of the International Law Commission on peremptory norms of general international law, Advisory report no. 37, 27 July 2020, pp. 9-10.

22 In this connection, J. Wouters notes as follows: 'First of all, legal principles do not specify legal consequences that follow automatically in certain defined circumstances, whereas legal rules typically have an "all-or-nothing" nature. Indeed, in the words of Kolb, "their main characteristic is to be general". As Advocate General Mazák observed in his opinion in *Palacios de la Villa* before the CJEU: "It lies in the nature of general principles of law, which are to be sought rather in the Platonic heaven of law than in the law books, that both their existence and their substantive content are marked by uncertainty". A second characteristic of legal principles is their dimension of weight or importance: when principles contravene each other, the problem should be solved by evaluating the significance of each principle relative to the other.' J. Wouters, 'Conclusions: The Role of General Principles in a Multi-layered Legal Setting', in: M. Andenas, M. Fitzmaurice, A. Tanzi and J. Wouters (eds.), *General Principles and the Coherence of International Law*, Brill Nijhoff, 2019, pp. 195-196 (footnotes omitted). See also K. Gorobets, 'Solidarity as a Practical Reason: Grounding the Authority of International Law', *Netherlands International Law Review* (69-2) 2022, pp. 13-14, where he cites as examples the principle of the prohibition of genocide, the principle of non-intervention and the principle of the non-use of force. Quoting Dworkin and Raz, he indicates that rules produce a concrete outcome and stipulate relatively specific actions (or omissions), whereas principles produce a less concrete outcome and stipulate highly unspecific actions (and omissions). R. Kolb, 'General Principles of Procedural Law', in: A. Zimmermann and C.J. Tams et al. (eds), *Statute of the International Court of Justice: A Commentary (3rd Edition)*, Oxford University Press, 2019, p. 963, pp. 964-965, para. 2 (footnotes omitted), writes as follows: 'A "principle" of law is a general normative proposition considered to be expressive of the ratio of a series of more detailed rules. The principle is thus a sort of "constitutional" proposition of a legal order: it expresses an important or general legal value, or it is the hallmark of a legal idea that permeates different questions of law. It covers an important or even unlimited segment of the legal reality, without, however, spelling out in a precise way the conditions of its application or its legal effects. A series of "concretizations" of a principle can ordinarily be grouped around it; they are treated as its derivatives or otherwise as related concepts. (...) Principles, not being cast into limits as precise as rules proper, display distinctive functions in the legal system. They have an important role in smoothing the application of the law in a given case and have a sort of adapting or equitable function. Moreover, they play a major role in the development of the law, sometimes by allowing new rules to be shaped. A simple "rule" of law does not possess such a constitutional role. It is narrower, more limited in its reach; its scope of application and its effects are spelled out much more clearly. As can be grasped, there is no clear-cut distinction between principles and rules, but at least a grey area exists: a rule can be quite general and thus eventually qualify as a principle; a principle can be narrow, but qualify as such on account of its importance.'

23 Article 23 and Article 27, paragraph 3 of the UN Charter. This is why the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia was wrong to refer to a 'right to equality' of States in ICTY, 29 October 1997, *Prosecutor v. Blaškić*, IT-95-14-PT. 7, para. 40 (italics added): 'The international community primarily consists of sovereign States; each jealous of its own sovereign attributes and prerogatives, e*ach insisting on its right to equality* and demanding full respect, by all other States, for its domestic jurisdiction.'

24 See League of Nations, Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee,* 16–24 June 1920, pp. 286-287, 293-297, 306-325, 331-338, 344-346 and 351, https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf.

25 ILC Report 2023, p. 29, Conclusion 10, Commentary, para. 3. For a different view, see A. Pellet and D.

Müller, 'Article 38', in: A. Zimmermann and C.J. Tams et al. (eds), *Statute of the International Court of Justice: A Commentary (3rd Edition)*, Oxford University Press, 2019, p. 819, p. 941, para. 297.

26 See generally the interesting contributions in M. Andenas, M. Fitzmaurice, A. Tanzi and J. Wouters (eds.), *General Principles and the Coherence of International Law*, Brill Nijhoff, 2019.

27 ILC Report 2023, p. 30, Conclusion 10, Commentary, para. 7.

28 See A. Pellet and D. Müller, 'Article 38', in: A. Zimmermann and C.J. Tams et al. (eds), *Statute of the International Court of Justice: A Commentary (3rd Edition)*, Oxford University Press, 2019, p. 819, pp. 922-923, para. 251; and I. Saunders, *General Principles as a Source of International Law, Article 38(1)(c) of the Statute of the International Court of* Justice, Hart, 2021, pp. 221-229.

29 ILC Report 2023, pp. 31-32, Conclusion 10, Commentary, paras. 11-14. However, a distinction without (substantive) consequences is pointless. See discussion in A. Pellet and D. Müller, 'Article 38', in: A. Zimmermann and C.J. Tams et al. (eds), *Statute of the International Court of Justice: A Commentary (3rd Edition)*, Oxford University Press, 2019, p. 819, pp. 925-927, paras. 256-261. See also the taxonomy of four different types of principles of law – three of which do not in fact amount to a principle of law – in K. Gorobets, 'Solidarity as a Practical Reason: Grounding the Authority of International Law', *Netherlands International Law Review* (69-2) 2022, pp. 12-18.

30 See also K. Gorobets, 'Solidarity as a Practical Reason: Grounding the Authority of International Law', *Netherlands International Law Review* (69-2) 2022, pp. 9-11, who discusses the positions of authors who have supported or opposed the idea that solidarity, as a principle or general principle of law, can generate obligations.

31 ILC Report 2023, pp. 31-32, Conclusion 10, Commentary, paras. 11-14.

32 ILC Report 2023, pp. 31-32, Conclusion 10, Commentary, paras. 11-14.

33 ICJ, 20 December 1988, B*order and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, ICJ Reports 1988*, p. 69, para. 94 (italics added); see also ICJ, 20 December 1974, *Nuclear Tests (Australia v. France), Judgment, ICJ Reports 1974*, p. 253, para. 46.

34 ILC Report 2023, p. 30, Conclusion 10, Commentary, para. 7.

35 ILC Report 2023, pp 31-32, Conclusion 10, Commentary, paras. 11, 13 and 14.

36 A. Pellet and D. Müller, 'Article 38', in: A. Zimmermann and C.J. Tams et al. (eds), *Statute of the International Court of Justice: A Commentary (3rd Edition)*, Oxford University Press, 2019, p. 819, pp. 942-944, paras. 301-304.

37 ILC Report 2023, p. 15, Conclusion 3, Commentary, para. 2.

38 ILC Report 2023, pp. 15-16, Conclusion 3, Commentary, para. 3; and, according to ILC Report 2023, pp. 22-23, Conclusion 7, Commentary, para. 2 also in State practice. However, it is then noted that some ILC members consider that Article 38, paragraph 1 (c) does not encompass a second category of general principles of law, or at least remain sceptical about this, and note that the doctrine is divided on this issue.

39 ILC Report 2023, pp. 22-23, Conclusion 7, Commentary, para. 2.

40 See also the reactions of States in the Sixth Committee of the General Assembly in: ILC, Report of the International Law Commission on the work of its seventy-fourth session (2023), Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-eighth session, prepared by the Secretariat, UN Doc A/CN.4/763, pp. 3-7.

41 See League of Nations, Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*, 16–24 June 1920, pp. 286-287, 293-297, 306-325, 331-338, 344-346 and 351, https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf.

42 For implicit support for the view that Article 38, paragraph 1 of the ICJ Statute relates only to general principles of law derived from national legal systems, see M. Wood, 'Customary International

Law and the General Principles of Law Recognized by Civilized Nations', *International Community Law Review* (21-3-4) 2019, pp. 307 and 317-321; for the view that general principles of international law do fall under Article 38, paragraph 1 (c) of the ICJ Statute, see E. Bjorge, 'General Principles of Law Formed within the International Legal System', *International and Comparative Law Quarterly* (72-4) 2023, p. 845. See also I. Saunders, *General Principles as a Source of International Law, Article 38(1)(c) of the Statute of the International Court of Justice*, Hart, 2021, pp. 229-236.

43 In this connection, see Resolution 2625 (XXV) of the UN General Assembly (24 October 1970), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, The principle of sovereign equality of States, UN Doc A/RES/2625(XXV).

44 ICJ, 3 February 2021, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment, ICJ Reports 2012*, p. 99, p. 123, para. 57.

45 Sometimes, the principle of consent by States to the settlement of their disputes may even entail that where consent is given by two States as a basis for the jurisdiction of a court, for example the International Court of Justice, jurisdiction may still not be exercised if an eventual ruling would necessarily also settle a dispute with a third State. This may be the case when a court, in order to reach a judgment on a dispute between two States, must rule on a violation of international law by a third State. The archetypal example of this is ICJ, *Case of the monetary gold removed from Rome in 1943 (Preliminary Question), ICJ Reports 1954*, p. 19, pp. 32-33. See also generally B.I. Bonafé, 'Indispensable Party', *Max Planck Encyclopedia of International Procedural Law*, 2018.

46 ILC Report 2023, pp. 15-16, Conclusion 3, Commentary, para. 1.

47 ILC Report 2023, p. 17, Conclusion 4, Commentary, para. 3 and pages 22-23, Conclusion 7, Commentary, para. 3. Cf. G. Schwarzenberger, *The Inductive Approach to International Law*, Stevens & Sons, 1965, pp. 8-42.

48 Draft conclusion 4 in ILC Report 2023, p. 11.

49 Draft conclusion 5 in ILC Report 2023, p. 12.

50 Draft conclusion 6 in ILC Report 2023, p. 12.

51 ILC Report 2023, p. 17, Conclusion 4, Commentary, paras. 2, 4 and 7.

52 ILC Report 2023, p. 21, Conclusion 6, Commentary, para. 3.

53 ILC Report 2023, p. 21, Conclusion 6, Commentary, para. 5.

54 ILC Report 2023, pp 21-22, Conclusion 6, Commentary, paras. 3, 4 and 7.

55 ICTY, 29 October 1997, *Prosecutor v. Blaškić*, IT-95-14-PT. 7, para. 40. For further discussion of this topic, see A. Pellet and D. Müller, 'Article 38', in: A. Zimmermann and C.J. Tams et al. (eds), *Statute of the International Court of Justice: A Commentary (3rd Edition)*, Oxford University Press, 2019, p. 819, pp. 930-931, paras. 268-270, without consideration of the textual basis for a requirement of transposability.

56 See, for example, H. Lauterpacht, P*rivate law sources and analogies of international law (with special reference to international arbitration)*, Longmans, 1927; L.R. Helfer, 'Constitutional Analogies in the International Legal System', *Loyola of Los Angeles Law Review* (37) 2004, p. 193; D. Sarooshi, 'Editorial: The Role of Domestic Law Analogies in the Law of International Organizations', *International Organizations Law Review* (5-2) 2008, p. 237; S. Vöneky, 'Analogy in International Law', *Max Planck Encyclopedia of Public International Law*, 2008; A. Hertogen, 'The Persuasiveness of Domestic Law Analogies in International Law', *European Journal of International Law* (29-4) 2018, p. 1127; E. Bjorge, 'Public Law Sources and Analogies in International Law', *Victoria University of Wellington Law Review* (49-4) 2018, p. 533.

57 A. Pellet and D. Müller, 'Article 38', in: A. Zimmermann and C.J. Tams et al. (eds), *Statute of the International Court of Justice: A Commentary (3rd Edition)*, Oxford University Press, 2019, pp. 819, 873, para. 137.

58 ILC Report 2023, p. 17, Conclusion 4, Commentary, para. 5 and pp. 21-22, Conclusion 6, Commentary, paras. 2 and 7. Alternatively, consideration could be given to defining the requirement of transposition or transposability in such a way that it is necessary to establish only that the principle is not

incompatible with the international legal system.

59 ILC Report 2023, p. 17, Conclusion 4, Commentary, para. 6.

60 ILC Report 2023, pp 21-22, Conclusion 6, Commentary, paras. 3, 4 and 7.

61 ILC Report 2023, p. 23, Conclusion 7, Commentary, para. 3.

62 ILC Report 2023, p. 23, Conclusion 7, Commentary, para. 4.

63 ILC Report 2023, pp. 23-24, Conclusion 7, Commentary, paras. 5-7.

64 See I. Saunders, *General Principles as a Source of International Law, Article 38(1)(c) of the Statute of the International Court of Justice*, Hart, 2021, pp. 220-221.

65 M. Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations', *International Community Law Review* (21-3-4) 2019, p. 307, pp. 319-320, footnote 47.

66 See generally G. Nesi, 'Uti possidetis Doctrine', *Max Planck Encyclopedia of Public International Law*, 2018.

67 ILC Report 2023, p. 25, Conclusion 7, Commentary, paras. 8-10 and also as noted in para. 13; see also ILC Report 2023, pp. 29-32, Conclusion 10, Commentary.

68 R. Kolb, 'General Principles of Procedural Law', in: A. Zimmermann and C.J. Tams et al. (eds), *Statute of the International Court of Justice: A Commentary (3rd Edition)*, Oxford University Press, 2019, p. 963, p. 964, para. 2 notes as follows: 'A "principle" of law is a general normative proposition considered to be expressive of the ratio of a series of more detailed rules.'

69 Or, as the Permanent Court of International Justice (PCIJ) held: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.' PCIJ, 7 September 1927, *The Case of the SS 'Lotus'*, *Publications of the Permanent Court of International Justice, Series A, No. 10*, p. 18.

70 ILC Report 2023, p. 24, Conclusion 7, Commentary, para. 11.

71 See the many contributions in M. Andenas, M. Fitzmaurice, A. Tanzi and J. Wouters (eds.), *General Principles and the Coherence of International Law*, Brill Nijhoff, 2019; and H. Addink, 'Good Governance: A Principle of International Law', in: C. Ryngaert, E.J. Molenaar and S. Nouwen (eds.), *What's Wrong with International Law? Liber Amicorum A.H.A. Soons*, Brill Nijhoff 2015, p. 288.

72 For example, see M. Dordeska, *General Principles of Law Recognized by Civilized Nations (1922-2018): The Evolution of the Third Source of International Law through the Jurisprudence of the Permanent Court of International Justice and the International Court of Justice*, Brill Nijhoff, 2020, pp. 102-131, Chapter 4, *Introducing the Cube.*

List of abbreviations

CAVV
Advisory Committee on Issues of Public International Law

ICTY
International Criminal Tribunal for the former Yugoslavia

ICJ
International Court of Justice

ILC
International Law Commission

PHIJ
Permanent Court of International Justice

UN
United Nations