XXXIX POLISH YEARBOOK OF INTERNATIONAL LAW
2019
DOI 10.24425/pyil.2020.134475
PL ISSN 0554-498X

*Przemysław Saganek**

THE SOURCES OF GENERAL INTERNATIONAL LAW IN THE RECENT WORKS OF THE INTERNATIONAL LAW COMMISSION

Abstract: *The present text describes the attitude toward sources of law in the recent works of the International Law Commission (ILC) on custom, general principles of law, and jus cogens (with special emphasis on reports of the respective special rapporteurs). The three main tasks of the text are to verify whether the ILC rapporteurs: grasped the essence of unwritten sources (reality-concern); preserved the coherence of views when referring to different topics (coherence-concern); and last but not least allow states to have the decisive voice as regards the set of their obligations (sovereignty-concern). The author notes the nominal strict attachment of the ILC to two-element nature of custom as a general practice recognized as law. Though in fact it should be a good message for states, this strict attitude of the ILC seems not to be based on a real stress test. It seems to ignore the reality of lawyers and even international judges referring to several customary norms without the slightest attempt to verify the true existence of both the two elements of custom – namely practice and opinio juris. What is more, the ILC does not see any problem with calling all general principles as sources of law. What is overlooked is the element of state consent to be bound by several presumed general principles. This is qualified by the author as a threat to state sovereignty – with states being pressured to follow some patterns of conduct to which they have not given their consent.*

Keywords: custom, general principles of law, *jus cogens*, *opinio juris*, sources of international law

INITIAL REMARKS

The sources of international law are a mandatory topic of every international law manual. The number of legal topics connected with them as well as their size usually dissuade authors, as well as editorial boards of journals, from including shorter texts on the sources of international law. It seems that the recent works of the International Law

* Associate Professor (dr. habil.), Institute of Law Studies of the Polish Academy of Sciences; e-mail: psaganek@yahoo.com; ORCID: 0000-0002-9877-8376.

Commission (ILC) justify a slight change in this attitude. It is quite exceptional that within the last few years, the ILC has been working almost simultaneously on three (formally separate) topics, namely: custom, general principles of law, and *jus cogens*.

The works of the ILC on custom have taken the form of a Memorandum by the ILC Secretariat,[1] five reports by the Special Rapporteur Michael Wood,[2] and the 2018 Draft conclusions on the identification of customary international law.[3] So far only one report on general principles of law, prepared by Marcelo Vázquez-Bermúdez, was presented in 2019.[4] The year 2019 also witnessed the presentation of the fourth report on peremptory norms of international law (*jus cogens*) by Dire Tladi,[5] and the adoption by the ILC of a set of 23 Draft Conclusions on *jus cogens*.[6] The main aim of the present text is to analyse how the ILC special rapporteurs[7] have, in the three above-mentioned works, approached the issue of sources of general (unwritten) international law.[8] It must be stressed that the subject of interest of this article is not divided equally among all the three topics of the ILC works. The nature and definition of custom lies at the very centre of this examination. General principles are interesting for this text only insofar as concerns their qualification as a source of general international law. In contrast, only two aspects of *jus cogens* will be of our interest, as *jus cogens* norms do not, as such, form a separate type of sources of international law.

It will be interesting for us to see how the ILC (and especially its rapporteurs) have defined those sources, identified their basic elements and prerequisites, and to assess the merits and drawbacks of their approach(es).

---

[1] ILC, *Formation and evidence of customary international law. Elements in the previous work of the International Law Commission that could be particularly relevant to the topic. Memorandum by the Secretariat*, A/CN.4/659 (Memorandum).

[2] ILC, *First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur*, 17 May 2013, A/CN.4/663; ILC, *Second report on identification of customary international law by Michael Wood, Special Rapporteur*, 22 May 2014, A/CN.4/672; ILC, *Third report on identification of customary international law by Michael Wood, Special Rapporteur*, 27 March 2015, A/CN.4/682; ILC, *Fourth report on identification of customary international law by Michael Wood, Special Rapporteur*, 8 March 2016, A/CN.4/695; ILC, *Fifth report on identification of customary international law by Michael Wood, Special Rapporteur*, 14 March 2018, A/CN.4/717.

[3] Available at: https://bit.ly/2WUWFa0 (accessed 30 June 2020).

[4] ILC, *First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, 5 April 2019, A/CN.4/732.

[5] ILC, *Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur*, 31 January 2019, A/CN.4/727. It was preceded by: ILC, *First report on jus cogens by Dire Tladi, Special Rapporteur*, 8 March 2016, A/CN.4/693; ILC, *Second report on jus cogens by Dire Tladi, Special Rapporteur*, 16 March 2017, A/CN.4/706; ILC, *Third report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur*, 12 February 2018, A/CN.4/714.

[6] ILC Report 2019, UN Doc. A/74/10, p. 142.

[7] For reasons of simplicity they will be referred to using the names of the respective Special Rapporteur and numbers, e.g. Wood, 1st report.

[8] For more on the understanding of this term as "an umbrella term that includes both customary international law and general principles", *see e.g.* Memorandum, Observation 29, p. 35. *See also* Tladi, 2nd Report, p. 27, para. 53.

The subsequent analysis focuses on three main concerns. The first has to do with the correctness of the main answers given by the ILC. We can label this as a "reality-concern." The main underlying concern is whether the ILC has been able to properly address the essences of custom and general principles. If not, the fundamental question would be: What is the source of any mistake(s) and how can they be corrected? It must be admitted that this fear may speak in favour of taking a more bold attitude toward the creation of norms of general international law (sources of general international law).

Secondly, one may be concerned that the teaching on the sources of general international law contains some incoherent statements and sometimes lacks logical foundations. We can label this a "coherence-concern." This concern constitutes the primary reason for referring in this article to all three of the above-mentioned topics of the ILC works and not reducing our interest here to its works on custom only.

Last but not least, the third concern has to do with the necessity of respecting state sovereignty. If we accept this as a fundamental basis of international law, the teaching on sources must take it into serious consideration. We can call this a "sovereignty-concern." Such an approach calls for adopting a more careful attitude toward the sources of international law. The central issue will be to discover and analyse the element of state consent (even tacit consent) to a given norm of unwritten international law.

An attempt will be made to show that the works on custom adopt a very traditional approach, very friendly to state sovereignty. One can wonder whether it fully reflects the reality. On the other hand, the attitude of the ILC to general principles is not based on a careful consideration of the implications for state sovereignty. This forms a challenge both with respect to state sovereignty and to the coherence of the entire field of general international law.

1. THE ILC WORKS ON CUSTOM – AN ATTEMPT AT EVALUATION

1.1. Introductory remarks

As was noted above, custom must be treated as a crucial element of any discussion of general international law. Two aspects of custom deserve to be emphasized here, namely its definition and its unique position. The former aspect is discussed in detail in the sections that follow. As regards the position of custom, we must take as a point of reference the positivist view, which accepts only two sources of international law, namely: international custom and treaties.[9] This conclusion has been considered as a consequence of the principle of sovereignty of states and the necessity of their consent[10]

[9] F. Despagnet, *Cours de droit international public*, Recueil Sirey, Paris: 1910, p. 69. P. Heilborn, *Les Sources du droit international*, Recueil des Cours de l'Académie de Droit International, vol. 11 (1926), p. 19.

[10] Which however is understood in the case of custom. As concerns some modifications of this requirement with respect to some basic underlying rules of the international order, *see* Tladi, 1st Report, pp. 11-12, para. 22.

to norms which bind them. This consent could be express (via treaties) and tacit (by custom). For some positivists, custom is a tacit treaty.[11]

It must be stressed that the number of sources of general law is a subject of controversy. In practice this means that there are two groups of authors. The first group limits general international law to custom only.[12] This is why custom is of such great importance, both in general and in the present text. The second group of authors adds to custom also general principles of law.[13] One should include in this second group those authors who deny any *numerus clausus* of sources of international law.[14]

All the same the overall picture of norms of general law advocated by these two groups of authors are not that different. The definitions of custom advocated by them are also either identical, or almost identical. This is the main reason underlying the reality-concern in this area. The main underlying question is whether the classical (traditional, orthodox) definition of custom should be modified. The voice of the ILC in this matter is of primary importance.

1.2. The two-element definition of custom as the main message from the reports of M. Wood

Despite the relatively large number of reports of M. Wood and their considerable size (especially the 2nd and 3rd report), it is not difficult to sum them up. Together they form a very strong voice in favour of the classical definition of custom. As the Special Rapporteur put it "[t]here was general support among members of the Commission for the 'two-element' approach, that is to say, that the identification of a rule of customary international law requires an assessment of both general practice and acceptance of that practice as law."[15] In the next report he pointed to the full consensus as to the two-element approach in the Sixth Committee.[16] It is thus little wonder that the 2018 Conclusions provide that: "[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)."[17]

The Special Rapporteur did not hesitate to cite numerous works advocating this definition, a task which is quite easy. The two-element definition finds its support in

[11] Heilborn, *supra* note 9, p. 19.

[12] Ch. Rousseau, *Droit international public*, Sirey, Paris: 1970, pp. 59-60; W. Góralczyk, *Prawo międzynarodowe publiczne w zarysie* [Public international law. An overview], PWN, Warszawa: 1989, pp. 65-66; R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne* [Public international law], PWN, Warszawa: 1994, p. 78.

[13] P. Cahier, *Changements et continuité du droit international. Cours général de droit international public*, Recueil des Cours de l'Académie de Droit International, vol. 195, p. 222; N. Quoc Dinh, P. Daillier, A. Pellet, *Droit international public*, Libraire Générale de Droit et de la Jurisprudence, Paris: 1994, p. 114; A. Cassese, *International Law*, Oxford University Press, Oxford: 2005, p. 183.

[14] A. Verdross, B. Simma, *Universelles Völkerrecht. Theorie und Praxis*, Duncker & Humblot, Berlin: 1984, p. 323.

[15] Wood, 2nd Report, p. 2. *See also* p. 9, para. 24.

[16] Wood, 3rd Report, p. 3.

[17] Conclusion No. 2.

several judgments of the World Court,[18] the case law of international and domestic courts, arbitral awards, and perhaps all manuals of international law, monographs of sources, of custom,[19] and countless articles on the latter and other works referring to the matter of custom. In fact, the considerable size of the reports of M. Wood is to a large extent due to this rich bibliography.

The basic question is thus whether one could have expected something else as regards the definition of custom. The theoretically possible decision to abandon the "two-element" approach could have been viewed as an abuse in many respects. Firstly, it would look as if the subsidiary body of the UN GA were ready to neglect the very wording of Art. 38 of the ICJ Statute (as an annex to the UN Charter). Secondly, it would seem to be ignoring the almost complete consensus among states and among scholars in the matter (despite some opinions to the contrary, which are cited below). Last but not least, it would seem to be a "motion of no-confidence" towards the World Court. Additionally, the attitude of the Special Rapporteur seems to respond in a satisfactory way to the sovereignty-concern. There is still an open question with respect to the two other concerns, however the evaluation of the ILC works on custom may, as a result of their perspective, influence the definitive answer as to the sovereignty-concern as well.

First of all, it must be stressed that what is expected is not an overt denial of the two-element definition of custom. Nobody can deny the existence of norms based on long term-usage,[20] or general, uniform, consistent practices recognized as law. In this sense nobody can deny the customary nature of such norms as: the territorial sovereignty of a state (the right to regulate matters on its territory); the right of a coastal state to a territorial sea; or the inviolability of diplomats. Given the prevalence of practices on those matters nobody can deny the binding force of norms founded on them or defend the opposite or contrary propositions as norms (e.g. a general lack of territorial sovereignty; a general prohibition of the creation of territorial seas of whatever width or a general lack of inviolability of diplomats). Nobody can deny the existence of such norms even if there may exist some doubts as to their exact shape. In this sense the binding force of such norms could not have been denied based on the fact that prior to 1982 the size of territorial seas differed to some extent, or before 1961 there were voices proposing some possible exceptions to the rule of inviolability of diplomats.

What remains to be discussed are the borderline cases, doubts, unexpected and unorthodox visions of custom, and possible heresies. They were fortunately referred to in the first report. In this sense M. Wood made a great concession to the reality-concern.

---

[18] The International Court of Justice (ICJ) and its predecessor the Permanent Court of International Justice (PCIJ). *See* in particular: the *Lotus* case, PCIJ Publications A 10, p. 28; *North Sea Continental Shelf*, Judgment, ICJ Rep 1969, p. 44; para. 77, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, Judgment, ICJ Rep 1986, p. 109, para. 207.

[19] *See e.g.* K. Wolfke, *Custom in Present International Law*, Kluwer Academic Publishers, Dordrecht, Boston, London: 1993, pp. 40-41.

[20] It being understood that some norms can emerge in a shorter time frame.

These unorthodox elements will occupy a special position in the present text. They are new and form a challenge for specialists of international law, and the ability of the ILC and its rapporteurs to cope with them is especially important. One should however stress that their importance is much smaller than it may seem. This error of perspective is inevitable, and the only thing that can be done is to foresee it and call it by its proper name.

1.3. The mystery of custom and the ILC

One of the most interesting trends in the legal scholarship concerning general international law is connected with doubts as to the very phenomenon of custom in general and/or its elements. This trend may lead to different results. Firstly, it may lead to remarks which refer to the mysteries, paradoxes, and irony of custom, creating a vicious circle in the teaching on it and so on. Secondly, it may lead to an abrupt denial of custom. Last but not least, it may also lead to putting into doubt the correctness of the two-element definition of custom. The latter aspect will be discussed in the following section, while the other doubts and trends are examined below.

What can be treated as an extreme is a famous statement on custom made by N.C.H. Dunbar, according to whom:

> Students of the subject have, from the cradle so to speak, been brought up to embrace this kind of affirmation as an article of faith. Indeed, to question its veracity might well be regarded as tantamount to a heretical attack on the fundamental beliefs and dogma of the creed, shaking, if not destroying, the very foundations on which international law is built.[21]

Other authors rather do not treat custom as a myth, but simply point out mysteries surrounding it. A good example of this trend is a remark of P. Weil, according to whom "Tous les auteurs ont été interpellés par le mystère de la coutume, qui change le fait en norme. Tous se sont interrogés sur cette alchimie et se sont demandé pourquoi et comment «ce qui *est* devient ce qui doit être»."[22]

The Special Rapporteur did not pay special attention to this general aspect of custom. He was more ready however to refer to the paradox of *opinio juris*. As he wrote:

> In particular, some have debated whether the subjective element does indeed stand for the belief (or opinion) of States, or rather, for their consent (or will). Others have deliberated the *opinio juris* "paradox", that "vicious cycle argument" which questions how a new rule of customary international law can ever emerge if the relevant practice must be accompanied by a conviction that such practice is already law. Still others have questioned whether States may be capable at all of having a belief, and whether such inner motivation can ever be proved.[23]

---

[21] N.C.H. Dunbar, *The Myth of Customary International Law*, 8 Australian Yearbook of International Law (1978-80), pp. 1-2.

[22] P. Weil, *Le droit international en quête de son identité. Cours général de droit international public*, Recueil des Cours de l'Académie de Droit International, vol. 237, pp. 161-162.

[23] Wood, 2nd Report, p. 47, para. 66.

This paradox was magnificently summed up by P. Cahier, who wrote that:

> Mais le processus de création de la coutume reste tout à fait mystérieux. Son origine repose sans doute sur une pratique uniforme, mais qui ne saurait être considérée par les Etats dès le début comme obligatoire, autrement, comme l'a indiqué Kelsen, la coutume naîtrait de l'erreur.[24]

The readiness of the Special Rapporteur to go into detail on these matters was however rather restrained. He himself disqualified these elements as academic debates.[25] The question remains however whether one can try to grasp the essence of custom as such without going into such debates. In my opinion the answer is no. Therefore it seems to me that the worst omission of M. Wood in his reports was his failure to trace back the very origin of the teaching on custom.[26] In particular, one should ask what justifies the predominant position of certain practices in law.[27] Is it a question of analogy with domestic law, which is believed to have originated from customary law? In this sense custom would be a phenomenon common to all law – be it domestic or international. Or maybe international law has a particular standing? But if so, what does that mean? Does it speak in favour of a monopoly of customary norms as a source of general law?

This is a good place to address the decision of M. Wood to not deal with the nature (customary or otherwise) of the very rules on formation and identification of custom.[28] It is worth pondering whether custom can be justified by custom – i.e. whether there is a customary norm according to which customs should be obeyed? A norm identifying custom as law would be rather a kind of meta-norm. There is no particular problem with calling it a general principle of law, though maybe not necessarily the one recognized by internal orders of "civilized nations."

The only general element that attracted the attention of the Special Rapporteur was the sequence of practice and *opinio juris*. The Special Rapporteur himself expressed the view that "custom begins with 'acts' that become a 'settled practice'; that practice may then give rise to the belief that it had become obligatory."[29] In his third report M. Wood conceded that different scenarios are possible as to the sequence of the two elements of custom.[30] One can agree with this opinion with the full consciousness that it is only a fraction of the problems requiring clarification, and neither the most difficult nor the most important one.

---

[24] Cahier, *supra* note 13, p. 230.

[25] Wood, 2nd Report, p. 48, para. 66.

[26] In this sense the attitude of M. Vázquez-Bermúdez seems to be much better, *see* Vázquez-Bermúdez, 1st Report, p. 20 ff. The same applies to D. Tladi, *see* Tladi, 1st Report, p. 23, para. 42.

[27] For more on different justifications of practice, *see* N. Petersen, *Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23(2) American University International Law Review 275 (2008), pp. 280 and 283.

[28] Wood, 1st Report, p. 17, para. 38.

[29] *Ibidem*, p. 46, para. 96.

[30] Wood, 3rd Report, p. 7, para. 16.

On the other hand, it seems obvious that it would be very difficult to transform the doubts and mysteries of custom and the critical remarks on it into the language of articles proposed by the ILC special rapporteurs. M. Wood repeated several times that "the outcome should be a practical guide for assisting practitioners in the task of identifying customary international law."[31] To a large extent the Special Rapporteur is also right in presenting such and similar views as attempts at "de-emphasizing one of the two standard requirements or by displacing them altogether."[32] This matter requires closer scrutiny in the next section.

1.4. Doubts as to two-element definition of custom

The above-mentioned reality-concern refers first of all to doubts as to the correctness of the two-element definition of custom. Such doubts may appear on different levels. They may concern a given customary norm or pretended/assumed customary norm (e.g. the immunity of diplomats in transit, rights of equatorial states to geo-stationary orbit or *non-refoulement*) or entire sets of customary norms or pretended/assumed customary norms (e.g. investment law, law of development). We can examine the attitude of a given actor (a state, the ICJ, ILC, or International Committee of the Red Cross) toward the task of proving the existence of the customary norms advocated, or even entire ways of legal argumentation in general. In all cases the readiness to confirm the existence of a coherent practice and *opinio juris* lies at the centre of interest. Doubts as to the existence of that readiness may be expressed by a given actor directly, or they may be generated unconsciously and unintentionally by authors who speak in favour of the presence of a given norm.

Possible deviations from the two-element character of custom attracted the attention of the Special Rapporteur already in his first report. As he noted: "[o]ne issue that the Commission will need to address is whether there are different approaches to the formation and evidence of customary international law in different fields of international law, such as international human rights law, international criminal law and international humanitarian law."[33]

The special rapporteur in his second report recalled the view according to which in these three fields "among others, […] one element may suffice in constituting customary international law, namely *opinio juris*."[34] However, according to him "the better view is that this is not the case."[35]

In the third report the Special Rapporteur limited himself to citing the previous report (without however enumerating the three areas) and adding that:

> This reflects the inherently flexible nature of customary international law, and its role within the international legal system. Accordingly, in some cases, a particular form (or

[31] *Ibidem*, p. 2, para. 4.
[32] Wood, 1st Report, p. 50, para. 97.
[33] *Ibidem*, pp. 7-8, para. 19. *See also* Wood, 2nd Report, para. 28.
[34] Wood, 2nd Report, p. 12.
[35] *Ibidem*.

> particular instances) of practice, or particular evidence of acceptance as law, may be more relevant than in others; in addition, the assessment of the constituent elements needs to take account of the context in which the alleged rule has arisen and is to operate. In any event, the essential nature of customary international law as a general practice accepted as law must not be distorted.[36]

This statement is the main argument for labelling the attitude of the Special Rapporteur as conservative. He seems to have been deeply impressed by the phrase of K. Wolfke, according to which:

> Without practice (*consuetudo*), customary international law would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law. On the other hand, without the subjective element of acceptance of the practice as law, the difference between international custom and simple regularity of conduct (*usus*) or other non-legal rules of conduct would disappear.[37]

While one should be grateful to the Special Rapporteur for referring directly to the matter of possible doubts, their treatment however is far from satisfactory. As the previous section was the proper place to criticize the ILC for not examining the matter of the origins of custom in general, the present section is the proper place to do so with respect to the analyses of the origin of chosen customary norms. Of course nobody could have expected this with respect to all norms, or even massive numbers of norms. All the same, the choice of a few representative examples would be a very good decision. It would mean the adoption of the inductive method.[38] Unfortunately, this is almost[39] absent in the reports. It would be interesting to know, for example, what kinds of practices justify the existence of several norms of humanitarian law (starting with the prohibition of killing prisoners of war). Where does one look for the practice justifying a norm prohibiting genocide? What types of practices justify the norm according to which a treaty obtained by corruption is void? What kinds of practices would undergird a finding that there is a norm dealing with the use of the Moon?

This is the central issue from our perspective. My suggestion is to dwell on it within a more general framework of "creation of norms of general international law." To this end it is necessary to refer to works on general principles of law.

2. GENERAL PRINCIPLES OF LAW AND THE PROBLEM OF SOURCES OF INTERNATIONAL LAW

It must be stressed that the 2019 first report of M. Vázquez-Bermúdez could be treated as a masterpiece in many respects. However, his treatment of the theoretical

[36] Wood, 3rd Report, pp. 7-8, para. 17. *See also* a statement by P. Šturma, Summary record, A/CN.4/SR.3226, 17 July 2014, cited after: Wood, 3rd Report, p. 7, fn 31.

[37] Wolfke, *supra* note 19, pp. 40-41.

[38] For the choice of this method *see* on the contrary: Tladi, 1st Report, p. 7, para. 13.

[39] For exceptions *see* Wood, 3rd Report, p. 10, para. 20; p. 21, para. 37, fn 77; p. 27, para. 40.

matter of sources of law does not belong to them. The Special Rapporteur does not seem to see any problem in this area. He treats general principles of law as one of the sources of law without seeing any necessity to justify or test the thesis, which seems to be obvious to him. For example, when presenting a plan of his report, he writes that: "[p]art Three provides an overview of the development of general principles of law over time. Section I sets out the practice of States and adjudicative bodies relating to this source of international law prior to the adoption of the Statute of the Permanent Court of International Justice."[40] The beginning of Part One contains the even more promising words that "[t]he present topic concerns "general principles of law" as a source of international law."[41] In fact however one can hardly encounter any serious argument on the matter of sources. It should be noted that this attitude is frequent in the legal doctrine.[42]

What seemed to attract more attention on the part of M. Vázquez-Bermúdez was a doctrinal qualification of the general principles as a supplementary source of law,[43] a fact which is of much less importance for the present text.

Interestingly though, the reports of M. Wood contain some statements on general principles, and the report of M. Vázquez-Bermúdez also refers to custom. It is thus helpful to confront these remarks.

M. Wood wrote in his first report that: "[t]he distinction between customary international law and 'general principles of law' is also important, but not always clear in the case law or the literature."[44] He seemed to take for granted that general principles of law recognized by civilized nations were a source of international law, separate from customary international law. He noted that the role played by the former was due to a narrow definition of custom.

This remark on the "unclear" nature of the relationship between the two phenomena did not escape the attention of M. Vázquez-Bermúdez. As he wrote:

> The relationship between general principles of law and customary international law, sometimes described as unclear, deserves particular attention. Nevertheless, the fact that a rule of customary international law requires there to be a "general practice accepted as law" (accompanied by *opinio juris*), while a general principle of law needs to be "recognized by civilized nations", should not be overlooked. This suggests that these two sources are distinct and should not be confused.[45]

The cited fragments allow us to identify two underlying ideas. The first of them refers to ontological differences between customary norms and general principles and

[40] Vázquez-Bermúdez, 1st Report, p. 4, para. 7.

[41] *Ibidem*, p. 5, para. 10.

[42] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, Cambridge: 2006, p. 24; R. Kwiecień, *General Principles of Law: The Gentle Guardian of Systemic Integration of International Law*, 37 Polish Yearbook of International Law 235 (2017).

[43] Vázquez-Bermúdez, 1st Report, p. 7, paras. 25 and 26 respectively.

[44] Wood, 1st Report, p. 16, para. 36.

[45] Vázquez-Bermúdez, 1st Report, p. 8, para. 28.

the self-sufficient character of both of them as sources. The second has to do with the role of principles for the formation of customary norms and their interpretation.

Both trends are visible in another statement of M. Wood, according to which:

> An important interaction was the one that took place between customary international law and the general principles of law, the latter often being used in conjunction with or in place of the traditional criteria of customary law. It was thus conceivable for a customary rule to be interpreted in the light of a recognized general principle. The role of such principles was closely linked to the formation and evidence of customary international law […] The Commission must be careful, however, not to exclude the possibility of identifying a general principle as a source of international law, whether as a stand-alone rule or as a complement to other rules from other sources.[46]

In fact, the number of links is much larger.[47] However, neither these matters nor the place of general principles of law in arbitral awards and judgments of international courts are the topic of the present study. The same applies to lists of general principles and their groups. Important as they are, such matters cannot replace a thorough analysis of the reasonableness of calling general principles sources of law, especially from the perspective of the sovereignty-concern. On the other hand, the coherence-concern brings to the fore the issue of the value of very strict adherence to the traditional definition of custom if we accept a relatively open category of general sources of law, namely general principles.

This question is quite complicated. One can imagine a traditional dispute between a positivist (as defined in section 2.1.) and non-positivist, with the former arguing that only customs form general unwritten law, and the latter accepting another source (or maybe other sources) of general international law. One can however imagine dozens of disputes between other pairs of protagonists with opposing views, both accepting that some norms of general international law may not have a customary nature. All the same, the sets of such norms accepted by a given protagonist may differ to a great extent, as well as the justifications adopted by them. The basic challenge is how to reconcile such norms with state sovereignty – in other words, where to look for the consent of states for a given norm.

M. Vázquez-Bermúdez seems to attach decisive importance to Art. 38 of the ICJ Statute. As he writes, "Article 38, paragraph 1(c), of the Statute of the International Court of Justice is an authoritative statement of the legal nature of general principles of law as a source of international law."[48] In this respect he can refer to many other authors. C. Eggett even goes so far as to write "that Article 38(1)(c) ICJ Statute is one of the established sources of international law is uncontroversial."[49] It is difficult to agree with

[46] *Yearbook … 2013*, vol. I, 3183rd meeting, p. 92, para. 14. Cited on the basis of Vázquez-Bermúdez, 1st Report, pp. 17-18, para. 67.

[47] Vázquez-Bermúdez, 1st Report, p. 67, para. 233.

[48] *Ibidem*, p. 5, para. 14.

[49] C. Eggett, *The Role of Principles and General Principles in the 'Constitutional Processes' of International Law*, 66 Netherlands International Law Review 197 (2019), p. 205.

that thesis. Although there is a group of authors attributing this role to Art. 38 of the Statute of the ICJ,[50] there is another group which stresses that from the formal point of view Art. 38 lists the bases of decision-making by the ICJ, and not necessarily sources of law.[51] I myself am very impressed by the words of A. Ross, according to whom Art. 38 of the Statute of the ICJ "cannot formally constitute the foundation of the doctrine of the sources of International Law", and that "the doctrine of the sources can never in principle rest on precepts contained in one among the legal sources the existence of which the doctrine itself was meant to prove."[52]

The fact of the ICJ being able to apply general principles of law to inter-state disputes is important, but it tells more about the treaty law creating the ICJ and empowering it to act than about the nature of general law as such. It would be unrealistic to ignore the fact that the drafters of the Statute of the PCIJ (which introduced the reference to "general principles of law recognized by civilized nations") had great influence upon the teaching of international law and its sources. In my opinion there are, however, very important arguments against treating Art. 38 of the Statute as the constitution of general law. If we are to look for such a constitution it should be looked for rather in Art. 2(1) of the UN Charter, which refers to the sovereign equality of states. Can we call a state sovereign and believe that it is bound by a principle which it was not only never asked about, but it has not even had any chance to suspect its existence. It is believed that the requirements of practice and *opinio juris* give states a say at the time of the formation of customary norms. That is why the matter is so pressing with respect to general principles. This is especially important if we are confronted with strongly normative statements, e.g. that states are "obliged" to follow those principles. How can states follow at a given moment principles which are going to be discovered, inferred, or maybe even invented within the next 50 or 100 years without any chance for that state to take part in their formation?

That is why special care should be taken when formulating statements about the normative character, binding force, and source of law character of general principles. The most dangerous mistake is the readiness to find easy answers, of the type that "principle x is a source of law and is not a custom, so all principles are also sources of law" or "principle y is not a source of law, so no principle of law can be such a source unless it fulfils the criteria of a customary norm."

This is especially pressing if we are aware of the weaknesses inherent in the narrowing-down effects of elements present in both the very notion of general principles of law and in Art. 38(1)(c) of the ICJ Statute. In particular, these factors are: being a principle;

[50] M.N. Shaw, *International Law*, Cambridge University Press, Cambridge: 1991, p. 98. He does not conceal the dispute on this matter, *ibidem*, p. 99. *See also* K. Zemanek, *Unilateral Legal Acts Revisited*, in: K. Wellens (ed.), *International Law: Theory and Practice*, Nijhoff Publishers, The Hague: 1998, p. 131.

[51] Góralczyk, *supra* note 12, p. 63; Bierzanek, Symonides, *supra* note 12, p. 78; P.-M. Dupuy, *Droit international public*, Dalloz, Paris: 2008, p. 280; A. Ross, *A Textbook of International Law. General Part*, Longman, London, New York, Toronto: 1947, p. 83.

[52] Both citations from Ross, *supra* note 51, p. 83.

being general; and being "recognized by civilized nations" (recognized generally). In fact, however, the first two elements are only apparent narrowing-down factors. The first is usually an opportunity for referring to Dworkin's division between principles and rules,[53] although it is hard to imagine disqualification of a general norm only because of it being a rule and not a principle.[54] We can compare the following: *nemo iudex in causa sua propria*; good faith; reciprocity; *inadimplenti non est adimplendum*; *competence de competence* of an international court; *negotiorum gestio; lex specialis derogat generali*; and extinctive prescription. Which of them has the nature of a principle and which of a rule? Are they general enough? In my opinion, three first ones are principles, and the remaining ones are rules.[55] The second question seems to be purely academic. Whatever answers are given to both questions, however, all of the listed elements can be justified either as general principles or simply principles.

As regards the last narrowing-down factor (namely the fact of a given principle "being recognized") one should note that M. Vázquez-Bermúdez identifies two groups of general principles. They are, namely, those stemming from domestic laws and those typical for the international order only. For both groups he underlines the importance of recognition.[56] He is also aware of the problems with understanding this term. For the first group he stresses not only the presence of a given principle in the domestic law of several groups of states, but also the possibility of its transformation into the international order.[57]

The basic question is how to grasp state consent for such principles. Could it be found in this element of recognition, or maybe also in the element of transformation? One can be rather sceptical about this. The special rapporteur does not seem to see the importance of this element and therefore does not take a definitive position on it. All the same he seems to see the element of recognition in the very presence of a given rule in domestic systems.[58] What does it mean, however, that states adopt certain domestic provisions establishing, for example, relatively short periods (3-10 years) of extinctive prescription? Can anybody see in this their consent for a parallel rule of international law? I cannot see any such consent in this area.

There is also the risk of misunderstandings. There is no problem with calling as principles such norms as *pacta sunt servanda* or the basis of state responsibility (any breach of law gives rise to responsibility). Does this mean however that they are not customary norms? In my opinion it would be a great mistake to think so. In any case the presence in international law of such principles/rules would not have been any smaller in the absence of Art. 38(1)(c) of the ICJ Statute.

---

[53] Vázquez-Bermúdez, 1st Report, p. 44, para. 146. *See also* Petersen, *supra* note 27, p. 289 ff.

[54] The Special Rapporteur expressly concedes this. *See* Vázquez-Bermúdez, 1st Report, p. 46, para. 152.

[55] C. Eggett rightly qualifies "general principles" as rules, Eggett, *supra* note 49, p. 199, *see also* p. 205.

[56] Vázquez-Bermúdez, 1st Report, p. 49, para. 165.

[57] *Ibidem*, p. 51, paras. 168-169.

[58] *Ibidem*, pp. 56-57, paras. 190-191.

This is why it is useful to look at how the sovereignty of states is respected in the hitherto works of the ILC concerning both custom and general principles of law.

3. NORMS OF GENERAL INTERNATIONAL LAW AND STATE CONSENT

The strict attachment of M. Wood to the two-element nature of custom could be treated as a calming-down factor if viewed from the perspective of the sovereignty-concern. It is worthwhile to test the practical value of this factor on several levels.

The first level has to do with establishing what kind of scrutiny is presented by the most important actors with respect to practice and *opinio juris*. Such actors certainly include, among others, the ICJ and the ILC itself.

Viewed in this light the picture looks much worse than can be expected. The examination of the attitude of the World Court to evidence of customary norms would require a voluminous study. That is why is seems useful to look at the perception of this attitude in the doctrine and by the ILC special rapporteurs themselves.

A careful reader of the reports on custom may discover a somehow hidden, but yet visible, critical assessment of the influence of the ICJ on the teaching regarding custom. As M. Wood wrote: "At the same time, commentators have suggested that the Court has thus far provided only limited guidance on how a rule of customary international law is formed and is to be ascertained, having 'a marked tendency to assert the existence of a customary rule more than to prove it'."[59]

Even more critical was his remark distinguishing –"at the risk of oversimplification" – two main approaches of the ICJ to the identification of particular rules of custom. Namely, he states that:

> [I]n some cases the Court finds that a rule of customary international law exists (or does not exist) without detailed analysis. This may be because the matter is considered obvious (…) In other cases the Court engages in a more detailed analysis of State practice and *opinio juris* in order to determine the existence or otherwise of a rule of customary international law.[60]

The Special Rapporteur is in a position to cite only one case of the latter type however. What is a little bit striking is his statement according to which:

> There is a considerable number of cases in which the Court has addressed specific aspects of the process of formation and identification of rules of customary international law, covering many of the issues that arise under the present topic, chief among them the nature of the State practice and *opinio juris* elements, and the relationship between treaties and customary international law. While such cases do not provide complete answers, they offer valuable guidance.[61]

[59] Wood, 1st Report, p. 25, para. 64.
[60] *Ibidem*, pp. 24-25, para. 62.
[61] *Ibidem*, p. 25, para. 63.

What is worrying however is the lack of any citation in support of this statement. In fact, the Special Rapporteur simultaneously cites the words of Tomka to the contrary. According to Judge Tomka:

> However, in practice, the Court has never found it necessary to undertake such an inquiry for every rule claimed to be customary in a particular case and instead has made use of the best and most expedient evidence available to determine whether a customary rule of this sort exists. Sometimes this entails a direct review of the material elements of custom on their own, while more often it will be sufficient to look to the considered views expressed by States and bodies like the International Law Commission as to whether a rule of customary law exists and what its content is, or at least to use rules that are clearly formulated in a written expression as a focal point to frame and guide an inquiry into the material elements of custom.[62]

Similar (also very cautious) remarks are addressed by M. Wood to the ILC. Interestingly enough, the Special Rapporteur seems to look at it through the prism of "legal writings." In one sentence referring at one and the same time to the ILC, the International Law Association (ILA), and the Institute of International Law (IDI), he notes that: "[a]s with all writings, however, it is important, if not always easy, to distinguish between those that are intended to reflect existing law (codification, or *lex lata*) and those that are put forward as embodying progressive development (or *lex ferenda*)."[63]

It is a kind of irony that D. Tladi – confronted with critical statements on the insufficient references to practice in his first report – went so far as to say that: "(...) many texts on other topics of the Commission have been adopted on significantly less practice than what is provided in support of the contents of paragraph 2 of draft conclusion 3."[64] Perhaps this is true, but what does it actually mean?

In fact it refers to a wider problem – that of making very bold statements on binding norms of international law – be they customary ones or general principles – without special and focused attempts to verify the grounds of their binding force. This has provided many authors with reasons to offer very critical assessments of the situation.

It is difficult not to refer to a few remarks made in a provocative text by F.R. Tesón. He refers to what he calls "fake custom." As he notes, "International lawyers, norm entrepreneurs, and international courts perpetrate fake custom with alarming frequency."[65] Though it is difficult to agree with all the opinions expressed by this author, in my opinion he addresses the essence of a true problem. It can be partly traced in publications treated as "scientific", but they form only the tip of the iceberg. What is a hidden

[62] P. Tomka, *Custom and the International Court of Justice*, 12(3) The Law and Practice of International Courts and Tribunals 195 (2013), Cited after: Wood, 1st Report, p. 27, para. 65. *See also* D. Tladi who notes (with respect to the Inter-American Court of Human Rights) that "Similarly, the Court's earlier decisions on the *jus cogens* nature of torture focused on the nature and gravity of torture rather than any State consent to the prohibition." Tladi, 1st Report, p. 34, para. 55.

[63] Wood, 3rd Report, p. 45, para. 65.

[64] Tladi, 2nd Report, p. 8, para. 17.

[65] F.R. Tesón, *Fake Custom*, in: B.D. Lepard (ed.), *Reexamining Customary International Law*, Cambridge University Press, Cambridge: 2017, p. 87.

underneath are hundreds and thousands of oral or written statements which are very strict and refer to very precise norms of international law, without the slightest attempt being made to refer to any practice and *opinio juris* or other forms of state consent. The only addition which should be made to the remarks of F. R. Tesón would have to refer to "fake general principles." In my opinion, they may be even more dangerous and ruinous for any rational arguing in the field of public international law.

F.R. Tesón identifies what he calls "fake custom techniques."[66] They mainly refer to types of argumentation which employ the formulation of bold statements on apparent customary rules which in fact are based on the contents of nonbinding resolutions (the *Ad Nauseam* Fallacy), treaties (the Treaty Fallacy), and domestic laws (the Legislative Fallacy). Some others are based on selective citations of sources; auto-citations of international courts, bad faith citations of very vague statements of international courts, and so on.

N. Petersen is perfectly right to say that "it seems practically impossible to ascertain the practices of the nearly 200 states in the international community. Thus, a survey of customary international law is often highly selective and takes into account only major powers and the most affected states."[67] This picture is actually too optimistic. In many cases no attempt to refer to any practice is visible. Therefore, he is more right when he writes that: "But even in this smaller focus there is no adequate and systematic method for proving the elements of custom. Consequently, international law arguments based on custom always suffer from a considerable degree of arbitrariness."[68]

One can only add here that arguments referring to general principles go even further. Their potential was not ignored at the time of drafting the Statute of the PCIJ. What deserves special mention is the opinion of E. Root, who said that "[i]t is inconceivable that a Government would agree to allow itself to be arraigned before a Court which bases its sentences on its subjective conceptions of the principles of justice. The Court must not have the power to legislate."[69] What can one then say about states which do not accept the jurisdiction of the Court but are at the same time confronted with very apodictic statements on the binding force of some pretended/assumed rules.

It is not difficult to foresee two important areas in which this process is the most likely. They are firstly – rules which are so common to thinking about law that they are inevitable to a high extent. The second group is composed of true or apparent rules on matters associated with human rights. The first area seems to a high extent acceptable, although discussions and disputes may be encountered over details.

The second area however is much more complicated. In fact, it is no coincidence that the reports of M. Wood identified possible anomalies in such areas as human rights, humanitarian law, and international criminal law.

---

[66] Tesón, *supra* note 65, pp. 92-99.

[67] Petersen, *supra* note 27, p. 277.

[68] *Ibidem*.

[69] Vázquez-Bermúdez, 1st Report, p. 27, para. 99.

The International Criminal Tribunal for ex-Yugoslavia (ICTY) in its judgment in the case *Prosecutor v. Kupreškić* ruled that:

> Principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.[70]

N. Petersen also describes attempts to justify the binding force of unwritten norms on human rights. There is no wonder that those justifications easily jump back and forth between custom and general principles.[71]

It must be noted that there is a group of authors ready to see custom even without developed practice.[72] What is required is a genuine consensus of states on a given matter.[73] This, however, seems to be denied by the ILC as regards custom. This should be a good message for states. All the same this is of no special value for states if they can be ambushed by arguments referring to general principles of law.

This process of argumentation with respect to norms should be subjected to strict scrutiny, even if it is understood that it cannot be stopped or reversed entirely. In some instances, it would not be rational to stop it. Let us take human rights. It is easy to justify the presence of international norms on the prohibition of genocide, massive killing of non-belligerents, and the prohibition of torture. Can we, however, prove the binding force of such general norms as guaranteeing the freedom of trade unions or assembly? Why not of housing and access to culture? If so, what would be the sense of making any agreements to this end. In any case the element of practice would require the actual presence of such rights in the legal orders of all states (it being understood that even such presence does not guarantee the presence of *opinio juris*). It is all the more necessary to exercise caution if we look at the attitude of all three above-mentioned special rapporteurs to the importance of nonbinding resolutions. They were referred to in the third report of M. Wood. As he put it (with respect to the UN GA resolutions): "Such resolutions may be particularly relevant as evidence of or impetus for customary international law."[74] The special rapporteur was in a position to cite both proponents as well as opponents of treating nonbinding resolutions as evidence of customary law.[75] Interestingly enough, references to such resolutions emerge also in the reports on general principles of law[76] and on *jus cogens*,[77] largely in the affirmative.

---

[70] Wood, 1st Report, p. 30, para. 70.
[71] Petersen, *supra* note 27, pp. 283-285.
[72] Tesón, *supra* note 65, p. 109.
[73] *Ibidem*.
[74] Wood, 3rd Report, p. 31, para. 46.
[75] *Ibidem*, p. 35, paras. 49-50.
[76] Vázquez-Bermúdez, 1st Report, p. 52, para. 173.
[77] Tladi, 2nd Report, p. 41, para. 82.

A somewhat calming-down factor is the cautious reference of the ICJ to Art. 38(1)(c) of its Statute.[78] All the same, lawyers must look at the potential of some processes. This potential is both great and dangerous. The treatment of *jus cogens* can serve as an illustration of this process.

4. THE TEACHING ON *JUS COGENS* AS A PRACTICAL TEST OF RESPECT FOR THE SOVEREIGNTY-CONCERN

It is not the task of this present text to describe the four reports on *jus cogens* and the 2019 Draft Conclusions. What is interesting is the influence of the teaching on *jus cogens* on the legal scholarship on sources of general international law, and vice versa. It is difficult not to refer to what seemed to be the worst scenario which came to my mind at the start of the ILC works on *jus cogens*. It was described as follows: "[i]f the above-mentioned way of apodictic teaching on norms is continued, we will be soon informed about a new type of source – namely jus cogens." What could be treated as a warning was the statement by D. Tladi, according to which "[t]he peremptory nature of public order norms could themselves be explained by either consent or non-consent based theories."[79] I feel obliged to confess that this worst-case scenario has not been realized so far.

What interests me in particular here is the correlation between the character of *jus cogens* and the type of source from which it stems. As D. Tladi put it in his first report: "[t]he requirement that, to be *jus cogens,* a norm must be a norm of general international law is also a key requirement of peremptoriness. It is not only a requirement for peremptoriness, it is also an element for its identification."[80]

In the second report D. Tladi developed this idea and wrote that:

> Article 53 [of the Vienna Convention on the Law of Treaties] sets forth two cumulative criteria for the identification of *jus cogens*. First, the relevant norm must be a norm of general international law. Second, this norm of general international law must be accepted and recognized as having certain characteristics, namely that it is one from which no derogation is permitted and one which can be modified only by a subsequent norm of *jus cogens*.[81]

He seems to adopt these elements as general preconditions, which would seem to be a calming-down factor. This is all the more so because in the second report D. Tladi identified two sources of norms which may be *jus cogens* norms; namely custom and general principles.[82]

---

[78] Vázquez-Bermúdez, 1st Report, p. 36, para. 127. *See also* Kwiecień, *supra* note 42, p. 239.
[79] Tladi, 1st Report, p. 35, para. 56.
[80] *Ibidem*, p. 38, para. 62.
[81] Tladi, 2nd Report, p. 18, para. 37.
[82] *Ibidem*, p. 22, para. 43 and p. 24 para. 48 ff.

The second interesting element to me here has to do with the notion of the persistent objector. D. Tladi wrote that:

> Norms of *jus cogens,* as distinct from *jus dispositivum,* are also generally recognized as being universally applicable. As a point of departure, the majority of international law rules are binding on States that have agreed to them, in case of treaties, or at the very least, to States that have not persistently objected to them, in the case of customary international law (*jus dispositivum*). *Jus cogens*, as an exception to this basic rule, presupposes the existence of rules "binding upon all members of the international community. In reality, the characteristic of universal applicability flows from the notion of non-derogability, that is, it is difficult to see how a rule from which no derogation is permitted can apply to only some States.[83]

How does one reconcile this with the previous statements of D. Tladi? On its face it seems not a very dangerous picture for states. A given norm should be erected as any other. Only its *jus cogens* status is believed to be not subject to the persistent objector rule. As the D. Tladi puts it:

> This characterization is correct, as long as it is understood that the "first" and "second" acceptance are qualitatively different from each other. In the first acceptance, the norm is accepted as a norm of international law, either through "acceptance as law" (*opinio iuris sive necessitatis*) for customary international law or recognition "by civilized nations" for general principles of law. The second acceptance is the acceptance of the special qualities of that norm of general (...) international law, namely its non-derogability. This latter acceptance has been referred to as *opinio juris cogentis*.[84]

This assumes, however, that there is a very precise temporal sequence to the creation of *jus cogens* norms. But what if this description does not work. What if a given norm makes no sense if it is not given the status of *jus cogens*?

It is worth recalling that just a few years earlier M. Wood had the opportunity to refer to the matter of a persistent objector.[85] There is no sense in summarizing this part of his report here, but what is interesting is what is *not in it*. Namely, it does not contain any reference to customary norms *jus cogens* being any different with respect to the phenomenon of the persistent objector. It is true that already in his first report M. Wood excluded from his works the topic of *jus cogens*.[86] In any case however it seems to me impossible for the norm advocated by D. Tladi to exist and to be overlooked by M. Wood. There would seem to be no problem if one Rapporteur defended one general norm and another Rapporteur defended another one which was to a great extent irreconcilable with the former.

Of course, the coherence-concerns seem to arise in such situations. I must stress that it is not my intention to make the matter of the persistent objector and *jus cogens*

[83] Tladi, 1st Report, pp. 40-41, para. 66.
[84] Tladi, 2nd Report, p. 39, para. 77.
[85] Wood, 3rd Report, pp. 59-67.
[86] Wood, 1st Report, pp. 9-12, paras. 24-27.

the central issue. It should serve rather as an illustration of a wider process of very bold "norm advocacy." It illustrates the perils for states and their sovereignty, which have been referred to several times in this text. It makes it very probable that states will be persuaded to, pressed to, and even forced to follow some patterns of conduct which were not accepted by them in any way. That is why the main concern which arises here is the sovereignty-concern.

5. STATES VIS-À-VIS THE ILC

If the main danger identified so far has to do with the preservation of the position of states (the sovereignty-concern), it would be interesting to examine how they take care about their own interests. As it is impossible to examine all the works of the Sixth Committee since the beginning of its functioning, a tempting alternative would be to examine all the reactions of states to all reports on custom and on general principles of law. In fact, however, the position of M. Wood with respect to the requirements of custom was very conservative and did not call for any state reaction. In contrast, several statements of M. Vázquez-Bermúdez called for such a reaction, at least in my opinion. Thus I have decided to examine the statements made by states in the Sixth Committee in 2019[87] with respect to the first report on general principles of law and the draft articles on *jus cogens*.

As regards the first item, it is visible that states have no problem with referring to general principles as sources of law.[88] What attracted more attention was the more precise qualification of this type of source. Thus for example India expressed itself as being against calling general principles a "subsidiary source" or "secondary source", opting instead for the term "supplementary source."[89] One can thus wonder what are the normative effects of such a choice of the basic term. For example, the Netherlands also expressed itself as being against calling general principles of law a subsidiary source of international law; although it acknowledged at the same time that "States can be responsible for an internationally wrongful act when acting contrary to an obligation arising from a general principle."[90] All the same, the Netherlands stressed that "a further

[87] All statements are available on the webpage: https://papersmart.unmeetings.org/en/ga/sixth/74th-session/statements/ (all accessed 30 June 2020). Due to the small size of State statements, the numbers of pages or paragraphs were given exceptionally.

[88] *See e.g.* the positions of Poland: http://statements.unmeetings.org/media2/23329211/-e-poland-statement.pdf; of Philippines: http://statements.unmeetings.org/media2/23329226/-e-philippines-statement.pdf, of the UK: http://statements.unmeetings.org/media2/23329156/-e-united-kingdom-statement.pdf; of Australia: http://statements.unmeetings.org/media2/23557938/-e-australia-cluster-iii-statement_final.pdf; of Greece: http://statements.unmeetings.org/media2/23329232/greece-statement.pdf.

[89] *See* http://statements.unmeetings.org/media2/23329202/-e-india-statement.pdf. For more on the use of this term, *see also* the position of the Czech Republic, http://statements.unmeetings.org/media2/23329204/-e-czech-republic-statement.pdf.

[90] The present and the following citations are based on: http://statements.unmeetings.org/media2/23329149/-e-netherlands-statement.pdf, p. 3.

inquiry would be appreciated into the question whether general principles of law can be violated." One can add that if not, it would mean that their normative character could be put into doubt. Interestingly enough, Austria also expressed its awareness of the difficulties concerning the term "source" of international law. Nevertheless it was ready to acknowledge general principles of law as norms of international law.[91] In fact only a very short Japanese statement demanded a clarification of the very term "source of law"[92] and therefore referred to the core of the problem.

In this sense states did not show any special sensitivity to the potential dangers to their sovereignty connected with automatically calling all principles as sources of law, norms, or obligations.

Several delegations referred to the question of distinguishing general principles from custom.[93] Italy was a little more specific in this respect and considered two possibilities. According to the first, general principles of international law would be those inferred from the rules of customary international law.[94] The second possibility would be to consider general principles as being of a self-sufficient nature. The first possibility could be seen as a kind of protection of the interests of states, even though in any case this defence is quite weak. In fact, several such calls look like no more than attempts to clarify the matter. Several of them referred to the relationship between general principles of law, the fundamental principles of international law, as well as the principles regulating the various branches of international law.[95]

Another relatively weak form of defence consists of references to the necessity for a cautious approach. As Norway put it, "this is especially so when it comes to general principles of law in relation to the applicable substantive law."[96]

It is a kind of paradox that states were more suspicious of general rules formed within the international legal order than those stemming from domestic legal systems.[97]

---

[91] *See* http://statements.unmeetings.org/media2/23329132/-e-austria-statement.pdf, p. 3.

[92] *See* http://statements.unmeetings.org/media2/23329181/-e-japan-statement.pdf.

[93] *See e.g.* Norway's statement on behalf of the Nordic countries, http://statements.unmeetings.org/media2/23329125/-e-norway-on-behalf-statement.pdf. For the position of Ireland *see* http://statements.unmeetings.org/media2/23329148/-e-ireland-statement.pdf; of Estonia: http://statements.unmeetings.org/media2/23329213/-e-estonia-statement.pdf; of Croatia: http://statements.unmeetings.org/media2/22000123/-e-croatia-statement.pdf.

[94] *See* http://statements.unmeetings.org/media2/23329159/-e-italy-statement.pdf, pp. 2-3.

[95] *See* the position of Romania: http://statements.unmeetings.org/media2/23329157/-e-romania-statement.pdf, p. 2. Austria called for strict differentiation between principles of international law governing relations among states on the one hand and general principles of law on the other; see: http://statements.unmeetings.org/media2/23329132/-e-austria-statement.pdf, pp. 3-4. For a similar position by Slovakia, *see* http://statements.unmeetings.org/media2/23329143/-e-slovakia-statement.pdf; by Poland, *see* http://statements.unmeetings.org/media2/23329211/-e-poland-statement.pdf; by Spain, *see* http://statements.unmeetings.org/media2/23329162/-s-e-spain-statement.pdf.

[96] *See e.g.* Norway's statement on behalf of the Nordic countries, http://statements.unmeetings.org/media2/23329125/-e-norway-on-behalf-statement.pdf.

[97] *See* the position of the Republic of Korea, http://statements.unmeetings.org/media2/23329216/-e-rep-of-korea-statement.pdf.

One should highly appreciate the remarks of Malaysia, which referred to the fact that "the role that the general principles play in the two very different legal systems i.e. national legal systems and the international legal system, differs greatly."[98]

Summing up, we can see a very low level of awareness on the part of States of the dangers inherent in the very idea of general principles. It is once again a kind of paradox that Spain went as far as to ask: "Who is afraid of general principles of law?"[99] One should reverse this question and ask: "Who should be afraid of some interpretations of general principles?" In my opinion the answer should be simply: States.

On the other hand, one could associate this low level of awareness with the very initial stage of works on general principles. This is why it is useful to look at some comments on the 2019 draft articles on *jus cogens*.

In fact, the strict adherence to the criteria for establishing *jus cogens* seems to protect the interests of states. This is in line with the 2019 statement of China.[100] France strongly relied on the division between the existence of primary norms and the secondary rules on those norms having a peremptory character.[101] In the opinion of France, the mandate of the ILC does not cover the former.

Other delegations asked either for less rush in the adoption of the rules on *jus cogens*.[102] or insisted on strict adherence to customary norms in this area.[103] Turkey went so far as to deny the development of such customary norms in this area.[104] Also the UK delegation claimed that the 2019 Draft Articles "cover a diverse range of sensitive issues which do not in all respects reflect current law or practice."[105] One should also cite the position of Thailand, pointing to the fact that the qualification by a very large majority of a given norm as *jus cogens* may be too low.[106]

Two important comments deserve special mention. As the British delegate stated:

> The Commission's work products are nowadays frequently cited by international and domestic courts and tribunals. This is in principle a good thing – provided there is clarity about the legal force of these products. But that is not always the case. The Commission's work is sometimes relied on as an articulation of international law without proper consideration of whether that product has been accepted as a treaty or is sufficiently underpinned by State practice and opinio juris to be regarded as customary international law.[107]

---

[98] *See* http://statements.unmeetings.org/media2/23329235/-e-malaysia-statement.pdf, p. 6.

[99] *See* http://statements.unmeetings.org/media2/23329162/-s-e-spain-statement.pdf, p. 5.

[100] *See* http://statements.unmeetings.org/media2/21999909/-e-china-statement.pdf.

[101] *See* http://statements.unmeetings.org/media2/23328954/france-statement.pdf.

[102] For the 2019 position of Slovakia, *see* http://statements.unmeetings.org/media2/21999915/-e-slovakia-statement.pdf.

[103] *See* the position of Israel, http://statements.unmeetings.org/media2/23329042/-e-israel-statement.pdf, p. 6.

[104] *See* http://statements.unmeetings.org/media2/23328689/-e-turkey-statement.pdf.

[105] *See* http://statements.unmeetings.org/media2/21999917/-e-united-kingdom-statement.pdf, para. 23.

[106] *See* http://statements.unmeetings.org/media2/21999964/thailand.pdf, para. 10. *See also* the position of Vietnam: http://statements.unmeetings.org/media2/23328684/viet-nam.pdf.

[107] *See* http://statements.unmeetings.org/media2/21999917/-e-united-kingdom-statement.pdf.

It is also worthwhile referring to the statement of Israel, according to which:

> If the Commission were in fact interested in using its own past work to demonstrate that certain norms have a peremptory character, it should have, at the very least, shown that its past work was well-founded and based on a coherent methodology, in accordance with the principles described above. Otherwise, the list entails a somewhat unseemly and arguably unreliable act of self-referencing to assertions made, with no detail as to how these conclusions were reached or as to why the legal threshold for jus cogens was considered satisfied in such cases.[108]

One can see that states know how to counteract over-activism on the part of the ILC, and thus one can expect that they will react somehow also in the matter of general principles of law in near future. It would probably be too optimistic however to believe that this reaction will address the very core of the issue.

CONCLUDING REMARKS

One can have the impression that critical remarks on the ILC works on custom and on general principles of law (the references to *jus cogens* being of a very selective nature) dominate not only the present text but the overall evaluation of these works. This however would not be accurate. As has been noted, the first report on general principles is a masterpiece in many respects. One should also refer to several valuable elements of the reports on custom. One of them is the topic of the relationship between practice and *opinio juris.* The fragment of the third report devoted to this is one of the brightest elements of the entire works on custom. The systematic scheme of the types of practice[109] is also very valuable. It distinguishes nine types of practice (extending from physical actions of states up to voting on non-binding resolutions in international organizations). Inaction is also qualified as an additional type of practice.[110] This multiplicity of forms of practice is reflected in the multiplicity of instances of *opinion juris*.[111] The Special Rapporteur is aware of the resemblance of some instances of *opinio juris* with forms of practice. His decision not to depart from the two-element definition of custom because of such cases is, in my opinion, one of the most valuable elements of his efforts. He rightly points out the different roles of *opinio juris* and practice. Also the matter of inaction was given a very interesting treatment. The Special Rapporteur distinguished between inaction as an element of practice and inaction as an element of *opinio juris*.[112] The doctrine of international law can be grateful to the Special Rapporteur also for his original systematization of possible relationships between treaties and custom.[113]

[108] *See* the position of Israel at: http://statements.unmeetings.org/media2/23329042/-e-israel-statement.pdf, p. 8.

[109] Wood, 2nd Report, pp. 21-27, para. 3(e).

[110] *Ibidem*, p. 27, para. 42.

[111] *Ibidem*, pp. 55-60, para. 76.

[112] Wood, 3rd Report, pp. 10-11, para. 21.

[113] *Ibidem*, p. 19, para. 35.

At the same time, it should be said that regardless of whatever added value we are able to accord to the works of the ILC on custom, it is difficult to get rid of a feeling of anxiety. It seems that M. Wood was aiming to build a fortress protecting states from reckless arguments on unwritten norms, but there seems to be a great hole in this fortress (namely general principles of law), which makes the value of – or maybe even the existence of – this fortress quite doubtful. In other words, states got a shield but it may easily turn out to be a paper one. In fact, it is not based on real stress tests. Such tests would have to refer to the legal and philosophical foundations of custom on the one hand, and practical analyses on the emergence of chosen customary norms on the other. In fact, the ILC did not really face the actual problem of the phenomenon of reckless or even bad faith arguments on unwritten norms binding upon states.

What can be worrying is the relative fragmentation of the works on different topics, and lack of sensitivity to the need for a careful analysis of both the term "source of law" as well as of the sovereignty-concern. This is the most important concern, as opposed to the two others discussed in the present text, namely the reality-concern and coherence-concern. The latter have to do with the correctness of the descriptions of the sources of law by the ILC, while the practical effects of any such defects may be very small. In contrast the challenges to state sovereignty are real. In fact, one should stress that it is time for states to take a more active role in defending their interests. If the international elites are ready to see *opinio juris* in each and every nonbinding resolution, it is time for states to issue reservations that their voting for them does not imply any agreement to new binding rules. One can conclude that it is no longer the time for passive behaviour.