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GENERAL PRINCIPLES OF LAW AT THE TURN OF CIVILISATIONS

Abstract: This review of general principles of law at the process of great changes observed in reality shows not only the past that have been (diversity of the view; contentious issues) and the present (impulse to merge; impetus for thinking) but also the future. The aim of this synthesis was to reconstruct the system of general principles of international law (the need to take into account the general principles of private law and the general principles of law constructed in the process of regional integration of states) as well as the vision of future work on this issue aimed at muted understanding and cooperation for mutual benefit.

Keywords: general principles, artificial intelligence, technological civilizations

Introduction

The process of digitisation and automation of public life marks the beginning of a technological civilisation. When the human mind (reason) is slowly being replaced by the synergistic mind (algorithms), there is a need to develop legal engineering and to use the code of creativity in every field of knowledge. The law becomes a code. This alters the sense of “general principles of law recognized by civilized nations” within the meaning of Art. 38(1)(c) of the Statute of the International Court of Justice (ICJ). It is worth

considering whether the ILC in its work on “general principles of law”¹ is aware of the civilisational breakthrough that we are witnessing ‘here and now’. During this breakthrough, we can observe a process of market globalisation and cultural universalisation. This process has a fundamental impact on the integration of international law in a horizontal system (merging public and private norms as well as general and specific norms) and vertically of the fusion of spheres of law created at a global, regional, and national level into a specific system, such as the law of artificial intelligence. The core of the new legal system are international technical standards, whose entry into force is based increasingly on the so-called tacit consent. Our aim is to draw attention to the influence that this process has on the debate regarding general principles of international law as those at the top of the hierarchy of sources within an integrated legal order. However, the present paper is not meant as a thorough analysis ILC reports. The authors intend to carry out the review on the basis of three reports, the last of which appeared only after the 73rd session of the Commission in Geneva, consisting of 11 proposed conclusions of the ILC’s work on the general principles of law.²

The subject of the general principles of law has been the focus of many invaluable contributions written by professor Janusz Gilas.³ His views have hitherto inspired not merely the scientific community of Toruń, but reached far beyond.⁴ In our essay, we composed a bouquet of other people’s flowers, adding only a metaphorical ribbon that tied them together. Like Bob de Wit and Ron Meyer,⁵ we decided to apply strategic thinking to our own legal backyard. Under the influence of governance (and the latest technologies, organically linked to this field of knowledge within the market), contemporary international relations, which are the basis for the general principles of international law, are changing in the first place. This is the point of view

1 Draft ILC, General Assembly Resolution of 15 December 2020, A/RES/75/135. Judgments of courts and tribunals cited in this report will be referred to in this article.

2 International Law Commission, Seventy-third session, 18 April–3 June and 4 July–5 August 2022. A/CN.4/L.971.

3 Gilas, “Zasady ogólne prawa w pracach Międzynarodowego Trybunału Sprawiedliwości”, 29-48. In this text, the Professor’s thoughts on Article 38(1)(c) are most fully developed. The author refers to a wealth of domestic and foreign literature.

4 This issue was referred to by Jasudowicz, “On General Principles of Law Recognised by Civilised Nations – A Handful of Reflections”, published in a collection of studies on the occasion of the sixtieth anniversary of the birth of Professor Janusz Gilas, edited by Mik, *Pokój i sprawiedliwość przez prawo międzynarodowe*, 141-162.

5 de Wit and Meyer, *Strategy Synthesis: Resolving Strategy Paradoxes to Create Com-petitive Advantage*, passim.

on the research problem we have adopted in this essay. We have been using this form of communicating ideas for years in our joint publications in the fields of law in literature, law and economics, comparative legal cultures and space sciences.⁶

This task is not an easy one, because the dynamics of change in management, technology and the law makes us think about security of future generations to a much greater extent than ever before. The present leap could even be compared to the turn of civilization 10,000 years ago, when Sapiens (rational) of the genus Homo (human) began transforming his biological life into cultural life.⁷ In order to get a clear picture of the role of “general principles of law” in contemporary universal legal order, it is advisable to clearly separate the past from the present and the future.⁸

1. The Past

1.1. Diversity of Views

In deliberations on the general principles of law in the ICJ jurisprudence, views inspired by the doctrine and precedent judgments are expressed. Scholars and judges alike focus on analyzing specific cases placed in an international context. Only in the history and theory of international relations are holistic approaches presented, putting the *ius naturale* and *the ius gentium* in a historical, normative and empirical perspective. Since the heyday of legal positivism, attention has been focused on national codifications and international agreements, using the formal-dogmatic

6 See especially Brodecki, Konopacka, “Thinking Out of the Box: The Human Being in the AI Era”, 195-215.

7 Harari, *Sapiens. Od zwierząt do bogów*, 28. At the same time, biological life (1.0) began to transform into cultural life (2.0). Max Tegmark, in his work *Life 3.0 Człowiek w erze sztucznej inteligencji* concluded that we are currently witnessing a process of transition from cultural life to technological life. Original title: *Life 3.0 Being Human in the Age of Artificial Intelligence*, passim. In the Prologue to the booklet *Temple in Cyberculture. Digital Technologies and Law in a Knowledge Society* (joint publication with Anna Maria Nawrot, pp. 9-20), I adopted an identical periodisation of history.

8 Harari, *ibidem*, 28. At the same time, biological life (1.0) began to transform into cultural life (2.0). Max Tegmark, in his work *Life 3.0 Człowiek w erze sztucznej inteligencji* concluded that we are currently witnessing a process of transition “from cultural life to technological life”. Original title: *Life 3.0 Being Human in the Age of Artificial Intelligence*, passim. In the Prologue to the booklet *Temple in Cyberculture. Digital Technologies and Law in a Knowledge Society* (joint publication with Anna Maria Nawrot, pp. 9-20), I adopted an identical periodisation of history.

method. For the above reason, to this day, more general conclusions are formulated only with regard to fragmented reality.

This is quite understandable, since cases from every nook and cranny of international law have arisen in court and arbitration proceedings. Against this background, judges delivering opinions and decisions, as well as their commentators, presented the perspective of international diversity. Those who saw the need to open up the general principles of law to meta-law and to ‘elementary considerations of humanity’ usually only made the case for human rights to be taken into account in the universal and regional system.⁹

The first ILC Report draws attention to the role played in practice by “the general principles of law recognized by the community of nations” (within the meaning of Article 15(2) of the International Covenant on Civil Rights) and “the general principles of law recognized by civilized nations” (referred to in Article 7(2) of the European Convention on Human Rights), while at the same time recalling the Nuremberg Principles.¹⁰ Article 38(1) (c) of the ICJ Statute has been invoked by the ECtHR (in *Golder v. the United Kingdom*)¹¹ and by the CJEU (in a number of cases, including *C-641/18 Rina*).¹²

1.2. Contentious Issues

As the discrepancies between the different viewpoints on the general principles of law relate to a wide variety of matters, it is difficult to gain insights from them on the fundamental issues related to the application of Article 38(1)(c) of the ICJ Statute. This is certainly why, according to Janusz Gilas, it is advisable to focus on the essence of general principles of law and their relation to other sources of international law.¹³ At the initial stage of the development of general principles of law within the meaning of Article 38(1)(c) of the ICJ Statute, the predominant view was that they were common to the domestic legislation and practice of states. This position was in contrast to the views represented by a minority of judges who treated them

9 Jasudowicz, *ibidem*, 145.

10 General Assembly resolution 95 (I) of 11 December 1946, cf. *travaux préparatoires* on the Covenant and the Convention: A/2929, 127, para. 96; A/4625, paras. 15-16; A/C.3/SR.1008, paras. 2 and 14; A/C.3/SR.1010, para. 9; A/C.3/SR.1012, para. 15; A/C.3/SR.1013, paras. 14-15, 17; European Commission on Human Rights, Preparatory work on article 7 of the European Convention on Human Rights, Background paper prepared by the Commission Secretariat (DH (57) 6), 4.

11 *Golder v. the United Kingdom*, no 4451/70, judgment of 21 February 1975, para. 35.

12 C-641/18, judgment of 7 May 2020, ECLI:EU:C:2020:349. Cf. e.g. Castellarin, “General Principles of EU Law and General International Law”, 131-148.

13 Gilas, *ibidem*, 143.

as principles of international law. The clash of these viewpoints mobilised writers of different nationalities to search for an appropriate synthesis based on the logic of 'both'. Today, the source of the general principles of law recognised by civilised nations is an integrated legal order that includes both national and international contexts.

The debate on this topic took place during the formulation of the Nuremberg Principles, amongst others, in the context of necessary defence as a counter-type of crimes. Two positions emerged during the exchange of views. Spiropoulos argued that the Nuremberg Tribunal should – if necessary – apply the general principles of municipal law in international cases. Scelle, on the other hand, emphasised that the principles of international law derive from custom, that is, they originate from municipal law, and are in fact principles of international law. His point of view is widely accepted today.¹⁴

In a similar way, one can discuss the relationship between the general principles of law recognised by civilised nations and international conventions, whether general or particular, establishing norms expressly recognised by the disputing states and international custom (as evidence of general practice accepted as law). No one doubted that the general principles of law within the meaning of Article 38(1)(c) were a separate source of law, since this was apparent from a systemic interpretation of the provision. Some judges, however, believed that they are in fact principles of international law within the meaning of Article 38(1)(a) and (b). Their position is an expression of the promotion of legal positivism in international law, because it questions the existence of principles beyond those that are written down or derive from custom.

The Commission's report devotes a great deal of attention to principles, general principles of law and general principles of international law in the context of the responsibility of states for acts prohibited by international law (state responsibility) and over the responsibility of international organisations (responsibility of international organisations). The commentaries highlighted two general principles (good faith and reciprocity)¹⁵ and a number of specific principles that dealt with, amongst others, counterclaims, allocation of costs and expenses, abuse of rights, *ex iniuria ius non oritur*,

¹⁴ *Yearbook of the International Law Commission, 1949*, Summary Records and Documents of the First Session including the report of the Commission to the General Assembly, New York 1956, paras. 80 i 81.

¹⁵ Paragraph (5) of the commentary to guideline 3.1.5 and paragraph (33) of the commentary to guideline 4.2.4, "Guide to Practice on Reservations to Treaties", *Yearbook of the International Law Commission*, vol. II (part three), 213, 271.

free will, the principle of *competence-competence* and mutual expectations.¹⁶ Particularly noteworthy is the position of one member of the Commission who stated that the French language clearly distinguishes between *les principes généraux de droit international* and *les principes généraux reconnues par les nations civilisées*.¹⁷

Aversion to general principles that are not enshrined in an international agreement or are not among the “customs” is characteristic of those judges who limit their mission to clarifying and explaining the content of legal rules or customary norms. They treat their rulings as an auxiliary means of establishing norms of law within the meaning of Article 38(d) of the ICJ Statute; after all, they underestimate the authority of precedents. There is also a perception in the doctrine that judicial decisions only have a certain impact on the development of international law.¹⁸ Few regard judgments rendered in so-called difficult cases as having creative force and thus as a source of international law. Their position is confirmed by the judgment of the Nuremberg Tribunal¹⁹ and the ICJ judgment on *the Straits of Corfu*.²⁰ Behind these judgments is the *auctoritas rerum similiter iudicatorum*.

In the context of the maxim *lex specialis derogat legi generali*, Martii Koskenniemi expressed the view that, in practice, treaties are often considered as *lex specialis vis-à-vis* international custom and general principles of law.²¹ The Study Group’s conclusions further explained that general principles

16 *Yearbook of the International Law Commission*, 1953, vol. I, 188th Congress, 27, para. 75; 192nd Congress, 53, para. 98; 193th Congress, 57, par. 65; 236th reunion, 362, par. 92 and 376, paras. 67-68; *Yearbook of the International Law Commission*, 1953, vol. II, 219, par. 100; *Yearbook of the International Law Commission*, 1953, vol. II, A/CN.4/63, p. 148, para. 3 of the commentary on draft article 12 of the articles on the law of treaties proposed by the Special Rapporteur on the subject; 155, para. 5 of the commentary on draft article 15, *Yearbook of the International Law Commission* 1958, vol. I, 441th Congress, 45, para. 8.

17 *Yearbook of the International Law Commission*, 2005, vol. I, 2860 convention, 218, para. 60.

18 A.g. Bierzanek, Symonides, *Prawo międzynarodowe publiczne*, 116.

19 Judgment of 1 October 1946. The final speech of the prosecutor Jerzy Sawicki before the Supreme National Tribunal included the phrase *crimen laese humanitatis*.

20 *The Corfu Channel Case*, ICJ judgment of 9 April 1949, ICJ Pleadings 1949, vol. II, 29. This case was highlighted by Janusz Gilas in the cited text (34-38). According to the Professor, the Court did not decide whether the general principles of law are common to the legislation and practice of States, or whether they are general principles of international law.

21 Para. 5 of the conclusions of the Study Group on the Fragmentation of International Law, *Yearbook of the International Law Commission*, 2006, vol. II (part 2). See also: Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission finalised by Martti Koskenniemi (A/CN.4/L.682 and Corr. 1 and Add.1).

of law create a special regime to fill legal gaps,²² and furthermore serve to interpret treaties on the basis of Article 31(3)(c) of the Vienna Convention on the Law of Treaties. At the same time, it argued against a hierarchical view of custom and general principles of law.²³

2. The Present

2.1. The Impulse to Merge

Since its inception, the law has developed in interaction with the market and culture. This could already be seen from the moment when man set out from the rivers of paradise to the seas and a maritime culture emerged alongside the so-called land culture. The former depended primarily on ideology, while the latter, from its birth, inspired the process of economic integration through law.²⁴ An outline of the history of maritime law up to the end of the 18th century²⁵ shows that the idea of integrating law was born in maritime shipping and international trade. The impetus for the integration of law was most felt in the medieval *ius gentium*. It is to it that we owe the style of the modern *legis mercatoriae*, which has had the greatest impact on global economic integration.²⁶

Comparing the land perspective with the maritime perspective allows a better understanding of the strategic context. Already at the outset, it is useful to introduce the key words that open the door to the audience.

22 Para. 15 of the conclusions of the Study Group on the Fragmentation of International Law, *Yearbook of the International Law Commission, 2006*, vol. II (part 2), 179.

23 Ibidem, paras. 18-20, 180; cf. also: Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International law, para. 469. For the Vienna Convention on the Law of Treaties of 23 May 1969, see United Nations Treaty Series, vol. 1155, no. 18232, 331.

24 Ibidem, para. 31; cf. also: Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International law, para. 85. “Any court or lawyer will first look at treaties, then custom and then the general principles of law for an answer to a normative problem”.

25 Matysiak, *Prawo morskie. Zarys systemu*, 24-35. The author concluded that it is not known to this day whether Rhodes’s maritime law existed only in customary form or whether it was written down. Later maritime customs were written down, as evidenced by the Book of the so-called Maritime Consulate, the Oléron Scrolls, the so-called Black Book of the Admiralty, the Resolutions of the Convention of the Hanseatic Cities, the Navigation Act of 1651, the *Ordonnance de la marine of 1681*, among others.

26 Jürgen Basedow, among others, has written about the effects of globalisation on the development of private international law and the growing importance of general principles of contract law. See Basedow, “The Effects of Globalization on Private International Law”, 1-10.

Table 1

	Land-based perspective	Maritime perspective
Market	State territory	World without borders
Culture	Social and political integration	Economic integration
Law	Regulation	Deregulation

Source: own study.

The emphasis on state territory and associated jurisdiction has contributed to the development of conflict of laws norms. In the 21st century, the question of “whether territorial sovereignty can continue to be a cornerstone of the global legal architecture in the age of globalisation” is particularly pertinent.²⁷ As James Gordley writes, “new problems call for transnational solutions, nevertheless there are also old problems that need to be rethought.”²⁸ Gordley agrees with Joseph Beal that, in the *common law* world, the forerunner of modern theories of private international law (conflict of laws) was Joseph Story (judge of the US Supreme Court – SCOTUS – and author of the first commentary on the US Constitution), while the most prominent theorist on the Continent was Friedrich Carl von Savigny. Story’s starting point was the principle of territorial sovereignty – in his view “the laws of one country cannot have internal force, *proprio vigore*, beyond the territorial limits and jurisdiction of that country.”²⁹ The possible extraterritorial application of internal law is not the result of any original power to extend the boundaries of its validity, but rather the result of the respect (*comitas*) which, for reasons of public policy, other nations are willing to show to a foreign legal system, with reasonable and liberal motives of common convenience and mutual benefit and need.³⁰ The contemporary reception of von Savigny’s concepts, however, does not deny the validity of the theses he put forward, both for the civil law system and for precedent. Among other things, the importance of the theory of the “seat of the legal relationship”³¹ for the creation of the directional principle of the closest connection,³² applicable in the absence

27 Gordley, “Extra-territorial Legal Problems in a World without Nations: What the Medieval Jurists Could Teach Us”, 35.

28 Ibidem.

29 Beale, *A Treatise on the Conflict of Laws*, § 72. cf. also.

30 Gordley, ibidem, 36, after Story, *Commentaries on the Conflict of Laws Foreign and Domestic* (1883), § 7.

31 von Savigny, *System des heutigen römischen Rechts*, 108.

32 Lagarde, “Le principe de proximité dans le droit international privé contemporain”, 29; Zachariasiewicz, “Prawo właściwe dla zobowiązań z umów w braku wyboru prawa w Konwencji rzymskiej”, 7.

of choice of law and the impossibility of determining the applicable law on the basis of assignment to the listed types of contracts and the connecting factor of the habitual residence of the party obliged to provide the characteristic performance³³ (recital 21 and Article 4(4) of the Rome I Regulation),³⁴ but also applied *ex post* by US courts on the basis of the *Restatement (Second) of Conflicts of Laws*.³⁵ According to Recital 16 of the Rome I Regulation, in order to ensure legal certainty in the European area of justice, “conflict-of-law rules should be predictable to the greatest extent possible. However, the courts should have some discretionary power to determine the law that is most closely connected with the case”.³⁶

Table 2

Comparison of perspectives	Perspective of global convergence	Perspective of international diversity
International diversification	Uniformisation	Diversity
International linkage	Integration	Fragmentation
Reality	Technology and communication	Cultural identity
Strategy	Synergy	Local sensitivity

Source: de Wit, Meyer, *Synteza strategii, Tworzenie przewaga konkurencyjnej przez analizowanie paradoksów*, 341 (scheme simplified and adapted to legal language).

In considering the term civilised nations, the focus is primarily on the international context. In this light, the paradox of globalisation and regionalisation can be seen. Eminent scholars of economic jurisprudence have the most to say in assessing these perspectives. Their perspective

33 Lipstein writes early in the development of European private law on the evolution of the principle originated by A. Schnitzer based on Swiss practice, “Characteristic Performance – A New Concept in the Conflict of Laws in Matters of Contract for the EEC”, 402 et seq.

34 Cf. Article 4(3) of the Rome II Regulation, which, in line with recitals 14, 18 and 20 of the preamble, establishes an escape clause of a “much closer connection” where it is not possible to determine the applicable law on the basis of a cascade of connecting factors.

35 See § 188(1) (1996). Peari, *Savigny’s Theory of Choice of Law as a Principle of Voluntary Submission*, 106-51, <http://www.jstor.org/stable/24311926>; Behr, “Rome I Regulation a – mostly – Unified Private International Law of Contractual Relationships within – most – of the European Union”, 245.

36 Van Den Eeckhout, *Private International Law in an Era of Globalisation. ‘Neutral’ Private International Law!? An Analysis Through the Lens of Protection of Weak c.q. Vulnerable Parties* (August 2020). Accessed 10 February 2022: <https://ssrn.com/abstract=3677937>.

on the actors applying international law is valuable in appreciating the role of individuals in contemporary international relations. Expanding the circle of public actors (states and international organisations) to include multinational corporations makes it possible to compare the perspective of global convergence with that of international diversity.

A comparison between the law of a classical international organisation and the law of regional integration organisations requires an in-depth analysis of the founding treaties. This is because they are the basis for the creation of regional legal orders. Cezary Mik has presented with exceptional precision the scope of the capacity to create integration law – both the legislative capacity (competence norms of a legislative nature) and the adjudicatory capacity (the right to issue legal acts by EU institutions and control their compliance with the statutes of the organisation by, among others, the courts).³⁷ Against this background, the paradox of unity and fragmentation of international law emerges. Most accept the view that the principle of *lex specialis* operates in international law. In this light, the founding treaties of regional integration organisations constitute *leges speciales* in relation to customary law and general principles of law.³⁸

2.2. Impetus for Thinking

Looking at civilised nations through the lens of the breakthrough of civilisation forces one to rethink even the symbolism of the legal order. Tracing the impact of the latest technologies on the management of space (within and beyond the boundaries of state territories) and law (within and beyond the jurisdictional limits of states), one can conclude that the symbolism of the Egyptian pyramid should be replaced by the symbolism of the Roman *axis* associated with the *centre* where traditional temples were built. Indeed, the Romans transformed the Egyptian eternally static image of the world into a dynamic image of the crossing of the axis. In the new empire, the departures and returns of the Caesars had existential significance.³⁹ In the light

³⁷ A major contribution to the science of law has been made by Cezary Mik, with the publication of a two-volume work entitled *Fenomenologia regionalnej integracji państw. Studium prawa międzynarodowego*. Notes on the Relationship between the Law of Regional Integrating Organisations and International Law (vol. II, 441-619) can be confidently treated as a monograph. It is difficult to take anything away from them and add something.

³⁸ *Ibid.*, vol. II, 550.

³⁹ Norberg-Schultz, “Znaczenie w architekturze Zachodu”, 6-20 (on Egyptian architecture) and 42-57 (on Roman architecture).

of the symbolic temple, it is clear that the judges of the ICJ are closer to Eastern cultural patterns than to the tradition of Roman jurisprudence.⁴⁰

The reference to Roman jurisprudence is justified for two reasons. Firstly, the proposals made during the drafting of the ICJ Statute drew attention to the traditions;⁴¹ secondly, the President of the deliberations, Mr Descamps, proposed that point (d) be added to points (a), (b) and (c) in Article 38(1) to read: “international jurisprudence as a means for the application and development of law”.⁴² The traditions of Roman jurisprudence are only continued by judges trained in common law culture. This is borne out by the biography of Lord Mansfield, who enriched the common law norms with the *lex mercatoria* and thus made a significant modification to the judicial philosophy itself.⁴³ His judgments had a philosophical and legal dimension and epoch-making significance. Lord Denning in the Islands⁴⁴ and Judge Holmes overseas⁴⁵ were also exceptionally creative. Judges representing legal positivism have often rejected the application of general principles of law in their jurisprudence.⁴⁶ More recently, the prevailing view is that the general

40 This thesis has been exposed in the books: Brodecki, Lipska-Toumi, *Zderzenie cywilizacji w Europie*; Brodecki, *Legal Traditions in the Changing World*. Historical propaganda proudly emphasises the Roman roots of the European legal tradition. An in-depth analysis leads to the conclusion that in the sphere of Greco-Slavic civilisation, Byzantine law tradition is dominant. Also, in the Germanic and Scandinavian legal family, the influence of this culture is strong, which is due to the fact that Protestantism drew its juices from Byzantium. Only Roman law is situated between the *common law* culture (because of the role of jurisprudence in the development of administrative law in particular) and the culture of statute law (because of the role of the great codifications in the legal system).

41 Cf. Article 7 of the ABGB, Article 12 of the Italian Civil Code, Article 19 of the Mexican Federal Civil Code, Article 1(4) of the Spanish Civil Code and 1(2) of the Egyptian Civil Code.

42 *Procès-verbaux of the Proceedings of the Committee*, 16-24 June 1920, 13th Convention, 293 and Annex 3, 295.

43 Zajadło, *Lord Mansfield. Sędzią być!*

44 Resiak-Skrzyńska, *Lord Denning. Prawo to ja*, 373-384.

45 In practical descriptions, Oliver Wendell Holmes is portrayed as a priest of the law and the courts as his place of activity, temples of the law. See Tokarczyk, *Prawo amerykańskie*, 36. Holmes's political and ideological neutrality during adjudication is also famous. As pointed out by M. Konopacka, “the posthumous publication of his correspondence revealed that he was a flesh-and-blood Republican, although he still voted for the strengthening of liberal-socialist solutions (such as the limitation of working hours in the *Lochner* case, in which he filed a dissenting opinion), described by him privately as ‘socialist nonsense.’” See Konopacka, “Wielopoziomowa niesprawiedliwość a Sędzią albo Złota Legenda o Świętym Jerzym opowiedziana we współczesnej Europie”, 41.

46 On the subject of the *kadi*, judges exerting a significant influence on Islamic jurisprudence, see Glenn, *Legal Traditions of the World*, 171-223. The author furthermore presents the ‘Hindu legal tradition’ (273-303) and the ‘Asian legal tradition’ (304-443). Knowledge of the role of principles in these families of law facilitates a confrontation especially with the role of principles in the common law culture (224-272).

principles of law should be treated with due deference. This is evidenced by the judgments of the ICJ⁴⁷ and international criminal courts,⁴⁸ WTO panels,⁴⁹ CJEU⁵⁰ and international administrative courts.⁵¹

The Byzantine origins of Germanic, Scandinavian and Slavic law contributed to the flourishing of the dogmatics of international law. Evidence of the existence of a dogmatic approach to law in international relations can be found by looking at the general principles of law, as recognised by civilised nations through the prism of the general principles of law as written down in the UNCITRAL (such as the principle of good faith) or the CoPM (such

47 See *Jaworzina Case*, advisory opinion of 6 December 1923, PCIJ Series B, no. 8, 37-38 (dismissing Poland's complaint based on the "traditional principle" *ejus est interpretare legem cuius condere*); *Mavrommatis Jerusalem Concessions*, judgment of 26 March 1925, PCIJ Series A, no. 5, 30 (referring to "principles which seem to be generally accepted in regard to contracts"); *Case concerning the repayment of Serbian loans contracted in France*, Judgment of 2 July 1929, PCIJ Series A, no. 20/21, 38-39 (rejecting an application of the doctrine of estoppel); *Interpretation of the Greek-Turkish Agreement of 1 December 1926*, advisory opinion of 28 August 1928, PCIJ Series B, No. 16, 20 (applying the principle of *compétence- compétence*); *Chorzów factory case (Germany/Poland)*, judgment of 27 July 1927, PCIJ Series A, No. 9, 31; *North Sea continental shelf case (Federal Republic of Germany/Netherlands)*, ICJ judgment of 20 February 1969, ICJ Reports 1969, 21-22, paras. 17-18 (dismissal of German claims based on the argument of "just and equitable share as a general principle of law in the sense of Article 38(1)(c) of the Statute"); *Rights of Passage through Indian Territory*, ICJ judgment of 12 April 1960, ICJ Reports 1960, 43. Among more recent judgments, it is worth noting the application of the good faith presumption in the judgment concerning negotiations for the suspension of the nuclear arms race and disarmament (*Marshall Islands v. United Kingdom*), Memorial of the Marshall Islands, para. 182; abuse of law in the Antarctic whaling case (*Australia v. Japan: New Zealand intervening*), Counter-Memorial of Japan, para. 9.40 et seq.); calculation of compensation in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Memorial on Compensation of Guinea, para. 13; *exceptio non adimpleti contractus* and in Application of the Interim Agreement of 13 September 1995 (*FYROM v. Greece*), Counter-Memorial of Greece, para. 8.1 et seq.; *Reply of North Macedonia*, para. 5.54 et seq.; *Rejoinder of Greece*, para. 8.6 et seq.); Exclusion of Unlawfully Obtained Evidence in Criminal Proceedings in *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Memorial of Mexico, paras. 21, 374, 380; *Counter-Memorial of the United States*, paras. 8.27 et seq.).

48 *Situation in the Democratic Republic of the Congo*, ICC judgment of 13 July 2006 (ICC-01/04), para. 32 (refusing to allow an appeal based on general principles of law not provided for in the Rome Statute); *Prosecutor v. Jean-Paul Akayesu*, judgment of 2 September 1998, Trial Chamber (ICTR-96-4-T), para. 501 (referring to the general principles of criminal law – *in dubio pro reo*).

49 WTO Appellate Body Report, *United States – Ban on Imports of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 158; WTO Appellate Body Report, *Brazil – Measures Affecting the Importation of Retreaded Tires*, WT/DS332/AB/R, 3 December 2007, para. 224 (referring to good faith and the abuse of rights).

50 Castellarin, "General Principles of EU Law and General International Law", 131-148.

51 Klabbbers, Reinisch, "Sources of International Organisations' Law: Why Custom and General Principles are crucial", 1022.

as the principle of equity)⁵² or the interpretation of treaty norms. This can be seen in terms of each of the three elements of general principles of law within the meaning of Article 38(1)(c) of the ICJ Statute: general principles of law, recognition and civilised nations. The most controversial issue has to do with the relationship between principles and rules. During the debate on the Commission's report, Fitzmaurice pointed out the logic behind them. While rules are designed to concentrate on what they are bound to express, principles are the result of answering the question why?⁵³ Judge Cançado Trindade, in turn, drew attention to the etymology of principles, deriving them from the Latin word *principium*. In his view, general principles of law are *prima principia*, which refer to the entire legal order (both national and international, and today we would say regional as well).⁵⁴ They are the ones that justify and inspire the integration process through law in every forum. This applies to general⁵⁵ and fundamental principles.

The second element of principles within the meaning of Article 38(1)(c) of the ICJ Statute relates to their recognition in practice. In this context, it is considered what the relations are between general principles of law, recognised by civilised nations and international custom as evidence of general practice accepted as law within the meaning of Article 38(1)(b) of the ICJ Statute. This relationship was most accurately and clearly set out by B. Cheng in his work *General Principles of Law as Applied by International Courts or Tribunals* (Cambridge University Press, Cambridge 1953, 24). According to his position, recognition by civilised nations does not require a general practice to be stipulated as law. Article 38(1)(c) testifies to the existence of a certain principle arising from the nature of law (principles intrinsically legal in nature).⁵⁶ The term civilised nations has historical connotations. It dates back to a time when only the so-called civilised nations participated

52 The 1982 Convention on the Law of the Sea is a kind of constitution to which the conventions adopted under the auspices of the IMO, including SOLAS and MARPOL, are subordinate. On the latter see Mik, "Rola konwencji i aktów Międzynarodowej Organizacji Morskiej w prawie Unii Europejskiej", 281-305. Konopačka, "Metody i poziom zintegrowania prawa ochrony środowiska morskiego w UE", 467-483.

53 Fitzmaurice, *The General Principles of International Law considered from the Standpoint of the Rule of Law*, 7.

54 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ judgment of 20 April 2010, ICJ Reports 2010, 14, separate opinion of Judge Cançado Trindade, 210, para. 201.

55 In this vein, the ICJ spoke in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, ICJ judgment of 12 October 1984, ICJ Reports 1984, 288-290, para. 79.

56 Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 24.

in the creation of international law and were obliged to comply with it.⁵⁷ All other nations – according to B. Cheng – did not belong to this group.⁵⁸ Today, this term is already considered anachronistic, although we submit that recent developments point to the fact that some states need to reconsider their adherence certain fundamental values shared by a global family of nations.

Scepticism about the process of change taking place in international relations is unjustified. Authors of different nationalities, with the highest qualifications in international law, should recognise the chaos prevailing on the market (the paradox of control and arbitrariness) and in culture (in Hobbesian, Lockean and Kantian versions)⁵⁹ and justify the abandonment of practices associated with the realisation of *realpolitik*, which means treating others (including androids and other non-human creatures) in a selfish manner, as if the others were nothing more than objects.

The debate on the relationship between international law and domestic law is made more difficult by the acceptance of two general models: dualism (promoted by scholars of the calibre of Tripel and Anzilotti, adopted in Ireland, the United Kingdom and many Commonwealth countries, in the Scandinavian countries and to some extent in Italy and Germany) and monism (promoted by Kelsen, adopted in Spain, Portugal, France, Belgium, the Netherlands, Switzerland, Austria, as well as in the USA and many Latin American and African countries). Alongside dualism, multicentrism has recently emerged as a view that is also in opposition to and its new version in the form of an integrated legal order.⁶⁰ Dualism and multicentrism assume the existence of two or more legal orders existing side by side (i.e. legal relations of an external nature). In contrast, the doctrine of monism and the theory of the integrated legal order favour the process of merging legal orders into a single entity that has several constituent parts within it that are dependent on each other (i.e. the development of legal relations

57 Sloan, “Civilized nations”, para. 2.

58 Cheng, *ibidem*, 25.

59 The literature draws attention to the structure in the role of law under anarchy. See Wendt, *Spółeczna teoria stosunków międzynarodowych*, 231-288. The author exposes the views of Hobbes, Locke and Kant as those which have had the greatest impact on international relations. Cf. also. Konopacka, “Wielopoziomowa Niesprawiedliwość a Sędzia albo Złota Legenda o Świętym Jerzym opowiedziana we współczesnej Europie”, 17.

60 Lang, “Wokół “Multicentryczności systemu prawa”, 95, Kalisz, “Multicentryczność systemu prawa polskiego a działalność orzecznicza Europejskiego Trybunału Sprawiedliwości i Europejskiego Trybunału Praw Człowieka”, 35–36, Łętowska, “Multicentryczność systemu prawa i wykładnia jej przyjazna”, *passim*; Kotowski, “Zjawisko multicentryczności systemu prawa z perspektywy koncepcji integracyjnej”, 101-122.

of an internal nature). Under this assumption, there is greater freedom to decide on the constitutional principles (principle of subsidiarity and principle of proportionality) and on the operability of the system (principle of direct effect, principle of supremacy).

In contemporary legal relations, there is a need to reconstruct the legal order. The new division was proposed by Ronald Dworkin. His concept is held in high regard not only in the United States, but practically all over the world, except on the European continent, where his predecessor at Oxford, the positivist Hart,⁶¹ is a major influence on the philosophy of law. The creator of the third way in jurisprudence (combining the advantages of legal-naturalist and positivist concepts) emphasised principles (principles) and the requirements of legal policies (policies), distinguishing them from rules (rules). At the same time, he assumed that the court should weigh principles when they are in conflict. In this light, he formed the concept of a single correct decision. At the centre of his focus is Judge Hercules, who seeks to answer the question: why do certain patterns of argument dominate over others? This view of the law can be applied to the norms of any forum: not only national (which Dworkin had before him), but also regional and international.⁶² The glue that binds the law together vertically are Dworkin's principles and policies, and what disrupts their unity are rules, created in an all-or-nothing fashion. In our view, rules should be subordinated to principles with the force of *ius cogens*⁶³ and *erga omnes* reach. "The decision reached by a court in a difficult case requires recourse to extra-textual principles (according to Ronald Dworkin's morally oriented theory)⁶⁴ or the application of a rule or group of rules from which it follows "what the law is" (as Dworkin's more pragmatic and positivist teacher H.L.A. Hart preferred to describe the process).⁶⁵ In doing so, the court makes sure that the legitimate expectations of both parties to the dispute (e.g. debtor and

61 See, amongst others, Zirk-Sadowski, *Wprowadzenie do filozofii prawa*, 197-214. Chapter two in Part Two, which discusses the relationship between Ronald Dworkin's integral philosophy of law and positivist philosophy of law, is devoted to this issue.

62 Mik, *Fenomenologia regionalnej integracji państw: studium prawa międzynarodowego. Vol. 2, Regionalne organizacje integracyjne z perspektywy analitycznej prawa międzynarodowego*, 5-25.

63 A term introduced by Article 53 of the 1969 Vienna Convention on the Law of Treaties, the codification conference expressly declined to specify the content of the catalogue of norms. Thus, there is no obstacle to referring to *ius cogens* as rules as immutable and peremptory norms applicable to all (*erga omnes*). Menkes, "Ius cogens", 132-134.

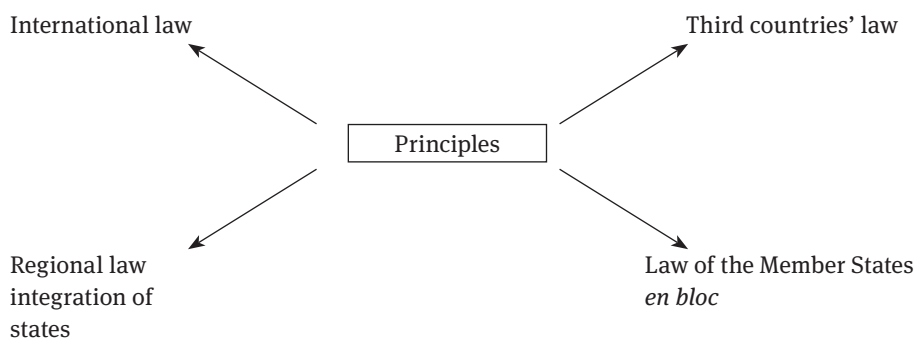
64 Dworkin, *Biorąc prawa poważnie*, 120-122.

65 Hart, *Pojęcie prawa (The Concept of Law)*, 58.

creditor) have been taken into account. Knowing this, or at least expecting it from the court (expecting a just result), both parties should feel secure. This sense of security promotes acceptance and compliance with the judgment.⁶⁶

Martti Koskenniemi, in his report *Peremptory Norms of General International Law (jus cogens)*, emphasised that general rules of international law (together with international treaties and customs) can create peremptory norms for the entire legal order.⁶⁷ Already in the architecture of ancient Rome, there appeared this *genius loci*, this space divided into parts by lines intersecting at right angles: the most important, called *cardo* (axis of the world) and the second, called *decumanus* (symbolising the course of the sun on the horizon). The universalism of the *regulae iuris* enabled jurists to agree across divisions across the empire on three continents, with the *forum Romanum* as the centre. Today, universalism fights against particularism as a reaction to the globalisation of the market and the uniformisation of culture. Tracing the dynamics of digitalisation and the automation of public life, one can conclude that universalism will prevail.

The reflections born of the impulse to think presuppose the acceptance of a new division of the sources of law (the universality of principles and their radiation to the entire legal order shaped in international, regional and national forums) and a new division of the legal order into component parts (with the assumption that the relations between these parts are internal and can be shaped by judges). This can be illustrated by means of the following figure:



Source: authors.

66 Konopacka, “Wielopoziomowa niesprawiedliwość a sędzia albo Złota Legenda o Świętym Jerzym opowiedziana we współczesnej Europie”, 47.

67 “*Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International law*”, Report of the Study Group of the International Law Commission finalised by Martti Koskenniemi (A/CN.4/L.682 and Corr. 1 and Add.1), 254.

A map of structural theorising modelled on the sketch of a Roman augur during the consecration of a place can be used when assessing the development of thought to date and their impact on the role of general principles of law, recognised by civilised nations. The Roman rule as a summary of the law (*brevi rerum narratio*), with a more normative than descriptive character (*non ex regula ius summat, sed ex iure quod est regula fiat*) and functions similar to *causae connectio* in the process,⁶⁸ can be considered the prototype of all present-day principles of law. The similarity of modern rules to Roman rules is evidenced by the autonomy of Roman jurists, who, according to their knowledge of divine and human things and their knowledge of what is just and unjust had to decide whether its application in a given case would be in accordance with the principles of equity and whether it would be in harmony with the other elements of the legal order, and if not, they should deviate from the application of the rule. This understanding of Roman rules and modern rules shows that they were born in practice, i.e. in the initial phase of the creation of sources of law.

Many past and present rules/principles are characterised by universalism. It is due to the dialectical method of definitio by *divisio* or *partitio* in a particular case.⁶⁹ Medieval glossators began to distinguish between the terms *regula* and *definitio*. This was the beginning of the separation of induction (the generalisation of detailed determinations) from deduction (the analytical explanation of the essence of things).⁷⁰ and the renaissance of Roman *paremia* on our continent. In order to build a bridge of thought between the West and the East, it would be advisable to confront the thoughts of eminent Roman jurists with those of Constantine. Judicial dialogue can play an important role in transforming “law of force” (order without law) into “force of law” (order with law), provided that it is not only horizontal but also vertical and even diagonal.⁷¹ The focus of this dialogue should now be on practice, where the seeds of future customs or agreements can be discerned, and this is because, in the process of digitalisation and automation of public life, many codes of conduct are born, established by *tacit* acceptance. Their violation leads to disputes resolved through diplomatic methods such as negotiation, mediation, good offices or conciliation. Once practice begins

68 Wołodkiewicz, *Regulae iuris*, 1-11.

69 Ibidem.

70 Ibidem.

71 This topic is presented in her post-doctoral book on judicial dialogue by M. Konopacka.

to develop into custom or consensus, then these matters will certainly begin to be dealt with in court and arbitration procedures as well. The phenomenon of law amalgamation depends on the methodology of contemporary *regulae iuris*. This process is fostered by the tendency to replace traditional comparative law (comparison of histories, comparison of legislations, comparison of systems) by contemporary legal comparativism (analysis of the structure of the legal system, analysis of the content of legal relations and vision of the development of law)⁷² and confrontation of legal methods (logic, analysis, argumentation and hermeneutics) with jurisprudence (historical, critical, sociological and economic)⁷³. The most initiated should furthermore recognise the virtues of inter-trans and supra-disciplinary research (on the assumption that supra means between, trans means between and above, and supra means exclusively above disciplines).⁷⁴ Considering all aspects of the contemporary methodology of legal sciences leads to the conviction that the traditional general principles of law, recognised by civilised nations are likely to play a key role in the future. As universal principles, they can radiate to the entire integrated legal order.

3. The Future

3.1. Reconstructing the System of International Law

3.1.1. *The Necessity to Take Into Account General Principles of Private Law*

The tendency for the spheres of public law and private law to interpenetrate one another justifies considering the possibility of including the general principles of private law, including conflict of laws rules, in future work on the general principles of universal law. The question of why common principles are sought is a philosophical one, requiring a presentation of both the historical development of contract law principles in Europe, as well as the currently observed process of globalisation and, in particular, one of its manifestations – the integration of law in the European Union (EU). It is thus at the same time a question of whether the Europeanisation

72 Brodecki, “Art de comparaison”, 15-24.

73 Brodecki, “Jurysprudencja”, 144-147.

74 Brodecki, *Supradyscyplinarna analiza praw człowieka*, passim.

of law is necessary and, if so, why.⁷⁵ The proposal for an answer should begin by identifying the objective to be served by private codifications, which is facilitated by the adoption of two fundamental criteria: efficiency and fairness. The full picture of the topic at hand will only be obtained once the question of how the general rules function and how they should function in the EU legal area is answered.⁷⁶ The question of how they function is resolved descriptively as well as normatively. For example, the private codifications of international contract law will continue to function as general rules applicable to cross-border contracts, i.e. as *lex mercatoria*.⁷⁷ An analogous role has long been played by the UNIDROIT Principles of International Commercial Contracts, incorporated or chosen by the parties to a contract (a substantive legal indication in line with recital 13 and Article 3 of the Rome I Regulation), but also applied by arbitrators, especially those ruling *ex aequo et bono*.⁷⁸ Precedents based on general principles common to the traditions of the Member States can also be created by the CJEU, although with regard to contract law principles this case law is fragmented. An example of the incomplete success of initiatives intending to codify general principles on a regional basis is the Draft Common Frame of Reference (DCFR), by Ch. von Bar, among others. The DCFR is a set of principles of European civil law, based mainly on the concept of the Ole Lando Commission, which during two decades of comparative efforts created the PECL (Principles of European Contract Law).⁷⁹ These documents became the basis for the European Commission's proposal for a Common European Sales Law, an optional regulation to strengthen consumer confidence in intra-EU cross-border transactions.⁸⁰ Also this project, much reduced

75 This is also the first of two fundamental questions Professor Ole Lando asks when reflecting on the features of contract law in the third millennium. Lando, "Some Features of the Law of Contract in the Third Millennium".

76 "The term 'principle' has many meanings if one considers the contexts in which the word is used in relation to attempts to harmonise, unify and codify European private law." Alpa, "CESL, Fundamental Rights, General Principles, Rules of Contract Law", 838.

77 Fuchs, *Lex mercatoria w międzynarodowym obrocie handlowym*, 65. More on UNIDROIT rules see Rajski, "Zasady międzynarodowych kontraktów handlowych UNIDROIT", 237-249. The UNIDROIT and PECL Principles are briefly described by Hartkamp, "Principles of Contract Law", 125-143.

78 Boele Woelki, "Principles and the Private International Law", 666, Hartkamp, "The Use of the UNIDROIT Principles of International Commercial Contracts by National and Supranational Courts", 256; Lando, "Some Issues Relating to the Law Applicable to Contractual Obligations", 60.

79 Konopacka, "Zasady Europejskiego Prawa Umów".

80 Alpa, "CESL, Fundamental Rights, General Principles, Rules of Contract Law", 837 et seq.

compared to the ambitious idea of a European Civil Code, was abandoned in 2011 by the Juncker Commission and on 21 October 2019. The Conference of Presidents (CoP) called on Parliament to ask the EC to formally withdraw the CESL proposal.

Making sense of the establishment of common European principles of civil law, or even just of contract law in relation to consumer sales, is not possible without considering the legal nature of the principles collected in private initiatives. The status of Lando's European contract law principles resulted from the limitations imposed on the Community legislator by the Treaty Establishing the European Community. A look at the methods of the integration of civil law in the EU leads to the observation that the principles of European contract law went beyond the traditionally accepted techniques, which involved a lack of treaty legitimacy and political will to create a binding instrument in the form of an intra-EU convention, for example. However, as the authors of the idea of creating a set of principles themselves wanted, they could still be the European equivalent of the American restatement, i.e. a private codification based on a comparative analysis of legal institutions in different legal systems (in the American restatement – in individual US states, in its European version – in the EU Member States) and the so-called better law approach, i.e. the selection of the best solution or the creation of an original, more perfect principle, or the search for common content in the regulation of individual institutions (common core approach).⁸¹ At this stage, it is questionable whether there will ever be the political will and the legal possibility to reactivate the idea of codifying common principles of civil law or even just contract law, in addition to a collection of legal acts protecting consumers in certain selected aspects. However, principles such as the DCFR or the PECL continue to function as model law, serving as an invaluable model for national legislators, as well as for the institutions creating EU legislation, fragmentarily – within the scope of the TFEU regulation – harmonising contract law.⁸² Nevertheless, the example described above of decoding common European civil law principles from national systems and international circulation and encoding them in a binding formula if only

81 Guido Alpa writes about the problems in this regard in the context of the principle of good faith: Alpa, *I Principi Generali*, 249-257.

82 Busch, "Identification of Gaps and Gap-filling under the Common European Sales Law – a Model for Uniform Law Instruments?", 29-44.

as an opt-in instrument brings to mind the myth of Sisyphus rather than that of Hercules.

*3.1.2. The Necessity to Take Into Account the General Principles of Law
in the Regional Integration of States*

In the future, more importance should be given to the law of the regional integration of states, which has an increasing impact on public international law. The preliminary ruling procedure under Article 267 TFEU presupposes the existence of a dialogue, albeit perceived differently by EU and national judges. It is up to the latter to implement the policies envisaged by primary and secondary law, but also, through Article 6 TEU, by the general principles of law, reflecting and linking the constitutional traditions of the Member States. Often these European national judges are looking for a key, opening the door to a pro-EU interpretation of national law or to the direct effectiveness in the national system of EU norms. The Court is therefore asked to pronounce on the content of a standard that must ultimately be incorporated as uniformly as possible into national systems. Sometimes, knowledge of the legal craftsmanship, which is otherwise excellent among judges of this stature, is not enough to produce such an original key to order for the national court. In the more difficult cases, which sometimes even require the enlargement of the panel to the Grand Chamber or a decision by the full court, the judges create a history of EU law, e.g. in the form of systemic precedents. The opinions of Advocates General cannot be overestimated, who, designing an often extremely sophisticated key to the problem presented, are able to avoid the constraining rules of the Court to rule within their jurisdiction. Bravely applying the comparative method in a strict sense, the advocates reach for arguments contained in the jurisprudence of foreign courts, even if they only have a persuasive dimension.⁸³

The jurisprudence of the CJEU cannot be denied significance for the development of the general principles of law within its jurisdiction, which gives the Court influence over the lives of almost half a billion people and around 25 million economic entities operating within the EU, not to mention NGOs or companies from third countries targeting the EU and affecting the internal market. Sometimes, despite the theoretical possibility of applying

83 C-450/93, *Kalanke*, ECLI:EU:C:1995:322, paras. 8 and 9, footnotes 8 and 10 referring to affirmative action in SCOTUS case law.

the doctrine of *acte clair* or *acte éclairé*, when confronted with an issue with an EU dimension, a national judge prefers to ‘shift responsibility’ for a controversial decision to the Luxembourg judges. However, the opposite also happens: the highest-ranking national courts, which are obliged under the Treaty and the case law of the CJEU to ask a question for a preliminary ruling,⁸⁴ do not do so, stating that this should have been done by the court of appeal, or simply keeping silent on the issue.

An interesting example of analysis of the reading and evolution of the general principles of law in the judicial dialogue is the *Intermodal Transports* judgment,⁸⁵ in which “the Court confirmed that the adoption by the administrative authorities of a different position (...) than the one to be adopted in the case pending before the supreme court does not exclude the possibility of relying on the doctrine of *acte clair*.” However, the exemption of the supreme courts from the obligation to ask a question under Article 267 TFEU does not apply to questions concerning the validity of legal acts of the Union.⁸⁶ The belief that a national court of first instance is not precluded from relying on the *acte clair* doctrine when a lower court in the same State has referred a similar question of law to the Court, the Advocate General relied on three considerations.

The first argument is structural and paradoxically alludes to MacIntyre’s proof of the non-existence of human rights: the EU, with its twenty-four official languages and the greater emphasis on the role of national supreme courts introduced by the Lisbon Treaty (Article 19(2) TEU), cannot be bound by the doctrine of the *Cilfit* era,⁸⁷ as the possibility of its real application today would be at best as likely ‘as meeting a unicorn’. “Secondly, the system of checks and balances associated with the third paragraph of Article 267 TFEU has also evolved. The Commission reaffirms the obligation to supervise the use of the *acte clair* doctrine by national courts of last instance.” The situation has also been changed by the *Francovich*⁸⁸ and *Köbler*⁸⁹ rulings, which

84 That is, those against whose decisions national law does not provide for an appeal – the courts of highest instance. C-99/00, *Lyckeskog*, ECLI:EU:C:2002:329. Broberg, “National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom”, 243-256.

85 C-495/03, ECLI:EU:C:2005:552.

86 C-354/09, *Gaston-Schul*, ECLI:EU:C:2010:439.

87 C-283/81, ECLI:EU:C:1982:335.

88 C-6/90 and C-9/90, ECLI:EU:C:1991:428.

89 C-224/01, ECLI:EU:C:2003:513.

imply severe consequences for a Member State for failing to submit a request under the third paragraph of Article 267 TFEU.

Third, as a matter of fact, the national courts of first instance do not in practice exclude the invocation of the *acte clair* doctrine (directly or indirectly), even in cases where the judgment appealed against (...) contains divergent opinions. (...) This would seem to be contrary both to contemporary trends and to the spirit of cooperation that prevails in preliminary ruling proceedings between the Court and the (highest) national courts.

In the case at hand, *Hoge Raad* was not in doubt as to which position to take, but merely asked the Court to clarify whether the lower court's concerns necessarily affected the discretion of the highest court. "However, as Advocate General C. Stix-Hackl, the obviousness of the correct interpretation is not in general incompatible with the fact that a provision can be understood in two ways". The requirement that "a national court or tribunal [must be] convinced that the issue in question is equally obvious to the courts of other Member States and the Court of Justice" should not be treated as absolute, according to Advocate Wahl. "Rather, it should be understood to mean that the judges in the last instance of appeal deciding the case should be convinced in *their minds* that other judges would agree with them."⁹⁰

3.2. The Vision of the UN ILC

The changes proposed by the ILC with regard to the analysis of general principles of law (*GPRs*) in its first report on this⁹¹ reflect the practice of states and the jurisprudence of judicial and arbitral bodies in various fora. They concern:

- general principles of law as a source of international law;
- making their enforcement subject to the recognition by States to cover those which;
 - a. derive from national legal systems;
 - b. are found in the international legal system.

⁹⁰ C-72/14 and C-197/14, *X v Inspecteur van Rijksbelastingdienst and T.A. van Dijk et al*, ECLI:EU:C:2015:564.

⁹¹ M. Vázquez-Bermúdez, "First Report on General Principles of Law", 5 April 2019, International Law Commission, 71st Session, Geneva, 29 April-7 June and 8 July-9 August 2019, A/CN.4/732.

Most of the judgments cited in the report fall within the standard of easy cases in which conflicts are removed by means of legal inference (*argumentum a similibi*, *argumentum a contrario*, *argumentum a fortiori*) or a systemic directive of interpretation (*argumentum a rubica*). In this report, there are few traces of so-called hard cases, which, according to Hart, require going outside the legal system thanks to open-text concepts, while, according to Dworkin, find a solution within the whole legal system on the basis of principles and/or guidelines. Overlooking many opposites (such as law versus morality, law versus science, law versus technology, law versus economics) makes it difficult to understand the transformations taking place in contemporary international relations. In order to do so, it is necessary to go beyond the ‘law versus law’ pattern. This postulate is reminiscent of the well-known saying: Think out of the box.⁹²

The Second Report of the ILC⁹³ summarises the discussion so far and shows the spheres where consensus has been reached and those on which not all States have the same optics. It also notes the moderate response of States to the request formulated in the First Report to provide information on their positions and practices on the application and respect of general principles of law, stressing the importance of dialogue between States, the Commission and the Sixth Committee, including through informal consultations. The importance of long-term projects was reiterated, such as: Universal criminal jurisdiction and Sea level rise in the context of international law, included in the Commission’s multi-annual work programme.⁹⁴

The framework of the Commission’s work has been redefined, covering: the legal nature of general principles of law as a source of international law; the genesis and categories of general principles of law; the functions of the general principles of law and their relationship to other sources of international law; and, last but not least, the identification of general principles of law. The starting point of the Commission’s work has invariably been Article 38(1)(c) of the Statute of the ICJ, analysed in the light of the practice of States and the jurisprudence of international courts and tribunals. It was reaffirmed that recognition is an essential condition for

92 Brodecki, Konopacka, “Thinking out of the Box: The Human Being in the AI Era”, 195-214.

93 M. Vázquez-Bermúdez (Special Rapporteur), “Second report on general principles of law”, 9 April 2020, International Law Commission, 72nd Session, Geneva, 27 April -5 June and 6 July -7 August 2020, A/CN.4/741.

94 Official Minutes of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10), para. 369.

the existence of a general principle of law and that the term civilised nations as anachronistic should, in the opinion of most States, no longer be used. As “in today’s world all nations must be considered civilized”.⁹⁵

Commission members unanimously supported the category of general principles of law derived from national legal systems and agreed with the general approach that a two-step analysis was needed to identify such principles. Many members of the Commission favoured the category of general principles of law formed in the international legal system. At the same time, various concerns were raised, including how such principles should be identified and how they relate to customary international law.

Delegations mostly agreed with the description and relevance in the context of the work in progress of the first category of the general principles of law. A majority of States also supported the second category of the general principles of law but some doubts were expressed as to whether this category fell within the scope of the topic under consideration, whether there was sufficient State practice to arrive at constructive conclusions, and whether such principles fell within the scope of the sources of international law. Delegations also stressed that the Commission should pay attention to the distinction between general principles of law and customary international law.

A number of questions were raised in relation to this methodology, in particular:

- a. the precise manner in which recognition is expressed;
- b. the extent to which the principle must be present in national legal orders;
- c. the precise meaning of the term “community of nations” in this context; and
- d. how to distinguish the methodology for identifying general principles of law from the methodology for identifying customary international law.

The UN General Assembly, referring to the ILC Reports, recalls the importance of multilingualism and intergovernmental dialogue in the evolution of the General Principles and suggests that the Secretariat post an interim summary of its work in English and French on the website of the ILC. “It also welcomes the Secretariat’s efforts to ensure the timely

⁹⁵ However, in the context of Russia’s attack on Ukraine and the behaviour of the Russian delegate at the UN, this view should, according to both authors, be revised. In the coming years, one can even expect a renaissance of the concept of civilised nations.

and efficient processing of the ILC's documents" and stresses the importance of publishing the ninth edition of the Works of the ILC also in Chinese, French, Russian, Spanish, and reiterates its request that the Secretary-General continue to publish the Works of the ILC at the beginning of every five years in all six official languages and the reports of international arbitral awards in English or French with summaries, in addition to the Advisory Opinions and the Order of the ICJ in all six official languages every five years.⁹⁶

According to the Resolution of 9 December 2021, further work is scheduled for 18 April - 3 June and 4 July - 5 August 2022 at the United Nations Office at Geneva, during the seventy-third session of the ILC. Being the fruit of these debates, Report Three completes the eleven-point draft conclusions of the Commission's work,⁹⁷ Conclusion 1 sets out the focus of the ILC: general principles of law as a source of international law. Conclusion 2 includes the demand to drop the phrase civilised nations, stating: "For there to be a general principle of law, it must be recognised by the community of nations". Two categories of general principles of law were distinguished: those that derive from national legal systems and those that may arise within the international legal system. According to the Conclusion 4,

in order to establish the existence and content of a general principle of law emanating from national legal orders, it is necessary to establish the existence of a principle common to the various legal systems of the world and its transposition into the international legal system (the two-stage test). The need for a comparative analysis of national legal systems to establish the existence of a principle common to the different legal systems of the world is also stressed. It should be broad and representative, covering different regions of the world.

The comparative analysis should include an assessment of national legislation and decisions of national courts and other relevant material. A principle common to the different legal systems of the world can be transposed into the international legal system as long as it is compatible with it (Conclusion 6). According to Conclusion 7,

96 72nd Session of the United Nations, Report of the International Law Commission on the work of its seventy-second session, Agenda item 82, Resolution adopted by the General Assembly on 9 December 2021, A/RES/76/111 17 December 2021, on the report of the Sixth Committee (A/76/473, para. 12).

97 A/CN.4/L.971.

in order to establish the existence and content of a general principle of law that may arise within the international legal system, it is necessary to establish that the community of nations has recognised the principle as inherent in the international legal system (without prejudice to the question of the possible existence of other general principles of law created within the international legal system).

The Conclusion 9 on the role of jurisprudence – by analogy with Article 38 of the ICJ Statute – specifies that judgments of international courts and tribunals, in particular of the ICJ, concerning the existence and content of general principles of law are an auxiliary means of establishing those principles. Judgments of the national courts on the existence and content of general principles of law, as well as doctrine, may also be taken into account as a subsidiary means, if necessary. The Conclusion 10 is devoted to the function of general principles of law. They are mainly used when other rules of international law fail to resolve an issue in whole or in part. General principles of law further contribute to the coherence of the international legal system. They are helpful in interpreting and filling gaps in the rules of international law and can be the source of primary rights and obligations as well as the basis for (secondary rights and obligations) and procedural rules. The final Conclusion sets out the relationship between general principles of law and treaties and customary international law. The first paragraph states that general principles of law, as a source of international law, are not in a hierarchical relationship with treaties and customary international law. A general principle of law may exist alongside a rule of the same or similar content contained in a treaty or customary international law, and any conflict between a general principle of law and a rule of a treaty or customary international law is to be resolved using generally accepted techniques of interpretation and conflict resolution in international law.

The debate on the final report of the ILC is scheduled to take place at the seventy-seventh session of the General Assembly on 24 October 2022.

Conclusions

In contemporary legal relations, law interacts with the market (as expressed in economic integration through law)⁹⁸ and with culture (as seen in the context of social integration and political integration). The dynamic development of integration processes is mainly determined by the phenomenology of the regional integration of states. It is to be hoped that in the course of further work members of the ILC will view the law of the regional integration of states as the glue of the entire legal order and not only of international law. If this were not the case, then the effect of the process of merging law in regions with international law would be to sever the bond between the law of regional integration of states and the law of member states, which is linked to it in an almost organic way.

The failure to recognise the changes taking place in international relations at the turn of the civilisation has also had the effect of making the existence of the general principles of law dependent on their recognition by states. The ignoring of entities with specific competences (global and regional international organisations and individuals) testifies to the dominance of the state in the international community and the aversion to the community of nations as the new *civitas gentium*. The deletion of the notion of civilised nations from Article 38(1)(c) of the ICJ Statute due to its archaic form demonstrates a lack of deeper reflection on international relations.

The position on the origin of general principles of law is indicative of the ILC's desire to preserve *the status quo* and tranquillity. The members of the Commission avoid asking the difficult questions that arise in contemporary international relations under the drive to colonise spaces beyond the jurisdictional boundaries of states. The claim that international agreements do not bind individuals and therefore do not constitute a barrier to private sector economic freedom in space⁹⁹ is an attempt to undermine

98 This scientific discipline was promoted in Poland by Professor Janusz Gilas in many of his publications and a textbook.

99 This was the position at the heart of the US Private Sector Space Activities Act. Many countries are following the same path in practice, although the authors believe that the vociferous international criticism of the commercialisation of space is valid. It is justified by the existence in Article 6(2) of the Moon Treaty and Article IV of the Outer Space Treaty of general principles governing the nature of the use of space resources for scientific purposes (this is to be done for the common good of all states and the international scientific community), which should furthermore be read in the context of the principle of the non-appropriation of space as

the role of general principles of law, established through the evolution of jurisprudence – including through mutual citations and various forms of dialogue – of international courts and national courts of principle, relativised to social, economic and technological developments. Can expansion beyond Earth’s orbit justify a break from this tradition? This is a rhetorical question to which the ILC should find an answer. A collection of studies for Professor Janusz Gilas’s 60th birthday was entitled “Peace and Justice through International Law”. Another collection prepared by the Professor’s students and the continuators of his thought could expose two ethical values (humanitarianism and justice) in confrontation with praxeological value (efficiency as a synthesis of rule of law and rationality) and security. This is what is required by looking at the law through the lens of the market and culture. It should not be forgotten that the synergy of law with economics, management, anthropology, sociology and psychology determines the recognition of law as a set of norms. This final reflection is illustrated by the ‘seal’:

M C
 Norm
 R

M=Market

C=Culture

R=Right.

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