

## Regional principles of law in the works of the International Law Commission

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### 1. *Introduction*

The International Law Commission's (ILC, or Commission) work on the sources of international law has advanced considerably in the past 10 years, with the inclusion of customary international law, *jus cogens* and general principles of law in its programme of work. At the same time, the methodology of the Commission's work has been object of debate, praise and criticism.<sup>1</sup> The extent to which ILC has taken up regional approaches in the study of the sources of international law, and whether the methodology it advances accommodates ascertaining sources that are applicable within a limited region or number of States provides one instance that can be subject to analysis.

In his first report, submitted to the Commission in 2019, Special Rapporteur on the topic of general principles of law (GPL, or 'general principles') Mr. Marcelo Vázquez-Bermúdez considered that 'The Commission may also wish to consider whether there may be general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute that are not universal but rather regional, or even principles that are applicable in

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<sup>1</sup> For an overview of the praises in criticisms to the Commission's work back in 1998, which largely remain valid today, see J Dugard, 'How Effective is the International Law Commission in the Development of International Law? A Critique of the ILC on the Occasion of Its Fiftieth Anniversary' (1998) 23 South Africa YB Intl L 35. See also K Kleine, 'The International Law Commission as a Club of Cynics? Originalism and Legalism in the Commission's Contemporary Work' and Galvão Teles' reply 'The Added Value of the International Law Commission and Its Future Role in the Progressive Development and Codification of International Law', in Baad and others (eds), *Cynical International Law?* (Springer 2020); the criticism of the 'orthodox account' of the ILC approach to the identification of customary international law; M Hakimi, 'Making Sense of Customary International Law' (2020) 118 Michigan L Rev 1487.



bilateral relations'.<sup>2</sup> In response, during the discussion in the Sixth Committee of the UN General Assembly in 2018, 'the view was expressed in support of the existence of regional principles and their study as part of the topic'.<sup>3</sup> The Second Report submitted by Mr. Vázquez-Bermúdez and the structure presented therein do not explicitly examine regional principles of law (for brevity, also here referred to as 'regional principles'). Nonetheless, the topic was raised again in the debates of the Commission's 2021 meeting.<sup>4</sup>

Acknowledging the existence of regional principles could have immediate practical (positive) outcomes.<sup>5</sup> Just like regional customary law, regional principles of law can apply to disputes that have a regional scope, in jurisdictions with both universal or regional scope. Regional principles can play a gap-filling role in disputes that are, for example, based on regional treaties. Said principles can be developed in the practice related to a given regional treaty or regional organization, and can be of procedural or substantive nature. The process for ascertaining a regional principle would differ from that to ascertain *general* principles of law, as the adjudicator or the State advancing its existence would need to emphasize its particular nature.

Against this backdrop, this contribution explores the place for regional principles in the works of the ILC on GPL. The focus of the present work is Mr. Vázquez-Bermúdez's Second Report, submitted to the Commission in 2020 (the 'Second Report').<sup>6</sup> More specifically, it addresses whether the considerations and draft conclusions advanced by the Special Rapporteur are compatible with the existence of regional

<sup>2</sup> ILC, 'First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' UN Doc A/CN.4/732 (5 April 2019) ('First Report') para 33.

<sup>3</sup> ILC, 'Report of the International Law Commission on the work of its seventy-first session (2019), Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-fourth session, prepared by the Secretariat' UN Doc A/CN.4/734 (12 February 2020) 10 para 39.

<sup>4</sup> ILC, 'Report of the International Law Commission on the work of its seventy-second session' (26 April–4 June and 5 July–6 August 2021) UN Doc A/76/10 ('2021 Report') 158 para 220.

<sup>5</sup> For a recent examination of the importance of regional approaches to international law, see A Koagne Zouapet, 'Regional Approaches to International Law (RAIL): Rise or Decline of International Law?' (2021) 46 KFG Working Paper Series, Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?'

<sup>6</sup> ILC, 'Second Report' on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' UN Doc A/CN.4/741 (9 April 2020) ('Second Report').



principles. With this aim, Section 2 examines the extent to which the draft conclusions advanced in the Second Report accommodate the existence of regional principles. It examines whether the methodology to ascertain the two categories proposed by the Special Rapporteur (GPL deriving from national legal systems and GPL formed within the international legal system) are compatible with the notion of a principle that is common and specific to a region or a limited number of States. The analysis demonstrates that, at least at the present stage, the Special Rapporteur has seemingly set aside the existence and relevance of regional principles.

By including regional principles of law within the topic of GPL, the ILC could advance a contribution to the broader question of regionalism and international law. Yet, such endeavour may not be so simple: Section 3 describes some of the methodological difficulties arising from a possible examination of this subcategory of GPL.

For the purposes of this work, it is necessary to define the meaning of ‘regional principles of law’. To that end, it is useful to refer to Forteau’s definition of ‘regional international law’, narrowly and broadly: ‘In the first sense, it designates any set of rules with which a region endows itself because of the distinctive values shared by its members. In the second sense, it encompasses any rule having a regional scope of application’.<sup>7</sup> This contribution considers regional principles of law both as reflecting ‘distinctive values’ shared by the members of a region and as ‘having regional scope of application’. Further, in the present work, regional principles are considered as a ‘subcategory’ of GPL under the ‘general principles of law’ set forth by Article 38(1)(c) of the Statute of the International Court of Justice (ICJ).

It should also be noted that, at the time of writing, the Commission has not yet discussed in detail all draft conclusions and, accordingly, the methodology advanced in the Second Report.<sup>8</sup> However, even though there is still much room for debate and change before the conclusion of

<sup>7</sup> M Forteau, ‘Regional International Law’ (2006) Max Planck Encyclopedia of Public Intl L para 1 (‘Regional’). It should be noted that the author considers the concept to be ‘rather evanescent as a legal concept’, since, as he argues, the geographical aspect has become irrelevant. *ibid* paras 11 ff.

<sup>8</sup> See below (n 10) and accompanying text.

the works on the topic, this contribution aims at underlining how regional principles can be placed in the current state of play of the works on the topic.

## 2. *The categories of GPL in the Second Report and regional principles*

The Second Report on GPL presented by Special Rapporteur Vázquez-Bermúdez sets forth six Draft Conclusions, in addition to the three previously submitted in his preceding First Report.<sup>9</sup> At the time of writing, Draft Conclusions 1, 2 and 4 have been provisionally adopted, and the Commission has ‘taken note’ of Draft Conclusion 5 and has not yet addressed the remaining draft conclusions.<sup>10</sup>

Draft Conclusion 1 introduces the scope of the draft conclusions. Draft Conclusion 2 presents the ‘requirement of recognition’, stating that ‘[f]or a general principle of law to exist, it must be recognized by the community of nations’. Draft Conclusion 3 divides GPL into two categories: ‘those derived from national legal systems and [those] formed within the international legal system’. GPL Draft Conclusions 4 through 6 detail the methodology to be followed when ascertaining the existence and content of a GPL deriving from national legal systems. Draft Conclusion 7 indicates the methodology to ascertain the existence and content of a GPL formed within the international legal system. Draft Conclusion 8 speaks of decisions of courts and tribunals as a subsidiary means for the determination of GPL. Finally, Draft Conclusion 9 addresses the value of ‘teachings of the most highly qualified publicists’ as ‘subsidiary means for the determination of general principles of law’.<sup>11</sup>

Hence, in the current stage, regional principles of law have not been explicitly dealt with in the works of the Special Rapporteur. None of the Draft Conclusions nor the commentary and findings in the two reports submitted thus far mentions regional principles of law. Therefore, regional principles would be compatible with the current works of the ILC only insofar as they can be accommodated within one of the two catego-

<sup>9</sup> ILC, ‘First report’ (n 2).

<sup>10</sup> ILC, ‘2021 Report’ (n 4) 151 para 172.

<sup>11</sup> ILC, ‘Second Report’ (n 6) Annex.



ries mentioned in the Draft Conclusions. In this vein, this section examines whether regional principles of law can fall within the scope of one of the two, or indeed both, categories of GPL.

### 2.1. *GPL deriving from national legal orders*

Draft Conclusions 4, 5 and 6 of the Special Rapporteur's Second Report set forth the methodology for the identification of GPL deriving from national legal systems ('domestic GPL', for brevity).<sup>12</sup> The approach suggested in the report does not diverge from traditional accounts on the determination of the existence and content of this category of general principles.<sup>13</sup> In essence, domestic GPL should reflect a common principle found in 'the various legal systems of the world' which is transposable to the international legal system (Draft Conclusions 4 and 6).

The requirement that the principle is reflected in the 'various legal systems of the world' entails a 'comparative analysis of national legal systems' that is 'wide and representative, including different legal families and regions of the world'.<sup>14</sup> In the commentaries to Draft Conclusion 4, Special Rapporteur states that '[t]his exercise, which is essentially inductive, is necessary to show that a legal principle must be found in legal systems of the world generally'.<sup>15</sup>

The requirement of transposition is 'understood as the process of determining whether, to what extent and how a principle common to the various legal systems can be applied in the international legal system',<sup>16</sup> due to the particularities of the latter concerning the former legal systems.<sup>17</sup>

Special Rapporteur Vázquez-Bermúdez has thus endorsed the prevailing (positivist) approach that the identification of a domestic GPL

<sup>12</sup> See (n 10) and accompanying text.

<sup>13</sup> See A Pellet, D Müller, 'Article 38' in A Zimmerman and others, *The Statute of the International Court of Justice: A Commentary* (OUP 2019) 928 para 264; G Gaja 'General Principles of Law' (2013) Max Planck Encyclopedia of Public Intl L para 7 ff. On the exercise of a comparative study and the identification of general principles, see J Ellis, 'General Principles and Comparative Law' (2011) 22(4) Eur J Intl L 949.

<sup>14</sup> ILC, 'Second Report' (n 6) 22 Draft Conclusion 5(2).

<sup>15</sup> ILC, '2021 Report' (n 4) 163.

<sup>16</sup> ILC, '2021 Report' (n 4) 163.

<sup>17</sup> ILC, 'Second Report' (n 6) 22 para 73.

entails a comparative methodology of different legal families.<sup>18</sup> The question arises as to whether these domestic GPL can also be identified within a limited number of domestic legal systems, and thus be relevant and applicable only to a given group of States. International legal scholarship has generally suggested that domestic GPL should be ascertained against a broad comparative approach, since ‘the underlying legitimacy of general principles stems from their universal acceptance’.<sup>19</sup> At the same time, much like customary law, although ‘universal general principles’ are perhaps the preferred or more recurrent form of general principles, the existence of regional principles of law is not incompatible with the logic underlying this source of international law.

Yet, Draft Conclusion 5 gives a negative answer to this proposition. The very title of Draft Conclusion 5 seems to exclude from the outset regional principles of law from its scope of operation, given that a domestic GPL must be ‘common to the principal legal systems of the world’. Paragraphs (1) and (2) corroborate this understanding, positing that to determine ‘the existence of a principle *common to the principal legal systems of the world*’, the ‘comparative analysis must be wide and representative, including *different legal families and regions of the world*’.<sup>20</sup>

One may thus infer that an analysis that would focus on the legal systems of a given region (for instance, certain Latin American or African States) would not be ‘wide and representative’ in the sense intended in this Draft Conclusion. A State or adjudicator claiming the existence of a GPL common to a given group of States, which could be demonstrated by a comparative assessment of national legislation and decisions of courts from States in that area (and therefore applicable only to those

<sup>18</sup> As Pellet and Müller explain, ‘[...] all modern domestic laws can be gathered into a few families or systems of law which, insofar as general principles are concerned, are coherent enough to be considered as ‘legal systems’, and, since only very general rules are to be taken into consideration in any event, it is enough to ascertain that such principles are present in any (or some) of the laws belonging to these various systems’ (Pellet, Müller (n 13) 928). These families can be grouped into eight legal systems: common law, Romanistic civil law, Germanic civil law, Nordic law, Socialist law, Far Eastern law, Islamic law and Hindu law (CT Kotuby, LA Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (OUP 2017) 24).

<sup>19</sup> Kotuby, Sobota (n 18) *ibid* 21.

<sup>20</sup> This methodology was object of intense debate in the 2021 ILC session. See ILC, ‘2021 Report’ (n 4) 155-156 paras 200-204.



States), could not be considered a domestic GPL within the meaning of Draft Conclusion 5. One may conclude, therefore, that regional principles are incompatible with the methodology presented by Special Rapporteur for GPL deriving from national legal systems.

## *2.2. GPL formed within the international legal system*

The second category of general principles set forth by the Second Report comprises those ‘formed within the international legal system’ (‘international GPL’, for brevity). Draft Conclusion 7 determines the methodology for the identification of principles falling within this category:

*‘Draft conclusion 7. Identification of general principles of law formed within the international legal system*

To determine the existence and content of a general principle of law formed within the international legal system, it is necessary to ascertain that:

- (a) a principle is widely recognized in treaties and other international instruments;
- (b) a principle underlies general rules of conventional or customary international law; or
- (c) a principle is inherent in the basic features and fundamental requirements of the international legal system’

In essence, international GPL are reflected in the underpinnings of international rules and the international legal system, and can be inferred therefrom. They can be stated by these rules explicitly or implicitly.

Draft Conclusion 7 indicates three distinct ways of identifying the existence of international GPL. Paragraph (a) determines the identification of general principles ‘by ascertaining that a principle has been widely incorporated into treaties and other international instruments, such as General Assembly resolutions’.<sup>21</sup> Special Rapporteur Vázquez-Bermúdez refers to many examples in international practice, but all of them refer to conventions of universal reach (the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal, Convention on the Prevention and Punishment of the

<sup>21</sup> ILC, ‘Second Report’ (n 6) para 122.

Crime of Genocide, *inter alia*).<sup>22</sup> Consequently, the Second Report leaves aside the possibility that general principles can also be distilled from conventions of regional scope, ie that have a regional character.

The same is true regarding the commentary to paragraph (b), according to which '[g]eneral principles of law formed within the international legal system may also be identified by establishing that they underlie general rules of conventional or customary international law'. The examples used to illustrate this draft paragraph include the ICJ's use of the Hague Convention of 1907 in the Corfu Channel case, in which reference was made to the principles of 'elementary considerations of humanity, [...] the principle of the freedom of maritime communication; and every States obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.<sup>23</sup> The other examples mentioned in the report are also based on international case law resorting to treaties of universal reach to 'deduce the principles underlying them'.<sup>24</sup>

Paragraph (c) describes a methodology according to which GPL may be identified '[...] by ascertaining that they are inherent in the basic features and fundamental requirements of the international legal system, which is a creation of the community of nations'.<sup>25</sup> By definition, this approach excludes regional principles of law.

Despite the unacknowledged possibility of ascertaining regional principles of law from regional conventions (and, perhaps less likely, regional custom), this exercise is not incompatible with the methodology indicated in Draft Conclusion 5. The existence of regional principles has been considered in the framework of regional systems of human rights. As an illustration, the African Charter of Human and People's Rights acknowledges the 'general principles of law recognized by African States' (Article 61). Moreover, the existence of 'general principles common to

<sup>22</sup> *ibid* 39 ff.

<sup>23</sup> *ibid* 45 para 139.

<sup>24</sup> *ibid* 46 para 144.

<sup>25</sup> ILC, 'Second Report' (n 6) 47 para 146.





the laws of the Member States' (Article 340 of the Treaty on the Functioning of the European Union) also points to the existence of regional principles of law in the European context.<sup>26</sup>

Conversely, the existence of a regional principle of law is compatible with the methodologies outlined in paragraphs (a) and (b).

### 2.3. *Interim remarks*

On a methodological level, Special Rapporteur Vázquez-Bermúdez follows the work on the identification of customary international law, adopted by the ILC in 2018. Some examples of this reliance are reflected in his choice on the format of the outcome ('conclusions')<sup>27</sup> and the weight to be given to judicial decisions and teachings of publicists in the ascertainment of GPL (subsidiary means for the identification of GPL).<sup>28</sup> Concerning the former, the choice for the outcome in the form of conclusions with commentaries follows the recent work by the Commission regarding sources of international.<sup>29</sup> Regarding the latter, the Special Rapporteur did not delve with detail into the merits of Sir Wood's choice; rather, Vázquez-Bermúdez merely considered that he 'sees no reason to depart from the above approach for purposes of the present topic'.<sup>30</sup>

Similarly, there could also be a parallel in the approach to regional sources in the two works. In the 2018 *Conclusions on the identification of customary international law*, particular customary international law is set out by Draft Conclusion 16 – the very last in the set of conclusions. Draft

<sup>26</sup> See HR Fabri, 'Principes généraux du droit communautaire et droit comparé' (2007) 45 *Droits* 127; E Castellarin, 'General Principles of EU Law and General International Law' in M Andenas and others, *General Principles and the Coherence of International Law* (Brill 2019).

<sup>27</sup> ILC, 'First report' (n 2) para 34.

<sup>28</sup> 'The Special Rapporteur stated that his approach in that part was based on the conclusions reached by the Commission in its work on identification of customary international law'. ILC, '2021 Report' (n 4) 153, para 188.'

<sup>29</sup> As explained by Mr Tladi (Special Rapporteur to the topic of peremptory norms of international law), 'draft articles would not be an appropriate format since, like the Commission's work on identification of customary international law and subsequent practice and subsequent agreements in relation to treaty interpretation, the essential character of the work on this topic should be to clarify the state of the law based on current practice' (ILC, 'First report on jus cogens by Dire Tladi, Special Rapporteur' (2016) UN Doc A/CN.4/693 para 73).

<sup>30</sup> ILC, 'Second Report' (n 6) 54 para 177.

Conclusion 16(1) considers that ‘a rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States’. In his commentaries to Conclusion 16, Special Rapporteur Sir Wood explained that ‘Draft conclusion 16 has been placed at the end of the set of draft conclusions since the preceding draft conclusions generally apply also in respect of the determination of rules of particular customary international law’.<sup>31</sup> However, the wording of the Draft Conclusions and the structure described in the previous subsections leads to conclude that, as it stands, the approach suggested by Mr. Vázquez-Bermúdez in his Second Report does not admit the existence of regional principles of law, at least not explicitly.

Nevertheless, the methodology presented for the identification of international GPL is not incompatible with the existence of a regional principle of law. In the way the Draft Conclusions are currently framed, principles deriving from domestic legal systems and common to a specific regional area are not acknowledged by the report, and only principles formed within the international legal system of a given regional space could be recognized as regional principles. However, the second category of GPL is still highly controversial and it is not clear whether it will be recognized in the final outcome of the Commission’s work.<sup>32</sup>

One may wonder whether the lack of attention to the topic, reflected both in international practice<sup>33</sup> and in scholarship, has not influenced this approach. Although much has been written on regional international law,<sup>34</sup> limited literature can be found on regional sources of international law.<sup>35</sup> This can be partially explained by the idea that international law

<sup>31</sup> ILC, ‘Report of the International Law Commission on the Work of its 70th Session’ (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 154 para (2).

<sup>32</sup> In this respect, see the 2021 debates within the Commission: ILC, ‘2021 Report’ (n 4) 156 paras 210 ff.

<sup>33</sup> See sections 3.2 and 3.3 below.

<sup>34</sup> See eg Max Planck Encyclopedia of Public Intl L entries on ‘Regional Developments’ (TA Mensah, ‘Africa’; V Marotta Rangel, ‘Latin America’; M Fadel, ‘Islam’; DA Desierto, ‘South and South-East Asia’; S Hamamoto, ‘East Asia’).

<sup>35</sup> One noteworthy exception in the field of GPL is I Saunders’ *General Principles as a Source of International Law: Art 38(1)(c) of the Statute of the International Court of Justice* (Hart 2021) Ch 8.



purports to be universal.<sup>36</sup> Similarly, it is often claimed that general principles of law derive from maxims of Latin and Roman traditions, and, though in a logical leap, this view grounds the assumption that said principles are reflections of universal justice.<sup>37</sup>

Works contesting this conception have gained traction in more recent international scholarship,<sup>38</sup> but regional principles of law have not been significantly debated by scholars, in particular within the framework of Article 38(1)(c) of the ICJ Statute. Most of the scholarship available on the topic explores the existence of ‘European’ regional principles.<sup>39</sup> This default, coupled with the lack of international practice, limits the ease and incentive for the ILC to deal with the topic. The next session examines possible reasons why the Commission has seemingly left aside regional principles of law as a specific subcategory of GPL, and examines some obstacles that may hinder progress on the question should the Special Rapporteur change course.

<sup>36</sup> As Forteau points out, the notion of regional law was historically ‘[...] deeply interconnected with universal international law, since, at that time, universal international law which came into being at the end of the Middle Ages mainly reflected European conceptions. Incidentally, this is, up to a certain point, still valid today since some fundamental international legal principles derive from European political thought. This is not without difficulties since European concepts are not always familiar to all societies’. Forteau, ‘Regional’ (n 7) para 2. Already in 1909 Alejandro Alvarez remarked that ‘[...] the widespread belief that the precepts governing international law must be universal, and that consequently the incorporation of America into the community of nations could produce no effect other than to make the international rules which governed the community of Europe equally applicable to it’ (A Alvarez, *American Problems in International Law* (Baker, Voorhis 1909) 90).

<sup>37</sup> According to Kotuby and Sobota, ‘Notions such as *pacta sunt servanda* and *nemo auditur propriam turpitudinem allegans* are among these principles, often expressed in Latin maxims deriving from Roman law to demonstrate pedigree, permanence, and universality’ (n 18) xii.

<sup>38</sup> To illustrate, the A Roberts’ *Is International Law International?* (OUP 2017) and the proliferation of works on third world approaches to international law (for an introduction, see A Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) Ch 10 (‘Third World Approaches’)).

<sup>39</sup> See T Tridimas, *The General Principles of EU Law* (2nd edn OUP 2007); S Vogenauer, S Weatherill (eds) *General Principles of Law: European and Comparative perspectives* (Hart 2017) Part 1 (‘General Principles of European Union Law’); E Castellarin, ‘General Principles of EU Law and General International Law’ in Andenas and others, *General Principles and the Coherence of International Law* (Brill Nijhoff 2019).

### 3. *Obstacles to the consideration of regional principles of law*

The absence of considerations of regionalism in the works of the Commission is not restricted to the topic of GPL, or sources of international law more broadly. Crawford goes as far as to say that ‘the Commission's record reveals not merely an absence of reference to the issues of regionalism but even a deliberate attempt to eschew any such idea’.<sup>40</sup> He suggests some reasons for this, generally related to the fact that, ultimately, the Commission is a subordinate organ of the United Nations, ‘the prototype of the universal international organization’ and that international law is a *global system*. Crawford also notes that the Commission’s greatest successes ‘have been in areas where the general reciprocity of States is the strongest’, as opposed to other topics, less successful in turn, ‘where divergences of interest are sharper’ and to which political and geographical elements may play a more significant role.<sup>41</sup>

One could argue that the composition of the ILC counterbalances this limitation, as the Commission is formed bearing in mind that ‘representation of the main forms of civilization and of the principal legal systems of the world should be assured’.<sup>42</sup> Consequently, even if the Commission avoids explicitly addressing questions of ‘regionalism’ in its works, members naturally carry along their socio-legal backgrounds into the works of the ILC, thereby providing an indirect type of ‘cross-fertilisation’ of legal cultures. On the other hand, Forteau argues that, despite the theoretical representativeness of different regions of the world in the membership of the Commission, most special *rapporteurs* appointed have been from the West.<sup>43</sup>

<sup>40</sup> J Crawford, ‘Universalism and Regionalism from the Perspective of the Work of the International Law Commission’ in *International law on the eve of the Twenty-First Century: views from the International Law Commission* (United Nations 1997) available at <<https://legal.un.org/cod/books/IntlLawOnEveOf21stCentury.pdf>> 113.

<sup>41</sup> Crawford points out that ‘Beyond the terms of the Statute itself and the generality of the Commission's mandate lie other considerations. The Commission's greatest successes have been in areas where the general reciprocity of States is strongest, and the “situational” distinctions between different groups or categories of States are weakest or most variable’, Crawford (n 40) 109.

<sup>42</sup> Art 9(2) Statute of the ILC.

<sup>43</sup> M Forteau, ‘Comparative International Law within, Not against, International Law: Lessons from the International Law Commission’ (2015) 109 *AJIL* 498, 504-506, 503. On a similar note, the role of *ad hoc* judges in the representativeness of different



While these considerations may serve as a backdrop to this section, it is beyond the scope of this article to address in detail the reasons why the Commission does not engage more deeply in questions of regionalism – hopefully, this can be grasped to some extent by a comprehensive reading of the contributions to this Zoom-In. Rather, this section explores four reasons that may explain the non-consideration of regional principles of law in the works on GPL. Even if the Special Rapporteur decided to examine regional principles at a later stage, in any case these reasons also reflect *obstacles* to the assessment of the existence and identification of this subcategory of GPL. The hurdles identified here, which are by no means exhaustive, are: (1) regional principles of law arguably represent a departure from (if not an incompatibility with) the wording of ICJ Statute Article 38(1)(c); (2) the lack of (available) State practice on regional principles; (3) the lack of judicial practice; (4) a concern against a ‘proliferation’ of subcategories of GPL. Granted, some of the elements described may also apply to other ambits of work of the Commission.

### 3.1. *Incompatibility of regional principles with ICJ Statute Article 38(1)(c)*

Article 38(1)(c) of the ICJ Statute is the ‘starting point’ for the works of the ILC on GPL.<sup>44</sup> This provision enumerates the ‘general principles of law recognized by civilized nations’ as a source of international law. Following a narrow reading of this provision, it seems to be a *contra legem* interpretation to admit that general principles can also be *regional*. Further, the *travaux préparatoires* of Article 38 also indicate the notion of

regions of the world in the ICJ is examined in P Palchetti, ‘Judges Ad Hoc at the International Court of Justice A Means for Enhancing Regional and Legal Systemic Diversity in the Composition of the Court?’, in F Baetens, *Identity and Diversity on the International Bench: Who is the Judge?* (OUP 2020). Palchetti argues that despite the possibility of appointing *ad hoc* judges from different regions of the world, including its own nationals, disputants often appoint judges coming from European or Anglo origins. He concludes that this is a missed opportunity, as ‘the institution of the judge ad hoc does little nowadays to increase regional and legal systemic diversity on the bench of the Court’ (ibid 88).

<sup>44</sup> See the debate on the relevance of this provision for the works of the ILC in the Commission’s 2019 report, ILC, ‘Report of the International Law Commission on the Work of its 71st session’ (29 April–7 June and 8 July–9 August 2019) 336 para 245 (‘Report 2019’) para 228-232 and 251-252.



general principles as having a universal scope of application. This can be confirmed by the debates between Root and Descamps, the former advocating for a positivist approach to the sources which the World Court should resort to and generally concerned with varying conceptions of the ‘principles of justice’,<sup>45</sup> and the latter advocating for a jusnaturalistic approach to GPL, as the ‘fundamental law of justice and injustice deeply engraved on the heart of every human being’.<sup>46</sup> In the same sense, Draft Conclusion 2 on GPL put forward by Special Rapporteur Vázquez-Bermúdez considers that ‘For a general principle of law to exist, it must be generally recognized by the community of nations’.

During the debates in the Commission, while some Members welcomed the possibility of addressing regional principles of law, others ‘stressed that they did not fall within the scope of the topic’. The latter group also cautioned that ‘the term “general” in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice entailed the applicability of general principles of law to “all States”, excluding “regional” or “bilateral” general principles of law’.<sup>47</sup>

A few counterarguments can be advanced to these concerns. First, one must bear in mind that the original intents behind the drafting of Article 38 are relevant only to a certain extent. In this sense, the phrase ‘recognised by *civilised nations*’ has long been considered to have fallen out of use.<sup>48</sup> Moreover, if anything, this phrasing was meant to *exclude* universality, by purporting that only a certain group of nations was civilised. Second, it can be contended that Article 38 being the departure point for the work of the Commission does not mean that the draft conclusions are relevant only to the disputes brought before the ICJ. On the contrary, the study of GPL has encompassed other international courts, and is not aimed at serving as a ‘commentary’ or as a manual to the practice of the ICJ. Mr. Vázquez-Bermúdez’s First Report makes it clear that ‘it is expected that the Commission will provide guidance to States, international organizations, courts and tribunals, and others called upon to

<sup>45</sup> PCIJ, ‘Advisory Committee of Jurists - Procès-Verbaux of the Proceedings of the Committee’ (June 16th – July 24th 1920) (The Hague 1920) 309-310.

<sup>46</sup> *ibid* 310. For a thorough description of the origins of ICJ Statute’s art 38(1)(c) see Saunders (n 35) Ch 2.

<sup>47</sup> ILC, ‘Report 2019’ (n 44) para 240.

<sup>48</sup> See ILC, ‘First report’ (n 2) para 176 ff; Pellet and Muller (n 13) para 262.



deal with general principles of law as a source of international law'.<sup>49</sup> Therefore, even if one considers that regional principles of law fall outside the scope of Article 38(1)(c), this does not mean that they should not be contemplated by the ILC.

### 3.2. *Lack of (available) practice on regional principles of law*

The second limitation arises from the methodology followed in the works of the Commission. In accordance with its role of 'codifying' international law, the ILC departs from existing State practice.<sup>50</sup> Consequently, the lack of State practice may represent a substantial hurdle to the Commission in its works.<sup>51</sup> The lack of (available) practice on regional principles could curtail not only codification, but also the prospects of acceptance of this subcategory by the members of the Commission and the States.

And indeed, there does not seem to be much available State practice on regional principles of law. This can be observed in two ways. First, the Special Rapporteur requested that States provided information regarding their practice on GPL, including decisions of national courts and legislation, pleadings before international courts and tribunals, statements made in international organisations and other international fora and treaty practice.<sup>52</sup> Despite this request, only four States have submitted in-

<sup>49</sup> ILC, 'First report' (n 2) para 10.

<sup>50</sup> Moreover, it has been observed by commentators that the role of 'progressive development' has in practice been granted secondary importance in the works of the ILC. See, for instance Dugard (n 1) 40-42; F Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63(2) ICLQ 535, 555-558; L Crema, 'La Commissione del Diritto Internazionale e i suoi metodi di codificazione al tempo del diritto internazionale "debole"' in A Annoni, S Forlati, F Salerno (eds), *La codificazione nell'ordinamento internazionale e dell'Unione Europea* (Editoriale Scientifica 2019).

<sup>51</sup> In fact, the works of the Commission not rarely are affected by this constraint, as there is a more general problem of available state practice. See Forteau, 'Comparative' (n 43).

<sup>52</sup> ILC, 'Report of the International Law Commission on the Work of its 71st session' (29 April-7 June and 8 July-9 August 2019) UN Doc A/74/10 8 para 30 ('Report 2019').



formation (Australia, Belarus, the Netherlands and the Russian Federation).<sup>53</sup> Moreover, the documents produced by these States did not highlight principles specific to a given area or group of States; rather, the GPL mentioned are those perceived to be ‘universal’: some examples are the burden of proof,<sup>54</sup> good faith,<sup>55</sup> *pacta sunt servanda*,<sup>56</sup> *res judicata*,<sup>57</sup> *ne bis in idem*,<sup>58</sup> *lex specialis derogat generali*,<sup>59</sup> among others. The only exception perhaps was Russia’s reference to the *Agreement between the Government of the Russian Federation and the Government of the United Arab Emirates on the promotion and reciprocal protection of investments*, which refers to the ‘general principles of law commonly recognized by both Contracting Parties’ as sources of rights and obligations.<sup>60</sup> However, such reference was not further explained in Russia’s submission.

Second, the Secretariat prepared a memorandum upon request of the Special Rapporteur, which included a review of references to general principles in international treaties.<sup>61</sup> The vast majority of references to GPL described in the Memorandum are not restricted to a regional scope of application. Rather, while the Secretariat found ‘nearly 2,000 pages of relevant references’, only a handful described in the Memorandum could be relevant for the purposes of regional principles. Four bilateral Conventions on Arbitration and Conciliation mentioned in the Memorandum, concluded during the era of the League of Nations, set out the applicable law before an international tribunal in case of dispute, including ‘The conventions, whether general or particular, in force between the

<sup>53</sup> See ‘Comments by Governments’ at <legal.un.org/ilc/guide/1\_15.shtml#govcoms>.

<sup>54</sup> ‘Comments by Australia’ <legal.un.org/ilc/sessions/72/pdfs/english/gpl\_australia.pdf> 2.

<sup>55</sup> *ibid* 5.

<sup>56</sup> ‘Comments by the Kingdom of the Netherlands’ Annex 1 <legal.un.org/ilc/sessions/72/pdfs/english/gpl\_netherlands.pdf>.

<sup>57</sup> *ibid*.

<sup>58</sup> *ibid*.

<sup>59</sup> ‘Practice of the Russian Federation relating to General Principles of Law’, available at <legal.un.org/ilc/sessions/72/pdfs/english/gpl\_russia.pdf> para 11.

<sup>60</sup> *ibid* para 23.

<sup>61</sup> ILC, ‘General principles of law, Memorandum by the Secretariat’ (12 May 2020) UN Doc A/CN.4/742 (‘Memorandum’) upon request by the Commission (ILC, ‘Report 2019’ n (44) paras 207 and 286.





Parties, and the *principles of law arising therefrom*'.<sup>62</sup> This reference seems to fall within the categories of international GPL 'widely recognized in treaties and other international instruments' or that 'underlie general rules of conventional or customary international law', framed by Draft Conclusion 7 discussed above.<sup>63</sup>

In addition to these four Conventions on Arbitration and Conciliation, the Memorandum further mentions treaties which suggest that '[...] the general principles in question are common to the States parties or organizations in question, for example, "common general principles of law of the members", "the general principles applicable in the respective countries", and "general principles of law recognized by African States"'.<sup>64</sup> These are the *Agreement for the Establishment of an Arab Organization for the Petroleum Exporting Countries*, the *Agreement between the United States of America and Mexico relating to Reciprocal Trade*, the *Agreement between the United States of America and Paraguay relating to Reciprocal Trade* and the *African Charter on Human and Peoples' Rights*.<sup>65</sup>

It is interesting to note that in the first group of treaties, the 'regional principles' would arise from the conventions in force between the parties', thereby conforming to the conclusions advanced in Section 2 of the present article (*i.e.* regional principles would 'be formed within the international legal order). Conversely, the second group of treaties reflects regional principles inasmuch they are common/applicable to the domestic laws of the countries involved. As discussed in Section 2, these would not conform to the methodology to ascertain GPL in the current report.

The practice associated with these treaty references provides a valuable departure point to study the existence of regional principles of law. Yet, it is true that these nine treaties provide limited material when compared to the other references to GPL, which presumably refer to 'universal' principles, and could instead demonstrate that, indeed, there is no

<sup>62</sup> *ibid* para 17. Said treaties are: *Convention of Arbitration and Conciliation between Germany and the Netherlands* (The Hague, 20 May 1926) LNTS 66 No 1527 art 4; *Convention of Arbitration and Conciliation between Germany and Sweden* (Berlin, 29 August 1924) LNTS 42, No 1036 art 5; *Convention of Arbitration and Conciliation between Germany and Estonia* (Berlin, 10 August 1925) LNTS 63 No 1484 art 5; *Treaty of Arbitration and Conciliation between Germany and Luxembourg* (Geneva, 11 September 1929) LNTS 118 No 2715 art V.

<sup>63</sup> See Section 2.2.

<sup>64</sup> ILC, 'Memorandum' (n 61) para 46 footnotes omitted.

<sup>65</sup> *ibid* fns 112-113 and accompanying text.

sufficient State practice corroborating the existence of a category of regional principles of law.

Finally, one should add the hurdle that regional sources of State practice will oftentimes be expressed in languages that are not the ones used by Commission members (English, French and Spanish). This means that practice available to the works of the ILC predominantly comes from Western States.<sup>66</sup> This restricts even more the pool of material to which the Commission can resort to examine regional principles of law.

### 3.3. *Lack of case law on regional principles of law*

In addition to *State* practice, the practice of international courts and tribunals is relevant for the codification of this source of international law, to the extent that the Commission heavily relies on the practice of and before international jurisdictions.<sup>67</sup> Additionally, jurisdictional practice is even more relevant in the context of GPL, as this source of law was specifically incorporated into Article 38(1)(c) for judicial usage.<sup>68</sup> As it is known, GPL were included in that provision as a ‘precaution’, to avoid cases of *non liquet*, where the Court ‘would have to refuse to resolve a dispute brought before it on the ground that the applicable law provided no answer’.<sup>69</sup>

<sup>66</sup> On this, see Koagne Zouapet (n 5) 43-44.

<sup>67</sup> For example, in the works of the Commission on the topic of customary international law, Sir Wood noted that ‘There continued to be widespread agreement that among the main materials for seeking guidance on the topic were decisions of international courts and tribunals, in particular the International Court of Justice’. ILC, ‘Third report on identification of customary international law by Michael Wood, Special Rapporteur’ UN Doc A/CN.4/682 (27 March 2015) 2 para 4.

<sup>68</sup> Albeit for somewhat different reasons, judicial decisions (in particular the practice of the ICJ) is also central to the clarification of the methodology to ascertain customary international law (what Tams calls ‘meta-custom’): ‘[...] when it comes to the regime of ‘meta-custom’, the Court enjoys a lot of leeway – precisely because there has been so relatively little concerted law-making activity. Unconstrained by treaties, and lacking guidance from bodies like the General Assembly and (so far) the ILC, the Court has been and remains relatively free to roam’. C Tams, ‘Meta-Custom and the Court: A Study in Judicial Law-Making’ (2015) 14 *L and Practice of Intl Courts and Tribunals* 51, 55. While the same influence has not been exerted with respect to ‘meta-general principles’, their formulation remains centrally connected to the practice of international courts.

<sup>69</sup> H Thirlway, *The Sources of International Law* (2nd edn, OUP 2019) 11.



However, available judicial practice on regional sources of law is also generally scarce. This paucity is illustrated by the ICJ's apparent reluctance to take up regional considerations.<sup>70</sup> One example is the treatment of the *uti possidetis* – 'a principle purely of American origin'.<sup>71</sup> The qualification of *uti possidetis* as a general principle of law in the meaning of Article 38(1)(c) of the ICJ Statute is contested,<sup>72</sup> but regardless of its legal nature, this case demonstrates the Court's approach (if not hesitancy) in resorting to regional sources of law.

The notion of *uti possidetis* finds its origins in Roman law,<sup>73</sup> but its applicability to inter-State relations was developed in the specific context of Latin American decolonisation.<sup>74</sup> In the *Frontier Dispute (Burkina Faso v Republic of Mali)*,<sup>75</sup> the Court examined the parties' requests to resolve the delimitation of borders based on the 'principle of the intangibility of frontiers inherited from colonization'.<sup>76</sup> The Court noted that the principle of *uti possidetis* had 'first [been] invoked and applied in Spanish America', but that '[n]evertheless the principle is not a special rule which pertains solely to one specific system of international law'.<sup>77</sup> The Court reviewed African State practice to corroborate that the principle was also

<sup>70</sup> For a thorough analysis on the Court's reluctance to 'attribute any legal significance to regional considerations as such', see Crawford (n 40) 113 ff.

<sup>71</sup> A Alvarez, *American Problems in International Law* (Baker, Voorhis 1909) 96.

<sup>72</sup> See eg A Peters, 'The Principle of *Uti Possidetis Juris*: How Relevant is it for Issues of Secession?' in C Walter, A von Ungern-Sternberg, K Abushov (eds), *Self-Determination and Secession in International Law* (OUP 2014) 99. It should be remarked that, although the Court referred to *uti possidetis* under the terminology 'principle' and 'general principle', the judges were most likely invoking a rule of customary nature, as evidenced in paragraph 21: 'The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.' (ibid para 21 emphasis added).

<sup>73</sup> MN Shaw, 'The Heritage of States: the principle of *uti possidetis juris* today' (1996) 76 *British YB Intl L* 97.

<sup>74</sup> *ibid*.

<sup>75</sup> ICJ, *Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgement) 1986 ICJ Rep 1986, 554.

<sup>76</sup> *ibid* 565.

<sup>77</sup> *ibid* 565.



applicable to the African context,<sup>78</sup> concluding that ‘It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs’.<sup>79</sup>

The Court did not assess the recognition of *uti possidetis* by the ‘international community’ to justify its classification as a ‘general principle’.<sup>80</sup> *Uti possidetis* had a regional origin, confined to Spanish America, and nonetheless the Court applied it in the context of the African continent. To avoid concerns of ‘judicial activism’ (generally surrounding resort to unwritten sources of international law), the Court should have qualified the applicability of *uti possidetis* to all contexts of decolonisation with a more extensive and representative review of ‘the principal legal systems of the world’. Instead, the Court extrapolated the local use of *uti possidetis* from the region of Spanish America to consider its application also to the African continent.

The reference to *uti possidetis* in the *Frontier dispute* was thus a missed (or perhaps avoided) opportunity for the Court to pronounce on the existence of regional/particular sources of law.<sup>81</sup> Moreover, while the ICJ has pronounced itself with respect to regional/particular customary international law (most notably in the *Asylum*<sup>82</sup> and *Right of Passage over Indian Territory* cases),<sup>83</sup> it has not addressed the existence of regional principles of law.

In some regional jurisdictions, the allusion to regional principles of law also appears to be timid. In the *Case of Aloeboetoe et al. v. Suriname* before the InterAmerican Court of Human Rights (IACtHR), the Court resorted to general principles of law expressly invoking ICJ Statute Article 38(1)(c). The IACtHR considered that

‘It is a norm common to most legal systems that a person’s successors are his or her children. It is also generally accepted that the spouse has

<sup>78</sup> *ibid* para 22.

<sup>79</sup> *ibid*.

<sup>80</sup> It should be noted that the Court refers to *uti possidetis* interchangeably as principle and customary law. See (n 92) and accompanying text.

<sup>81</sup> Pellet and Müller point out that in the *Land, Island and Maritime Frontier dispute* case, another Chamber of the ICJ referred to the principle of *uti possidetis* as an American rule. Pellet, Müller (n 13) fn 711.

<sup>82</sup> *Asylum (Colombia v Peru)* (Merits) [1950] ICJ Rep 50, 276-7.

<sup>83</sup> *Right of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 60, 40.



a share in the assets acquired during a marriage; some legal systems also grant the spouse inheritance rights along with the children. If there is no spouse or children, private common law recognizes the ascendants as heirs. It is the Court's opinion that these rules, generally accepted by the community of nations, should be applied in the instant case, in order to determine the victims' successors for purposes of compensation'.<sup>84</sup>

The IACtHR, however, did not provide a comparative study on which legal systems it had resorted to asserting these rules on succession as a general principle of law. To be methodologically sound, the assertion would need to be accompanied by references to different legal systems, including common law, civil law, Socialist law, Far Eastern law, Islamic law and Hindu law.<sup>85</sup> Given the difficulties of proceeding with such a wide-ranging set of legal systems, and considering the regional scope of the IACtHR, it would perhaps have sufficed to consider that the general principle of succession proclaimed in that paragraph reflected the domestic law of the American regional context, accompanied by references to the domestic legal systems of the States in the American region. Instead, the adjudicators took the less convincing road of a simple assertion that the rule of succession in question reflected a general principle of law 'common to most legal systems' and 'generally accepted by the community of nations'.

Interestingly, the Special Rapporteur's request for a Secretariat's memorandum of references to GPL did not include a survey of the case law of regional jurisdictions. Rather, the call specifically requested 'a memorandum surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a *universal* character', as these 'would be particularly relevant for its future work on the topic'.<sup>86</sup> This choice is understandable at an early stage of the works on GPL (in 2019, only the first report by Special Rapporteur Vázquez-Bermúdez had been advanced). Yet, one may wonder if another request, focusing on regional courts and tribunals, may eventually come to place.

<sup>84</sup> *Case of Aloeboetoe et al v Suriname* (Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 62.

<sup>85</sup> See (n 12) and accompanying text.

<sup>86</sup> ILC, 'Report 2019' (n 44) para 207.

### 3.4. *Proliferation of categories*

During the debates on the First Report submitted by the Special Rapporteur, the question of ‘categories’ of general principles was addressed by certain ILC Members. Some members advocated the inclusion of further categories in the study of the topic (substantive and procedural GPL).<sup>87</sup> On this, ‘[t]he Special Rapporteur stressed that besides the two categories proposed in the first report, which are supported by practice and doctrine, the Commission should avoid an unnecessary proliferation of categories of general principles of law’.<sup>88</sup> Therefore, the Special Rapporteur may perceive the enunciation of a third category as undesirable by the, at least at this stage of the works of the Commission.

As discussed in section 2.2, the approach currently put forward by Special Rapporteur Vázquez-Bermúdez only accommodates regional principles within the category ‘general principles formed within the international legal system’. While the creation of a third subcategory may be undesirable to avoid a ‘proliferation of categories’, the blending of regional principles of law with general principles of international law may be equally, if not even more, problematic.

The distinction between GPL deriving from national legal systems and the international legal order is subject to much contention. In the last two ILC sessions, members presented a word of caution concerning the recognition of the latter category in the works of the Commission; others expressed opposition. The concerns mainly revolved around the lack of practice with respect to international GPL and the blurred distinction between these and customary international law.<sup>89</sup>

Some argue that GPL only comprise those coming from domestic systems, while those which have been called ‘principles of international law’ in international practice are in fact customary law.<sup>90</sup> The blurred (or inexistent) distinction between international GPL and customary international law reflects on concerns against judicial activism: the argument

<sup>87</sup> *ibid* 336 para 244.

<sup>88</sup> *ibid* 338 para 260.

<sup>89</sup> *ibid* 336 para 245. Special Rapporteur Vázquez-Bermúdez considered that such difficulties were not insurmountable (*ibid*).

<sup>90</sup> For an overview of these concerns, see M Wood, ‘Customary International Law and the General Principles of Law Recognized by Civilized Nations’ (2019) 21 *Intl Community L Rev* 307.



goes that the elements for the identification of a general principle of international law overlap with those of customary international law but are devoid of the stricter requirement of demonstrating state practice and *opinio juris*. In this sense, Sir Wood explains that ‘such an approach might make it all too easy for a general principle of law to be invoked, which would affect the credibility of this source of international law’.<sup>91</sup> The *Frontier dispute* discussed above illustrates this criticism, as the Chamber of the Court refers interchangeably to *uti possidetis* as a ‘general principle’ and a ‘principle of customary international law’, without however ascertaining the existence of the state practice and *opinio juris* to qualify the concept as a customary norm.<sup>92</sup>

The lack of precision when ascertaining a regional principle could ‘add to the pot’ and lead to even more confusion between international GPL and customary international law. The methodology for determining the existence of regional principle should therefore be even more explicit as to their regional scope of application. For a regional principle to be invoked according to the methodology in Draft Conclusion 7 of the Second Report, States and adjudicators would need explicitly state how a regional principle of law ‘is widely recognized in [regional] treaties and other [regional] instruments’ or ‘underlies [regional] rules of conventional or customary international law’. These difficulties could be overcome should the Commission clarify the existence (or non-existence) of and the methodology for ascertaining regional principles of law within the works on GPL.

#### 4. Conclusions

The scholarship on GPL is extensive but fragmented. There are many points open to debate and disagreement on fundamental elements of general principles: whether they represent an autonomous or a subsidiary source of law (or even if these two possibilities exclude one another), their nature and function, whether they originate only from domestic legal systems or whether they can be distilled from the international legal

<sup>91</sup> *ibid* 321.

<sup>92</sup> On this, see also S Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (2015) 26 *Eur J Intl L* 417.





order, etc. In this sense, the works of the ILC are very much welcome, as they could serve as an authoritative clarification on the topic. It can be expected that the adoption of a set of Draft Conclusions on GPL by the ILC will help mitigate these obscurities and will foster the consolidation of a more widespread understanding of this source of international law.

This extends to regional principles of law as a potential subcategory of GPL, scarcely explored by scholarship and international practice. Currently, the works of the ILC do not give much room for the existence of this subcategory, and significant hurdles may make it difficult for the Commission to include regional principles in its work on GPL.

Nevertheless, undoubtedly the works of the Commission could contribute to the debate, even if to conclude that regional principles of law are not an autonomous source of international law, or that the scope of Article 38(1)(c) of the ICJ Statute does not encompass regional principles. Indeed, in his fourth report on peremptory norms of international law, Special Rapporteur Dire Tladi included an extensive discussion on the existence of regional *jus cogens*, only to conclude that ‘the notion of regional *jus cogens* does not find support in the practice of States’.<sup>93</sup> The inclusion of a report focusing only on regional *jus cogens* certainly served to encourage the debate on regionalism and the sources of international law. The topic of general principles of law would certainly benefit from the same approach, should it come to a similar result or not.

<sup>93</sup> ILC, ‘Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur’ UN Doc A/CN.4/727 (31 January 2019). Although this was the position adopted by the Special Rapporteur to the topic, other authors have asserted otherwise. See eg G Gaja, *Jus Cogens beyond the Vienna Convention* (1981) 172 Recueil des Cours 284.

