

HISTORICAL DEVELOPMENT AND CURRENT FORM OF UNWRITTEN SOURCES OF PUBLIC INTERNATIONAL LAW

HISTORICKÝ VÝVOJ A SÚČASNÁ PODOBA NEPÍSANÝCH PRAMEŇOV MEDZINÁRODNÉHO VEREJNÉHO PRÁVA¹

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ABSTRACT

The article deals with the historical development, legal nature and contemporary significance of three unwritten sources of public international law – international custom, general principles of law and tacit international agreements. The aim is to assess their position in the context of the growing dominance of treaty law and to identify trends in their further development. The research is based on qualitative legal analysis using historical, comparative, normative and teleological methods, with an emphasis on the views of the international law science, the case law of the International Court of Justice and the codification outputs of the UN International Law Commission. The authors conclude that despite the expansion of written sources, unwritten sources remain relevant and irreplaceable parts of the international legal order, especially in filling gaps in written sources of international law, its interpretation and ensuring its flexibility.

ABSTRAKT

Článok sa zaoberá historickým vývojom, právnou povahou a súčasným významom troch nepísaných prameňov medzinárodného práva verejného – medzinárodnej obyčaje, všeobecných právnych zásad a tacitných medzinárodných dohôd. Cieľom je posúdiť ich postavenie v kontexte rastúcej dominancie zmluvného práva a identifikovať trendy ich ďalšieho vývoja. Výskum je založený na kvalitatívnej právnej analýze využívajúcej historickú, komparatívnu, normatívnu a teleologickú metódu, s dôrazom na názory vedy medzinárodného práva, judikatúru Medzinárodného súdneho dvora a kodifikačné výstupy Komisie OSN pre medzinárodné právo. Autori dospeli k záveru, že napriek expanzii písaných prameňov zostávajú nepísané pramene relevantnými a nenahradiateľnými súčasťami medzinárodného právneho poriadku, najmä pri vyplňaní medzier v písaných prameňoch medzinárodného práva, jeho výklade a zabezpečovaní jeho flexibility.

I. INTRODUCTION

The existence of unwritten sources within public international law has a very long tradition. From a historical point of view, international custom is the most frequently occurring source, which dominated the sources of public international law in the period of the so-called traditional international law, i.e. from the second half of the 17th century practically until 1945. It is indisputable that even in contemporary public international law, it is a still-occurring source, formed through the long-term use of a given rule (lat. *usus longaevus*) in the form of

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legal precedents by States, followed by the emergence of the States' conviction regarding the legal binding nature of this rule (lat. *opinio iuris necessitatis*).

During the second half of the 19th century, another unwritten source of public international law played a significant role in terms of the sources of public international law – general principles of law, created as a source of public international law mainly by transferring important principles of the national legal systems of States into the framework of public international law, mainly through international arbitration, especially in areas where international legal regulation was lacking. The legal life of this source of international law persists and is being revived even today.

In the second half of the twentieth century, the existence of another unwritten source of public international law, the so-called tacit international agreement, was also confirmed. The existence of this source of public international law is confirmed by Article 3 of the *Vienna Convention on the Law of Treaties* (1969),⁴ a whole range of case law of international judicial and arbitral bodies as well as the relevant practice of States in applying this source of international law in practice.

The aim of this article is to map the historical development and current form of three unwritten sources of public international law – international custom, general principles of law and tacit international agreement, and subsequently identify their significance in the context of the sources of public international law (hereinafter referred to as international law) as a whole.

In accordance with the stated goal of the paper, the authors formulated the following hypothesis and research question, which consider theoretical and legal research into the issue of the historical development of unwritten sources of law and their current form.

Hypothesis: Despite the growing number of written sources of international law, international customs, general legal principles and tacit agreements are relevant and irreplaceable (unwritten) sources of public international law.

The authors proceed from the assumption that the growing predominance of treaty-based norm formation has not displaced unwritten sources but has rather transformed and differentiated their functions within the international legal system. In order to confirm or reject the above hypothesis, a research question was also set, which is related to the fulfilment of the goal, which the authors defined as follows: "What is the legal nature and effectiveness of the unwritten sources of public international law and what trend can be observed in their development"?

The research is based on qualitative legal analysis, which uses several interconnected methods of scientific research into international law and the policies of the most important States in the creation of unwritten sources of law. A comparative method will be used, which will enable a comparison of selected international customs and general legal principles. The normative method will be applied to the analysis of legal provisions of decisions of the International Court of Justice and related scientific outputs of judges of the International Court of Justice with regard to the identification of the legal nature and binding nature of unwritten sources. The historical method will enable the analysis of interactions between the above types of unwritten sources of public international law and written sources. The teleological method will be used to interpret the content of individual unwritten sources, having regard to the acceptance or rejection, of certain customs, general legal principles or tacit agreements.

The primary sources of research will be the texts of international conventions, protocols and decisions of the International Court of Justice (hereinafter abbreviated as ICJ). Secondary sources will be monographs, textbooks and scientific articles in domestic and foreign scientific journals, including scientific articles indexed in the Scopus and Web of Science databases, as well as annotated codification documents of the UN International Law Commission. Based on the results of legal analysis, comparison and interpretation of the acquired knowledge, the

⁴ *Vienna Convention on the Law of Treaties*. Vienna, 23 May 1969. *United Nations Treaty Series*, vol. 1155, p. 331.

authors will evaluate the established hypothesis at the end of the paper, while identifying trends in the development of unwritten sources of law.

II. INTERNATIONAL CUSTOM

International custom has historically been the dominant source of so-called traditional international law, which developed mainly after the adoption of the complex of peace treaties of the Congress of Westphalia in 1648 as the normative basis of the so-called traditional system of international relations. As a source of international law, it fulfilled the role of "central legislation" until 1850, when the first multilateral law-making treaties began to be adopted. Customary international rules were the "central legislation" within international legal relations until 1945, due to the fact that the number of written international treaties had not yet significantly outweighed the existing customary norm formation.⁵ The situation is similar in the domestic law of European countries. Legal custom was a fundamental source of law until the mid-20th century—for instance, in the territory of Slovakia, until 1950.⁶

Customary rules of international law were mainly created by the powers of the time in their relations with each other, while other States limited themselves to tacit consent in relation to these customary rules. At the end of the nineteenth century, as a result of the division of the vast majority of overseas territories among the powers, many customary norms in force between European States became universal with *erga omnes* application. Thus, general international law with universal application emerged.⁷

Over time (especially after 1945), customary rules were codified in multilateral treaty form or in so-called non-treaty codification instruments of international codification bodies. In addition to customary rules, multilateral treaties or codification documents created in this way also covered issues not regulated by custom. The expansion of treaty-based norm formation after 1945 substantially increased the importance and functional differentiation of written international law. However, in some areas of international law, customary rules still retain a key importance (e.g. the State responsibility for internationally wrongful acts⁸ or legal regulation of individual countermeasures).⁹ Universal customary rules also exist in other areas of international law that are partially or almost completely codified in written form. New rules are also constantly emerging in areas of public international law where there were few in the past, such as international environmental law.¹⁰ Jan Klabbbers argues that in international law, which is characterized by the absence of a central legislator, customary law has traditionally played and continues to play a very important role.¹¹

This development should not, however, be understood as a linear replacement of customary international law by treaty-based law. In the authors' view, the expansion of treaty law has primarily resulted in a functional differentiation between written and unwritten norm formation. Treaty law enables States to regulate increasingly complex areas of international relations in a detailed and deliberate manner, while customary international law continues to provide generally applicable rules in areas where treaty regulation is absent, incomplete or not

⁵ JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLÁŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť*. Plzeň : Aleš Čeněk, 2015. p. 178.

⁶ ŠTENPIEN, E. Štefan Werbőczy -- život a dielo. In: *Tripartitum*. Žilina : Eurokódex, 2008. p. 19. ISBN 978-80-89363-24-7.

⁷ JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLÁŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť*. Plzeň : Aleš Čeněk, 2015. p. 178.

⁸ *Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the United Nations International Law Commission* (2001), annexed to the Resolution adopted by the General Assembly No. 56/83 "Responsibility of States for internationally wrongful acts", UN Doc. A/RES/56/83 (2002).

⁹ JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLÁŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť*. Plzeň : Aleš Čeněk, 2015. p. 178.

¹⁰ JANKUV, J. *Environmentalizácia medzinárodného práva verejného a jej vplyv na právo Európskej únie a právny poriadok Slovenskej republiky*. Praha : Leges, 2021. p. 76 -- 77.

¹¹ KLABBERS, J. *International Law*. Cambridge : Cambridge University Press, 2013. p. 26.

universally accepted. Custom may also coexist with treaty rules as an independent source of identical or complementary obligations. The contemporary relevance of customary international law should therefore not be assessed solely by reference to the number of newly emerging customary rules. Its systemic importance also lies in its capacity to operate independently of treaty participation and to maintain normative continuity in areas in which treaty regulation remains incomplete or fragmented.

In addition to international customs of a universal nature, bilateral customs also occur in international legal practice, as confirmed by the ICJ in the case of the *Right of Passage over Indian Territory* (1960).¹² For the sake of completeness, it is also necessary to point out the existence of regional customs, as follows from the *Asylum Case* (1950),¹³ also from the framework of ICJ case law.

The definition of international custom is based on the provision of Article 38(1)(b) of the Statute of the ICJ, which characterizes international custom as evidence of a general practice accepted as law. Some theorists of international law have accepted the wording of Article 38(1)(b) only with serious reservations and argue that this provision is incorrectly formulated, since custom is not evidence of a particular practice, but on the contrary, general practice is evidence of the existence of custom.¹⁴ Despite these reservations, arising from the wording of the provision of Article 38, paragraph 1, letter b) of the Statute of the International Court of Justice, it is possible to define international custom as a binding rule of conduct of States in their mutual relations which has become legally binding because of the belief of States in its legal binding nature, as well as the general long-term practice of at least the majority of States. It should also be emphasized that general practice is perhaps more important today than long-term practice.¹⁵

From the foregoing definition, it is possible to identify several specific features of international custom. The primary feature is the fact that the binding nature of international custom is identical to the binding nature of an international treaty, i.e. their legal force is the same.

The definition of international custom also indirectly implies the fact that in principle only States participate in the formation of customs. When examining the scope of the international legal personality of other subjects of international law (international intergovernmental organizations, national liberation movements, insurgent movements, etc.), it is necessary to state that their share in the area of customary norm formation is significantly limited. States participate in the formation of international custom to an unequal extent. International custom is mostly created by the economically and politically strongest States and the so-called interested States, while other States limit themselves only to their implicit (tacit) consent to international custom.¹⁶

For an international custom to arise, it must have been applied for a long time, i.e. the criterion of long-term use (*usus longaevus*) must also be met. International law does not contain any norm that would specify this criterion. The fulfillment of this criterion is therefore assessed individually for each potential custom. The mere long-term use is not sufficient for the emergence of an international custom. Its use must be continuous, with States gradually acquiring a permanent conviction of its legal binding nature (*opinio iuris necessitatis*). Such conviction is confirmed by the fact that States use a customary norm even when it is

¹² *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of April 12, 1960. ICJ Reports 1960, p. 6.

¹³ *Asylum Case*, Colombia v. Peru, Judgment of November 20, 1950, ICJ Reports 1950, p. 266 et seq.

¹⁴ WOLFKE, K. *Custom in Present International Law*. Wrocław : Polska Akademia Nauk, 1964, p. 26.

¹⁵ JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLAŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť*. Plzeň : Aleš Čeněk, 2015, p. 178 -- 179.

¹⁶ JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLAŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť*. Plzeň : Aleš Čeněk, 2015, p. 179.

disadvantageous for them. Another characteristic feature of international custom is the fact that custom is an unwritten rule.¹⁷

The above-mentioned features of international custom allow for the identification of its fundamental differences from an international treaty. The fundamental difference between international custom and an international treaty is the unequal degree of participation of States in the creation of international customs. States generally participate in the creation of international treaties to the same extent. The long-term use necessary for the emergence of international custom is the second difference between international custom and an international treaty, which can also arise in a much shorter period. The unwritten nature of custom is another, third difference between international custom and an international treaty, which is usually written (with the exception of so-called tacit international agreements).

It is therefore necessary to determine the content of international custom, which does not contribute to the legal certainty of subjects. It is possible to arrive at knowledge of custom in several ways. Their summary was carried out by the *UN International Law Commission* in accordance with Article 24 of its Statute. In its report to the UN General Assembly in 1950, it stated that the texts of international treaties (including those that have not yet entered into force), decisions of international judicial and arbitral bodies, decisions of national judicial bodies concerning international law, national legislation regulating issues of international interest and, in particular, legislation implementing multilateral conventions, state constitutions, diplomatic correspondence of States and codification documents of UN bodies can serve as evidence of the existence of international customary rules.¹⁸

In contemporary international law, intensive codification of customary rules is underway with the aim of replacing customary rules with treaty rules, particularly within the framework of the UN codification body – The United Nations International Law Commission (hereinafter referred to as the ILC). This codification body has since included the issue of identifying customary norms in its codification programme and, in this context, adopted *Draft Conclusions on Identification of Customary International Law with Commentary* (2018),¹⁹ after the second reading. This draft contains a total of 16 conclusions, which, for the purpose of identifying custom, state the need for the existence of the two constitutive elements of custom mentioned above (general practice of States and acceptance of this practice as law), describe in detail the process of identifying these elements, identify the importance of international treaties, resolutions of international organizations and international conferences, judgments of international courts and tribunals, as well as the science of international law in identifying customary rules, define qualified practice of a State, which excludes the possibility of stabilizing a customary rule, and confirm the possibility of the existence of universal, regional or local (bilateral) customs. Wouter Werner argues that this codification draft differs from most other works of the ILC because it seeks to identify the way in which customary international law arises.²⁰

The International Court of Justice has also expressed its views on the issue of international custom in several cases. Perhaps the most comprehensive was its statement in the

¹⁷ JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLAŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť*. Plzeň : Aleš Čeněk, 2015. p. 179 -- 181.

¹⁸ *Ways and means for making the evidence of Customary International Law more readily available*. Yearbook of the International Law Commission, 1950, Vol. II, p. 367 -- 373. See also: AKEHURST, M. *A Modern Introduction to International Law*. London and New York : Routledge, 1995. p. 26 -- 27.

¹⁹ *Draft Conclusions on the Identification of Customary International Law with Commentaries*, as adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as part of the Commission's report covering the work of that session, A/RES/73/203 (2018), para. 4.

²⁰ WERNER, W. The Making of Lawmaking: The ILC Draft Conclusions on the Identification of Customary Law. In: KRISCH, N., YILDIZ, E. (eds.). *The Many Paths of Change in International Law*. Oxford : Oxford University Press, 2023. p. 131.

North Sea Continental Shelf case (1969),²¹ where he particularly specified the issue of States' belief in legal bindingness. In relation to international custom, the cases of *Continental Shelf* (1985) are also relevant²² and the *Military and Paramilitary Activities in and against Nicaragua* case (1986).²³

The science of international law, in connection with the existing international legal regulation and the aforementioned case law, further elaborates in detail the issue of international custom as a source of law. According to the science, custom has two basic levels – static and dynamic. The static level manifests itself as a form of law that grants legal validity to the content of a norm and in which subjects and applying bodies recognize this legal rule. The dynamic level represents the process of its creation, which together with the static element forms a logical unity.²⁴ The static level of the existence of international custom consists of the material element of the qualified long-term practice of subjects of international law (*usus longaevus*) and the subjective element, which is the belief of the State about the legal bindingness of the custom (*opinio iuris sive necessitatis*).²⁵ State practice is one of the main elements of customary law-making. This fact is confirmed by Article 38(1) of the Statute of the International Court of Justice, as well as by the case-law of the International Court of Justice, which stated that, in accordance with Article 38, "...it must be ensured that the existence of a rule by *opinio iuris* is confirmed by the practice of States...".²⁶ Such a practice should, according to Article 38(1), be "general", i.e. respected by all states, and need not consist only in active action, but also in "inaction", i.e. omission of rejection or objection to the applied rule.²⁷

State practice doesn't need be absolutely uniform and may not reflect the content of the emerging customary rule completely. The International Court of Justice has stated in this regard that "*For a rule to become customary law, it is not necessary that the relevant practice of States be in absolute conformity with it. For a court to find that a customary rule exists, it is sufficient that this practice is generally consistent with the rule of conduct and that the conduct of States which is inconsistent with that rule is generally regarded as a breach of that rule and not as recognition of a new rule.*"²⁸ However, an apparently contradictory and unstable practice cannot be considered part of the formation of customary rules.²⁹

Qualified practice is created by a whole series of relevant partial behaviours, some of which act as precedents. A precedent represents an action or omission of subjects of international law that, to one degree or another, changes the existing reality.³⁰

The features of precedent in international law comprise six constitutive elements: *repetition, uniformity, continuity, generality, representativeness, and long duration*. The concept of repetition means that a customary norm cannot be formed on the basis of a single precedent, but only as a result of a whole series of precedents. Uniformity indicates a practice leading to the emergence of one and the same norm, including inaction, but only such as is manifested by the implicit consent of the State. Continuity represents the consistent conduct of

²¹ *North Sea Continental Shelf cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), ICJ Reports 1969, p. 3.

²² *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, ICJ Reports 1985, para. 29.

²³ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), ICJ Reports 1986, para. 97.

²⁴ MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*. 5. podstatně upravené a doplněné vydání. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 186.

²⁵ MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*. 5. podstatně upravené a doplněné vydání. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 187 -- 188.

²⁶ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), ICJ Reports 1986, para. 97.

²⁷ KLUČKA, J. *Medzinárodné právo verejné (všeobecná a osobitná časť)*. 2. doplnené a prepracované vydanie. Bratislava : Iura Edition, 2011. p. 115.

²⁸ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), ICJ Reports 1986, para. 97.

²⁹ KLUČKA, J. *Medzinárodné právo verejné (všeobecná a osobitná časť)*. 4. vydanie. Bratislava : Wolters Kluwer, 2023. p. 95.

³⁰ MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*. 5. podstatně upravené a doplněné vydání. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 186.

active States in a given matter, which must be consistent, while they may not behave differently in identical situations. Generality and representativeness do not require the participation of all States in the process of creating customs, the bindingness of which is drawn primarily from the behaviour of the States involved, while the uninvolved States resort to systematic protests to avoid interpreting their passivity as implicit consent.

The conviction of subjects about the legal bindingness of a rule of conduct contained in a given practice is identified as external manifestations of the behaviour of States - e.g. a reference to a valid customary norm in a valid international treaty or an explicit recognition of the bindingness of a customary norm by the State concerned even in a situation where it is materially or otherwise disadvantageous for it.³¹ In order to demonstrate the existence of a belief in legal bindingness, according to the International Court of Justice, two conditions must be met. The acts constituting a customary practice must constitute an established practice and must also be carried out in such a way as to give evidence of a belief that the practice is carried out in a binding manner in pursuance of the existence of a legal rule requiring such conduct.³²

The dynamic dimension of the existence of international custom is ensured by States through their norm formation activities. States that, in the early stages of the process of creating custom, provide practice with precedents often purposefully aim at the emergence of a customary norm. In the science of international law, there are different opinions on this matter as to whether this activity of States is capable of giving the custom-forming development a consensual character, or whether the process as a whole remains spontaneous. However, the truth lies somewhere in the middle. The process of creating custom is spontaneous, but consensus is applied within one of the stages that precede the establishment of a valid customary norm. The precedent of an active State and the tacit consent of other States to its precedent-setting behaviour combine to form a kind of tacit agreement, which, however, operates only once and cannot be interpreted as recognition of the final binding nature of the rule of conduct. This interaction nevertheless should not be understood as equating the formation of customary international law with the conclusion of a tacit agreement. In the authors' view, tacit consent may constitute evidence relevant to the formation of custom, but the legal character of the resulting rule ultimately depends on the fulfilment of the constitutive requirements of customary international law, particularly general practice and *opinio juris*. However, as a result of the regular repetition of such an agreement, a customary rule may arise over time.³³ On the other hand, if certain conduct of a State gives rise to protests from other States which claim that such conduct is unlawful, such protests deprive the said conduct of any value as evidence of the existence of a customary rule.³⁴

From the perspective of the legal life of international custom, it is important to pay attention to the issue of the relationship between international custom and international treaty as the basic sources of international law. The relationship between an international treaty and international custom is that they are legally equivalent, that is, they are equally legally binding. The equivalence of these basic sources of international law is also reflected in the fact that in the event of a breach of the international obligations contained in them, a uniform regime of international legal responsibility comes into play. Provision of Article 12 of the *Draft Articles on the Responsibility of States for Wrongful Conduct of the UN International Law Commission* (2001)³⁵ in this regard, it states that: "A breach of an international obligation occurs when the

³¹ MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*. 5. podstatně upravené a doplněné vydání. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 192.

³² *North Sea Continental Shelf cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), ICJ Reports 1969, p. 3.

³³ MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*. 5. podstatně upravené a doplněné vydání. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 194.

³⁴ AKEHURST, M. *A Modern Introduction to International Law*. London and New York : Routledge, 1995. p. 30.

³⁵ *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001). Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as part of the

conduct of a State is not in accordance with what the obligation requires of it, regardless of its nature and character."³⁶

The coexistence of treaty and customary rules also demonstrates that the increasing codification of international law does not necessarily reduce the normative relevance of custom. In certain circumstances, treaty rules may codify pre-existing customary rules, contribute to the crystallization of emerging customary rules, or subsequently generate customary rules through sufficiently general State practice and *opinio juris*. Conversely, customary law may continue to regulate matters not addressed by a treaty or may bind States that are not parties to the relevant treaty where the customary rule has an independent legal basis. The authors therefore consider the relationship between treaty and customary law to be better described in terms of interaction and functional complementarity than in terms of replacement of one source by another.

Custom and contract *can compete*,³⁷ it is therefore true that the content of rules of international law which are a treaty norm for certain States may apply as a customary international rule for other States which have not acceded to the treaty norm in question (e.g. the rules enshrined in the *Geneva Protocol for the Prohibition of Chemical and Bacteriological Weapons* (1925)), if they have been recognised as such by such States. A treaty rule may therefore, on the basis of interstate practice, give rise to a new customary rule applicable in parallel with its treaty form. This applies to any new treaty provision of international law which is not based on an existing customary provision. This fact is recalled by Art. 38 of the *Vienna Convention on the Law of Treaties* (1969), according to which: "*Nothing in Articles 34 to 37 shall prevent any provision of a treaty from becoming binding on a third State as a customary rule of international law recognised as such a rule*".

Both types of sources can exist in *symbiosis*, or in *complementary coexistence*³⁸ in such a way that international custom supplements an international treaty or vice versa. The Preamble to the *Vienna Convention on the Law of Treaties* (1969) states in this regard that "*the rules of customary law shall continue to govern questions not covered by the provisions of this treaty*". Thus, not only are contractual and customary regulations mutually compatible in terms of content, but the purposefulness and effectiveness of the entire regulation are conditioned by the coexistence of rules in both forms. If there is competition in terms of content between international custom and an international treaty, i.e. if both sources regulate a certain issue differently and incompatibly, in principle it does not cause the invalidity of either of them.³⁹

For their relationship, it is possible to selectively use logical and interpretative principles such as *lex specialis derogat legi generali*, or *lex posterior derogat legi priori*. As an example for the use of the first mentioned principle, it is possible to cite the customary legal regime of the so-called historical bays (e.g. Hudson Bay, Gulf of Riga, etc.), which takes precedence over the more general contractual regulation of bay regimes under the *United Nations Convention on the Law of the Sea* (1982).⁴⁰

The application of the second principle is particularly problematic in the case of the relationship between universal customs and later adopted multilateral international treaties.

Commission's report covering the work of that session, UN Doc. A/56/10 (2001); annexed to the Resolution adopted by the General Assembly No. 56/83 "Responsibility of States for internationally wrongful acts", UN Doc. A/RES/56/83 (2002).

³⁶ *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001). Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as part of the Commission's report covering the work of that session, UN Doc. A/56/10 (2001); annexed to the Resolution adopted by the General Assembly No. 56/83 "Responsibility of States for internationally wrongful acts", UN Doc. A/RES/56/83 (2002).

³⁷ MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*. 5. podstatně upravené a doplněné vydání. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 196.

³⁸ MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*. 5. podstatně upravené a doplněné vydání. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 196.

³⁹ MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*. 5. podstatně upravené a doplněné vydání. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 196 -- 197.

⁴⁰ DAVID, V., SLADKÝ, P., ZBOŘIL, F. *Mezinárodní právo veřejné s kazuistikou*. Praha : Leges, 2008. p. 108.

This rule can only be applied if the later adopted multilateral international treaty has the character of a so-called universal codification treaty.⁴¹ If both sources regulate the matter in the same way, i.e. there is a so-called *cumulation*, the principle *lex posterior derogat legi priori* does not apply. If the custom and the treaty are identical in content, the above rules do not cancel each other out. This also applies to so-called *codification conventions*, which practically capture international custom in written form.⁴²

There is no rule in current international law that would determine in a binding manner for States which area of potential international legal regulation they have, can, or even must regulate in the form of an international treaty or international custom. Despite this freedom to freely choose any of the basic sources of international law for regulating their new rights and obligations, current developments to date confirm that States *prefer contractual regulation*. This applies not only to the mutual regulation of rights and obligations, but also to entire branches of international law that are codified through international conventions of a "legislative nature". Current international law is therefore predominantly a law of a *contractual nature* and in many cases customary rules in those branches of international law that have been codified (international maritime law, international diplomatic law, international consular law, the law of international conventions). However, precise boundaries between treaty (written) international law and unwritten customary law do not currently exist, and for this reason, many rules of international law exist in a "mixed" treaty-customary form.⁴³

III. TACIT INTERNATIONAL AGREEMENT

Tacit international agreement have been largely overlooked since the second half of the 20th and early 21st centuries. However, the concept of a "tacit agreement" as a binding agreement in international law has existed since the 17th century. Danae Azaria provides us with an overview of the historical theoretical approaches of Grotius, de Vattel and de Martens to the issue of defining tacit treaties, at various levels.⁴⁴

Some States (after 1945) recognized, or at least did not refute, tacit agreement as a type of binding international agreement. However, it is not clear whether the term "*tacit agreement*" was used with a consistent meaning in State practice at the time.⁴⁵ In this regard, it is important to note that the consent of a State expressed in the context of a tacit agreement must be distinguished from the consent of a State to a customary rule. Tacit agreements are bilateral and require a high standard of proof to prove consent, whereas customary law is a multilateral process in which consent is implicit, not explicit, and can create rules binding on all States unless another legally relevant entity formally objects to the existence of the custom.

In the authors' view, the decisive criterion distinguishing tacit agreements from customary international law is not merely the duration of State conduct, but the nature and intensity of legally relevant consent. A tacit agreement presupposes that the conduct of the States concerned can be interpreted as demonstrating their intention to establish legally binding rights and obligations between themselves. Customary international law, by contrast, is not dependent upon the identification of such an agreement between particular States; its formation

⁴¹ DAVID, V., SLADKÝ, P., ZBOŘIL, F. *Mezinárodní právo veřejné s kazuistikou*. Praha : Leges, 2008. p. 108.

⁴² MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*. 5. podstatně upravené a doplněné vydání. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 196.

⁴³ JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLÁŠKOVIC, K. *Mezinárodní právo veřejné. Prvá část*. Plzeň : Aleš Čeněk, 2015. p. 183.

⁴⁴ AZARIA, D. Tacit Agreements. In: HEIDAR, T., BOURKE, N., KIM, H-J. *The Judicial Work of the International Tribunal for the Law of the Sea: Progress and Challenges -- Liber Amicorum Judge Jin-Hyun Paik* (forthcoming, Routledge). Posted: 9 May 2024. [online] [cit. 9. septembra 2026]. Dostupné online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4822624.

⁴⁵ AZARIA, D. Tacit Agreements. In: HEIDAR, T., BOURKE, N., KIM, H-J. *The Judicial Work of the International Tribunal for the Law of the Sea: Progress and Challenges -- Liber Amicorum Judge Jin-Hyun Paik* (forthcoming, Routledge). Posted: 9 May 2024. p. 2 -- 5. [online] [cit. 9. septembra 2026]. Dostupné online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4822624.

requires general State practice accepted as law. Consequently, consistent conduct between two States should not automatically be classified as a tacit agreement. The existence of a tacit agreement requires convincing evidence of legally relevant consent, whereas conduct contributing to the formation of customary law must be assessed in the broader context of general practice and *opinio juris*. The same conduct may therefore have different legal significance depending on the context in which it occurs and the evidence available concerning the intention of the States involved.

In general, an international treaty in a written form is currently considered the predominant basic source of international law. Its dominant position in comparison with international custom is given by the fact that it is more unambiguous in content, provides greater legal certainty and its content is immediately and more easily accessible. A valid international treaty may also provide a more precise legal framework for determining the consequences of a breach, including the applicable mechanisms of international responsibility and, where provided for by the relevant legal regime, specific forms of enforcement or other legal consequences. The *Vienna Convention on the Law of Treaties* (1969) contains detailed regulations on the conditions for the formation, amendment and termination of international treaties in relations between states⁴⁶ and in relations between States and international organizations in the *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations* (1986).

Article 3 of the *Vienna Convention on the Law of Treaties* (1969) states that the Convention does not apply to international agreements which are not in written form. The provision of this article indicates that, however, there are also unwritten international agreements in international law, in the form of so-called tacit (silent) agreements. In the spirit of this article, there is also a clear terminological distinction between the concept of a written international treaty and the concept of an unwritten agreement. A written form of this source of international law is called a "treaty", and an unwritten one is called an "agreement" in this convention.

The concept of a "tacit agreement" in international law is not entirely clear. However, it can be understood, in contrast to an express or explicit written treaties, as an agreement the existence of which can be inferred from the conduct of the parties.⁴⁷ In the case of tacit agreements, consensus arises from the implicit behaviour of the parties involved. It is therefore the result of mutual real behaviour that does not raise any doubts.⁴⁸

In this regard, this means that an agreement, express or implied, creates binding rights and obligations only if the parties intend it to do so. The intention of the parties to be bound by the agreement (lat. *animus contrahendi*) determines its legal nature, distinguishing between a legally binding agreement such as a treaty in the strict sense of the word and an instrument that is not legally binding, such as a political agreement.⁴⁹

As regards the intention to be bound by a tacit agreement, the ICJ stated in this regard in the case of *Obligation to Negotiate Access to the Pacific Ocean* (2018),⁵⁰ that "(even) whatever form agreements may take, they require the intention of the parties to be bound by legal obligations. This also applies to tacit agreements." A tacit agreement can therefore acquire legal force at the moment when the intention of the parties to create rights and obligations under international law is demonstrated.

⁴⁶ *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (1969).

⁴⁷ JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law*. Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. Dostupné online: <https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265>.

⁴⁸ ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. 1. vydanie. Praha : C. H. Beck, 2008. p. 127.

⁴⁹ JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law*. Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. Dostupné online: <https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265>.

⁵⁰ *Obligation to Negotiate Access to the Pacific Ocean, Bolivia v Chile, Judgment*, ICJ Reports 2018, para. 97.

The concept of tacit agreements has also been recognized in other international jurisprudence. The existence of a tacit agreement has often been invoked, particularly in the context of maritime boundary delimitation before international courts and tribunals. Although such claims have rarely been accepted by international courts and tribunals, the concept of a tacit agreement itself has never been questioned.⁵¹ In this regard, Azaria notes that since 1945, State practice in the form of submissions before international courts and tribunals and decisions of international courts and tribunals have consistently recognized the existence of a tacit agreement. For example, in the case of *Nicaragua vs. Honduras* (2007)⁵² the International Court of Justice has acknowledged the possibility of a tacit agreement but has found that “*there was no tacit agreement between the parties (...) of such a nature as to establish a legally binding maritime boundary*”. Furthermore, in the case of *Ghana vs Côte d’Ivoire* (2017)⁵³ the Special Chamber of the International Tribunal for the Law of the Sea considered that the evidence before it did not prove that a tacit agreement had occurred.⁵⁴

Paik Jin-Hyun points out the ways in which a tacit agreement can arise. In his view, a tacit agreement can arise from the contemporaneous conduct or practice of the parties concerned. It can also arise from the silence or inaction of one party in relation to the conduct of another party, if such conduct requires a response. The International Court of Justice stated in the *Gulf of Maine case* (1984)⁵⁵ that a tacit agreement may take the form of consent in the sense of “*tacit recognition expressed by unilateral action which the other party may interpret as consent*”. For the conduct or practice of the parties to be relevant to the formation of a tacit agreement, it must be sufficiently clear and related to the subject matter of the agreement. Other relevant factors may include the degree of agreement and consistency of the conduct of the parties, as well as its duration. The higher the degree of agreement and consistency and the longer such conduct lasts, the more likely it is that the conduct constitutes a tacit agreement.⁵⁶

In the case of a tacit agreement arising from silence or inaction, the requirements of consent may be relevant. It is generally understood that consent may arise from the silence or inaction of a State when certain facts were or should have been known to the State (knowledge), are of direct interest to the State (interest), have existed for a considerable period of time (duration) without significant change (consistency) and can be attributed to the State's agent (attribution). A State invoking the existence of a tacit agreement through silence or inaction must demonstrate that these requirements have been met.⁵⁷

Jin-Hyun states that the existence of a tacit agreement must be established in the same way as the existence of an express agreement, in that the intention of the parties to create legal rights and obligations must be demonstrated. However, in the case of a tacit agreement, the lack of express terms indicating the existence of legal obligations may make it more difficult to

⁵¹ JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law*. Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. Dostupné online: <https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265>.

⁵² *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659.

⁵³ *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean*, Ghana v Côte d’Ivoire, Provisional Measures, ITLOS Case No. 23, ICGJ 494 (ITLOS 2015), 25 April 2015, International Tribunal for the Law of the Sea (ITLOS).

⁵⁴ AZARIA, D. Tacit Agreements. In: HEIDAR, T., BOURKE, N., KIM, H-J. *The Judicial Work of the International Tribunal for the Law of the Sea: Progress and Challenges -- Liber Amicorum Judge Jin-Hyun Paik* (forthcoming, Routledge). Posted: 9 May 2024. p. 7 -- 8. [online] [cit. 9. septembra 2026]. Dostupné online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4822624.

⁵⁵ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA)*, Judgment, I.C.J. Reports 1984, p. 246.

⁵⁶ JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law*. Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. Dostupné online: <https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265>.

⁵⁷ JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law*. Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. Dostupné online: <https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265>.

establish such intention. All relevant evidence, such as whether the conduct is sufficiently specific, concurrent and consistent over a significant period of time, must be assessed objectively. The standard of proof for proving a tacit agreement was further specified by the *International Court of Justice* in the context of maritime boundary delimitation in the case of *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (2007).⁵⁸ The ICJ held that the standard: “*The proof of a tacit agreement must be convincing. The establishment of a permanent maritime boundary is a matter of extraordinary importance, and agreement cannot be lightly assumed.*” This statement has been consistently upheld in subsequent decisions of international courts and tribunals as the standard of proof for establishing the existence of a tacit agreement.⁵⁹

According to Čepelka and Šturma, tacit agreements also extend the scope of treaties on internationalized rivers and the treaty regime of Antarctica, and they also arise within the framework of the activities of international organizations. A typical example is the sending of an official of an international organization to a non-member state of the organization, which receives him not as a private person, but as a representative of the body of the international organization.⁶⁰ Čepelka also identifies an example of a tacit agreement in a situation where States provide refuge to persecuted persons in the buildings of diplomatic missions, although they are not bound to do so by customary or written norms of international law. This is the provision of refuge for humanitarian reasons, while the State of the seat of the mission tolerates this practice. In this case, the provision of refuge is based on an *ad hoc* tacitly negotiated unwritten international treaty that arose on the basis of the “*tacit*” behavior of states. The content of such an unwritten treaty is the right to provide humanitarian refuge to persecuted persons and the obligation to tolerate the safe departure of the person or persons from the country by the state of the seat of the diplomatic mission.⁶¹

In particular, the existence and functioning of tacit agreements in international environmental law can be mentioned. Tacit agreements are often used to accelerate the entry into force of amendments, technical annexes and supplements to multilateral environmental treaties by means of tacit consent. This mechanism allows for amendments to be adopted by a majority vote and to be automatically binding on all parties after a specified period, unless a certain number of States formally object. For example, amendments to the annexes to the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (1989)⁶² concerning hazardous waste.

In connection with the above information, the question may arise in the science of international law as to what is the difference between international custom and tacit agreement. The first difference is that a tacit agreement can arise in the practice of States in a very short time, while the emergence of a customary rule usually requires a long-term practice of States. Another difference is that a tacit agreement is usually a bilateral application of a universal law-making international treaty. However, it is not excluded that a tacit agreement can take the form of a bilateral international custom through long-term use. The main difference between a tacit agreement and a custom is that tacit agreements are based on a high standard of evidence of demonstrated consent of states, although it may only have a tacit (silent) form, whereas the

⁵⁸ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, para. 253.

⁵⁹ JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law*. Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. Dostupné online: <https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265>.

⁶⁰ ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. 1. vydanie. Praha : C. H. Beck, 2008. p. 127 -- 128.

⁶¹ ČEPELKA, Č. Vývoj institutů azylu a uprchlictví v mezinárodním právu. In: ČEPELKA, Č., ŠTURMA, P., BÍLKOVÁ, V., FÁBEROVÁ, A., SKÁLKOVÁ, M., HONUSKOVÁ, V. *Teorie a praxe azylu a uprchlictví*. Praha : Univerzita Karlova a UNHCR, Scripta Iuridica No. 2, 2006. p. 19. ISBN 80-85889-79-X.

⁶² *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, adopted on 22 March 1989, 1673 UNTS 125.

consent of States to a custom is often only implicit with a lower standard of demonstrated consent of States.

As regards the relationship between tacit agreements and customary and general principles of law, we can state that, according to the *Draft Conclusions on General Principles of Law* (2023)⁶³ of the *UN International Law Commission*, the relationship of general principles of law to international treaties and customary international rules is not hierarchical. All three sources have equal legal force. Any conflict between them must be resolved by generally accepted methods of interpretation and resolution of conflicts between sources of international law. This same approach logically applies to the relationship of the three unwritten sources to written international treaties.

IV. GENERAL PRINCIPLES OF LAW

As regards the historical development of the concept of general principles of law in international law, it should be noted that the legal life of this source of international law began in the nineteenth century. The reason for the emergence of this concept was the fact that in the nineteenth and early twentieth centuries, arbitral bodies and courts, when deciding disputes between States, were faced with cases in which no treaty or customary rule regulated the matter submitted to arbitration. Antonio Cassese writes in this regard that these bodies found it necessary to refer to certain general principles common to the national legal systems of most countries. This was a clever way of filling legal gaps, thus developing what was then a rather rudimentary and incomplete body of international law. No State objected, which is not surprising, since the courts applied general principles known to the States concerned.⁶⁴

After the First World War, the reference to these principles was codified in Article 38, paragraph 3, of the Statute of the *Permanent Court of International Justice* (1921), drawn up by the *Advisory Committee of Jurists* appointed by the *Council of the League of Nations*. Cassese points out that this source was included in the Statute at the suggestion of the President of the aforementioned body, Decamps (E.E.F.) who proposed that the Court should apply, in addition to treaties and customs, “*the rules of international law as recognized by the legal conscience of civilized nations*.”⁶⁵ However, the final wording of the Article 38, paragraph 3, of the Statute as for this source of international law was slightly different, in the form “*The general principles of law recognized by civilized nations*”.

The concept of general principles of law is now included in Article 38(1)(c) of the *Statute of the International Court of Justice* (1945), in the same form, together with the historically surviving addition of “*civilized nations*”. The whole wording of this article, including this addition, was taken from the abovementioned Statute of the Permanent Court of International Justice. The Permanent Court of International Justice (PCIJ) operated as a court of the League of Nations from 1921 to 1940.

The above wording, as reproduced in Article 38(1)(c) of the *Statute of the International Court of Justice* (ICJ), has drawn criticism because it appeared to be based on the outdated concept that only certain nations can rightly be called civilized.⁶⁶ This criticism is evident from the extent of Judge Fouad Ammoun's separate opinion in the *North Sea Continental Shelf* case, which the ICJ delivered (1969),⁶⁷ who stated: “First of all, it is important to note that the

⁶³ *General principles of law*. Text of the draft conclusions provisionally adopted by the Drafting Committee on first reading. International Law Commission, Seventy-fourth session, Geneva, 24 April -- 2 June and 3 July -- 4 August 2023. UN Doc. A/CN.4/L.982 (12 May 2023).

⁶⁴ CASSESE, A. *International Law*. Oxford : Oxford University Press, 2001. p. 155 -- 156.

⁶⁵ CASSESE, A. *International Law*. Oxford : Oxford University Press, 2001. p. 156.

⁶⁶ GAIA, G. General Principles of Law. In: *Max Planck Encyclopaedia of Public International Law*, article last updated: April 2020. Dostupné online: <https://opil.ouplaw.com/display/10.1093/law/epil/9780199231690/law-9780199231690-e1410>. DOI 10.1163/9789004390935_004.

⁶⁷ *North Sea Continental Shelf cases* (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*), ICJ Reports 1969, p. 3.

wording of Article 38, paragraph 1, sub-paragraph (c) of the Statute, which refers to “*general principles of law recognized by civilized nations*”, is inapplicable in the form in which it is formulated, because the term “*civilized nations*” is incompatible with the relevant provisions of the Charter of the United Nations and results in an unwise restriction of the concept of general principles of law.” Prof. Yu Lu rightly considers this term to be an anachronism and proposes replacing it with the term “*States*”.⁶⁸

Although classified as one of the sources of international law, general principles of law remain unclear and undefined to this day. Although there is no complete agreement on what general principles are, they are closely intertwined with the structure of international law and, together with treaties and customary international law, form the international legal system.⁶⁹

The issue of general principles of law is currently the subject of codification by the *UN International Law Commission* (hereinafter UNILC or ILC). In 2023, the UNILC adopted, after first reading, the aforementioned *Draft Conclusions on General Principles of Law* (hereinafter referred to as the “*Draft Conclusions (2023)*”),⁷⁰ which contain a total of 11 draft conclusions. The aforementioned conclusions confirm, in particular, that general principles of law are a source of international law, but as such they must be recognized by the international community. The Draft Conclusions (2023) have already abandoned the use of the aforementioned, historically outdated adjective “*recognized by civilized nations*”. This document further states that we distinguish between two categories of the above-mentioned principles, namely general principles of law derived from national legal systems and general principles of law formed within the framework of international law.

According to the Draft Conclusions (2023) and current state practice, general principles of law are, above all, principles that are generally applicable in various legal systems of the world, i.e. within the national legal orders of states in the international community. Usually, these are private law principles of substantive law (e.g. the principle of the obligation to compensate for damage and lost profits from internationally wrongful acts) or public law procedural principles (e.g. the principle of *nemo iudex in causa sua*, the principle of *ne bis in idem*, etc.). They must also be principles that do not contradict the nature of international law, i.e. principles that are by their nature compatible with the system of international law and applicable in international legal relations. In such a case, they can be transformed into the framework of international law.⁷¹ For example, the procedural principle of individual access to courts can only be applied in the field of international human rights law, but not in proceedings before the International Court of Justice or arbitral bodies.⁷² A general overview of the principles adhered to by the *Permanent Court of International Justice* and the *International Court of Justice* at certain historical periods is provided by Antonio Cassese.⁷³

General principles of law formed within the international legal system appear less frequently in State practice than principles derived from national legal systems. Their relative

⁶⁸ LU, Y. Analysis of the General Principles of Law of Article 38 of the Statute of the International Court of Justice. In: *Beijing Law Review*, 2022, Vol. 13, p. 787. Dostupné online: <https://doi.org/10.4236/blr.2022.134051>. DOI 10.4236/blr.2022.134051.

⁶⁹ DORDESKA, M. *General Principles of Law Recognized by Civilized Nations (1922-2018)*. Queen Mary Studies in International Law, Volume 39. Leiden : Brill/Nijhoff, 2020. p. 684.

⁷⁰ Regarding the progress of the codification work on the Draft Conclusions on General Principles of Law, it should be noted that, at its 77th session in July 2026, the ILC adopted, at second reading, a set of 12 Draft Conclusions on General Principles of Law, together with the commentaries. However, at the time this article was submitted for publication, the draft in question had not been published or included in the official version of the ILC documents. It was therefore necessary to proceed from the version of the draft after the first reading of 2023. In this regard, only the working document VÁZQUEZ-BERMÚDEZ, M. *Fourth report on general principles of law*, UN Doc. A/CN.4/785, International Law Commission, 76th Session (2025), is available, according to which Conclusion 12 concerning “General principles of law with a limited scope of application” was added to the text, and certain other conclusions were amended, though not substantially.

⁷¹ CASSESE, A. *International Law*. Oxford : Oxford University Press, 2001. p. 157.

⁷² JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLÁŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť*. Plzeň : Aleš Čeněk, 2015. p. 184.

⁷³ CASSESE, A. *International Law*. Oxford : Oxford University Press, 2001. p. 157.

rarity in practice, however, should not be understood as establishing an exhaustive or closed category. The Draft Conclusions (2023) recognise the possibility of identifying such principles where the relevant conditions for their existence and recognition within the international legal system are fulfilled. According to the Draft Conclusions (2023) of the ILC, the existence and content of such a principle must be confirmed by the recognition of such a principle as an integral part of international law by the international community. Examples of such principles are, for example, the principle of the consent of a State to the compulsory jurisdiction of an international court or the principle of respect for the historical administrative boundaries of former colonial territories when establishing borders between newly emerging States (the principle of *uti possidetis iuris*), and others.⁷⁴

According to the Draft Conclusions (2023), general principles of law are used in particular when other rules of international law do not address a specific issue in whole or in part. They are also intended to contribute to the coherence of the international legal system by being able to interpret and complement other rules of international law, to serve as a basis for primary rights and obligations, as well as for secondary rights and procedural rules. They therefore serve as aids to the interpretation of treaties and customary law, help to integrate legal norms and promote systemic stability, and can provide a basis for judicial decision-making in order to avoid a situation where no rule applies.

According to the Draft Conclusions (2023), the relationship between general principles of law and international treaties and customary international rules is not hierarchical. All three sources have equal legal force. The relationship between general principles of law and customary international law requires particular attention because both sources may perform a function of normative supplementation within the international legal system. Their similarity, however, should not lead to their conceptual conflation. In the authors' view, the principal distinction lies in the legal basis through which the relevant norm is identified.

Customary international law requires the existence of general State practice accepted as law. A general principle of law is identified on a different basis, depending on the category concerned. Principles derived from national legal systems require their recognition across a sufficiently broad and representative range of legal systems and their compatibility with the international legal order. Principles formed within the international legal system require recognition as principles inherent in the international legal system itself in accordance with the conditions reflected in the ILC Draft Conclusions (2023).

The subsequent application of a general principle by States does not, by itself, transform that principle into customary international law. Such a transformation would require the independent fulfilment of the constitutive requirements of custom, including the existence of general State practice accepted as law. Conversely, the fact that a principle may influence State practice or judicial reasoning does not deprive it of its character as a general principle.

The authors therefore consider the relationship between these two sources to be one of possible normative interaction rather than automatic transformation. A general principle may influence the development of State practice and may contribute to the clarification or development of customary rules, while a customary rule may provide evidence relevant to the application or interpretation of a general principle. Nevertheless, the legal basis for identifying the two sources remains distinct and should be maintained when determining the applicable rule of international law.

In this context, it should be noted that the conflict between rules is a very complex issue. There is no hierarchy of sources and treaties may deviate from custom and vice versa, but there are imperative norms – *ius cogens*, from which no deviation is permitted. An imperative norm

⁷⁴ The inclusion of these principles in the Draft Conclusions (2023) has sparked extensive discussion within the ILC. For more information, see: BJORGE, E. General Principles of Law Formed within the International Legal System. In: *International & Comparative Law Quarterly*, 2023, Vol. 72, No. 4, p. 846 -- 849.

can only be changed by another imperative norm. Imperative norms exist predominantly in customary form.

As regards the practical application of all three sources of international law, it must be said that in practice international treaties often function as a *lex specialis* with reference to relevant customary law and general principles.⁷⁵

The use of general principles of law is therefore particularly important in cases of gaps in international law. In such cases, either analogy of law or general principles of law are used. However, the application of general principles of law is referred to in many judgments of international judicial and arbitral bodies. The application of general principles of law is envisaged, for example, in Article 21 of the *Statute of the International Criminal Court* (1998).⁷⁶ General legal principles therefore still have their place within the sources of international law.

It is particularly appropriate to mention the issue of the applicability of general legal principles in international environmental law. Among the general legal principles of national origin, the principle of non-damage to the environment beyond the jurisdiction of States (lat. *sic utere tuo ut alienum non laedas*) is clearly applicable to environmental protection, which contains the obligation of states not to use their territory in such a way as to cause serious damage to the territory of other states. This is a principle found in all national legal systems of states, but which has also been transformed into a customary form in the meantime. The second principle of national legal origin is the "*polluter pays principle*", the existence of which has also been confirmed at the international level.⁷⁷

In connection with the above information, the question may arise in the science of international law as to what the difference between international customs and general principles of law is. The main difference between these two sources is that a general principle of law fills a gap in those areas of international law where there is no customary regulation or only partial, incomplete customary regulation. The subsequent development of State practice may, under the conditions required for the formation of customary international law, lead to the emergence of a customary rule corresponding in substance to a general principle of law. This should not, however, be understood as an automatic transformation of the general principle into custom, since the two sources retain distinct legal bases.

From the general principles of law under Article 38 of the ICJ Statute, it is necessary to distinguish general principles of international law that arise by generalizing existing specific norms of international law that do not originate in national law (e.g. the principle of prohibition of the use of force and threat of force). Science has not yet been able to take a definitive position on the issue of the relationship between general legal principles of international law, origin and general principles of international law. However, it is clear from the approach of the ILC to date that the above-mentioned groups of principles can be distinguished. Within the framework of general legal principles born within the framework of international law, the Commission, in the spirit of the Draft Conclusions on general legal principles, has included only some selected principles created in those areas of international law where there was only partial customary or treaty regulation or none at all. Ultimately, these are principles that differ, for example, from fundamental principles of international law that arose by generalizing existing more complex groups of norms of international law.

⁷⁵ *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (2006), p. 178.

⁷⁶ KLUČKA, J. *Mezinárodní právo veřejné (všeobecná a osobitná část)*. 4. vydanie. Bratislava : Wolters Kluwer, 2023. p. 99.

⁷⁷ ZÁSTĚROVÁ, J. *Prameny mezinárodního práva životního prostředí*. In: ŠTURMA, P., DAMOHORSKÝ, M., ONDŘEJ, J., ZÁSTĚROVÁ, J., SMOLEK, M. *Mezinárodní právo životního prostředí, I. část (obecná)*. Beroun : IFEC -- Eva Rozkotová, 2004. p. 75.

V. CONCLUSION

The aim of this article was to examine the historical development, legal nature and contemporary form of three unwritten sources of public international law – customary international law, general principles of law and tacit international agreements – and to determine their significance within the contemporary system of sources of international law. The analysis confirms the hypothesis that the growing number and importance of written sources of international law have not resulted in the disappearance of unwritten sources. The research nevertheless demonstrates that their contemporary significance cannot be explained merely by their continued existence. Their position within the international legal system has been transformed through an increasing functional differentiation between written and unwritten forms of international norm formation.

The first finding concerns customary international law. Its development since the nineteenth century, and particularly since 1945, demonstrates that the expansion of treaty-based norm formation has not displaced custom as an autonomous source of international law. The increasing codification of customary rules has instead changed the circumstances in which custom operates. Customary international law continues to perform an important function where treaty regulation is absent, incomplete or not universally accepted and may coexist with treaty rules as an independent or complementary legal basis for international obligations. Its contemporary relevance should therefore not be assessed solely according to the number of newly emerging customary rules. Its systemic importance also lies in its ability to provide generally applicable rules independently of participation in a particular treaty regime and to maintain normative continuity in areas in which written regulation remains incomplete.

The analysis further demonstrates that the formation of customary international law cannot be reduced to the mere repetition of State conduct over a prolonged period. The decisive elements remain general State practice and its acceptance as law. The temporal duration of practice may constitute relevant evidence, but it does not operate as an autonomous and universally applicable threshold. The identification of custom therefore requires an assessment of the quality, consistency and representativeness of State practice together with evidence of *opinio juris*. This confirms that contemporary customary international law is not simply a product of historical repetition, but a continuing process of normative development.

The second finding concerns tacit international agreements. Their character lies primarily in the nature and intensity of legally relevant State consent. Although tacit agreements may arise through conduct and may therefore resemble customary international law in their unwritten form, they should not be regarded as merely an accelerated form of custom. A tacit agreement requires sufficiently convincing evidence that the conduct of the States concerned demonstrates their intention to establish legally binding rights and obligations between them. Customary international law, by contrast, is based on general State practice accepted as law and does not require the identification of an agreement between particular States. The distinction between the two sources should therefore be based principally on the legal basis and evidentiary character of State consent rather than solely on the duration of the relevant practice.

The third finding concerns general principles of law. Their position is particularly complex because of the continuing doctrinal debate concerning their origin, identification and relationship with customary international law. The analysis supports the view that general principles of law and customary international law cannot be treated as interchangeable sources. Their legal bases remain distinct. Customary international law requires general State practice accepted as law, whereas general principles of law are identified on the basis of the conditions applicable to their respective categories, including principles derived from national legal systems and principles formed within the international legal system. The subsequent application of a general principle by States does not automatically transform that principle into customary international law. Such a transformation would require the independent fulfilment of the

requirements for the formation of custom. The relationship between the two sources should therefore be understood as one of possible normative interaction rather than automatic transformation.

The comparison of the three examined sources consequently leads to a broader conclusion concerning the contemporary structure of international law. The development of international law after 1945 cannot be adequately described as a transition from an unwritten system dominated by custom towards a written system dominated exclusively by treaties. Rather, it represents a process of functional differentiation. Treaty law increasingly provides detailed and deliberate regulation of international relations, while customary international law, tacit agreements and general principles continue to perform distinct functions that cannot be completely replaced by written norm formation. The contemporary system of sources is therefore characterised by coexistence and interaction rather than by the progressive disappearance of unwritten sources.

This conclusion also modifies the understanding of the relationship between the individual sources. Their significance cannot be determined solely by their formal classification or by an abstract hierarchy. Treaty rules, customary rules and general principles may regulate the same subject matter while deriving their legal force from different sources. Similarly, tacit agreements may produce legally binding effects without taking the form of a written treaty. The decisive issue is therefore not which source is generally superior, but which legal basis is applicable in the particular circumstances and how the relevant rule can be methodologically identified.

From a *de lege ferenda* perspective, greater methodological precision is desirable in the identification and differentiation of unwritten sources of international law. Particular attention should be paid to distinguishing customary international law from general principles of law and tacit agreements in situations where similar State conduct may provide evidence relevant to more than one source. The continuing work of the International Law Commission is therefore important not only for the codification of individual sources but also for clarifying the methodological relationship between them. Further development of international law should seek to preserve the flexibility of unwritten sources while maintaining sufficiently clear criteria for their identification in order to protect legal certainty and prevent the attribution of legal effects to State conduct without an adequate legal basis.

The research question can therefore be answered as follows: the legal nature and effectiveness of unwritten sources of public international law remain grounded in distinct mechanisms of international norm formation, while their contemporary development is characterised by increasing interaction with written sources and by differentiation of their respective functions. Their importance has not disappeared as treaty-based regulation has expanded; rather, their role within the international legal system has changed. The principal finding of this article is consequently that the development of contemporary international law has transformed, rather than displaced, unwritten sources. Their continuing relevance derives precisely from their capacity to perform normative functions that cannot be fully substituted by treaty-based regulation.

KEY WORDS

Public international law, unwritten sources, international custom, general legal principles, tacit international agreements

KLÚČOVÉ SLOVÁ

Medzinárodné právo verejné, nepísané pramene, medzinárodná obyčaj, všeobecné právne zásady, tacitné medzinárodné dohody

BIBLIOGRAPHY

1. AKEHURST, M. *A Modern Introduction to International Law*. London and New York : Routledge, 1995. 315 p. ISBN 0-415-09081-4.
2. AZARIA, D. Tacit Agreements. In: HEIDAR, T., BOURKE, N., KIM, H-J. *The Judicial Work of the International Tribunal for the Law of the Sea: Progress and Challenges -- Liber Amicorum Judge Jin-Hyun Paik* (forthcoming, Routledge). 24 p. Posted: 9 May 2024. [online] [cit. 9. septembra 2026]. Dostupné online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4822624.
3. BJORGE, E. General Principles of Law Formed within the International Legal System. In: *International & Comparative Law Quarterly*, 2023, Vol. 72, No. 4, p. 845 -- 867. DOI 10.1017/s0020589323000362.
4. CASSESE, A. *International Law*. Oxford : Oxford University Press, 2001. 469 p. ISBN 0-19-829998-2.
5. ČEPELKA, Č. Vývoj institutů azylu a uprchlictví v mezinárodním právu. In: ČEPELKA, Č., ŠTURMA, P., BÍLKOVÁ, V., FÁBEROVÁ, A., SKALKOVÁ, M., HONUSKOVÁ, V. *Teorie a praxe azylu a uprchlictví*. Praha : Univerzita Karlova a UNHCR, Scripta Iuridica No. 2, 2006. 239 s. ISBN 80-85889-79-X.
6. ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné*. 1. vydanie. Praha : C. H. Beck, 2008. 881 s. ISBN 978-80-7179-728-9.
7. DAVID, V., SLADKÝ, P., ZBOŘIL, F. *Mezinárodní právo veřejné s kazuistikou*. Praha : Leges, 2008. 432 s. ISBN 978-80-87212-08-0.
8. DORDESKA, M. *General Principles of Law Recognized by Civilized Nations (1922-2018)*. Queen Mary Studies in International Law, Volume 39. Leiden : Brill/Nijhoff, 2020. 684 p. ISBN 978-90-04-40018-4.
9. GAIA, G. General Principles of Law. In: *Max Planck Encyclopaedia of Public International Law*, article last updated: April 2020. [online] [cit. 9. septembra 2026]. Dostupné online: <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1410>. DOI 10.1163/9789004390935_004.
10. JANKUV, J. *Environmentalizácia medzinárodného práva verejného a jej vplyv na právo Európskej únie a právny poriadok Slovenskej republiky*. Praha : Leges, 2021. 388 s. ISBN 978-80-7502-580-7.
11. JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLÁŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť*. Plzeň : Aleš Čeněk, 2015. 319 s. ISBN 978-80-7380-559-3.
12. JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law*. Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. [online] [cit. 9. septembra 2026]. Dostupné online: <https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265>.
13. KLABBERS, J. *International Law*. Cambridge : Cambridge University Press, 2013. 375 p. ISBN 978-0-521-14406-3.
14. KLUČKA, J. *Medzinárodné právo verejné (všeobecná a osobitná časť)*. 2. doplnené a prepracované vydanie. Bratislava : Iura Edition, 2011. 725 s. ISBN 978-80-8078-414-0.
15. KLUČKA, J. *Medzinárodné právo verejné (všeobecná a osobitná časť)*. 4. vydanie. Bratislava : Wolters Kluwer, 2023. 536 s. ISBN 978-80-8078-414-0.
16. LU, Y. Analysis of the General Principles of Law of Article 38 of the Statute of the International Court of Justice. In: *Beijing Law Review*, 2022, Vol. 13, p. 785 -- 794. Dostupné online: <https://doi.org/10.4236/blr.2022.134051>. DOI 10.4236/blr.2022.134051.
17. MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*. 5. podstatně upravené a doplněné vydanie. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. 552 s. ISBN 978-80-7239-218-6.

18. ŠTENPIEN, E. Štefan Werbőczy -- život a dielo. In: *Tripartitum*. Žilina : Eurokódex, 2008. p. 320. ISBN 978-80-89363-24-7.
19. VÁZQUEZ-BERMÚDEZ, M. *Fourth Report on General Principles of Law*. UN Doc. A/CN.4/785. International Law Commission, 76th Session, U.N. Doc. A/CN.4/SER.A/2025 (2025).
20. WERNER, W. The Making of Lawmaking: The ILC Draft Conclusions on the Identification of Customary Law. In: KRISCH, N., YILDIZ, E. (eds.). *The Many Paths of Change in International Law*. Oxford : Oxford University Press, 2023, p. 109 -- 149. DOI 10.1093/oso/9780198877844.001.0001.
21. WOLFKE, K. *Custom in Present International Law*. Wrocław : Polska Akademia Nauk, 1964. 185 p.
22. ZÁSTĚROVÁ, J. Prameny mezinárodního práva životního prostředí. In: ŠTURMA, P., DAMOHORSKÝ, M., ONDŘEJ, J., ZÁSTĚROVÁ, J., SMOLEK, M. *Mezinárodní právo životního prostředí, I. část (obecná)*. Beroun : IFEC -- Eva Rozkotová, 2004. p. 58 -- 84. ISBN 80-903409-2-X.

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