

# Challenges in the Identification of the “General Principles of Law Recognized by Civilized Nations”: The Approach of the International Court

Rumiana Yotova\*

*This article reassesses the legal character of ‘the general principles of law recognized by civilized nations’, being one of the two unwritten sources of international law. The general principles of law are, however, the most controversial source of international law and have continued to divide the opinions of scholars and judges alike since their inception. Some view them as private law analogies, others as emanations of natural law and there are those who conflate them with custom. This article seeks to identify the appropriate methodology for ascertaining the existence of the controversial ‘general principles of law’. It does so by going back to the preparatory works of Article 38(1) (c) of the Statute of the International Court of Justice and then critically assessing the practice of states and the case law of the Court on identifying general principles. It will be argued that general principles of law are an important source of international law in their own right with a systemic function in the international legal order and a distinct methodology for their ascertainment. Three categories of general principles will be distinguished based on the nuanced methodologies for their ascertainment applied by the International Court of Justice and its predecessor, namely, general principles of international law, general principles of domestic law and general principles of procedural law.*

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\* Dr. Rumiana Yotova is a Fellow and Director of Studies in Law at Lucy Cavendish College, University of Cambridge and an Affiliated Lecturer at the Faculty of Law. She can be contacted at: rvy21@cam.ac.uk. The present article is based on a chapter of her PhD thesis.

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## I. Introduction

Article 38(1) of the *Statute of the International Court of Justice*<sup>1</sup> (“*SICJ*”) sets out the sources of international law that the International Court of Justice (“ICJ”) shall apply, including treaties, custom and notably, “the general principles of law recognized by civilized nations”.<sup>2</sup> The general principles of law proved to be the most controversial source during the drafting of the *Statute for the Permanent Court of International Justice*<sup>3</sup> (“*SPCIJ*”) in 1929 and continues to divide the opinions of scholars and

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1. 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) [*SICJ*].
  2. *Ibid*, art 38(1)(c).
  3. 16 December 1920, 6 LNTS 390 (entered into force 8 October 1921).

tribunals today. There is very little agreement on the interpretation of Article 38(1)(c) of the *SICJ* and arguably insufficient guidance by the ICJ itself on the methodology to be employed in its application.

This ongoing controversy is partly due to the unwritten character of general principles as a source of international law and the related challenges of evidence, capacity and burden of proof in their identification.<sup>4</sup> Another challenge lies in the different assumptions of civil and common law systems with respect to the function of general principles as a source of law and the perception of a law-making role of the judge in their identification including the resort to inductive but also deductive reasoning.<sup>5</sup> Finally, the identification of the general principles of law brings out the question of state consent and the corresponding division between the naturalist and the voluntarist approaches to international law, which became particularly apparent during the debates surrounding the drafting of Article 38(1)(c) of the *SICJ*. It is thus not surprising that in its latest annual report, the International Law Commission of the United Nations (“ILC”), which is the body responsible for the codification and progressive development of international law, identified the study of the general principles of law as one of the topics for its future programme of work.<sup>6</sup> Accordingly, a doctrinal engagement with the challenges in the identification and application of the general principles of law is both timely and much needed. This study will begin with the interpretation of Article 38(1)(c) of the *SICJ*, which sets out the definition of general principles as a source of international law, by reference to the general rule of treaty interpretation, as well as the preparatory works of the provision given its ambiguities. Next, it will assess critically the case law of the ICJ

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4. Jaye Ellis, “General Principles and Comparative Law” (2011) 22 *European Journal of International Law* 949 at 957.
  5. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1953) at 16-19; see also Clive Parry, *The Sources and Evidences of International Law* (Manchester: Manchester University Press, 1965) at 85-88.
  6. International Law Commission, *Report of the International Law Commission*, 68th Sess, UNGAOR, 71st Sess, Supp No 10, UN Doc A/71/10 (2016) at 378.

and its predecessor, given that they are the primary addressees of the provision, so as to identify the methodology of the ICJ with respect to the identification and the application of the general principles of law. The article will conclude by offering some methodological conclusions, as well as a typology of the general principles of law and their respective roles in international adjudication.

## II. The Doctrinal Debate on General Principles

It is worth noting briefly the ongoing doctrinal debate on the meaning, function and methodology for the ascertainment of general principles of law, given that the writings of scholars are one of the subsidiary sources for identifying the general principles of law in accordance with Article 38(1)(d) of the *SICJ*.<sup>7</sup> It is still true to say that the general principles are the most controversial of the sources of international law.<sup>8</sup>

### A. The Scope of "General Principles of Law" and the Methodology for their Ascertainment

Scholars disagree on the methodology for the identification of the general principles of law. Some advocate a comparative law approach; others advocate an international law-based one and there are those who adopt a 'hybrid' approach consisting of a combination of the two. Authors supporting the comparative approach include, among others,

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7. *SICJ*, *supra* note 1, art 38(1)(d).

8. Cheng, *supra* note 5 at xv.

Oppenheim,<sup>9</sup> Lauterpacht,<sup>10</sup> Grapin,<sup>11</sup> Schlesinger<sup>12</sup> and Herczegh.<sup>13</sup> Thirlway addresses this challenge by defining general principles as “those principles without which no legal system can function at all, that are part and parcel of legal reasoning” and the comparative methodology for their ascertainment is not so much a criterion but a guide.<sup>14</sup> Pellet adopts an attenuated comparative approach for deriving general principles from those common to national legal systems but with the additional requirement that they are “transposables dans l’ordre juridique international”.<sup>15</sup> This additional requirement is fully in line with the text of Article 38(1) of the *SICJ*, requiring the ICJ to decide disputes “in accordance with international law”.<sup>16</sup>

While firmly rooted in the tradition of voluntarism by requiring the consent of the majority if not all states for a principle to become a general principle of law as a source of international law, the conceptual difficulty with the comparative law approach lies in the transposition of domestic principles to the international plane which necessitates

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9. Sir Robert Jennings & Sir Arthur Watts, *Oppenheim’s International Law: Volume 1 Peace*, 9d (Oxford: Oxford University Press, 1996) at 37.
  10. Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (London: Longman’s, Green and Co, 1927) at 67-69.
  11. Pierre Grapin, *Valeur Internationale des Principes Généraux du Droit* (Paris: Montchrestein, 1934) at 49.
  12. Rudolph B Schlesinger, “Research on the General Principles of Law Recognized by Civilized Nations” (1957) 2 *American Journal of International Law* 734.
  13. Géza Herczegh, *General Principles of Law and the International Legal Order* (Budapest: Akadémia Kiadó, 1969) at 124.
  14. Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2014) at 99.
  15. Din Nguyen Quoc et al, *Droit International Public*, 6d (Paris: Librairie Générale de Droit et de Jurisprudence, 1994) at 344; see also Alain Pellet, “Article 38” in Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm, eds, *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2012) 677 at 840; see also Ellis, *supra* note 4 at 954.
  16. *SICJ*, *supra* note 1, art 38(1).

reasoning by analogy<sup>17</sup> and involves an inherent degree of indeterminacy. As highlighted by Ellis, "once the rule is taken from one context and introduced to another, one can be fairly sure that it will be transformed, without being able to make predictions as to how much or in precisely what way".<sup>18</sup> Indeed, D'Aspremont opines that the difficulties of collecting representative domestic laws have led to the ascertainment of general principles moving away from having any formal legal character at all.<sup>19</sup>

At the other end of the spectrum are those scholars who adopt a purely international law-based approach for the ascertainment of general principles. Kelsen forcefully rejects the comparative law methodology noting with some justification that "it is doubtful whether such principles common to the legal orders of civilized nations exist at all".<sup>20</sup> He argues instead that the general principles of law are only those that are already part of international law either as treaties or custom.<sup>21</sup> Cassese identifies two different classes of general principles of law, including the general principles of international law derived by induction from conventions and custom but also the "principles that are peculiar to a particular branch of international law".<sup>22</sup> It is difficult to see, however, how the latter category of principles meets the requirement of generality. Brownlie adopts a hybrid approach by including under the rubric of 'general principles'

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17. André Nollkaemper, "The Role of Domestic Courts in the Case Law of the International Court of Justice" (2006) 5 *Chinese Journal of International Law* 301 at 308.
  18. Ellis, *supra* note 4 at 967.
  19. Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press, 2011) at 171.
  20. Hans Kelsen, *Principles of International Law* (New York: Rinehart, 1952) at 393.
  21. *Ibid* at 394; see also Grigory Tunkin, "'General Principles of Law' in International Law" in René Marcic et al, eds, *Internationale Festschrift Für Alfred Verdross* (Munich: Wilhelm Fink Verlag Munchen, 1971) 523 at 523.
  22. Antonio Cassese, *International Law*, 2d (Oxford: Oxford University Press, 2005) at 189.

both principles derived from domestic laws and the general principles of international law defined as “abstractions ... [that] have been accepted for so long and so generally as no longer to be *directly* connected to state practice”.<sup>23</sup> The ILC, which is the UN body responsible for the codification and progressive development of international law, seems to adopt a hybrid approach too. For instance, in the report of its study group on fragmentation, it noted that the general principles of law could “refer to principles of international law proper and to analogies from domestic laws, especially principles of legal process”.<sup>24</sup> The hybrid approach seems convincing as it is also in line with that of the ICJ.

Cheng distances himself from the methodological debate all together, noting that “[i]t is of no avail to ask whether these principles are general principles of international law or of municipal law; for it is precisely the nature of these principles that they belong to no particular system of law, but are common to them all”.<sup>25</sup> He accordingly adopts an inductive method examining the decisions of international courts and tribunals as “the most important means for the determination of rules and principles of international law”.<sup>26</sup> While this is somewhat in line with the approach of the ICJ of using international decisions to identify general principles of law, it does not answer the pertinent methodological question as to whether these decisions are themselves direct evidence of the recognition of general principles or merely an easy shortcut for their identification. Furthermore, requiring that general principles are common to all legal systems goes beyond the exigencies of Article 38(1)(c) of the *SICJ* and potentially narrows that category even further.

Finally, some scholars adhere to the naturalist school of thought, adding values and morality to the methodology for the identification

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23. James Crawford, *Brownlie's Principles of Public International Law*, 8d (Oxford University Press, 2012) at 36-37 [emphasis in original].

24. Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, International Law Commission OR, 58th Sess, UN Doc A/CN.4/L.682 (2006) at 254.

25. Cheng, *supra* note 5 at 390.

26. *Ibid* at 1.

of general principles. Besson takes the view that the material source of general principles lies in moral values, giving as an example the protection of human rights.<sup>27</sup> Voigt notes in a similar vein that the approach to identifying general principles is based on "a common legal conscience"; an *opinio juris communis*" to be found in declarations and statements of states and international organisations.<sup>28</sup> While ethically appealing, these approaches find little support in the actual wording of Article 38(1)(c) of the *SICJ*, or in the practice of the ICJ on the application of this provision. Furthermore, it is far from clear whether one could simply equate the recognition required for the identification of the general principles of law with the acceptance as law or *opinio juris*, being the subjective element of customary international law under Article 38(1)(b) of the *SICJ*, not least due to the different wording of Article 38(1)(c).<sup>29</sup>

One question not well addressed in literature concerns the difference between custom and general principles, being the two unwritten primary sources of international law. Some argue that the two can and do at times overlap, others that general principles are a transitory stage between domestic law principles and custom,<sup>30</sup> and there are those who conceptualise general principles as inchoate custom that does not require support by state practice.<sup>31</sup> For example, the Special Rapporteur of the ILC on the Identification of Customary International Law implies that state practice is not a necessary element for the establishment of general principles, noting that "[t]he International Court itself may have recourse to general principles of international law in circumstances when

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27. *Ibid* at 47-49, 57.

28. Christina Voigt, "The Role of General Principles in International Law and their Relationship to Treaty Law" (2008) 31 *Retfærd: Nordic Journal of Law and Justice* 3 at 8 [emphasis in original].

29. *SICJ*, *supra* note 1, arts 38(1)(b)-(c).

30. Humphrey Waldock, "General Course on Public International Law" (1962) 106 *Rec des Cours* 39 at 62.

31. Giorgio Gaja, "General Principles of Law" in *Max Plank Encyclopedia of International Law* by Rüdiger Wolfrum (Oxford: Oxford University Press, 2016) at para 16, online: Oxford Public International Law <[www.mpepil.com](http://www.mpepil.com)>; see also Cassese, *supra* note 22 at 160-61.

the criteria for customary international law are not present”.<sup>32</sup> While acknowledging that it may be difficult to distinguish between general principles and custom in practice, Sir Michael Wood stresses the need to differentiate the rules that by their nature do not need to be grounded in state practice.<sup>33</sup> The first view is preferable as general principles can overlap with custom when the latter has the requisite degree of generality, as will be seen in the practice of the ICJ referring to the same norm at some times as custom and at others, as a general principle.

Overall, disagreement persists among the eminent scholars of international law with respect to the legal character of the general principles of law, be they principles of international law, those common to the municipal legal systems or both, as well as with respect to the methodologies for their ascertainment.

## **B. The Distinction Between Principles and Rules**

Scholars also disagree on how to distinguish between principles and rules. According to Sir Gerald Fitzmaurice:

[b]y a principle, or a general principle, as opposed to a rule, even a general rule, of law is meant chiefly something which is not itself a rule, but which underlines a rule, and explains or provides the reason for it. A rule answers the question ‘what’: a principle in effect answers the question ‘why’.<sup>34</sup>

Herczegh distinguishes principles from rules based on their level of generality, noting that “a principle of law is a norm of general content which manifests itself in a group or system of legal rules which are associated with one another”.<sup>35</sup> Dworkin opines that “both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give”

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32. Michael Wood, *First Report on Formation and Evidence of Customary International Law*, International Law Commission OR, 65th Sess, UN Doc A/CN.4/663 (2013) at para 36.

33. *Ibid.*

34. Gerald Fitzmaurice, “The Principles of International Law Considered from the Standpoint of the Rule of Law” (1957) 92 Rec des Cours 7 at 7.

35. Herczegh, *supra* note 13 at 122.

as rules apply in "an all-or-nothing fashion",<sup>36</sup> whereas principles have the dimensions of weight and importance and must be taken into account by decision makers as suggesting a given direction without necessitating a particular decision.<sup>37</sup> In his reply to Dworkin's criticisms, Hart defines principles as an aspect of legal reasoning and judicial decision-making<sup>38</sup> due to being "broad, general or unspecific ... because they refer more or less explicitly to some purpose, goal, entitlement or value".<sup>39</sup>

Kolb sees principles as "neither simple 'rules' nor simple 'vague ideas'" but rather "norm-sources" as a type of source that "does not essentially deal with the *fixed* meaning of rules to be applied, but with the *adaptation* of the rules to some constitutional necessities, to new developments and needs, to conformity with basic value-ideas".<sup>40</sup> There are also those who deny the meaningfulness of the distinction between rules and principles, arguing that both can be a direct source of rights and obligations.<sup>41</sup>

Most scholars seem to distinguish between rules and principles based on their level of generality. This is in line with the ordinary meaning of the term "principle", deriving from the Latin "principium", meaning origin, source or basis,<sup>42</sup> as well as with the wording of the *SICJ* stressing the element of generality in the principles of law recognized by civilized nations.

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36. Ronald Dworkin, *Taking Rights Seriously* (Cambridge MA: Harvard University Press, 1978) at 24.

37. *Ibid* at 28.

38. Herbert Lionel Adolphus Hart, *The Concept of Law*, 2d (Oxford: Oxford University Press, 1997) at 263.

39. *Ibid* at 260.

40. Robert Kolb, "Principles as Sources of International Law" (2006) 53 *Netherlands International Law Review* 1 at 9 [emphasis in original].

41. Sienho Yee, "Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases" (2016) 7 *Journal of International Dispute Settlement* 472 at 488; Committee on Formation of Customary (General) International Law, "Statement of Principles Applicable to the Formation of General Customary International Law" (Report delivered at the International Law Association London Conference, 2000) at 10-11, online: International Law Association <[www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376](http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376)>.

42. *The Oxford English Dictionary*, 2016, sub verbo "principium".

### C. The Function of General Principles

Scholars put different emphasis on the function of general principles in the system of international law. The views range from understanding general principles as gap-fillers to seeing them as the backbone of the international legal system. Verdross focuses on their interpretative function to conclude that both conventional and customary international law should be interpreted and applied in light of the general principles of law.<sup>43</sup>

McNair on the other side emphasises the role of general principles in investment contracts between states and corporations, reasoning that: “those contracts which, though not interstate contracts and therefore not governed by public international law *stricto sensu*, can more effectively be regulated by general principles of law than by the special rules of any territorial system”.<sup>44</sup> Clearly, in contrast to Verdross, McNair had in mind the general principles of private law whose function is to regulate private as opposed to inter-state relations.

For Koskenniemi, the key function of general principles is that of constructivist thinking in legal argumentation,<sup>45</sup> requiring “constructive activity from the judge who must provide a set of arguments in light of which the decision seems coherent with [the community’s] goals and values”.<sup>46</sup> Parry reasons in a similar vein that the general principles are “not so much a source as a method [for the judge] of applying other sources”.<sup>47</sup> In contrast, others, including Allott, adopt a ‘constitutionalist’

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43. Alfred Verdross, “Les Principes Généraux du Droit dans la Jurisprudence Internationale” (1935) 52 Rec des Cours 191 at 227.

44. Arnold McNair, “The General Principles of Law Recognized by Civilized Nations” (1957) 33 British Yearbook of International Law 1 at 15 [emphasis in original]; see also Wolfgang Friedmann, “The Uses of ‘General Principles’ in the Development of International Law” (1963) 57 American Journal of International Law 279 at 281.

45. Martti Koskenniemi, “General Principles: Reflections on Constructivist Thinking in International Law” in Martti Koskenniemi, ed, *Sources of International Law* (Burlington VT: Ashgate Publishing, 2000) 359 at 361.

46. *Ibid* at 375.

47. Parry, *supra* note 5 at 84.

view observing that it is the 'generic principles' that systemize the interacting sub-systems of society, organise their functioning relationship to each other and constitute an instance of a system shared by all societies.<sup>48</sup> Cassese too sees the general principles of law as 'constitutional principles' forming the "pinnacle of the legal system".<sup>49</sup> Similarly, Kolb identifies eight constitutional functions of general principles including: the unification of the legal system; its 'flexibilization'; a value-catalysis function; a dynamic and evolutionary function; a guide to interpretation and corrective function; an autonomous source of law function; a necessary complement to a series of legal rules and finally; the function of facilitating legal compromise.<sup>50</sup> According to Besson, "principles ensure guidance and coherence in legal interpretation by reference to a set of values, but also dynamism through teleological interpretation".<sup>51</sup> Cheng identifies three more practically-oriented functions fulfilled by the general principles of law: as a source of rules; as "guiding principles of the juridical order according to which the interpretation and application of the rules of law are oriented"; and thirdly, as a gap-filler "wherever there is no formulated rule governing the matter".<sup>52</sup>

Overall, there is little accord in doctrine on the meaning, function and methodology for the identification of general principles as a source of international law. The only shared understandings seems to be that general principles are more abstract than other rules and that they play an important role in the interpretation of international norms. If anything, scholars seem to add to rather than to resolve the underlying controversy.

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48. Phillip Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990) at 167-68; see also Malgosia Fitzmaurice, "History of Article 38 of the Statute of the International Court of Justice" in Samantha Besson & Jean d'Aspremont, eds, *The Oxford Handbook of Sources of International Law* (Oxford: Oxford University Press: 2017) [forthcoming in 2017] at 24.
49. Cassese, *supra* note 22 at 46, 188.
50. Kolb, *supra* note 40 at 27-35.
51. Samantha Besson, "General Principles in International Law – Whose Principles?" in Samantha Besson & Pascal Pichonnaz, eds, *Les Principes en Droit Européen* (Zurich: Schulthess Verlag, 2011) 19 at 32.
52. Cheng, *supra* note 5 at 390.

Accordingly, it is difficult to use scholarly writings as a subsidiary source for the identification of general principles of law or indeed for the interpretation of Article 38(1)(c) of the *SICJ*, so recourse will be had instead to the preparatory works of the provision and to the subsequent practice of the ICJ in its application.

### III. Interpreting Article 38(1)(c) of the *SICJ*

This section now turns to the interpretation of the provision establishing that “the general principles of law recognized by civilized nations” are one of the sources of international law to be applied by the ICJ.<sup>53</sup> Article 31 of the *Vienna Convention on the Law of Treaties*<sup>54</sup> (“*Vienna Convention*”) sets out the general rule of interpretation providing that treaties are to be interpreted in good faith and in accordance with the ordinary meaning of their terms. The ordinary meaning of “principle” could be derived, for example, from the *Oxford Dictionary* which defines the term as either “[a] fundamental truth or proposition that serves as the foundation for a system of behaviour”, as “[a] general law that has numerous special applications across a wide field”, or “[a] fundamental source or basis of something”.<sup>55</sup> In a similar way, the Institut de Droit International identifies different meanings of what constitutes a “principle” including “a norm of a higher or highest order”; “a norm that generates specific rules”; “a purpose to be achieved, a guiding idea”; or “rules or standards of interpretation”.<sup>56</sup> Accordingly, the ordinary meaning of the term ‘principle’ is quite ambiguous and open to varying interpretations.

The requirement that principles be ‘general’ is also far from clear. It could refer either to their level of abstraction or indeed to the recognition

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53. *SICJ*, *supra* note 1, art 38(1)(c).

54. 23 May 1969, 1155 UNTS 331 art 31 (entered into force 27 January 1980) [*Vienna Convention*].

55. *The Oxford English Dictionary*, 2016, sub verbo “principle”.

56. Krzysztof Skubiszewski, “The Elaboration of General Multilateral Conventions and of Non-Contractual Instruments Having a Normative Function or Objective” (Report delivered at the Session of Cairo, 1987) online: The Institute of International Law <[www.justitiaetpace.org/idiE/resolutionsE/1987\\_caire\\_02\\_en.PDF](http://www.justitiaetpace.org/idiE/resolutionsE/1987_caire_02_en.PDF)>.

necessary for their formation. The fact that the general principles of law ought to be "recognized by civilized nations" is underlined by open-endedness too. First, the term "recognize" is different from the expression "accepted as law", which is the subjective element of custom set out in Article 38(1)(b).<sup>57</sup> Yet, scholars have argued that recognition has more in common with the subjective attitude of states than with their practice.<sup>58</sup> The ICJ seems to confer a subjective meaning on "general recognition" as well as defining it as an indication that a rule of law or a legal obligation is involved.<sup>59</sup> Second, it is not clear whether all, or a representative majority of nations, ought to recognise the general principles. The latter interpretation is supported by the International Law Association, which is a professional body consisting of eminent international jurists from different states, arguing that the general principles ought to be recognised "by a prevailing – or at least a significant – number of nations within each legal culture".<sup>60</sup> Finally, it is also not obvious why Article 38(1)(c) of the *SICJ* requires the recognition of general principles by 'nations' whereas Article 38(1)(a) refers to the recognition of treaty rules by 'States' and whether any difference should be drawn between the two.<sup>61</sup> If anything, it seems that it might be easier to ascertain the acceptance of a rule by states as legal entities than the recognition of principles by nations, seen as communities of people. The reference to 'civilized nations' could also be understood as pointing to the international community of states as a whole.

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57. *SICJ*, *supra* note 1, arts 38(1)(b)-(c).

58. Waldock, *supra* note 30 at 49; Rein Müllerson, "The Interplay of Objective and Subjective Elements in Customary Law" in Karl Wellens, ed, *International Law: Theory and Practice – Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff, 1998) 161 at 163.

59. *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)*, [1969] ICJ Rep 3 at para 74 [*North Sea Cases*].

60. Maurice H Mendelson et al, "The Use of Domestic Law Principles in the Development of International Law Study Group" (Report delivered at the Johannesburg Conference, 2016) at 57, online: International Law Association <[www.ila-hq.org/en/committees/study\\_groups.cfm/cid/1033](http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1033)>.

61. *SICJ*, *supra* note 1, arts 38(1)(a), (c).

Given the ambiguities that persist after applying the general rule of treaty interpretation to Article 38(1)(c) of the *SICJ*, recourse should be had to the subsequent practice of states as to its interpretation, as well as to the preparatory works of the provision as a supplementary means for ascertaining its meaning in accordance with Article 32 of the *Vienna Convention*.<sup>62</sup>

### A. State Practice on the Interpretation of General Principles of Law

The subsequent practice of states as to the interpretation and application of the provision on general principles is difficult to establish, given that Article 38 of the *SICJ* is an applicable law clause addressed to the ICJ.<sup>63</sup> However, one could resort to indirect evidence of the position of states with respect to the definition and identification of the general principles of law.

For example, the *Restatement (Third) of Foreign Relations Law*<sup>64</sup> evidences the US understanding of this source as a form of inchoate custom derived through a comparative law methodology whose functions include the development of international law, the administration of justice and providing rules of reason:

[g]eneral principles common to systems of national law may be resorted to as an independent source of law. That source of law may be important when there has not been practice by states sufficient to give the particular principle status as customary law and the principle has not been legislated by general international agreement.<sup>65</sup>

Another source of evidence for the attitudes of states towards general principles can be found in the replies received in response to the ILC questionnaire on the Formation and Evidence of Customary

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62. *Vienna Convention*, *supra* note 54, art 32.

63. *SICJ*, *supra* note 1, art 38.

64. *Restatement (Third) of Foreign Relations Law*, (Philadelphia: American Law Institute, 1987) §102.

65. *Ibid.*

International Law.<sup>66</sup> For instance, the Czech Republic stated that many of its treaties with states of the former Soviet Union refer to "principles of international law", indicating an international law-based approach towards general principles in its treaty practice, as well as that of states from the former Soviet Union.<sup>67</sup> In a similar manner, El Salvador affirmed the understanding espoused by its Constitutional Court that the resolutions of international organisations, even though not themselves binding, contribute significantly to the formation of the other sources of international law, including the general principles.<sup>68</sup> Ireland referred to Article 29(3) of its Constitution affirming that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states".<sup>69</sup> It also relied on a judgment by its High Court holding that "[t]he most compelling evidence of whether any principle is generally recognised is the conduct of other states", as well as international conventions.<sup>70</sup> A narrower international law-based approach is reflected in Russia's reply to the ILC, quoting an interpretative decision of its Constitutional Court holding that "the

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66. Michael Wood, *Fourth Report on Formation and Evidence of Customary International Law*, International Law Commission OR, 68th Sess, UN Doc A/CN.4/695 (2016) at 4-12.
67. International Law Commission, Czech Republic, *Comments of the Czech Republic on the Specific Issues Raised in Chapter III of the Report of the International Law Commission on the Work of its 65th Session*, No 26/2014, 31 January 2014, at para B-II online: International Law Commission <legal.un.org/ilc/sessions/66/pdfs/english/pat\_czech\_republic.pdf>.
68. Supreme Court of El Salvador, Judgment No. 26-2006, 12 March 2007, cited in El Salvador, *Identificación del Derecho Internacional Consuetudinario, Informe de la República de El Salvador* at 3, online: International Law Commission <legal.un.org/docs/?path=../ilc/sessions/66/pdfs/spanish/icil/\_el\_salvador.pdf&lang=S>.
69. Permanent Mission of Ireland to the United Nations, *Reply on the Formation and Evidence of Customary International Law*, at 127.
70. *Horgan v Ireland*, [2003] 2 IR 468 (HC) at 496, cited in International Law Commission, Ireland, *Decisions of National Courts of Ireland Relating to the Formation and Evidence of Customary International Law*, online: <legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/icil\_ireland.pdf&lang=E>.

general principles of international law denote the fundamental imperative norms of international law, recognised and accepted by the international community of States as a whole from which no derogation is permitted”.<sup>71</sup>

Other states adduced practice in support of the comparative law-based approach to general principles. Germany, for instance, adopted the definition of its Federal Constitutional Court stating that the general principles of law are “accepted legal principles, which are consistently applied in the different domestic legal systems and which can be transferred to interstate relations”.<sup>72</sup> Similarly, Switzerland quoted the definition of general principles of law adopted by its Federal Council as “de normes dotées d’une validité universelle car connues de tous les grands systèmes juridiques dans le monde”.<sup>73</sup> Notably, however, Switzerland noted that its authorities also refer expressly to the general principles of international customary law or the general principles of international law as an autonomous source.<sup>74</sup> Accordingly, the practice of Switzerland is most in line with the hybrid approach to the general principles of law.

Overall, the practice of states in the interpretation of the general principles of law recognised by civilised nations is difficult to establish and is no less divided than the opinions of eminent scholars. It can be concluded that the available state practice does not seem to offer any conclusive evidence of a dominant approach towards the definition or the identification of the general principles of law.

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71. Russian Federation, *Formation and Evidence of Customary International Law*, at 1-2 [translated by author] (referring to Interpretative Decision of the Plenary of the Constitutional Court No. 5 of 10 October 2003).

72. Bundesverfassungsgericht (Federal Constitutional Court), *Decision of the Second Chamber of the Second Senate of 4 September 2008*, 2 BvR 1475/07 (Germany) at para 20.

73. Switzerland, *La Pratique Suisse Relative à la Détermination du Droit International Coutumier*, at 12, (Quoting FF2010, Conseil fédéral, Rapport additionnel au Rapport du 5 mars 2010 sur la relation entre droit international et droit interne, 30 mars 2011, FF 2011 3401, at 3412).

74. *Ibid.*

## B. Preparatory Works of Article 38(1)(c) of the *SICJ*

The preparatory works of the *SICJ* seem to raise more questions than they answer. Not surprisingly, the preparatory works confirm that the general principles of law were the most controversial source during the drafting of Article 38.

The Advisory Committee of Jurists ("ACJ") appointed by the League of Nations in 1920 prepared the draft of the *SPCIJ*, which later became the *SICJ* with minor modifications.

The idea of principles forming part of the applicable law was already present in the early governmental proposals which led the League of Nations to form the ACJ assigning to it the preparation of the draft *SPCIJ*. The Brazilian jurist Clóvis Beviláqua presented a draft on the organisation of the future court raising the issue as to the law to be applied in the absence of *jus scriptum*. He suggested that the tribunal would fill the lacuna in positive law "guided by the high principles, which constitute the basis of international judicial order ... by abstracting it directly from the prevailing juridical conception, in which such definitely secured principles are embodied".<sup>75</sup>

Opinions as to the sources to be applied by the Permanent Court of International Justice ("PCIJ") in the absence of treaty provisions varied during the ACJ proceedings. The Five Neutral Powers proposed that the PCIJ should apply: "recognised rules of international law"; the International Law Union favoured "the principles of justice"; Switzerland suggested "the principles of the law of nations"; and Germany advocated "international customary law and ... general principles of law and

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75. Clovis Beviláqua, "Explanatory Notes on the Draft Concerning the Organisation of a Permanent Tribunal of International Justice" (Delivered to The Committee Relating to the Existing Plans for the Establishment of a Permanent Court of International Justice, 1920) at 371, online: International Court of Justice <[www.icj-cij.org/pcij/serie\\_D/D\\_documents\\_to\\_comm\\_existing\\_plans.pdf](http://www.icj-cij.org/pcij/serie_D/D_documents_to_comm_existing_plans.pdf)>.

equity”.<sup>76</sup>

The first proposed formula on general principles was introduced by the President of the ACJ – the Belgian jurist Baron Descamps – and referred to: “the rules of international law as recognized by the legal conscience of civilized nations”.<sup>77</sup> This provision raised the most questions in the drafting of Article 38 of the *SICJ*, reflecting the divide on the function of the Court as *la bouche de la loi* or as a motor in the development of international law. The US delegate, Root, did not understand the meaning of the clause and whether it referred to “something which had been recognized but nevertheless had not the character of a definite rule of law”.<sup>78</sup> He cautioned that this article “constituted an enlargement of the jurisdiction of the Court which threatened to destroy it”.<sup>79</sup> Similarly, the British representative, Lord Phillimore was concerned that the provision on general principles either came within the limits of the provision on custom or “gave the Court a legislative power”, suggesting instead a reference to “rules of international law ... from whatever source they may be derived”.<sup>80</sup> The Dutch jurist Loder disagreed with these perspectives, reasoning that general principles referred to “[r]ules recognised and respected by the whole world” and that “it was precisely the Court’s duty to develop law, to ‘ripen’ customs and principles universally recognised, and to crystallise them into positive rules”.<sup>81</sup>

In response to these criticisms, Baron Descamps elaborated that, “[t]he principles which must guide the judge, in the solution of the disputes submitted to him are of vital importance”,<sup>82</sup> giving as examples other instruments containing rules illustrating the ‘legal conscience of civilized nations’, including Article 7 of the *Convention Relative to the*

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76. Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee June 16 - July 24 1920 with Annexes* (The Hague: Van Langenhuisen Brothers, 1920) at 89-91 [*Procès-Verbaux*].

77. *Ibid* at 306.

78. *Ibid* at 293-94.

79. *Ibid* at 294.

80. *Ibid* at 295.

81. *Ibid* at 294.

82. *Ibid* at 322.

*Creation of an International Prize Court* with its reference to "the general principles of justice and equity",<sup>83</sup> as well as the preamble of the 1899 *Hague Convention IV Respecting the Laws and Customs of War on Land*<sup>84</sup> referring to "the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of public conscience".<sup>85</sup> Descamps accordingly concluded that "it is impossible to disregard a fundamental principle of justice in the application of law, if this principle clearly indicates certain rules, *necessary for the system of international relations, and applicable to the various circumstances arising in international affairs*".<sup>86</sup> This statement indicates the understanding that the principles referred to in the draft statute were those applicable on the international plane, which was reinforced in the debates that followed.

In response, Root confirmed his acceptance of the jurisdiction of a court applying universally recognised rules of international law but stressed that he was not disposed to accept legislation through the application of "general principles, which are interpreted differently in different countries".<sup>87</sup> Descamps replied that this was a misunderstanding as the principles varying from country to country were rules of secondary importance whereas the provision referred to "the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations".<sup>88</sup> Descamps opined that rather than giving more discretion to judges, general principles in fact limited their liberty<sup>89</sup> as the solution that the judge was justified to apply had to be "approved by universal public opinion".<sup>90</sup> The Italian representative, Ricci-Busatti, gave as examples of such principles the rule that what is

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83. 18 October 1907, 205 Cons TS 381 art 7 (not ratified).

84. 18 October 1907, 36 Stat 2277 (entered into force 26 January 1910).

85. *Ibid*, preamble.

86. *Procès-Verbaux*, *supra* note 76 at 324 [emphasis added].

87. *Ibid* at 309.

88. *Ibid* at 310-11.

89. *Ibid* at 311.

90. *Ibid* at 318.

not forbidden between states is allowed, the prohibition against abuse of rights and *res judicata*.<sup>91</sup> Lord Phillimore took the view that the serious differences of opinion on general principles “arose from the continental idea of justice” giving too much freedom to the judges.<sup>92</sup> He also pointed out, with notable ethnocentricity, that “all the principles of common law are applicable to international affairs”<sup>93</sup> giving as examples the principle of *res judicata* as applied in *the Pious Fund Case (United States of America v Mexico)*,<sup>94</sup> as well as the principle *onus probandi incumbit actori*.<sup>95</sup> Notably, Lord Phillimore was in the minority advocating for the transposition of principles of national law on the international plane.

Following these debates, Root presented a draft of the provision on general principles of law, which was prepared in collaboration with Lord Phillimore and became the current text of Article 38(1)(c) of the *SICJ*.<sup>96</sup> The French representative, De Lapradelle asked how were general principles to be obtained if not from custom unless it was from judicial decisions and writers.<sup>97</sup> Lord Phillimore replied to that question with a much quoted remark, stating that “the general principles referred to in point 3 were these which were accepted by all nations in *foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*”, adding also the “maxims of law”.<sup>98</sup> De Lapradelle admitted that “the principles which formed the bases of national law, were also sources of international law”, but stressed that “the only generally recognised principles which exist, however, are those which have obtained unanimous or quasi-unanimous support”.<sup>99</sup> He accordingly concluded that it was preferable to keep the formula open “without indicating exactly the sources from which these principles

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91. *Ibid* at 314-15.

92. *Ibid* at 315.

93. *Ibid* at 316.

94. (1902) 9 Reports of International Arbitral Awards 1 (Permanent Court of Arbitration).

95. *Procès-Verbaux*, *supra* note 76.

96. *Ibid* at 331, 334.

97. *Ibid* at 335.

98. *Ibid* [emphasis in original].

99. *Ibid*.

should be derived".<sup>100</sup> The representative of Brazil, Clovis Bevilacqua, took the middle ground opining that the reference in the draft was to "those principles of international law which, before the dispute, were not rejected by the legal traditions of one of the States concerned in the dispute".<sup>101</sup> Accordingly, the question as to the source of the general principles of law was deliberately left open as was their relationship with customary international law.

During the final vote on Article 38 of the *SICJ*, De Lapradelle did not vote as he preferred that the provision referred to "general principles of law recognised by civilized Nations as interpreted by judicial decisions and by the teaching of the most highly qualified publicists of the various countries"; but he knew that his preference for this formula would not be shared.<sup>102</sup> The draft was adopted by a majority vote with the French and the Norwegian representatives abstaining and the Italian delegate against.<sup>103</sup>

The preparatory works of Article 38(1)(c) of the *SICJ* indicate that the provision was underlined by a lack of accord. It raised three major concerns among the ACJ. The first concern was the scope it left for judicial discretion, which was seen as law-making by the common law representatives from the US and the UK and as a normal exercise of judicial reasoning by the civil lawyers. Second, it was unclear throughout what methodology was to be applied for identifying general principles of law. Some opined that general principles were to be derived necessarily from custom, others favoured basing them upon judicial decisions and the writings of scholars as representative of the consciousness of their nations and finally the British representative opined that these were to be distinguished from custom as being rooted in the principles applied *in foro domestico*, a view that found limited support by other ACJ members. It should be noted in this context that the author of the final version of the provision himself, Elihu Root, expressly rejected the possibility of deriving general principles from domestic ones as they were

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100. *Ibid* at 336.

101. *Ibid* at 346.

102. *Ibid* at 649.

103. *Ibid*.

applied differently in different states. Accordingly, adopting such an interpretation of the provision he drafted must be somewhat tenuous. Thirdly, there was disagreement as to whether general principles were rooted in international law, the majority of the members of the ACJ, including the President, stressed repeatedly that this was the case. It can be concluded that the formula “general principles of law recognised by civilized nations” was left open on purpose for two reasons, one short-term, the other long-term: namely the underlying lack of agreement within the ACJ, but also in order to enable the judges to exercise a certain amount of discretion in deriving general principles from custom, treaties or the maxims common to most or all legal orders. What the committee seemed to agree on, however, was that general principles ought to be generally recognised by most states and that they should be only those capable of international application.

Another aspect of the preparatory work of Article 38, which has not attracted much attention, is the single modification to it made when it became the *SICJ*, namely the addition in paragraph 1 pursuant to the second modified proposal of the Chilean delegate, providing that the Court’s function is “to decide [disputes] in accordance with international law”.<sup>104</sup> Chile’s original proposal was to modify the wording of the paragraph on general principles to ‘principles of international law’.<sup>105</sup> Interestingly, this was dismissed as unnecessary as the majority of the delegates found it already implicit.<sup>106</sup> Accordingly the specification was added to the paragraph as a whole.

This drafting episode is remarkable in two ways – first, because the proposal’s original aim was to clarify the provision as referring to the general principles inherent in the system of international law, and further, because in effect the second proposal, which was eventually incorporated in the *SICJ*, achieved the object of the original one – it clarified that the reference in paragraph 3 is to principles (capable of international application) of international law. This interpretation is based on a

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104. UNCIO, Vol. XIII, Doc. 240. (1945), at 164.

105. *Ibid.*

106. *Ibid.*

systematic and grammatical reading of Article 38 of the *SICJ* as a whole, showing that paragraph 1 of Article 38 applies to all its sub-paragraphs.

In conclusion, the preparatory works of Article 38(1)(c) of the *SICJ* indicate that the general principles of law have to be applicable on the international plane, arguably compatible with international law's structure, even if drawn from the principles common to national systems and that the main criteria for their crystallisation on the international plane is general recognition by nations which can be illustrated *inter alia* through judicial decisions. The general principles of international law should be read as implicit in Article 38(1)(c) of the *SICJ* alongside the general principles derived from domestic laws.

#### **IV. The Approach of the International Court and its Predecessor Towards General Principles of Law**

Since Article 38 of the *SICJ* is an applicable law clause addressed to the ICJ, the methodology used by the ICJ in its interpretation and application ought to provide the most valuable guidance as to its meaning. Yet, somewhat disappointingly, the *International Court of Justice: Handbook*<sup>107</sup> updated regularly by the Registry does not address at all the general principles of law even though it tackles all the other primary and some of the secondary sources of international law.<sup>108</sup> It is useful to assess the key cases in which the ICJ resorted to general principles of law so as to establish the process of their distillation. As cautioned by Talmon, however, methodology is not the strength of the ICJ.<sup>109</sup>

While the Court has never based a judgment explicitly on the general principles of law recognised by civilised nations, it arguably relied implicitly on general principles of international law to decide the *Corfu Channel Case (United Kingdom v Albania)*<sup>110</sup> ("*Corfu Channel*")

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107. *International Court of Justice: Handbook*, 6d (New York: United Nations Publications, 2013).

108. *Ibid* at 95-99.

109. Stefan Talmon, "Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion" (2015) 26 *European Journal of International Law* 417 at 418.

110. [1949] ICJ Rep 4 [*Corfu Channel*].

discussed below. Notably, the Court relied recently on a general principle of international law in its Order of Provisional Measures in *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*<sup>111</sup> (“*Timor-Leste v Australia*”). This case arose from the seizure and detention by Australia of certain documents and data belonging to Timor-Leste. The Applicant argued that the confidentiality of communications between a lawyer and a client is covered by legal professional privilege as a general principle of law.<sup>112</sup> The ICJ, however, relied instead on the principle of sovereign equality of states as “one of the fundamental principles of the international legal order” set out in the *Charter of the United Nations* (“*Charter*”) to conclude that the rights relied upon by the applicant are plausible.<sup>113</sup> This rare instance where the ICJ had to resort to general principles of law in the absence of customary or treaty rules to address the dispute is symptomatic of the ICJ’s adamant reluctance to decide international cases by applying general principles of law derived from domestic laws using comparative law methodology. Despite the fact that the arguments of both parties were centred on the general principles of law, the ICJ deliberately chose to rely on established general principles of international law, regrettably, without explaining this different course of reasoning. In his dissenting opinion, Judge Greenwood expressed justified doubts as to whether the rights of confidentiality and of non-interference in communications with legal advisers relied upon by Timor-Leste could be derived from the *Charter* rather than from general principles of law.<sup>114</sup> The most problematic aspect of the order, however, is the ICJ’s silence with respect to the applicant’s express reliance on Article 38(1)(c) of the *SICJ* as a basis for its claims, supported by detailed evidence concerning the general recognition of the

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111. Order of 3 March 2014, [2014] ICJ Rep 147.

112. *Ibid* at para 24.

113. *Ibid* at para 27.

114. *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Dissenting Opinion of Judge Greenwood, [2014] ICJ Rep 194 at para 12.

principle in domestic laws and international decisions.<sup>115</sup> The ICJ did not address Australia's counter-arguments either, which were focused on the methodology for ascertaining the existence of general principles, and in particular on the lack of international applicability of the principle of legal professional privilege.<sup>116</sup> Accordingly, *Timor-Leste v Australia* does not shed much light on the proper methodology for ascertaining general principles of law under Article 38(1)(c) of the *SICJ*, but does indicate that the general principles of international law can be derived from widely ratified international treaties, such as the *Charter*.

The ICJ has referred to 'general', 'fundamental' and 'cardinal' principles on a number of other occasions too. The references to principles in the case law of the Permanent Court of International Justice ("PCIJ") and the ICJ can be grouped in three main categories: (i) general principles of international law; (ii) general principles of domestic law; and (iii) general principles of international procedural law. These will be tackled in turn with specific focus on the methodology used by the ICJ in their ascertainment and the function they performed in its reasoning.

## A. General Principles of International Law

### 1. The Jurisprudence of the PCIJ

The PCIJ referred to general principles of international law on a few occasions. It referred to the "elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State" in interpreting whether

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115. *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, "Memorial of the Democratic Republic of Timor-Leste" (28 April 2014) at paras 6.2-6.23, online: ICJ <[www.icj-cij.org/docket/index.php?p1=3&p2=3&k=17&case=156&code=tda&p3=1](http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=17&case=156&code=tda&p3=1)>.

116. *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, "Counter Memorial of Australia" (28 July 2014) paras 4.19-4.23, online: ICJ <[www.icj-cij.org/docket/index.php?p1=3&p2=3&k=17&case=156&code=tda&p3=1](http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=17&case=156&code=tda&p3=1)>.

it had jurisdiction under Article 26 of the *Mandate for Palestine*<sup>117</sup> in *Mavrommatis Palestine Concessions*.<sup>118</sup> The PCIJ found that in light of the international law principle of diplomatic protection, it had jurisdiction over the dispute which was initially between a private person and a state but had now entered a new phase in the domain of international law.<sup>119</sup> Regrettably, the PCIJ did not elaborate on how it reached its finding of the principle at hand but merely asserted it as self-evident.

In the *Case Concerning Certain German Interests in Polish Upper Silesia*<sup>120</sup> the PCIJ referred to the “generally accepted principles of international law” on the treatment of the private property, rights and interests of foreigners abroad as informing its interpretation of Head III on Expropriation of the 1922 *Germano-Polish Geneva Convention Concerning Upper Silesia*.<sup>121</sup> The PCIJ found that Head III constituted a derogation from the general principles by allowing expropriation and accordingly should be construed strictly.<sup>122</sup> The PCIJ again did not offer any methodological guidance as to where it derived the generally accepted principles of international law on the treatment of foreigners abroad. However, its holding is a good illustration of the use of general principles as an interpretative tool informing the assessment of treaty provisions in the broader context of general international law. This judgment can be seen as a precursor of the principle of systemic integration which was incorporated later in Article 31(3)(c) of the *Vienna Convention*.<sup>123</sup>

In *the Case of the S.S. “Lotus”*<sup>124</sup> (“*Lotus*”), the PCIJ had to interpret the reference to “principles of international law” in Article 15 of the 1923 *Treaty of Peace with Turkey Signed at Lausanne*,<sup>125</sup> which regulated the

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117. *The Mavrommatis Palestine Concessions*, PCIJ Ser. A, No. 2, Judgment of 30 August 1924, at 12.

118. *Ibid.*

119. *Ibid.*

120. (1926), PCIJ (Ser A) No 7 [*Polish Upper Silesia*].

121. *Ibid* at 21.

122. *Ibid.*

123. *Vienna Convention*, *supra* note 54, art 31(3)(c).

124. (1927), PCIJ (Ser A) No 10 [*Lotus*].

125. 24 July 1923, 28 LNTS 11 (entered into force 6 August 1924).

question of jurisdiction between Turkey and the other parties.<sup>126</sup> The PCIJ understood the reference as denoting "international law as it is applied between *all nations belonging to the community of States* ... meaning the principles which are in force between all independent nations and which therefore apply equally to all the contracting Parties".<sup>127</sup> In a much-quoted paragraph, the PCIJ underlined that:

[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by *usages generally accepted as expressing principles of law* and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>128</sup>

The PCIJ here derived the general principles of international law from the usages generally accepted as such, *i.e.* by a process of induction from customary international law. In its reasoning, the PCIJ referred both to the community of states and to its common aims, arguably implying the systemic function of general principles of international law in the international legal order. This judgment confirms that general principles can be distilled from the other primary sources of international law. Notably, it also indicates the understanding of the PCIJ that the community of states consists of all nations and that, arguably, general principles ought to be recognised by the international community as a whole.

Last but not least, the PCIJ briefly discussed general principles of international law in *the Oscar Chinn Case*<sup>129</sup> where the British Government invoked them as an alternative source of obligation for the Belgian Government in addition to the *Convention of Saint-Germain-*

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126. *Ibid.*

127. *Lotus*, *supra* note 124 at 16-17 [emphasis added].

128. *Ibid* at 18 [emphasis added].

129. (1934), PCIJ (Ser A/B) No 63 at 79 [*Oscar Chinn*].

*en-Laye*.<sup>130</sup> The PCIJ noted that the UK “relies on the obligation incumbent upon all States to respect the vested rights of foreigners in their territories”<sup>131</sup> but concluded that this obligation was not breached under the circumstances.<sup>132</sup> While the PCIJ did not apply the protection of vested rights being unwarranted under the facts, it did not question its status as a general principle of international law either, implicitly recognising it as such. The reliance on the principle can be seen as an instance of state practice in this respect too. In its memorial, the UK invoked the principles as “embodied in the law of nations, as recognised by the Court itself”,<sup>133</sup> quoting *Polish Upper Silesia*.<sup>134</sup> Furthermore, the UK advocated that the treaty “must be [interpreted] with reference to principles of international law”.<sup>135</sup> Notably, this is the second PCIJ case in which the protection of individual rights abroad was assessed as a general principle of international law.

In *Case Concerning the Factory at Chorzów*,<sup>136</sup> the PCIJ identified two general principles, notably by reference to case law. First, it observed that:

[i]t is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.<sup>137</sup>

Secondly, the PCIJ formulated the so-called ‘factory at Chorzów principle’

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130. *Treaty of Peace Between the British Empire, France, Italy, Japan and the United States (The Principle Allied and Associated Powers) and Belgium, China, Czechoslovakia, Cuba, Greece, Nicaragua, Panama, Portugal, Roumania, the Serb-Croat-Slovene State and Siam, and Austria*, 10 September 1919, 226 Cons TS 8 (entered into force 16 July 1920).

131. *Oscar Chinn*, *supra* note 129 at 81.

132. *Ibid* at 87.

133. *The Oscar Chinn Case*, “Case submitted by the Government of Great Britain and Northern Ireland” (12 May 1934), PCIJ (Series C) No 75, 12 at 40 [*Oscar Chinn (Great Britain Submissions)*].

134. *Polish Upper Silesia*, *supra* note 120.

135. *Oscar Chinn (Great Britain Submissions)*, *supra* note 133 at 45.

136. (1927), PCIJ (Ser A) No 9.

137. *Ibid* at 31 [emphasis added].

on reparation, reasoning:

[t]he essential principle contained in the actual notion of an illegal act – a *principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals* – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.<sup>138</sup>

The PCIJ illustrated the existence of the general principles by reference to international practice, focusing in particular on the decisions of international arbitral tribunals, as well as, subsidiarily, on the case law of municipal courts. It is far from clear, however, whether the PCIJ relied on the decisions of international tribunals establishing certain principles as a subsidiary source or as direct evidence of their recognition by civilized nations.

Overall, it is remarkable that all these cases in which the PCIJ referred to general principles of law concerned the general principles of international law. Methodologically, the PCIJ either asserted the existence of the principles as self-evident or derived them from custom and arbitral decisions. States relied on the case law of the PCIJ to illustrate the existence of general principles. It can be concluded that the PCIJ interpreted Article 38(1)(c) of the *SPCIJ* as including the general principles of international law and by using an international law-based methodology for their ascertainment. Furthermore, both the PCIJ and the states appearing before it used general principles as a tool for systemic interpretation of the treaty provisions at hand. Accordingly, general principles played a predominantly interpretative function.

## 2. The ICJ

The ICJ similarly has had the occasion to identify and apply general principles of (international) law. The ICJ resorted to them in its very first case, the *Corfu Channel*.<sup>139</sup> In assessing Albania's obligations with respect to its territorial waters, the ICJ disagreed with the UK's argument based

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138. *Case Concerning the Factory at Chorzow (Claim for Indemnity)*, PCIJ (Ser A) No 17 at 47 [emphasis added].

139. *Corfu Channel*, *supra* note 110.

on the 1907 *Convention Relative to the Laying of Automatic Submarine Contact Mines*<sup>140</sup> (“*Hague Convention XIII*”), as it applied only in time of war, and instead upheld its alternative argument based on “the general principles of international law and humanity”.<sup>141</sup> The ICJ based its reasoning “on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.<sup>142</sup> Unfortunately, the ICJ asserted these “general and well-recognized principles” as self-evident, without further discussion as to their origin or the method it used for their ascertainment. One can speculate that they could have been derived from the *Hague Convention VIII* to which the ICJ referred in the same sentence, yet only to dismiss its application in times of peace. Notably, general principles here were used as a direct source of legal rights and obligations rather than as a tool for interpretation. As such, they were outcome-determinative for the case.

In the *Reservations to the Convention on Genocide* Advisory Opinion,<sup>143</sup> the ICJ held that “the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation”.<sup>144</sup> This finding was based on the origins of the *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>145</sup> (“*Genocide Convention*”) and in particular the intention of the UN to condemn and punish genocide as expressed in *General Assembly Resolution 96(I), The Crime of Genocide*<sup>146</sup> of 11 December 1946 and the objective for the prohibition to be universal

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140. 18 October 1907, 36 Stat 2332 (entered into force 26 January 1910).

141. *Corfu Channel*, *supra* note 110 at 9-10.

142. *Ibid* at 22.

143. Advisory Opinion, [1951] ICJ Rep 15 [*Genocide Convention*].

144. *Ibid* at 23.

145. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

146. *The Crime of Genocide*, GA Res 96(1), UNGAOR, 1st Sess, UN Doc A/64/Add.1 (1946) 188 [*The Crime of Genocide*].

in scope as evidenced in the unanimously adopted *General Assembly Resolution 197(III), Admission of New Members*<sup>147</sup> of 8 December 1948.<sup>148</sup> The ICJ also took into account the 'objects' of the Convention, namely its "purely humanitarian and civilizing purpose ... to safeguard the very existence of certain human groups and ... to confirm and endorse the most elementary principles of morality".<sup>149</sup>

The Court in this opinion distilled the 'principles recognized by civilized nations' by reference to their inclusion in the *Genocide Convention* and notably, by the intention of the UN and the contracting parties for the prohibition to be universal in scope as evidenced by the voting pattern and wording of the two related General Assembly resolutions, as well as the Preamble of the *Genocide Convention*.<sup>150</sup> It is arguable that the ICJ distilled the requisite general recognition from the shared objectives of state parties to the treaty and the votes for the non-binding General Assembly resolutions, *i.e.* via deductive reasoning based on the will of the international community of states as a whole, rather than by induction from the attitudes of individual states. The moral and humanitarian dimensions of the *Genocide Convention* were also a consideration. The so-employed methodology indicates that general principles can be derived from treaties.

On a few occasions, the ICJ has resorted to legal maxims as axiomatic evidence of general principles of law. In the *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*<sup>151</sup> for example, the ICJ based its finding that Thailand acquiesced the contested maps on the maxim *qui tacet consentire videtur si loqui debuisset ac potuisset*.<sup>152</sup> The ICJ quoted the Roman law maxim as self-sufficient evidence of recognition of the principle, without much further analysis. Notably, the argument of acquiescence was raised by Cambodia in the second and last rounds of

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147. *Admission of New Members*, GA Res 197(III), UNGAOR, 3rd Sess, UN Doc A/900 (1948) 30.

148. *Genocide Convention*, *supra* note 143 at 23.

149. *Ibid.*

150. *The Crime of Genocide*, *supra* note 146, preamble.

151. [1962] ICJ Rep 6.

152. *Ibid* at 23.

oral pleadings and was formulated as one based on a principle of law, without any reference as to its sources.<sup>153</sup> Thailand did not contest the existence of the principle as such but rather its applicability under the circumstances.<sup>154</sup>

Another case where a general principle of law was illustrated merely by reference to a legal maxim is *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*,<sup>155</sup> where the ICJ sustained the principle *ex injuria non oritur jus*.<sup>156</sup> Instead of relying on the plethora of states incorporating the principle into their domestic legislation, the ICJ established its existence by referring solely to Roberto Ago's Report on the Draft Articles on State Responsibility published in the 1980 *Yearbook of the International Law Commission*. The argument was raised during the oral hearings by Hungary, using the same reference as an illustration.<sup>157</sup>

The *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*<sup>158</sup> ("*Nicaragua*") sheds more light on the process of distilling general principles of international law employed by the ICJ, as well as on their relationship with custom. Due to the multilateral treaty reservation of the United States, the ICJ had to apply the unwritten sources of international law in deciding the case and did so by resorting extensively to both custom and general principles. Its reasoning on the prohibition against use of force is particularly instructive in this respect as the ICJ noted that: "both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations".<sup>159</sup>

In assessing the legal status of the prohibition, the ICJ took note of the parties' agreement that "the fundamental principle in this area is

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153. *Temple of Preah Vihear*, "Oral Arguments Concerning the Merits" (15 June 1962) (ICJ Pleadings (Vol 2) 120 at 208.

154. *Ibid* at 440.

155. [1997] ICJ Rep 7.

156. *Ibid* at paras 57, 133.

157. *Project Gabčíkovo-Nagymaros (Hungary v Slovakia)*, "Public sitting held on Thursday 6 March 1997, at 10 am at the Peace Palace, President Schwebel presiding" (6 March 1997), CR 97/5 2 at 68.

158. [1986] ICJ Rep 14.

159. *Ibid* at para 181.

expressed in the terms employed in Article 2, paragraph 4"<sup>160</sup> and went on to satisfy itself that there existed *opinio juris* in customary international law to this effect, deducing it "with all due caution" from:

the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2525 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".<sup>161</sup>

The ICJ also drew on the "United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration of principles governing the mutual relations of States participating in the Conference on Security and Co-Operation in Europe (Helsinki, 1 August 1975)",<sup>162</sup> on the referral to Article 2(4) of the *Charter* "in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law",<sup>163</sup> as well as on the reference in the US Counter-Memorial on jurisdiction and admissibility to the prohibition as a "universally recognized principle of international law".<sup>164</sup>

In distilling the 'fundamental principle outlawing the use of force' underlying both the *Charter* and customary law, the ICJ again relied heavily on the acceptance of states as manifested in their attitude towards resolutions on principles adopted by international organisations, as well as on the statements of states' officials to this effect. Accordingly, the ICJ deduced the cardinal principle from both treaty and custom as sources of international law and placed particular emphasis with respect to the latter on the subjective element required. Notably, the ICJ's interchangeable references to the prohibition of the use of force as both a rule of custom and as a universally recognised principle of international law indicates either that the same norm can fall under both Articles 38(1)(b) and (c) of the *SICJ* or that the ICJ uses the terms indiscriminately. The former

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160. *Ibid* at para 188.

161. *Ibid*.

162. *Ibid* at para 189.

163. *Ibid* at para 190.

164. *Ibid* (for criticism, see Crawford, *supra* note 23 at 5).

view is preferable.

In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,<sup>165</sup> (“*Namibia Opinion*”), the ICJ assessed at length self-determination as a principle of international law. It did so by starting with Article 73 of the *Charter*, following its development in *General Assembly Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples* of 14 December 1960 and the resulting birth of new states.<sup>166</sup> Based on these considerations, the ICJ concluded that Article 22 of the *League of Nations Covenant* ought to be interpreted not statically but in an evolutionary manner, taking into consideration new developments of international law through the *Charter* and custom, including in particular the principle of self-determination.<sup>167</sup> The ICJ stressed that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation” and that it ought to faithfully discharge its functions by not ignoring the areas where “the *corpus iuris gentium* has been considerably enriched”.<sup>168</sup>

This case is another good example of the interpretative function of the general principles of international law in relation to treaties, particularly by way of systemic integration of their terms in the system of international law. It also proclaims the so-called principle of evolutionary interpretation of dynamic concepts, again by reference to the newly developed principles of international law. Last but not least, it confirms the ICJ’s approach of giving particular weight to General Assembly resolutions in the ascertainment of the recognition, content and status of the general principles of international law. It can be deduced that the collective acceptance of states expressed in universal treaties such as the *Charter* and in certain General Assembly resolutions can constitute evidence of general recognition by civilised nations under Article 38(1) (c) of the *SICJ*.

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165. Advisory Opinion, [1971] ICJ Rep 16 [*Namibia Opinion*].

166. *Ibid* at para 52.

167. *Ibid* at para 53.

168. *Ibid* [emphasis in original].

The so-identified approach in distilling general principles of international law was followed in the *Western Sahara* Advisory Opinion,<sup>169</sup> again in relation to the principle of self-determination.<sup>170</sup> The ICJ assessed the principle by reference to the *Charter*, to its earlier *Namibia Opinion*, to *General Assembly Resolutions 1514 (XV)* and *1541 (XV)* and to the *General Assembly Resolution 2625 (XXV) Declarations on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations* ("*Declaration on Friendly Relations*") Based on this evidence, the ICJ concluded that the validity of the principle was not affected by instances where the General Assembly dispensed with the requirement of consulting the inhabitants of a given territory. Accordingly, the widespread and consistent recognition of self-determination was sufficient to validate the principle even in the face of instances of conflicting practice.

In *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*,<sup>171</sup> a Chamber of the ICJ had to interpret the applicable law clause in the *Special Agreement*<sup>172</sup> between Canada and the United States, referring to "the principles and rules of international law".<sup>173</sup> In doing so, it made important pronouncements on the distinction between rules and principles, as well as on the methodologies for the ascertainment of principles of international law. The Chamber expressly acknowledged that: "'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character",<sup>174</sup> putting to rest the long scholarly debate as to whether the reference to general principles in Article 38(1)(c) of the *SICJ* includes or excludes the general principles of international law.

The Chamber interpreted the applicable law clause in the *Special*

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169. *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12 [*Western Sahara*].

170. *Ibid* at paras 55-60.

171. [1984] ICJ Rep 246 [*Gulf of Maine*].

172. *Ibid* at *Special Agreement*.

173. *Ibid* at para 79.

174. *Ibid*.

*Agreement* as referring primarily to rules and principles of customary law. It stressed that in the context of maritime delimitation, “the practice is still rather sparse, owing to the relative newness of the question”.<sup>175</sup> The Chamber went on to define its methodology:

[f]or the purpose of the Chamber at the present stage of its reasoning, which is to ascertain the principles and rules of international law which in general govern the subject of maritime delimitation, reference will be made to conventions (Art. 38, para. 1 (a)) and international custom (para. 1 (b)), to the definition of which the judicial decisions (para. 1(d)) either of the Court or of arbitration tribunals have already made a substantial contribution. So far as conventions are concerned, only “general conventions”, including, *inter alia*, the conventions codifying the law of the sea to which the two States are parties, can be considered ... mainly because it is in codifying conventions that principles and rules of general application can be identified. Such conventions must, moreover, be seen against the background of customary international law and interpreted in its light.<sup>176</sup>

The Chamber considered in particular the 1958 *Convention on the Continental Shelf*,<sup>177</sup> the *United Nations Convention on the Law of the Sea*<sup>178</sup> (noting in particular the symmetry of their provisions on continental shelf delimitation); as well as the case law of the ICJ, including the *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)*<sup>179</sup> (“*North Sea Continental Shelf*”), *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*,<sup>180</sup> and an arbitral award.<sup>181</sup>

The methodology for establishing general principles of international law is fully in line with the PCIJ’s approach in *Lotus* and the ICJ’s previous case law. It confirms that such principles can be deduced from the other sources of international law including custom and, notably, treaties of general character. Furthermore, it indicates the special authoritative weight of the previous pronouncements on general principles of the

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175. *Ibid* at para 83.

176. *Ibid*.

177. 29 April 1958, 499 UNTS No 7302 at 312 (entered into force 10 June 1964).

178. 10 December 1982, 397 UNTS No 31363 (entered into force 16 November 1994).

179. *North Sea Cases*, *supra* note 59.

180. [1981] ICJ Rep 3.

181. *Gulf of Maine*, *supra* note 171 at paras 84-96.

ICJ itself, as well as of arbitral tribunals treated within the confines of a subsidiary source rather than as direct evidence of recognition. Finally, the approach underlines the requirement of generality with respect to the recognition required.

In *Frontier Dispute (Burkina Faso/Republic of Mali)*,<sup>182</sup> another Chamber of the Court interpreted and applied the principle of *uti possidetis juris*. When asked under the *Special Agreement*<sup>183</sup> between Burkina Faso and Mali to settle the dispute "based in particular on respect for the principle of intangibility of frontiers inherited from colonization",<sup>184</sup> the Chamber held it "cannot disregard the principle of *uti possidetis juris*", emphasising "its general scope".<sup>185</sup> The Chamber observed that: "the principle is not a special rule which pertains solely to one specific system of international law" but "is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs".<sup>186</sup> It illustrated this generality by reference to: "the many declarations made by African leaders in the dawn of independence",<sup>187</sup> a 1964 resolution of the Organization of African Unity ("OAU") and "the numerous solemn affirmations of the intangibility of frontiers existing at the time of independence of African States, whether made by senior African statesmen or by organs of the Organization of the African Unity itself ... [that] recognize and confirm an existing principle".<sup>188</sup> The Chamber did acknowledge that the practice supporting the principle was limited to Spanish America and Africa,<sup>189</sup> but held nonetheless that the rule was of general scope based on the numerous declarations by states and international organisations. Accordingly, the Chamber applied the general principle in deciding the case, even if it was not expressly referred to under the *Special Agreement* and despite the objection that the two

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182. [1986] ICJ Rep 554.

183. *Ibid* at para 2.

184. *Ibid* at para 19.

185. *Ibid* at para 20.

186. *Ibid*.

187. *Ibid* at para 22.

188. *Ibid* at paras 21-24.

189. *Ibid* at paras 20-21.

disputing states achieved independence before its proclamation by the OAU in the 1964 resolution.<sup>190</sup>

The functional approach of the Chamber is significant as it confirms the trend of applying general principles of international law by way of systemic integration, even where the applicable law clause does not expressly include them. Furthermore, the methodology used in ascertaining the existence of *uti possidetis* is coherent with the previous instances, identifying general principles of international law by focusing on the existence of general recognition, evidenced by the states' support to resolutions of international organisations, as well as by official statements of senior statesmen and notably, of organs of the OAU. Notably, in this case, the Chamber seemed to link the requirement of generality to the scope of application of the principle, rather than to its recognition.

In *East Timor (Portugal v Australia)*<sup>191</sup> (“*East Timor*”), the ICJ affirmed that self-determination “is one of the essential principles of contemporary international law”<sup>192</sup> based on its recognition by the *Charter* and on the jurisprudence of the ICJ, in particular the *Namibia* and *Western Sahara* Advisory Opinions.<sup>193</sup> The ICJ’s reasoning indicates that it is likely to follow its own case law establishing that a given rule has the character of a general principle of international law.

Similarly, in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion,<sup>194</sup> the ICJ assessed the legality of the Israeli wall in the occupied Palestinian territory by reference to the applicable rules and principles of international law, including the principle of self-determination.<sup>195</sup> Following its methodology in *East Timor* and previous cases, the ICJ recalled that the principle was set out in: the *Charter*; the *Declaration on Friendly Relations*; and in its previous case law, including its *Namibia Opinion* as well as its opinion in *East*

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190. *Ibid* at para 26.

191. [1995] ICJ Rep 90.

192. *Ibid* at para 29.

193. *Ibid*.

194. Advisory Opinion, [2004] ICJ Rep 136 [*Legal Consequences of the Construction of a Wall*].

195. *Ibid* at paras 86-88.

*Timor*.<sup>196</sup>

In the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion,<sup>197</sup> ("Nuclear Weapons") the ICJ had to identify the principles and rules of humanitarian law applicable in armed conflict due to the absence of a conventional or customary rule on the legality of the threat or use of nuclear weapons.<sup>198</sup> It qualified these as "cardinal principles contained in the texts constituting the fabric of humanitarian law"<sup>199</sup> and derived them from the broadly ratified 1899 and 1907 *Hague Conventions*, the 1907 *Hague Regulations Respecting the Laws and Customs of War on Land*, the 1925 *Geneva Protocol to the Hague Convention IV*, the *Geneva Conventions* of 1864, 1906, 1929 and 1949, including the Additional Protocols and by reference to the Martens Clause in the preamble of the *Convention (II) With Respect to the Laws and Conventions of War on Land*. The ICJ also recalled its holding in *Corfu Channel*<sup>200</sup> and the statement of the Nuremberg International Military Tribunal that the humanitarian rules in the *Hague Convention IV* "were recognized by all civilized nations".<sup>201</sup> It took into account as an additional consideration that the humanitarian law principles are "so fundamental to the respect of the human person and 'elementary considerations of humanity'" to conclude that:

[t]he extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most *universally recognized humanitarian principles*.<sup>202</sup>

The ICJ conceptualised the rules of humanitarian law as fundamental and intransgressible principles of customary law. It established their status

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196. *Ibid* at para 88.

197. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 [*Nuclear Weapons*].

198. *Ibid* at para 74.

199. *Ibid* at para 78.

200. *Ibid* at para 79.

201. *Ibid* at para 80.

202. *Ibid* at para 82 [emphasis added].

by reference to the wide adherence to the conventions incorporating them, to international case law, as well as to their moral or humanitarian dimension. This methodology is arguably more akin to the one used in establishing general principles of international law rather than custom by focusing on the *opinio juris* of states and in this case, on its humanitarian dimension. This is illustrated by the reliance on the Martens Clause, which expressly refers to “the principles of international law derived from established custom ... the principles of humanity and ... the dictates of public conscience”.<sup>203</sup> However, the ICJ’s reasoning in this case highlights again the lack of clear boundaries between custom and general principles.

Another “basic principle” that the ICJ applied in this case is good faith. It identified it by reference to seven sources: Article 2(2) of the *Charter*; the *Declaration on Friendly Relations*; Security-Council Resolution 984 (1995); the *Final Act of the Conference on Security and Co-Operation in Europe*; the final document of the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons; the *Vienna Convention*; and its *Nuclear Tests* case. Again, the ICJ’s methodology focused on the incorporation of the principle in universal conventions, in resolutions expressing general recognition as well as on its own case law as a subsidiary source.

In conclusion, general principles were used by the ICJ and its predecessor where specifically mandated by the applicable law clause and by way of systemic integration in order to offer an interpretation that took into account new developments of the international legal system, as well as gap-fillers in the absence of crystallised custom *i.e.* in *Lotus* and the *Nuclear Weapons* opinion. The function of general principles most commonly informed the interpretation of treaties by way of systemic integration and evolutionary interpretation. However, in a few instances such as the *Corfu Channel*, *Nicaragua* and *Timor-Leste v Australia*, the general principles of international law served as a direct source of international obligations.

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203. *Ibid* at para 78, citing *Convention (II) with Respect to the Law and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899, 32 Stat 1803 (entered into force 4 September 1900).

The methodology used by the ICJ for the ascertainment of general principles is somewhat inconsistent but has developed considerably over time. While the PCIJ asserted general principles as self-evident legal axioms, the ICJ gradually developed a more coherent methodology for their identification. A few common trends should be highlighted: first, the ICJ gives decisive weight to the recognition of the principles by the international community of states as a whole, expressed in voting patterns in general and regional international organisations; in official statements; as well as the wide participation of states in general treaties. Notably, the ICJ ascertains general recognition by deductive reasoning rather than by looking for evidence of recognition on a state-by-state basis. Such general recognition has at times outweighed practice to the contrary effect. Secondly, the ICJ has deduced general principles from the other main sources of international law, namely treaties and custom, underlying the former's more general or fundamental character. However, it is clear from the case law of the ICJ that the same norm can fall under both categories. Thirdly, the ICJ assigns special authoritative weight to the findings of general principles in its own case law and at times in the case law of other courts and arbitral tribunals used as a subsidiary means for the identification of general principles.

## **B. General Principles of Private Law**

On even fewer occasions, the ICJ and its predecessor resorted directly to general principles of domestic law. This occurred when faced with questions of domestic rather than international law.

In *Mavrommatis Jerusalem Concessions (Greek Republic v His Britannic Majesty's Government)*,<sup>204</sup> the ICJ briefly referred to the British argument based on "those principles which seem to be generally accepted in regard to contracts" in assessing the validity of the concession contract in light of the purported error regarding Mavrommatis's nationality, noted as Ottoman in the contract but actually Greek.<sup>205</sup> Following these principles,

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204. (1925), PCIJ (Ser A) No 5.

205. *Ibid* at 30.

however, the ICJ found that the contract was valid.<sup>206</sup> It is notable that the UK did not rely on Turkish law, which was the proper law of the contract, but on the general principles of contract law instead.<sup>207</sup>

In *Barcelona Traction and Power Company, Limited (Belgium v Spain)*,<sup>208</sup> the ICJ not only took cognizance but also referred “to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State”.<sup>209</sup> This holding was in response to Spain’s invocation in its Counter-Memorial of the general principle of separation of the legal personality of the corporation from its shareholders recognised “dans la généralité des systèmes juridiques, il est fait abstraction de l’idée d’autonomie de la personnalité morale”.<sup>210</sup> Belgium objected that Spain: “ne peut être purement et simplement déduire d’institutions du droit privé interne”, cautioning against such an unacceptable method of transposing private law constructs to the international plane without taking into account the specificities of inter-state relations.<sup>211</sup> The ICJ, however, followed Spain’s approach.

It can be observed that the ICJ and its predecessor have considered and applied general principles of law common to the domestic laws of ‘civilized’ nations in the areas of contract and company law, but only when invoked by the parties and solely with respect to matters regulated by domestic law. The PCIJ and the ICJ referred to those principles

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206. *Ibid.*

207. *Ibid* (stating: “The British Government does not contend that, in Turkish law, the Ottoman nationality of the beneficiary was a condition essential to the validity of concessions; moreover, no law nor any document in this sense regarding the practice of the courts or competent authorities in Turkey has been produced” at 29).

208. Second Phase Judgment, [1970] ICJ Rep 3.

209. *Ibid* at para 50.

210. *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, “Pleadings, Oral Arguments, Documents” (19 June 1962) [1962] ICJ Pleadings (Vol 4) 5 at para 103.

211. *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, “Pleadings, Oral Arguments, Documents” (19 June 1962) [1962] ICJ Pleadings (Vol 5) 1 at 641.

specifically as rules of domestic law, rather than as general principles of law under the *SPCIJ* and the *SICJ*, leaving it open to interpretation whether it qualified them as such. The methodology used by the ICJ for the ascertainment of these domestic principles seems to be more one of assertion than of comprehensive comparative law study. It can also be inferred that in practice, the burden of proving those principles has lain on the parties rather than the ICJ.

In contrast, in cases where principles of municipal law have been invoked before the ICJ to inform the application of international law, the ICJ has declined to apply them. This could arguably be due to the fact that the purported 'general principles' were not capable of international application.

In the *Case Concerning Right of Passage over Indian Territory (Portugal v India)*,<sup>212</sup> Portugal argued that "the municipal laws of the civilized nations are unanimous in recognizing that the holder of enclaved land has the right, for purposes of access to it, to pass through adjoining land" and that "it is rare to find a principle more clearly emerging from the universal practice of States in *foro domestico* and more perfectly meeting the requirements of Article 38, paragraph I(c), of the Statute of the Court".<sup>213</sup> In support of this proposition, Portugal appended a legal opinion by Professor Max Rheinstein surveying the national laws of 64 states containing the right to access to enclaved land.<sup>214</sup> The ICJ, however, based its conclusions on the established practice between the British and Indian authorities and Portugal, observing that it did "not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result",<sup>215</sup> and noted that "[s]uch a particular practice must prevail over any general rules".<sup>216</sup>

In *South West Africa, Second Phase (Ethiopia v South Africa; Liberia*

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212. [1960] ICJ Rep 6 [*Passage over Indian Territory*].

213. *Ibid* at 43.

214. *Right to Passage over Indian Territory (Portugal v India)*, (July 1958) ICJ Pleadings (Vol 1) 397 at 543ff, 858ff.

215. *Passage over Indian Territory*, *supra* note 212 at 43.

216. *Ibid* at 44.

*v South Africa*),<sup>217</sup> (“*South West Africa*”) the ICJ refused the application of *actio popularis* as a general principle of law common to the national systems of most nations explicitly due to its inapplicability to international law at the time, noting:

the argument amounts to a plea that the Court should allow the equivalent of an “*actio popularis*”, or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the “general principles of law” referred to in Article 38, paragraph 1 (c), of its Statute.<sup>218</sup>

In *North Sea Continental Shelf*, Germany argued that, “the principle of the just and equitable share was one of the recognized general principles of law which, by virtue of paragraph 1(c) of the same Article, the ICJ was entitled to apply as a matter of the *justitia distributiva* which entered into all legal systems”.<sup>219</sup> The ICJ dismissed this argument as being “wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention [on the Continental Shelf]” – that is to say that the rights of the coastal state over the continental shelf exist *ipso facto* by virtue of its sovereignty over the land.<sup>220</sup> This case illustrates an additional limitation to the application of general principles derived from domestic law on the international plane, namely, that they cannot apply where in conflict with a rule of international law as the latter always prevails.

Mexico argued in *Avena and Other Mexican Nationals (Mexico v United States of America)*<sup>221</sup> that the “exclusionary rule” was a general principle of law under Article 38(1)(c) of the *SICJ*.<sup>222</sup> The ICJ refused to uphold this submission on the basis that it related to a question it already discussed sufficiently, reasoning further: “this question is one

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217. Second Phase Judgment, [1966] ICJ Rep 6 [*South West Africa*].

218. *Ibid* at para 88.

219. *North Sea Cases*, *supra* note 59 at para 17.

220. *Ibid* at para 19.

221. [2004] ICJ Rep 12.

222. *Ibid* at para 127.

which has to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration".<sup>223</sup>

Overall, the ICJ has been very reluctant to address and uphold rights and obligations based on 'general principles' derived from an inductive comparative law analysis of domestic legal systems. Notably, the ICJ itself has never resorted to a comparative law methodology in identifying a general principle applicable to international disputes.

### C. General Principles of Procedural Law

The general principles of (international) procedural law are seemingly the most resorted to and coherently identified category of general principles in the case law of the ICJ and its predecessor. Accordingly, it is important to identify the proper methodology for their ascertainment.

In some cases, the ICJ gave methodological guidance as to the evidence it used for the general recognition of principles of procedural law, including treaties, international decisions and even domestic laws, in line with the hybrid theory of general principles. In *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)*,<sup>224</sup> ("*Electricity Company*") the PCIJ affirmed that the provision of the *SPCIJ* on provisional measures "applies the principle *universally accepted by international tribunals and likewise laid down in many conventions* to which Bulgaria has been a party – to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given".<sup>225</sup>

In *Corfu Channel*, the ICJ held that "indirect evidence is admitted in all systems of law, and its use is recognized by international decisions".<sup>226</sup> Based on this principle, it allowed the United Kingdom a "more liberal recourse to inferences of fact and circumstantial evidence".<sup>227</sup>

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223. *Ibid.*

224. Order of 4 April 1939, PCIJ (Ser A/B) No 79.

225. *Ibid* at 199 [emphasis added].

226. *Corfu Channel*, *supra* note 110 at 18.

227. *Ibid.*

In *LaGrand (Germany v United States of America)*,<sup>228</sup> the ICJ for the first time formulated expressly the binding character of its orders for provisional measures, giving particular weight to “the existence of a principle which has already been recognized by the Permanent Court of International Justice”<sup>229</sup> in the *Electricity Company* case. The ICJ also recalled its own previous case law indicating provisional measures to stop the aggravation or extension of disputes as an illustration of the principle.<sup>230</sup> It used the so-established principle to interpret as binding the character of orders under Article 41 of the *SICJ*. The ICJ followed a similar approach in identifying general principles of procedural law in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)*,<sup>231</sup> holding that “[i]t is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact”.<sup>232</sup>

In a number of cases, the ICJ asserted general principles of procedural law as self-evident, without much methodological guidance. In the *Effect of Awards of Compensation Made by the UN Administrative Tribunal* Advisory Opinion,<sup>233</sup> the ICJ recalled the “well-established and generally recognized principle of law, [that] a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute”.<sup>234</sup> In the *Application for Review of Judgment No. 158 of the UN Administrative Tribunal*, the ICJ noted that:

[g]eneral principles of law ... require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal.<sup>235</sup>

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228. [2001] ICJ Rep 446.

229. *Ibid* at para 103.

230. *Ibid*.

231. [2008] ICJ Rep 12.

232. *Ibid* at para 45.

233. Advisory Opinion, [1954] ICJ Rep 47.

234. *Ibid* at 53.

235. *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*, Advisory Opinion, [1973] ICJ Rep 166 at para 36.

In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*,<sup>236</sup> the *Cumarasawamy* opinion, the ICJ held that Malaysia was under an obligation to respect "a generally recognized principle of procedural law" that "questions of immunity are ... preliminary issues which must be expeditiously decided *in limine litis*".<sup>237</sup> In *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*,<sup>238</sup> the Chamber of the ICJ in according permission for the first time under Article 62 of the *SICJ* observed that, "the intervening State does not become party to the proceedings, and does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court, or *the general principles of procedural law*".<sup>239</sup> As observed by Rosenne, the formulation of "'general principles of procedural law' is new to the lexicon of the International Court and its implications are not self evident".<sup>240</sup> In *South West Africa*, the ICJ, again axiomatically, recalled the "universal and necessary, but yet almost elementary principle of procedural law that a distinction has to be made between, on the one hand, the right to activate a court and the right of the court to examine the merits of the claim, and, on the other, the plaintiff party's legal right in respect of the subject-matter of that which it claims".<sup>241</sup>

It can be observed that the ICJ resorts to general principles of procedural law with some regularity, either asserting them as long-standing legal axioms arguably typical for all legal systems, deriving them from international treaties or from comparing domestic laws. The ICJ also commonly resorts to international judicial and arbitral decisions, arguably as a subsidiary source for the ascertainment of general principles of procedural law or as a short cut. This approach is not fully consistent

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236. Advisory Opinion, [1999] ICJ Rep 62.

237. *Ibid* at para 63.

238. Judgment of 13 September 1990, [1990] ICJ Rep 92.

239. *Ibid* at para 102 [emphasis added].

240. Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, 4d, vol 3 (Leiden/Boston: Martinus Nijhoff Publishers, 2006) at 1023.

241. *South West Africa*, *supra* note 217 at para 64.

with the ICJ's methodology used in ascertaining general principles of international law given its readiness to resort to comparative law on matters of procedure.<sup>242</sup> This could be explained by the easier adaptability and applicability of domestic procedural principles to the international legal process, given the inherent similarities between the two. However, it would be desirable for the ICJ to be more explicit in elaborating its methodology and justifying the differences in ascertaining general principles of substantive and of procedural law.

#### **D. General Principles in Separate and Dissenting Opinions**

General principles of law featured in a number of the individual opinions of the judges of the PCIJ and the ICJ. While some judges advocated importing general principles on the basis of a comparative law study of domestic laws, others conceptualised them as natural law constructs penetrating the international legal order, invariably linked to the protection of human dignity.

##### **1. General Principles as Private Law Analogies**

Most judges who relied on general principles in their individual or dissenting opinions adopted a comparative law methodology, arguing for their transposability on the international plane by way of private law analogy. Judge Anzilotti relied on principles of civil procedure in his dissent in *Chorzów Factory*,<sup>243</sup> to argue that the principle of *res judicata* should cover and preclude an action for indemnity based upon a declaratory judgment deciding it as a preliminary issue.<sup>244</sup> Judge Anzilotti reasoned that, "if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to 'the general principles of law recognized by civilized nations', mentioned in No. 3 of Article 38 of the Statute, that case is assuredly the present one".<sup>245</sup>

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242. *Corfu Channel*, *supra* note 110 at 18.

243. (1927), PCIJ (Ser A) No 13.

244. *Ibid* at 27.

245. *Ibid*.

Judge Hudson discussed the *exceptio non adimpleti contractus* as a general principle in a much-quoted Individual Opinion in *Diversion of Water From the Meuse (Netherlands v Belgium)*.<sup>246</sup> He derived it from the Anglo-American legal maxims of equity, supported by references to Roman law and the German civil code.<sup>247</sup> Judge Hudson did caution however that "[t]he general principle is one of which an international tribunal should make a very sparing application" in suggesting its application by analogy to international treaties.<sup>248</sup>

In his Separate Opinion in *International Status of South-West Africa*,<sup>249</sup> Judge McNair addressed South Africa's argument that the Mandate System under the League of Nations should be interpreted based on an analogy of the contract of mandate from private law.<sup>250</sup> Judge McNair cautioned, fully in line with the case law of the Court, that:

[t]he way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel', ready made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of "the general principles of law". In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.<sup>251</sup>

While acknowledging that Anglo-American trust law, as well as the case law of the two Mandatories, South Africa and Australia, contained a confirmation of principle akin to the Mandate System,<sup>252</sup> McNair stressed the public interest and the principle of 'sacred trust of civilization' underlying the new Mandate regime to conclude that it had more than a purely contractual basis and accordingly to reject the analogy.<sup>253</sup> Judge McNair's approach is convincing in confirming that principles of municipal law could inspire the future development of similar institutions

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246. (1937), PCIJ (Ser A/B) No 70 at 73.

247. *Ibid* at 77.

248. *Ibid*.

249. Advisory Opinion, [1950] ICJ Rep 128.

250. *Ibid* at 146.

251. *Ibid* at 148.

252. *Ibid* at 149-50.

253. *Ibid* at 154-55.

of international law while stressing that private law remains an analogy, rather than a direct source of international law.

Judge Lauterpacht has argued that the principle of severance could be applied as a general principle of law “as developed in municipal law” to treat as invalid part of the French declaration accepting as compulsory the jurisdiction of the ICJ under Article 36(2) of the *SICJ*.<sup>254</sup> In proposing this private law analogy, Judge Lauterpacht admitted that “[i]nternational practice on the subject is not sufficiently abundant to permit a confident attempt at generalization” on this question.<sup>255</sup> Indeed, it was over 50 years later in 2011 that the ILC finished its work on the *Guide to Practice on Reservations to Treaties* that incorporated the principle at hand with some qualifications.<sup>256</sup>

Judge Ammoun too resorted to municipal law reasoning in arguing that the principle of equity should be applied in *North Sea Continental Shelf*.<sup>257</sup> He referred to the legal systems of Western Europe, Latin America, China, Asian and African countries, Muslim law, Hindu law and Soviet law, to conclude that: “[a] general principle of law has consequently become established, which the law of nations could not refrain from accepting, and which founds legal relations between nations on equity and justice”.<sup>258</sup> In addition, Judge Ammoun felt the need to illustrate that the so-established general principle was ‘translated’ in international practice, recalling the Truman Proclamation and the statements of various Arab states.<sup>259</sup>

Two judges relied on general principles derived from comparative law in interpreting the joint responsibility of states. In *Certain Phosphate Lands in Nauru (Nauru v Australia)*,<sup>260</sup> Judge Shahabudeen invoked the

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254. *Case of Certain Norwegian Loans (France v Norway)*, [1957] ICJ Rep 9 at 56-57.

255. *Ibid* at 56.

256. International Law Commission, *Report of the International Law Commission*, 63rd Sess, UNGAOR, 66th Sess, Supp No 10, UN Doc A/66/10/Add 1 (2011).

257. *North Sea Cases*, *supra* note 59 at 139.

258. *Ibid* at 140.

259. *Ibid*.

260. [1992] ICJ Rep 240.

"principles of the law of trust in English law" to argue that the joint and several responsibility of Australia, New Zealand and the United Kingdom was preferable to their exclusively joint responsibility triggering the principle of necessary third party.<sup>261</sup> In *Oil Platforms (Islamic Republic of Iran v United States of America)*,<sup>262</sup> Judge Simma undertook a comparative law analysis in support of his argument that "the principle of joint-and-several liability common to the jurisdictions ... considered can properly be regarded as a 'general principle of law' within the meaning of Article 38, paragraph 1(c), of the Court's Statute".<sup>263</sup> He referred in particular to cases from the US and Canada, to French, Swiss and German tort law, noting that: "the question has been taken up and solved by these legal systems with a consistency that is striking".<sup>264</sup> Notably, Judge Simma did not stop at the municipal law analogy but adopted the qualified approach by also referring to the principles set out in the ILC Articles *on Responsibility of States for Internationally Wrongful Acts* as "an authoritative source addressing the issue".<sup>265</sup>

It can be observed that only a few judges have relied solely on comparative law as evidence for the recognition of general principles of law. A number of judges cautioned against the direct transposition of private law principles on the international plane and a few have illustrated the international applicability of the identified principles by reference to international practice. The approaches of qualified transposition and of going beyond mere private law analogies by reference to international practice are preferable.

## 2. General Principles as Natural Law

Fewer judges have conceptualised general principles as deriving from natural law. Two of the strongest proponents of this approach are Judges Tanaka and Cançado Trindade. In his Dissenting Opinion in *South West*

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261. *Ibid* at 285.

262. [2003] ICJ Rep 161 [*Oil Platforms*].

263. *Ibid* at 324.

264. *Ibid* at 354-57.

265. *Ibid* at 358.

*Africa*,<sup>266</sup> Judge Tanaka stated that: “the concept of human rights and of their protection is included in the general principles” mentioned in Article 38(1)(c) of the *SICJ*.<sup>267</sup> He reasoned that natural law elements were inherent in the provision giving it “supra-national and supra-positive character”.<sup>268</sup> With respect to the methodology for establishing general principles, Judge Tanaka noted that “recognition is of a very elastic nature”, adducing as evidence the fact that human rights are “an integral part of the constitutions of most of the civilized countries in the world”.<sup>269</sup> He noted further that recognition can also be manifested by “the attitude of delegations of member States in cases of participation in resolutions, declarations, etc. ... adopted by the organs of the League of Nations, the United Nations and other organizations”, as well as in custom and international conventions.<sup>270</sup>

In *Pulp Mills on the River Uruguay (Argentina v Uruguay)*,<sup>271</sup> Judge Cançado Trindade conceptualised general principles of law “as an indication of the *status conscientiae* of the members of the international community as a whole”, “ensuing from the idea of an objective justice, and guiding the interpretation and application of legal norms and rules”.<sup>272</sup> He criticised the ICJ for overlooking the general principles of law and argued that both principles of domestic and of international law fall under the scope of Article 38(1)(c) of the *SICJ* due to their universal axiological dimension.<sup>273</sup> Judge Cançado Trindade focused on ascertaining the existence of the environmental law principles of prevention and the precautionary principle, by reference to the *Declaration of the United Nations Conference on the Human Environment* and the *Rio Declaration on Environment and Development*, the General Assembly resolution containing the *World Charter for Nature*, a number of universal and

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266. *South West Africa*, *supra* note 217.

267. *Ibid* at 298.

268. *Ibid*.

269. *Ibid* at 299.

270. *Ibid* at 300.

271. [2010] ICJ Rep 14 [*Pulp Mills*].

272. *Ibid* at 214.

273. *Ibid* at 137, 155.

regional environmental treaties, as well as the case law of the ICJ itself.<sup>274</sup>

In conclusion, despite the difference in natural as opposed to positive law perspective on general principles, the methodology suggested by Judges Tanaka and Cançado Trindade is surprisingly similar to that adopted by the ICJ itself ascertaining the general recognition of the international community of states as a whole as evidenced in international treaties and declarations.

## V. Methodological Conclusions

The case law of the PCIJ and the ICJ indicates a nuanced approach towards the interpretation and identification of the 'general principles of law recognized by civilized nations', pointing to three categories of such principles, namely: general principles of international law; general principles of domestic law; and general principles of international procedural law. Under the rubric of general principles of international law, the ICJ has applied 'general' and 'fundamental' or 'cardinal' principles of international law deriving their recognition from universal treaties; custom; widely supported General Assembly resolutions; other non-binding statements of international organisations; Security Council resolutions; the case law of the ICJ itself; and of arbitral tribunals. Accordingly, in the identification of general principles, the subjective attitudes of the majority of states would compensate for a less-than-general state practice. The methodology of the ICJ in ascertaining the existence of general principles of international law is mostly deductive, which leaves it open to criticism for being too liberal in its approach.

The ICJ resorted to general principles of domestic law on rare occasions, largely limited to the interpretation of questions regulated by domestic law. It has done so by identifying principles common to the 'generality' of legal systems, mostly in the areas of contract and company law. While such general principles have limited significance in the case law of the ICJ due to the types of disputes it has jurisdiction over, their use has grown considerably in the context of mixed arbitrations involving a state and a non-state entity, and in particular in investment

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274. *Ibid* at 157-70.

treaty arbitration. This is underlined by the fact that quite a few bilateral investment treaties and investment contracts designate 'general principles of law' as applicable alongside national law and that tribunals have interpreted this formula to apply general principles of contract and other areas of private law instead of the designated national law. The methodology of the ICJ in ascertaining general principles of domestic law is primarily an inductive one, though heavily reliant on the evidence presented by the parties.

The ICJ also identified a number of principles of international procedural law, using a combination of inductive and deductive methodology by relying on international treaties, domestic laws, and international case law.

The different methodologies adopted by the ICJ with respect to the different categories of general principles can be justified theoretically but are also open to criticism for being inconsistent. It can be hoped that the ICJ will use future cases to set out more explicitly its interpretation of Article 38(1)(c) of the *SICJ* and a clear methodology for its application in practice.