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General principles of law as a source of international law

Загальні принципи права як джерело міжнародного права

Though general principles of law were included into the list of main sources of international law, there are many questions concerning their nature, scope and function, as well as of the criteria and methods for their identification.

General principles of law were enumerated in art. 38, para. 1 (c), of the Statute of the International Court of Justice as a source of international law. It reads: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: <...> (c) the general principles of law recognized by civilized nations”. This article was taken from the Statute of the Permanent Court of International Justice of the League of Nations.

General principles of law are also enumerated among the main sources of international law in the Conclusions of the Study Group of the UNO International Law Commission (ILC) on Fragmentation of International Law¹. It is stated that “the main sources of international law (treaties, custom and general principles of law as laid out in Article 38 of the Statute of the International Court of Justice) are not in a hierarchical relationship *inter se*”.

The First report on general principles of law was prepared by Marcelo Vázquez-Bermúdez, Special Rapporteur at the request of the ILC in 2019, thus complementing the existing work on the sources of international law identified in art. 38, para. 1, of the Statute of the International Court of Justice².

Marcelo Vázquez-Bermúdez came to three conclusions in the Report: 1) general principles of law is a source of international law; 2) for a general principle of law to exist, it must be generally recognized by States; 3) general principles of law comprise those: (a) derived from national legal systems; (b) formed within the international legal system³. The last conclusion seems to be the most important as traditionally general principles of law were considered

¹ Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. 2006. P. 7. URL: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf

² First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur. ILC Seventy-first Session Geneva, 29 April – 7 June and 8 July – 9 August 2019. URL: <https://documents.un.org/doc/undoc/gen/n19/100/93/pdf/n1910093.pdf?token=uBbh96glEOs8Ti4et9&fe=true>

³ Ibid.

to be principles common to national legal systems which were used to fill the gaps in international law system.

The reference to general principles of law may be found in many other international instruments. Thus, the International Covenant on Civil and Political Rights includes art. 15 (2) “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”.

The Convention for the Protection of Human Rights and Fundamental Freedoms includes art. 7 (2) with the same provision: “2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations”.

The Rome Statute of the International Criminal Court (ICC) in art. 21 also refers to general principles of law: “The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards...”.

General principles of law have been also referred to by international adjudicative bodies, starting with Permanent Court of International Justice. The International Court of Justice (ICJ) has relied upon general principles of law in many contentious cases and advisory opinions. Thus, in the Advisory Opinion on Reservations to the Convention on Genocide, ICJ referred to the principles underlying the Genocide Convention as “principles which are recognized by civilized nations as binding on States, even without any conventional obligation”⁴. In this Advisory Opinion, the ICJ stated as follows: “The origins of the [Genocide] Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception that the principles underlying the Convention are principles which are recognized by civilized nations, binding on States, even without any conventional obligation, points directly to Article 38, paragraph 1 (c), of the ICJ Statute.

As the author of the Report Marcelo Vázquez-Bermúdez states, in this Advisory Opinion there is no reference to principles common to national legal systems. It appears that the Court “found the basis for the existence of a principle in the recognition by States, noting that such recognition was expressed in resolution 96 (I) of the General Assembly, which marked ‘the intention of the United Nations to condemn and punish genocide as a ‘crime under international law’”⁵. It clearly indicates that general principles of law should not

⁴ Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 15, at p. 23.

necessarily be common to national legal systems but may be formulated in the international law system itself.

Beyond International Court of Justice general principles of law have been applied by Permanent International Arbitration, inter-State arbitration, the International Criminal Court, and international criminal *ad hoc* tribunals as well as by the regional human rights courts and other judicial and quasi-judicial bodies. Their practice relating to general principles of law leaves no doubt as to relevance of general principles of law for the international legal order.

Thus, as cited by Vázquez-Bermúdez, already in Nurnberg, the Tribunal had referred to certain principles of criminal law to render its decisions, such as the general principles of justice applied by jurists and practiced by military courts⁶. Subsequently, the General Assembly affirmed in resolution 95 (I) “the principles of international law recognized by the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal”⁷. In the Preamble to the Resolution the Secretary-General declared that “[i]n the interests of peace, and in order to protect mankind against future wars, it will be of decisive significance to have the principles which were employed in the Nürnberg trials made a permanent part of the body of international law as quickly as possible.” Moreover, as the rapporteur Vázquez-Bermúdez mentions, the Nürnberg principles were reaffirmed as “general principles of law recognized by the community of nations” and “general principles of law recognised by civilised nations” in the International Covenant on Civil and Political Rights and the European Convention on Human Rights respectively.

The Trial chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Kupreškić case while referring to general principles of law as part of the law to be applied by the ICTY, and addressing general principles regarding multiple offences, considered that, since it could not find any “general principle of law common to all major legal systems of the world”, it had to “endeavour to look for a general principle of law consonant with the fundamental features and the basic requirements of international criminal justice”⁸.

General principles common to national legal systems as well as those which were developed by international law system are numerous and are characterized by different degree of generality. Among the most frequently cited of them are the maxims like *lex specialis derogat legi generali*, *lex posterior derogat legi priori*, *abus de droit*, however many other general principles were referred to in theory and practice of international law, and there exists no exhaustive list of them.

Thus, general principles of law constitute one of the main sources of international law which may be derived from national legal systems or formed within the international legal system. The relationship of general principles of law with other sources of international law (rules of conventional and customary law) is complicated, but all of them are subject to the requirement of recognition by States.

⁵ First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur. ILC Seventy-first Session Geneva, 29 April – 7 June and 8 July – 9 August 2019. P. 69. URL: <https://documents.un.org/doc/undoc/gen/n19/100/93/pdf/n1910093.pdf?token=uBbh96glE0s8Ti4et98fe=true>

⁶ International Military Tribunal (Nürnberg), Judgment of 1 October 1946. *American Journal of International Law*. 1947. Vol. 41. Pp. 172–333, at p. 219.

⁷ General Assembly resolution 95 (I) of 11 December 1946 “Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal”, Preamble. URL: https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf

⁸ Prosecutor v. Zoran Kupreškić et al., Judgment of 14 January 2000, Trial Chamber (IT-95-16-T), para. 738.