



General Assembly

Distr.: General
5 April 2019
English
Original: English and French

International Law Commission

Seventy-first Session

Geneva, 29 April–7 June and 8 July–9 August 2019

First report on general principles of law

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* The Special Rapporteur wishes to thank Ms. Xuan Shao (DPhil candidate at University of Oxford) and Mr. Alfredo Crosato Neumann (PhD candidate at the Graduate Institute of International and Development Studies) for their invaluable assistance with the preparation of the present report.



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Introduction

I. Inclusion of the topic in the Commission's programme of work

1. At its sixty-ninth session, the Commission decided to include the topic "General principles of law" in its long-term programme of work.¹

2. In the course of the debate in the Sixth Committee in 2017, delegations emphasized the importance of the topic, and generally welcomed its inclusion in the long-term programme of work.² Many delegations noted that the Commission's work on the topic would complement the existing work on the sources of international law identified in Article 38, paragraph 1, of the Statute of the International Court of Justice. It was also indicated that the topic was ripe for inclusion in the programme of work of the Commission, and that it should be given priority. Delegations were generally of the view that the Commission could provide authoritative clarification of the nature, scope and function of general principles of law, as well as of the criteria and methods for their identification. At the same time, possible difficulties related to the topic were pointed out.³ In its resolution 72/116,⁴ the General Assembly took note of the inclusion of the topic in the Commission's long-term programme of work.

3. During its seventieth session, the Commission decided to include the topic in its current programme of work and appointed Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur. The debate in the Sixth Committee in 2018 again showed general

¹ A/72/10, para. 267.

² See Austria ("The source of international law known as 'general principles of law' was subject to the most divergent interpretations and needed urgent clarification") (A/C.6/72/SR.18, para. 80); Brazil ("the inclusion of the topic ... in the Commission's agenda would be in line with the work recently or currently undertaken regarding other sources of international law") (A/C.6/72/SR.21, para. 15); Chile (A/C.6/72/SR.19, para. 87); Czech Republic (A/C.6/72/SR.20, para. 20); El Salvador (A/C.6/72/SR.19, para. 33); El Salvador (on behalf of the Community of Latin American and Caribbean States) (A/C.6/72/SR.18, para. 38); Estonia ("the work could give a comprehensive insight into the three principal sources of international law") (A/C.6/72/SR.20, para. 75); Greece ("the Commission should undertake a thorough examination of the topic of general principles of law, which was closely related to the topic of sources of international law") (A/C.6/72/SR.19, para. 54); India (*ibid.*, para. 15); Japan (A/C.6/72/SR.20, para. 68); Malawi (A/C.6/72/SR.26, para. 137); Netherlands (A/C.6/72/SR.20, para. 24); New Zealand (*ibid.*, para. 53); Peru (A/C.6/72/SR.19, para. 12); Poland ("general principles of law were the only source of law applied by the International Court of Justice that had not been analysed by the Commission") (*ibid.*, para. 96); Portugal (A/C.6/72/SR.18, para. 92); Romania (A/C.6/72/SR.19, para. 86); Russian Federation (*ibid.*, para. 48); Singapore (A/C.6/72/SR.18, para. 157); Slovakia ("General principles of law were an essential complement to primary sources of international law but had not been given much attention by the Commission to date. The consideration of the topic was a natural next step, following the Commission's work on the law of treaties, customary international law and *jus cogens*") (A/C.6/72/SR.19, para. 60); Slovenia (*ibid.*, para. 19); Sweden (on behalf of the Nordic Countries) (A/C.6/72/SR.18, para. 63); Thailand (A/C.6/72/SR.19, para. 64); Turkey (A/C.6/72/SR.20, para. 83); United Kingdom of Great Britain and Northern Ireland (A/C.6/72/SR.26, para. 109).

³ A/CN.4/713, para. 83.

⁴ General Assembly resolution 72/116 of 7 December 2017, para. 7.

support for the topic.⁵ In its resolution 73/265,⁶ the General Assembly took note of the inclusion of the topic in the current programme of work of the Commission.

II. Purpose and structure of the report

4. This first report is preliminary and introductory in nature. Its main purpose is to lay the foundation for the future work of the Commission on the topic “General principles of law”, as well as to obtain the views of members of the Commission and States in this regard.

5. The report is divided into five parts. Part One addresses certain general matters. Section I deals with the scope of the topic and sets out the main issues which, in the view of the Special Rapporteur, should be addressed in the course of the work of the Commission. It also suggests a possible outcome of that work. Section II addresses questions of methodology.

6. Part Two deals with the previous work of the Commission related to general principles of law.

7. Part Three provides an overview of the development of general principles of law over time. Section I sets out the practice of States and adjudicative bodies relating to this source of international law prior to the adoption of the Statute of the Permanent Court of International Justice. Section II addresses the drafting history of Article 38 of the Statutes of the Permanent Court of International Justice and the International Court of Justice. Finally, Section III briefly summarizes the practice relating to general principles of law from 1920 to date.

8. Part Four makes an initial assessment of certain basic aspects of the present topic. Section I focuses on Article 38, paragraph 1 (c), of the Statute of the International Court of Justice and addresses the elements contained therein, namely the term “general principles of law”, the requirement of “recognition” and the term “civilized nations”. Section II analyses the origins of general principles of law as a source of international law. Finally, Section III provides some clarifications as regards terminology.

9. Part Five of the report sets out a tentative future programme of work.

⁵ Brazil (A/C.6/73/SR.21, para. 41); Colombia (A/C.6/73/SR.27, para. 35); Cuba (A/C.6/73/SR.23, para. 54); Czech Republic (A/C.6/73/SR.21, para. 14); Ecuador (A/C.6/73/SR.23, para. 18); El Salvador (on behalf of the Community of Latin American and Caribbean States) (A/C.6/73/SR.20, para. 24); Estonia (A/C.6/73/SR.21, para. 58); Gambia (on behalf of the African Group) (A/C.6/73/SR.20, para. 27); Iran (Islamic Republic of) (A/C.6/73/SR.24, para. 14); Italy (A/C.6/73/SR.20, para. 82); Japan (*ibid.*, para. 101); Malawi (A/C.6/73/SR.24, para. 42); Mexico (A/C.6/73/SR.25, para. 57); Peru (A/C.6/73/SR.20, para. 86); Poland (*ibid.*, para. 99); Portugal (A/C.6/73/SR.21, para. 3); Republic of Korea (A/C.6/73/SR.23, para. 70); Russian Federation (A/C.6/73/SR.22, para. 50); Sierra Leone (*ibid.*, para. 73); Singapore (A/C.6/73/SR.20, para. 96); Slovakia (A/C.6/73/SR.21, para. 26); Togo (A/C.6/73/SR.22, para. 103); United Kingdom (*ibid.*, para. 77); United States (A/C.6/73/SR.29, para. 25, but also stating the concern “that there might not be enough material on State practice for the Commission to reach any useful conclusions”).

⁶ General Assembly resolution 73/265 of 22 December 2018, para. 7.

Part One: General

I. Scope and outcome of the topic

10. The present topic concerns “general principles of law” as a source of international law. In this regard, the Special Rapporteur recalls that the Commission has made an important contribution in the sphere of the sources of international law. Some of the most relevant work of the Commission has related, for instance, to the law of treaties and to customary international law. In line with this, the Commission is in a position to clarify various aspects of general principles of law, and to do so in a pragmatic way based on current law and practice. In undertaking this work, it is expected that the Commission will provide guidance to States, international organizations, courts and tribunals, and others called upon to deal with general principles of law as a source of international law.

11. Since the adoption of the Statute of the Permanent Court of International Justice in 1920, various practical and theoretical issues concerning general principles of law have persisted. The practice of States and international courts and tribunals is sometimes described as unclear or ambiguous. Furthermore, the abundance of literature devoted to general principles of law shows not only the continuing relevance of the topic, but also the diversity of views that exist and the need for clarification. Against this background, and as the present topic is likely to touch upon certain fundamental aspects of the international legal system, a cautious and rigorous approach is required.

12. The following is a brief account of the main issues surrounding the topic which, in the view of the Special Rapporteur, should be addressed and clarified by the Commission. It is not intended to be an exhaustive list of all existing issues. The objective is to obtain early views of the members of the Commission and States as regards the future work on the topic.

A. Issues to be considered by the Commission

13. Without excluding other questions or aspects related to the present topic, it is suggested that the Commission should address the issues below. Some of them are dealt with in greater depth later in the present report.

1. The legal nature of general principles of law as a source of international law

14. Article 38, paragraph 1 (c), of the Statute of the International Court of Justice is an authoritative statement of the legal nature of general principles of law as a source of international law. It reads:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

...

(c) the general principles of law recognized by civilized nations.

15. This provision has been an important point of reference when general principles of law have been addressed, both in practice and in the literature. In the view of the Special Rapporteur, the starting point for the work of the Commission on this topic should be Article 38, paragraph 1 (c), analysed in the light of the practice of States and the jurisprudence of international courts and tribunals.

16. In this regard, the three elements found in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, namely the term “general principles of law”, the requirement of “recognition” and the term “civilized nations”, ought to be analysed by the Commission at the outset. Part Four below makes an initial assessment of these elements.

17. Several questions arise in connection with this paragraph. For example, the Commission would need to clarify whether the term “general principles of law” provides any indication of the possible nature, content or functions of this source of international law, its relationship with other sources of international law or its scope of application.

18. The requirement of “recognition” is of particular importance, and perhaps at the heart of the work of the Commission on the topic. The Commission can clarify a number of issues in this regard, such as the different forms that recognition may take, which materials are relevant when establishing that recognition exists and how to weigh them, and to what extent such recognition is required.

19. Another issue to address is whose recognition is required and the meaning of the term “civilized nations”. Many seem to be of the view that the term is anachronistic and should no longer be employed. This may be considered the current position of States, which have departed from that term in certain treaties subsequent to the adoption of the Statutes of the Permanent Court of International Justice and the International Court of Justice, such as the International Covenant on Civil and Political Rights⁷ and the Rome Statute of the International Criminal Court.⁸

20. In connection with the issue of whose recognition is required, the Commission may further consider whether international organizations and other actors may also contribute to the formation of general principles of law as a source of international law.

2. The origins of general principles of law

21. Immediately related to the above-mentioned issues is the question of the origins of general principles of law as a source of international law. Different viewpoints on this question exist, mainly in the literature but also in practice, and various categories of general principles of law have been referred to depending on their origin.

22. Among the categories of general principles of law that may fall under Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, two appear to stand out: (a) general principles of law derived from national legal systems; and (b) general principles of law formed within the international legal system. The present report addresses these two categories in Part Four below.

23. In the literature on the topic, references are made to other categories of general principles of law. One author, for example, considers that, in addition to the two categories mentioned above, there also exist principles “intrinsic to the idea of law and basic to all legal systems”, principles “valid through all kinds of societies in relationships of hierarchy and coordination”, and principles founded on “the very nature of man as a rational and social being”.⁹ Similarly, another author maintains

⁷ International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

⁸ Rome Statute of the International Criminal Court (Rome, 17 July 1998), *ibid.*, vol. 2187, No. 38544, p. 3.

⁹ O. Schachter, “International law in theory and practice: General course in Public International Law”, *Collected Courses of the Hague Academy of International Law 1982-V*, vol. 178 (1982), pp. 9–396, at pp. 74–75.

that there are principles “applicable to all kinds of legal relations” and principles “of legal logic”.¹⁰

3. The functions of general principles of law and their relationship with other sources of international law

24. Other important issues that the Commission may wish to consider are the functions of general principles of law and their relationship with other sources of international law, in particular treaties and custom. This, to a limited extent, has been addressed by the Commission in its previous work.¹¹

25. A number of questions in this respect would require clarification. A widely held view, for example, is that general principles of law are a supplementary¹² source of international law in the sense that they serve to fill gaps in conventional and customary international law, or to avoid findings of a *non liquet*.¹³ If this is so, the Commission may need to consider whether there exist gaps in international law in the first place and how to define them. Similarly, the Commission may need to address the precise meaning of *non liquet* and whether it is generally prohibited under international law.

26. It has also been suggested that general principles of law, in addition to serving as a direct source of rights and obligations,¹⁴ may serve as a means to interpret other rules of international law¹⁵ or as a tool to reinforce legal reasoning.¹⁶ A more abstract

¹⁰ H. Mosler, “General principles of law”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. II (Amsterdam, Elsevier, 1995), pp. 511–526, at p. 513–515.

¹¹ See paras. 65–75 below.

¹² The term “subsidiary” is often found in the literature. Yet this term also appears in Article 38, paragraph 1 (d) of the Statute with respect to judicial decisions and teachings, and it may cause confusion if used to describe general principles of law.

¹³ H. Thirlway, *The Sources of International Law* (Oxford University Press, forthcoming), pp. 125–130; A. Pellet and D. Müller, “Article 38”, in A. Zimmermann and C.J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford, Oxford University Press, 2019), p. 923; M. Andenas and L. Chiussi, “Cohesion, convergence and coherence of international law”, in M. Andenas *et al.* (eds.), *General Principles and the Coherence of International Law* (Brill, 2019), pp. 10 and 14; C. Redgwell, “General principles of international law”, in S. Vogenauer and S. Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Hart, 2017), p. 7; F.O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden, Martinus Nijhoff, 2008), p. 7; J. G. Lammers, “General principles of law recognized by civilized nations”, in F. Kalshoven *et al.* (eds.), *Essays on the Development of the International Legal Order in Memory of Haro F. van Panhuys* (Alphen aa den Rijn, Sijthoff and Noordhoff, 1980), pp. 53–77, at p. 64; J. A. Barberis, “Los Principios Generales de Derecho como Fuente del Derecho Internacional”, *Revista IIDH*, vol. 14 (1991), pp. 11–42, at pp. 14 and 29; M. Bogdan, “General principles of law and the problem of lacunae in the law of nations”, *Nordic Journal of International Law*, vol. 46 (1977), pp. 37–53, at p. 37; A. Blondel, “Les principes généraux de droit devant la Cour permanente de Justice internationale et la Cour internationale de Justice”, in *Recueil d’études de droit international en hommage à Paul Guggenheim* (Geneva, Institut universitaire de hautes études internationales, 1968), pp. 201–236, at pp. 202 and 204; D. Anzilotti, *Cours de droit international* (Editions Panthéon-Assas, 1929/1999), p. 117.

¹⁴ See para. 68 below. See also Pellet and Müller, “Article 38” (footnote 13 above), p. 941.

¹⁵ See para. 66 below. See also Andenas and Chiussi, “Cohesion, convergence and coherence of international law” (footnote 13 above), pp. 10 and 14–15; Raimondo, *General Principles of Law ...* (footnote 13 above), p. 7; Lammers, “General principles of law recognized by civilized nations” (footnote 13 above), pp. 64–65.

¹⁶ Pellet and Müller, “Article 38” (footnote 13 above), p. 944; Raimondo, *General Principles of Law ...* (footnote 13 above), p. 7; Blondel, “Les principes généraux de droit devant la Cour permanente de Justice internationale et la Cour internationale de Justice” (footnote 13 above), p. 202.

role is sometimes attributed to them, such as that they inform or underlie the international legal system,¹⁷ or that they serve to reinforce its systemic nature.¹⁸

27. Another question related to the relationship between general principles of law and other sources of international law is that of autonomy. Most of the literature suggests that general principles of law are distinct from treaties and custom, a proposition that is supported by a plain reading of Article 38 of the Statute of the International Court of Justice as a whole. Some seem to deny such autonomy by suggesting, for example, that a general principle of law must be somehow embodied in treaties or customary international law.¹⁹

28. The relationship between general principles of law and customary international law, sometimes described as unclear,²⁰ deserves particular attention.²¹ Nevertheless, the fact that a rule of customary international law requires there to be a “general practice accepted as law” (accompanied by *opinio juris*), while a general principle of law needs to be “recognized by civilized nations”, should not be overlooked. This suggests that these two sources are distinct and should not be confused.

4. The identification of general principles of law

29. As in the topic “Identification of customary international law”, the Commission can provide practical guidance regarding how to identify general principles of law. This issue is closely related to the meaning of the phrase “recognized by civilized nations” employed in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice insofar as one may have to look at the ways and means in which general principles of law are recognized in order to identify them.

30. The method for identifying general principles of law will depend on the conclusions that the Commission adopts concerning the issues set out above.²² For example, in order to identify general principles of law derived from national legal systems, a two-step analysis may be required: first, identifying a principle common to a majority of national legal systems; second, determining whether that principle is applicable in the international legal system.²³

¹⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, Separate Opinion of Judge Cançado Trindade, at p. 152, para. 41 (“It is in the light of [general principles of law] that the whole *corpus* of the *droit des gens* is to be interpreted and applied”); C. W. Jenks, *The Common Law of Mankind* (London, Stevens and Sons, 1958), p. 106.

¹⁸ Andenas and Chiussi, “Cohesion, convergence and coherence of international law” (footnote 13 above), pp. 10 ff.

¹⁹ See, for example, G. Tunkin, *Theory of International Law*, L. N. Shestakov (ed.) and William E. Butler (transl. and ed.) (Wildy, Simmons and Hill, 2003), pp. 145–157; G.I. Tunkin, “Co-existence and international law”, *Collected Courses of the Hague Academy of International Law*, vol. 95 (1958), pp. 1–81, at p. 26; V. M. Koretsky, “Общие Принципы Права” в *Международном Праве* [“General Principles of Law” in *International Law*] (Kiev, Ukrainian Academy of Sciences, 1957).

²⁰ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, Cambridge University Press, 1953), p. 23. See also paras. 70–71 below.

²¹ See, for example, Pellet and Müller, “Article 38” (footnote 13 above), p. 943 (“general principles of law are ‘transitory’ in the sense that their repeated use at the international level transforms them into custom and therefore makes it unnecessary to have recourse to the underlying general principles of law”). See also P. Palchetti, “The role of general principles in promoting the development of customary international rules”, in M. Andenas *et al.* (eds.), *General Principles and the Coherence of International Law* (Brill, 2019), pp. 47–59.

²² General principles of law have been described as a “heterogeneous concept”, in the sense that their nature and method of identification may vary depending on which category of general principles of law is in question. See Lammers, “General principles of law recognized by civilized nations” (footnote 13 above), pp. 74–75

²³ See Parts Three and Four below.

31. If, on the other hand, the Commission arrives at the conclusion that general principles of law comprise principles formed within the international legal system, not based on principles common to national legal systems, the method for identification may be different. The two-step analysis mentioned above may not be necessary, but “recognition” in the sense of Article 38, paragraph 1 (c), of the Statute would still need to be established.

32. Moreover, the Commission can clarify the role of judicial decisions and teachings as “subsidiary means” in the sense of Article 38, paragraph 1 (d), of the Statute in the identification of general principles of law. In this regard, views that the decisions of international courts and tribunals are not only an aid in the identification of general principles of law, but play also a substantive role in the formation of this source of international law may need to be addressed.²⁴

33. The Commission may also wish to consider whether there may be general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute that are not universal but rather regional, or even principles that are applicable in bilateral relations.²⁵

B. Final outcome

34. The Special Rapporteur considers that the outcome of the present topic should take the form of conclusions accompanied by commentaries. A first draft conclusion on the scope of the topic seems warranted at this stage:

“Draft conclusion 1: Scope

The present draft conclusions concern general principles of law as a source of international law.”

II. Methodological approach

35. The work of the Commission will be based primarily on the practice of States. This includes, *inter alia*, statements, diplomatic exchanges, pleadings before international courts and tribunals, treaties and their drafting histories, and decisions of national courts.

36. The practice of international organizations may also be analysed if considered relevant for purposes of the present topic.

37. The jurisprudence of international courts and tribunals will be analysed as well. The objective is to be as comprehensive as possible in covering the existing case law relevant to the topic.

38. A crucial methodological question in the present topic is how to select the relevant materials for its study. Terms such as “principle”, “general principle”, “general principle of law”, “general principle of international law” and “principle of international law” are often found in practice and in the literature, usually without a clear indication as regards the source of such principles. It may well be the case that, while such terms are employed on a given occasion, reference is being made to a rule of conventional or customary international law and not to a general principle of law

²⁴ See, for example, J. R. Leiss, “The juridical nature of general principles”, in M. Andenas *et al.* (eds.), *General Principles and the Coherence of International Law* (Brill, 2019), pp. 79–99.

²⁵ See, for example, R. Kolb, *La bonne foi en droit international public* (Geneva, Presses universitaires de France, 2000), pp. 50–52; Lammers, “General principles of law recognized by civilized nations” (footnote 13 above), p. 63.

in the sense of Article 38, paragraph 1 (c), of the Statute. How is one to make the distinction?

39. In order for the Commission to select the relevant materials, the Special Rapporteur considers that it is necessary to take into account certain factors. These include:

(a) Whether Article 38, paragraph 1 (c), of the Statute of the International Court of Justice is expressly referred to;

(b) Whether Article 38, paragraph 1 (c), of the Statute is implicitly referred to (for example, by employing the term “general principles of law”);

(c) Whether a legal norm is invoked or applied in the absence of a rule of conventional or customary international law;

(d) Whether, even though the terms “principle”, “general principle” or other similar terms are employed, there is a conventional or customary rule addressing the situation at hand;²⁶

(e) Whether the instrument governing the functioning of a court or tribunal contains an applicable law provision that includes general principles of law.²⁷

To the extent possible, the Special Rapporteur has taken these factors into account when selecting the materials that are discussed below.

40. Scholarly work on general principles of law will also be considered in an integrated and systematic manner with the rest of the materials. In this connection, the Commission could provide a widely representative bibliography containing the main writings related to the topic at the end of its work.

41. Examples of general principles of law will certainly be referred to in the course of the Commission’s work on the present topic and in the commentaries that will accompany the draft conclusions. However, in line with the practice of the Commission, the Special Rapporteur considers that those references should be for illustration only and that the Commission should not address the substance of general principles of law.²⁸

²⁶ It may be the case that a rule of conventional or customary international law addresses the same issue that a general principle of law does. An illustration of this is the principle of *res judicata* as applied by the International Court of Justice, which, while often referred to as a general principle of law, is also linked to Articles 59, 60 and 61 of the Statute of the Court. In such cases, it may be necessary to stop and ask whether the Court is applying a general principle of law or a treaty rule, or both at the same time.

²⁷ Arguably, and as it appears from some of the case law that is discussed below, general principles of law may not need to be expressly referred to in a statute or *compromis* for a court or tribunal to apply them.

²⁸ See the approach adopted by the Commission in its draft conclusions on the identification of customary international law (para. (6) of the commentary to conclusion 1, A/73/10, paras. 65–66, at p. 124).

Part Two: Previous work of the Commission

42. Before starting the analysis of the issues set out in Part One, it is useful to recall the previous work of the Commission that may be relevant for the consideration of the present topic.²⁹ The intention of the Special Rapporteur is to build on that work as appropriate.

43. General principles of law have appeared in the work of the Commission, often in a discrete manner, since its early years. For convenience, that work is divided in two parts: first, references to general principles of law within the Commission, including examples of such principles; second, the previous consideration by the Commission of certain aspects of the present topic that were outlined above.

I. References to general principles of law in the work of the Commission

44. References to “principles”, “general principles”, “general principles of law” and other similar terms can be found throughout the work of the Commission. As is often the case elsewhere, however, it is not always entirely clear whether those references are to general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice or to something else. One should therefore assess the work of the Commission with caution.

45. The examples that are given below are illustrative only and not exhaustive. They include references to general principles of law in statements by the Commission as a whole, in statements by individual members of the Commission in the course of debates, in reports submitted by Special Rapporteurs on various topics, and in memorandums prepared by the Secretariat.

46. As part of the topic “Formulation of the Nürnberg Principles” (Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal), the Commission formulated a number of “principles of international law” related to criminal matters. In the course of its deliberations, the Commission considered the question of whether it “should ascertain to what extent the principles contained in the Charter [of the International Military Tribunal] and judgment constituted principles of international law”. It concluded that “since the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission ... was not to express any appreciation of these principles as

²⁹ Another account of the work of the Commission relating to general principles of law can be found in the 2018 draft report of the International Law Association on “The use of domestic law principles in the development of international law” (paras. 106–181). The report has a somewhat different approach, focus being on references to domestic law principles within the work of the Commission. It states that, “in accordance with its mandate, the Study Group, expressly focused on general principles derived from domestic law, without discussing whether general principles could also derive from other sources” (*ibid.*, para. 2). The report also states that “[t]he Study Group has concluded its work but, considering the complexity and continuing relevance of the topic, it would recommend that the Association considers establishing a Committee with broader representation to contribute to the work of the ... International Law Commission on the broader topic of general principles of law (including other potential sources from which general principles could be derived)” (*ibid.*, p. 70). See also resolution 9/2018 adopted at the 78th Conference of the International Law Association, held in Sydney, Australia, from 19 to 24 August 2018.

principles of international law but merely to formulate them”.³⁰ Thus, the principles elaborated by the Commission should be understood in the light of this limited task.

47. A question arose during the debates of the Commission on that topic regarding the legal nature of the right of self-defence of the accused. One member considered that

the right of self-defence was certainly a principle of international law which had been recognized in the Charter and the Judgment and which at the same time constituted one of the general principles of law recognized by civilized nations, referred to in paragraph 1 (c) of Article 38 of the Statute of the International Court of Justice.³¹

On this point, another member commented that “general principles of law mentioned in [Article 38, paragraph 1 (c)] were principles of municipal law” and that “[i]t could not therefore be held that there was a principle of international law in that matter, which, moreover, came under penal procedure”.³² This view was objected to on the basis that nothing in that provision limits it to principles of municipal law. It was stated that “the Statute of the Court referred in that paragraph to the principles of international law as well as to the principles of municipal law”.³³

48. In its draft articles on the continental shelf and related subjects, the Commission noted, in the commentary to draft article 2 (on the exercise by the coastal State of control and jurisdiction over the continental shelf), that

[t]he Commission has not attempted to base on customary law the right of a coastal State to exercise control and jurisdiction for the limited purposes stated in article 2 ... It is sufficient to say that the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community.³⁴

49. References to general principles of law were also made in the work of the Commission related to arbitral procedure. In a first draft on arbitral procedure, in 1952, the Commission took the view that “the arbitral tribunal is always entitled to adjudicate on the basis of general principles of law considered to be rules of positive law, but is not entitled to act as *amiable compositeur*, that is, to judge *contra legem*, without the consent of the parties”.³⁵ The Commission also considered, with respect to draft article 12, that

paragraph 2 contains one of the most important stipulations in the whole draft. It corresponds to the general rule of law recognized in a large number of the

³⁰ *Yearbook ... 1950*, vol. II, document A/1316, p. 374, para. 96. See also *Yearbook ... 1949*, p. 133, para. 35; *Yearbook ... 1950*, vol. II, document A/CN.4/22, p. 189, para. 36.

³¹ *Yearbook ... 1949*, p. 205, para. 75.

³² *Ibid.*, p. 206, para. 80. Spiropoulos also said that “[t]he meaning of that paragraph was that the Court should, when necessary, apply the general principles of municipal law in the settlement of international disputes” (*ibid.*).

³³ *Ibid.*, p. 206, para. 81. Scelle pointed out, however, that “any principle of international law had its origin in custom ... Before becoming a principle of international law, therefore, any principle was first a general principle of municipal law and at both stages of its development it could be applied by the Court in international matters” (*ibid.*).

³⁴ Para. 6 of the commentary to art. 2 of the draft articles on the continental shelf and related subjects, *Yearbook ... 1951*, vol. II, document A/1858, annex, at p. 142.

³⁵ Para. (8) of the commentary to art. 9 of the draft on arbitral procedure, *Yearbook ... 1952*, vol. II, document A/2163, chap. II, at p. 63. See also *Yearbook ... 1953*, vol. I, 194th meeting, pp. 63–64, para. 73.

juridical systems of the world according to which a judge may not refuse judgment on the ground of the silence or obscurity of the law.³⁶

50. Draft article 12 was subject to further debate in 1958, with a proposal being made to delete it.³⁷ The provision was finally retained as article 11 (“The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of the law to be applied”).³⁸ The Commission also adopted article 10, concerning the possibility for an arbitral tribunal to apply, *inter alia*, “general principles of law recognized by civilized nations” in the absence of any agreement between the parties as to the law to be applied.³⁹

51. Within the context of its work on the law of treaties, various references to general principles of law were made. It was suggested by the Special Rapporteur, Sir Hersch Lauterpacht, for example, that “the conditions of the validity of treaties, their execution, interpretation and termination are governed by international custom and, in appropriate cases, by general principles of law recognized by civilized nations”.⁴⁰ Mention was also made of general principles of law concerning the voidance of contractual agreements whose object is illegal,⁴¹ *fraus omnia corrumpit*,⁴² error as a defect of consent,⁴³ and exceptions to the *pacta tertiis* rule.⁴⁴

52. In its draft articles on succession of States in respect of State property, archives and debts, the Commission referred to the “general principle” of equity in the context of movable State property, which “should never be lost from view and which, in such cases, enjoins apportionment of the property between the successor State or States and the predecessor State”.⁴⁵

53. Article 33 of the draft statute for an international criminal court provided that the court shall apply, *inter alia*, “[a]pplicable treaties and the principles and rules of general international law”.⁴⁶ The commentary to this provision specified that “[t]he expression ‘principles and rules’ of general international law includes general principles of law, so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty”.⁴⁷

54. The Commission also appears to have identified a number of “general principles” in the context of its work related to the draft code of crimes against the peace and security of mankind. It recognized, based on the Nürnberg principles, the

³⁶ Para. (2) of the commentary to art. 12 of the draft on arbitral procedure, *Yearbook ... 1952*, vol. II, document A/2163, chap. II, at p. 64. See also *Yearbook ... 1953*, vol. I, 188th meeting, p. 24, paras. 25–26; *Yearbook ... 1958*, vol. I, 441st and 442nd meetings, pp. 46–49, paras. 17–52.

³⁷ *Yearbook ... 1958*, vol. I, pp. 50–54, paras. 69–74 and paras. 1–42, respectively.

³⁸ *Yearbook ... 1958*, vol. II, document A/3859, pp. 84 *ff.*, para. 22.

³⁹ *Ibid.*

⁴⁰ *Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 90, 105–106, draft art. 3 and comments thereto of the articles on the law of treaties proposed by the Special Rapporteur on the topic.

⁴¹ *Ibid.*, p. 155, comment to draft art. 15, para. 5.

⁴² *Yearbook ... 1963*, vol. I, 679th meeting, pp. 32–38, paras. 2–60.

⁴³ *Ibid.*, 680th meeting, pp. 41–43, paras. 19–60.

⁴⁴ Para. (1) of the commentary to draft art. 62 of the draft articles on the law of treaties, *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 20.

⁴⁵ Para. (8) of the commentary to sect. 2 of the draft articles on succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), p. 30.

⁴⁶ Art. 33 of the draft statute for an international criminal court, *Yearbook ... 1994*, vol. II (Part Two), para. 91, at p. 51.

⁴⁷ Para. (2) of the commentary to art. 33, *ibid.* See also para. (5), *ibid.*, at p. 52. For previous debates of the Commission on this issue, see *Yearbook ... 1992*, vol. I, 2254th to 2264th meetings, pp. 3–69; *ibid.*, vol. II (Part Two), p. 14, para. 77; *Yearbook ... 1993*, vol. II (Part Two), p. 17, para. 63.

“general principle of the direct applicability of international law with respect to individual responsibility and punishment for crimes under international law”.⁴⁸ It similarly recognized the “general principle of the autonomy of international law over national law with respect to the criminal characterization of conduct constituting crimes under international law”.⁴⁹ Notably, the Commission also stated that the fact that it is not necessary for an individual to know in advance the precise punishment for a crime is “in accord with the precedent of punishment for a crime under customary international law or general principles of law as recognized in the Judgment of the International Military *Tribunal* for the Prosecution and Punishment of the Major War Criminals of the European Axis (Nürnberg Tribunal) and in article 15, paragraph 2, of the International Covenant on Civil and Political Rights”.⁵⁰

55. The Commission likewise referred to “general principles of criminal law relating to complicity”,⁵¹ as well as the “general principle” of *aut dedere aut judicare*⁵² and of fair trial.⁵³

56. Articles 14 and 15 of the draft code deal with the admissibility of defences and extenuating circumstances, both of which must be taken into account “in accordance with the general principles of law”.⁵⁴ With respect to article 14, the Commission explained that a competent court must consider the validity of a defence under general principles of law, which limits the possible defences to those that are “well-established and widely recognized as admissible with respect to similarly serious crimes under national or international law”.⁵⁵ Similar conclusions were reached as regards extenuating circumstances.⁵⁶ The Commission considered that, in order to determine the applicable general principles which govern these questions, guidance could be drawn from the case law of military tribunals and national courts after the trials of the major war criminals by the Nürnberg Tribunal.⁵⁷

57. The Commission also referred to various “principles”, “general principles”, “general principles of law” and “general principles of international law” in its articles on the responsibility of States for internationally wrongful acts.⁵⁸ In connection with article 3, for example, the Commission identified the “principle” according to which the characterization of an act of a State as internationally wrongful is not affected by the characterization of the same act as lawful by internal law.⁵⁹

⁴⁸ Para. (8) of the commentary to art. 1 of the draft Code against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 18.

⁴⁹ Para. (12), *ibid.*

⁵⁰ Para. (7) of the commentary to art. 3, *ibid.*, at p. 23.

⁵¹ Para. (5) of the commentary to art. 6, *ibid.*, at p. 26.

⁵² Para. (2) of the commentary to art. 9, *ibid.*, at p. 31.

⁵³ Para. (4) of the commentary to art. 11, *ibid.*, at p. 34. References to certain “general principles of criminal law” were also made in the debates of the Commission on the topic. See, for example, *Yearbook ... 1985*, vol. I, p. 15, para. 23, p. 20, paras. 51–52, p. 27, para. 42, p. 38, para. 27, pp. 52–53, paras. 35–36; *Yearbook ... 1986*, vol. I, p. 140, para. 43, pp. 141–142, paras. 58 and 61, p. 150, paras. 1 and 4, p. 151, paras. 11 and 14–16, p. 177, para. 36; *Yearbook ... 1988*, vol. I, p. 287, paras. 46–47.

⁵⁴ *Yearbook ... 1996*, vol. II (Part Two), para. 50, at pp. 39 and 42.

⁵⁵ Para. (3) of the commentary to art. 14, *ibid.*, at p. 39. See further discussions on this issue in *Yearbook ... 1991*, 2236th meeting, vol. I, pp. 192–194, paras. 66–94.

⁵⁶ Para. (3) of the commentary to art. 15, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 42.

⁵⁷ Para. (4), *ibid.*

⁵⁸ Similar references have been made in the topic “Responsibility of international organizations”. See *Yearbook ... 2011*, vol. II (Part Two).

⁵⁹ Commentaries to arts. 3 and 32 of the articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at pp. 36–38, 94.

58. In terms of attribution, the Commission referred to the “general principle” according to which the conduct of private persons or entities, as well as unsuccessful insurrectional movements, is not attributable to the State.⁶⁰ The Commission also referred to the “general principle” of intertemporal law⁶¹ and the “general principle” according to which the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached.⁶² With respect to *force majeure*, the Commission considered that it “may qualify as a general principle of law”.⁶³

59. In its principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the Commission indicated that “[s]ome general principles concerning payment of compensation have evolved over a period of time and were endorsed by the [International Court of Justice] and other international tribunals”.⁶⁴ During the debates of the Commission, reference to general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, such as the “polluter pays” principle, was also made.⁶⁵

60. In the context of its work on diplomatic protection, the Commission considered that, in case of direct injury to shareholders and where the company is incorporated in the wrongdoing State, “there may be a case for the invocation of general principles of company law in order to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment”.⁶⁶ Similarly, the Commission was of the opinion that, in case of joint exercise of the right of diplomatic protection, problems relating to such situations “should be dealt with in accordance with the general principles of law recognized by international and national tribunals governing the satisfaction of joint claims”.⁶⁷

61. The Commission’s Study Group on fragmentation of international law, referred in its conclusions to the “general principle”, “maxim” or “generally accepted technique of interpretation and conflict resolution” of *lex specialis derogat legi generali*,⁶⁸ to the “principle” of *lex posterior derogat legi priori*,⁶⁹ and to the “principle of harmonization” as a “generally accepted principle that when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations”.⁷⁰

62. During the debate on the 2005 report of the Study Group on the same topic, one member of the Commission noted that the report contained “fairly vague references to ‘general principles of international law’”. He expressed the view that, at least in French, a clear distinction exists between “*les principes généraux du droit international*” and “*les principes généraux de droit reconnus par les nations*”

⁶⁰ Commentaries to arts. 8 and 10, *ibid.*, at pp. 47, 50 and 52.

⁶¹ Commentary to art. 13, *ibid.*, pp. 57–59.

⁶² Para. (2) of the commentary to art. 29, *ibid.*, paras. 76–77, at p. 88.

⁶³ Para. (8) of the commentary to art. 23, *ibid.*, at p. 78. In a study of 1978, the Secretariat also referred to the possibility of *force majeure* being a general principle of law (see *Yearbook ... 1978*, vol. II (Part One), document A/CN.4/315, pp. 206–207, paras. 525–529).

⁶⁴ Para. (18) of the commentary to principle 3 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, at p. 76.

⁶⁵ See, for example, *Yearbook ... 2003*, vol. I, 2766th meeting, p. 107, para. 32, and p. 109, para. 48.

⁶⁶ Para. (4) of the commentary to art. 12 of the articles on diplomatic protection, *Yearbook ... 2006*, vol. II (Part Two), paras. 49–50, at p. 43.

⁶⁷ Para. (4) of the commentary to art. 6, *ibid.*, p. 34.

⁶⁸ Para. (5) of the conclusions of the Study Group on fragmentation of international law, *ibid.*, para. 251, at p. 178.

⁶⁹ Paras. (24)–(27), *ibid.*, at p. 181.

⁷⁰ Para. (4), *ibid.*, at p. 178.

civilisées”, the latter being those under Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.⁷¹

63. In its commentaries in the Guide to Practice on Reservations to Treaties, the Commission made reference to the “general principles” of good faith and reciprocity.⁷² With respect to the latter, the Commission was of the opinion that it “is recognized not only as a general principle, but also as a principle that applies automatically, requiring neither a specific clause in the treaty nor a unilateral declaration by the States or international organizations that have accepted the reservation to that effect”.⁷³

64. Other norms that have been considered general principles of law in the course of the Commission’s work include those relating to the connection between counter-claims and main claim,⁷⁴ division of costs and expenses,⁷⁵ public reading of judicial decisions,⁷⁶ abuse of rights,⁷⁷ *ex injuria jus non oritur*,⁷⁸ freedom of consent,⁷⁹ voidance of contractual agreements whose object is illegal,⁸⁰ competence-competence⁸¹ and the notion of “shared expectation”.⁸²

II. Previous consideration by the Commission of issues relating to the present topic

65. In addition to the references to and examples of general principles of law found throughout its work, the Commission has addressed specific issues that relate to the present topic and which were outlined in Part One.

66. The conclusions of the work of the Study Group on fragmentation of international law,⁸³ for example, are relevant to some aspects of the present topic, including as regards the relationship between general principles of law and other sources of international law, as well as the functions of general principles of law. The following conclusions adopted by the Study Group are worth highlighting:

(a) In the context of the maxim *lex specialis derogat legi generali*, the “source of a norm (whether treaty, custom or general principle of law) is not decisive for the determination of the more specific standard. However, in practice treaties often act as

⁷¹ *Yearbook ... 2005*, vol. I, 2860th meeting, p. 218, para. 60.

⁷² Para. (5) of the commentary to guideline 3.1.5 and para. (33) of the commentary to guideline 4.2.4 of the Guide to Practice on Reservations to Treaties, *Yearbook ... 2011*, vol. II (Part Three), at pp. 213 and 271, respectively.

⁷³ Para. (33) of the commentary to guideline 4.2.4, *ibid.*, p. 271.

⁷⁴ *Yearbook ... 1953*, vol. I, 188th meeting, p. 27, para. 75.

⁷⁵ *Ibid.*, 192nd meeting, p. 53, para. 98.

⁷⁶ *Ibid.*, 193rd meeting, p. 57, para. 65.

⁷⁷ *Ibid.*, 236th meeting, p. 362, para. 92, and p. 376, paras. 67–68; *Yearbook ... 1953*, vol. II, p. 219, para. 100.

⁷⁸ *Yearbook ... 1953*, vol. II, A/CN.4/63, p. 148, para. 3 of the comment to draft art. 12 of the articles on the law of treaties proposed by the Special Rapporteur on the topic.

⁷⁹ *Ibid.*, p. 149, para. 6.

⁸⁰ *Ibid.*, p. 155, para. 5 of the comment to draft art. 15 of the articles on the law of treaties proposed by the Special Rapporteur on the topic.

⁸¹ *Yearbook ... 1958*, vol. I, 441st meeting, p. 45, para. 8.

⁸² *Yearbook ... 1982*, vol. I, 1739th meeting, p. 243, para. 6.

⁸³ *Yearbook ... 2006*, vol. II (Part Two), p. 177, para. 251.

lex specialis by reference to the relevant customary law and general principles [of law]”,⁸⁴

(b) One of the roles of general law (including general principles of law) in special regimes is that of gap-filling;⁸⁵

(c) General principles of law can serve as a source external to a treaty for purposes of interpretation under article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties;⁸⁶

(d) The objective of systemic integration applies as a presumption with positive and negative aspects: “(a) the parties are taken to refer to customary international law and general principles of law for all questions which a treaty does not resolve in express terms; (b) in entering into treaty obligations, [States] do not intend to act inconsistently with generally recognized principles of international law”;⁸⁷

(e) General principles of law are of particular relevance to the interpretation of a treaty, especially where: “(a) the treaty rule is unclear or open-textured; (b) the terms used in the treaty have a recognized meaning ... under general principles of law; (c) the treaty is silent on the applicable law and it is necessary for the interpreter, applying the presumption [of systemic integration], to look for rules developed in another part of international law to resolve the point”;⁸⁸

(f) “The main sources of international law (treaties, custom and general principles of law ...) are not in a hierarchical relationship *inter se*.”⁸⁹

67. The Study Group also considered the distinction between “rules” and “principles”, noting that it “captures one set of typical relationships, namely those between norms of a lower and higher degree of abstraction. A ‘rule’ may thus sometimes be seen as a specific application of a ‘principle’ and understood as *lex specialis* or *lex posterior* in regard to it, and become applicable in its stead”.⁹⁰

⁸⁴ Para. (5) of the conclusions of the Study Group on fragmentation of international law, *ibid.*, at p. 178. See also “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr. 1 and Add.1) (available on the Commission’s website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)), para. 66.

⁸⁵ Para. (15) of the conclusions of the Study Group on fragmentation of international law, *Yearbook ... 2006*, vol. II (Part Two), at p. 179.

⁸⁶ Para. (18), *ibid.*, at p. 180. See also “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1) (see footnote 84 above), para. 469. For the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), see United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

⁸⁷ Para. (19), *Yearbook ... 2006*, vol. II (Part Two), at p. 180. See also “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1) (see footnote 84 above), para. 465.

⁸⁸ Para. (20), *Yearbook ... 2006*, vol. II (Part Two), at p. 180.

⁸⁹ Para. (31), *ibid.*, at p. 182. See also “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1) (see footnote 84 above), para. 85 (“Any court or lawyer will first look at treaties, then custom and then the general principles of law for an answer to a normative problem”).

⁹⁰ “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1) (see footnote 84 above), para. 28.

Additionally, the Study Group noted that “the general or earlier principle may be understood to articulate a rationale or a purpose to the specific (or later) rule”.⁹¹

68. In its articles on the responsibility of States for internationally wrongful acts, the Commission considered, in connection with article 12 (Existence of a breach of an international obligation), that “international obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order”.⁹²

69. The Special Rapporteur for the topic “Identification of customary international law” envisaged the possibility of covering the relationship between customary international law and general principles of law at the outset of his work.⁹³ This found the support of some members of the Commission.⁹⁴

70. In his first report, the Special Rapporteur considered briefly the distinction between general principles of law and customary international law.⁹⁵ He noted that: (a) the distinction between the two is important, but not always clear in the case law or the literature; (b) “general principles of law” are listed separately from customary international law in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, and in the case law and literature this is sometimes taken to refer not only to general principles common to the various systems of internal law but also to general principles of international law; (c) the International Court of Justice may have recourse to general principles of international law in circumstances when the criteria for customary international law are not present; and (d) while it may be difficult to distinguish between customary international law and general principles of law in the abstract, whatever the scope of general principles of law it remains important to identify those rules which, by their nature, need to be grounded in the actual practice of States.⁹⁶ The Special Rapporteur also referred to the term “general international law” in pointing out that “[a]t times the term is used to mean something broader than general customary international law, such as customary international law together with general principles of law, and/or together with widely accepted international conventions”.⁹⁷ He suggested that it was “desirable that the specific meaning intended by this term be made clear whenever the context leaves the meaning unclear”.⁹⁸

71. The debate within the Commission on these issues was brief. Some members agreed with the approach of the Special Rapporteur and considered that the relationship between the two sources should be addressed. Some preliminary points on that relationship were also made. One member, for example, noted that

[an] important interaction was the one that took place between customary international law and the general principles of law, the latter often being used in conjunction with or in place of the traditional criteria of customary law. It was thus conceivable for a customary rule to be interpreted in the light of a recognized general principle. The role of such principles was closely linked to the formation and evidence of customary international law ... The Commission

⁹¹ *Ibid.*, para. 29.

⁹² Para. (3) of the commentary to art. 12 of the articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 55. See also commentary to draft art. 17 of the draft articles on State responsibility, *Yearbook ... 1976*, vol. II (Part Two), para. 78, at pp. 80–87.

⁹³ *Yearbook ... 2012*, vol. II (Part One), document [A/CN.4/653](#), p. 55, para. 14.

⁹⁴ *Ibid.*, vol. I, 3148th meeting, p. 138, para. 31, 3151st meeting, p. 164, para. 27, and 3152nd meeting, p. 173, para. 8.

⁹⁵ [A/CN.4/663](#), para. 36.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, para. 42. See also [A/73/10](#), p. 123, footnote 667.

⁹⁸ [A/CN.4/663](#), para. 42.

must be careful, however, not to exclude the possibility of identifying a general principle as a source of international law, whether as a stand-alone rule or as a complement to other rules from other sources.⁹⁹

Another member suggested that “when general principles of law applicable under national law were transposed frequently enough into international law, they became customary rules of international law. The process by which that occurred was a mode of formation that the Commission could not afford to overlook”.¹⁰⁰ Yet another member noted that the distinction between customary international law and general principles of law was not always very clear in the case law and the literature, and referred to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* as an example, “inasmuch as the Court had based its conclusions on an analysis of customary international law, international humanitarian law and general international law, without however clarifying the relationship between those different sources”.¹⁰¹ Also referring to the difficulty of distinguishing customary international law from general principles of law, another member raised the question of whether *pacta sunt servanda* was a general principle of law, a rule of customary international law or a treaty rule, and suggested that “[t]he criterion might be the presence or the absence of actual State practice”.¹⁰² The view was also expressed that the term “general international law” encompasses general principles of law.¹⁰³

72. In his second report, the Special Rapporteur recalled that there was “general agreement that the Commission would need to deal to some degree with the relationship between customary international law and other sources of international law, in particular treaties and general principles of law”.¹⁰⁴ At the same time, he considered that the Commission should avoid entering into matters relating to other sources of international law that are better addressed separately.¹⁰⁵ This approach was adopted by the Commission, which made it clear in the commentary to the draft conclusions on the identification of customary international law that

no attempt is made to explain the relationship between customary international law and other sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice (international conventions, whether general or particular, and general principles of law); the draft conclusions touch on the matter only in so far as is necessary to explain how rules of customary international law are to be identified.¹⁰⁶

73. The relationship between general principles of law and peremptory norms of general international law (*jus cogens*) was addressed by the Special Rapporteur for the latter topic in his second report.¹⁰⁷ The focus of the Special Rapporteur was on whether the term “general international law” in article 53 of the Vienna Convention on the Law of Treaties encompasses general principles of law, and whether the latter could constitute a basis for *jus cogens* norms.

⁹⁹ *Yearbook ... 2013*, vol. I, 3183rd meeting, p. 92, para. 14.

¹⁰⁰ *Ibid.*, 3182nd meeting, p. 89, para. 39.

¹⁰¹ *Ibid.*, 3183rd meeting, p. 91, para. 5.

¹⁰² *Ibid.*, 3184th meeting, p. 97, para. 21.

¹⁰³ *Ibid.*, p. 98, para. 30.

¹⁰⁴ A/CN.4/672, para. 3.

¹⁰⁵ *Ibid.*, para. 14. Reactions to the Special Rapporteur’s decision not to cover the relationship between customary international law and general principles of law may be found in: A/CN.4/SR.3223, p. 11 (Mr. Caflisch); A/CN.4/SR.3226, pp. 3 (Mr. Šturma) and 6 (Mr. Hmoud); A/CN.4/SR.3227, p. 6 (Sir Michael Wood).

¹⁰⁶ Para. (6) of the commentary to conclusion 1 of the draft conclusion on identification of customary international law, A/73/10, paras. 65–66, at p. 124.

¹⁰⁷ A/CN.4/706, paras. 48–52.

74. The Special Rapporteur indicated that “[g]eneral principles of law, like rules of customary international law, are generally applicable”, but that there is little authority, apart from literature, to maintain that general principles of law can be the basis for a *jus cogens* norm.¹⁰⁸ After some analysis, he concluded that the term “general international law” encompasses general principles of law¹⁰⁹ and proposed a draft conclusion stating that they can serve as the basis for *jus cogens* norms.¹¹⁰

75. The proposal of the Special Rapporteur was provisionally adopted by the Drafting Committee with amendments. Draft conclusion 5, paragraph 2, as provisionally adopted by the Drafting Committee reads: “Treaty provisions and general principles of law may also serve as bases for preemptory norms of general international law (*jus cogens*)”.¹¹¹

Part Three: Development of general principles of law over time

76. In order to shed some light on the nature of general principles of law, and more generally to provide some background and relevant materials to members of the Commission, the present Part sets forth the practice of States and adjudicative bodies prior to the adoption of the Statute of the Permanent Court of International Justice, the drafting history of Article 38, paragraph 3, of the latter and Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, and later references to this source of international law in the practice of States and the decisions of international courts and tribunals.¹¹²

I. Practice prior to the adoption of the Statute of the Permanent Court of International Justice

77. The Special Rapporteur finds it useful to recall the practice prior to the adoption of the Statute of the Permanent Court of International Justice whereby rules or principles deriving from sources other than treaties and custom were resorted to. As some authors have pointed out, recourse to such rules or principles may be explained, at least partly, by the fact that international law at the time was not sufficiently developed to address all situations, yet disputes had to be settled all the same.¹¹³

78. Many treaties concluded for the settlement of disputes from the eighteenth century to the early twentieth century contained broad applicable law provisions. They provided that adjudicative bodies had to decide the disputes submitted to them on the basis of concepts such as “the law of nations”, “principles of international

¹⁰⁸ *Ibid.*, para. 48.

¹⁰⁹ *Ibid.*, para. 52.

¹¹⁰ Draft conclusion 5, paragraph 3, proposed by the Special Rapporteur read: “General principles of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice can also serve as the basis for *jus cogens* norms of international law” (*ibid.*, p. 46). The general debate on the report is available at [A/CN.4/SR.3368–3370](#) and [3372–3374](#).

¹¹¹ Statement of the Chair of the Drafting Committee, 26 July 2017, annex, p. 11.

¹¹² The examples referred to below are not exhaustive. References to further materials will be provided and analysed in more detail in Part Four below and in future reports.

¹¹³ A. Pellet, *Recherche sur les principes généraux de droit en droit international* (Université de droit, d’économie et de sciences sociales, 1974), pp. 7 and 15; H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London, Longmans, 1927), p. 39. See also H. Waldock, “General course on public international law”, *Collected Courses of the Hague Academy of International Law*, vol. 106 (1962), p. 54.

law”, “justice” and “equity”.¹¹⁴ For example, the 1907 Hague Convention (XII) Relative to the Creation of an International Prize Court, which never entered into force but was later referred to during the drafting of Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice, provided in article 7 that if a question was not covered by a treaty or a generally recognized rule of international law, the court was to “give judgment in accordance with the general principles of justice and equity”.¹¹⁵

79. The 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes also contained a broad applicable law provision according to which the settlement of disputes was to be made “on the basis of respect for law” (arts. 15 and 37, respectively). As will be shown below, some arbitral tribunals constituted under these Conventions applied rules or principles derived from sources other than treaties and custom.

80. The Martens Clause in the preamble of the 1899 Convention (II) with Respect to the Laws and Customs of War on Land is also worth highlighting, as it was mentioned during the drafting of Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice. It provided that:

Until a more complete code of the law of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.¹¹⁶

¹¹⁴ See, for example, art. VII of the 1794 Treaty of Amity, Commerce and Navigation (“Jay Treaty”) between Great Britain and the United States; art. IV of the 1839 Convention for the adjustment of claims of citizens of the United States against Mexico; art. II of the 1860 Convention concerning the adjustment of claims of citizens of the United States against Costa Rica; art. VI of the 1871 Treaty of Washington between Great Britain and the United States (concluded to settle the “Alabama Claims”); art. 6 of the 1882 Convention for the reparation of damages caused to French citizens between Chile and France; art. 6 of the 1882 Arbitration Convention between Chile and Italy; art. 4 of the 1896 Arbitration Agreement between Argentina and Chile; art. II of the 1899 Arbitration Agreement for the settlement of claims between Italy and Peru; Article XXII of the 1907 Convention for the Establishment of a Central American Court of Justice; art. 7 of the 1910 Special Agreement for the submission to arbitration of pecuniary claims outstanding between the United States and Great Britain. These and other relevant treaties may be found in J. B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, 6 vols. (Washington, Government Printing Office, 1898) and H. La Fontaine, *Pasicrisie internationale 1794–1900: Histoire documentaire des arbitrages internationaux* (Bern, Stämpfli, 1902).

¹¹⁵ See paras. 95 and 97 below. A report prepared by the First Commission of the 1907 Hague Peace Conference explained this provision as follows: “[The Court] is thus called upon to *create the law* and to take into account other principles than those to which the national prize court whose judgment is appealed from was required to conform. We are confident that the judges chosen by the Powers will be equal to the high mission thus entrusted to them, and that they will execute it with moderation and firmness. They will point practice in the direction of justice without upsetting it. A fear of their just decisions may mean the exercise of more wisdom by belligerents and national judges, may lead them to make a more serious and conscientious investigation, and thus prevent the adoption of regulations and the rendering of decisions which are too arbitrary”. See J. B. Scott, *The Proceedings of The Hague Peace Conferences: The Conference of 1907*, vol. I (Oxford, Oxford University Press, 1920), pp. 189–190.

¹¹⁶ *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920* (The Hague, Van Langenhuisen Bros., 1920), 13th meeting (see para. 97 below). The Martens Clause was later also included in the Hague Convention (IV) respecting the Laws and Customs of War on Land (1907) with identical wording, and in subsequent treaties with some modifications.

81. In the context of dispute settlement, rules and principles derived from sources other than treaties and custom were relied upon by States and adjudicative bodies, both on the basis of applicable law provisions like the ones mentioned above and in the absence thereof.

82. In the *Cestus* case (1870), for example, the arbitrator considered a claim by Great Britain for the losses suffered by British vessels due to the closure by Argentina of its ports as an act of warfare against Uruguay. After rejecting the arguments based on certain treaty provisions of Great Britain,¹¹⁷ the arbitrator proceeded to analyse whether Argentina was obliged to indemnify the losses “in justice”.¹¹⁸ That argument was rejected on the ground, *inter alia*, that “it is a principle of universal jurisprudence that he who uses his right offends no one”.¹¹⁹

83. In the *Alabama Claims* arbitration between Great Britain and the United States (1872), the tribunal was called upon to apply rules and principles related to due diligence, measure of damages and payment of interests.¹²⁰ The reasoning of the tribunal was concise, but the pleadings of the parties contained various references to national laws in support of their arguments.¹²¹

84. In the *Fabiani* case (1896), the arbitrator applied the concept of denial of justice to damages suffered by a French national before Venezuelan courts. It elaborated upon that concept by relying on the jurisprudence of the Swiss Federal Court, the French Code on Civil Procedure and doctrine. It concluded notably that:

By reference to the general principles of the law of nations ..., i.e., to the rules common to most legislations or taught by doctrines, one comes to decide the denial of justice comprises not only the refusal of a judicial authority to exercise its duties ... but also the obstinate delays on its part in rendering its sentences.¹²²

85. In the *Pious Fund* case between Mexico and the United States (1902), the Tribunal was asked to determine whether a previous decision rendered by the Mexico-United States Mixed Commission was governed by the principle of *res judicata*.¹²³ In the course of the proceedings, both parties relied extensively on the domestic law of

¹¹⁷ La Fontaine, *Pasicrisie internationale* (footnote 114 above), pp. 64–66. The *compromis* contained no applicable law provision.

¹¹⁸ *Ibid.*, p. 66.

¹¹⁹ *Ibid.*, p. 67.

¹²⁰ *Alabama claims of the United States of America against Great Britain*, Award of 14 September 1872, *Reports of International Arbitral Awards* (UNRIAA), vol. XXIX, pp. 125–134.

¹²¹ See, for example, *Case of the United States, to Be Laid before the Tribunal of Arbitration, to Be Convened at Geneva under the Provisions of the Treaty between the United States of America and Her Majesty the Queen of Great Britain, Concluded at Washington, May 8, 1871* (Washington, D.C., Government Printing Office, 1872), pp. 150–158 (defining the rule of “due diligence”). See also Lauterpacht, *Private Law Sources and Analogies of International Law* (footnote 113 above), pp. 216–223.

¹²² La Fontaine, *Pasicrisie internationale* (footnote 114 above), p. 356 (see also *Antoine Fabiani Case*, 31 July 1905, UNRIAA, vol. X, pp. 83–139, at p. 91). The arbitrator also relied on various national legal systems to elaborate on standards of evidence (p. 362) and responsibility (pp. 363–364).

¹²³ The dispute was submitted to arbitration based on a *compromis* of 1902. The *compromis* contained no applicable law provision. See *The Pious Fund Case (United States of America v. Mexico)*, Award of 14 October 1902, UNRIAA, vol. IX, pp. 1–14, at pp. 7–10. See also para. 101 below.

various States and Roman law to advance their arguments.¹²⁴ In its award, the tribunal considered that *res judicata* was a principle that applied to international arbitration.¹²⁵

86. In the *Venezuelan Preferential Case* (1904),¹²⁶ the arbitral tribunal decided, based on “principles of International Law and the maxims of justice”, that a right of preferential treatment of certain pecuniary claims existed in favour of Germany, Great Britain and Italy, with respect to other States with similar claims.¹²⁷ In the *North Atlantic Coast Fisheries* case (1910),¹²⁸ the United States argued the existence of an “international servitude” in its favour, which would deprive Great Britain from an independent right to regulate fisheries with respect to United States’ nationals in certain parts of Great Britain’s waters. In rejecting that claim, the tribunal relied, *inter alia*, on French civil law and Roman law, and considered that such a servitude would not suit inter-State relations.¹²⁹

87. In the *Walfish Bay Boundary* case between Germany and Great Britain (1911),¹³⁰ when defining the applicable law, the arbitrator considered that the two main questions put to him

must be solved in conformity with the principles and positive rules of public international law, and, where they fail, in conformity with the general principles of law, since neither the said Agreement of 1890 [nor] the supplementary Declaration of Berlin of the 30th January, 1909, in any way authorize the arbitrator to base his decision on other rules, and it is notorious, according to constant theory and practice, that such authority cannot be presumed.¹³¹

88. Later, in the *Russian Indemnity* case (1912),¹³² the arbitral tribunal was called upon to decide on matters related to the payment of moratory or compensatory interests. The tribunal considered that it was applying public international law, while also relying on the domestic (civil) law of various States and Roman law.¹³³ It came to the conclusion that “le principe général de la responsabilité des Etats implique une responsabilité spéciale en matière de retard dans le payement d’une dette d’argent, à

¹²⁴ The parties referred to Roman Law, the Napoleon Code, and the law and case law from Belgium, France, Germany, Mexico, the Netherlands, Prussia, Spain and the United States. See *United States vs. Mexico, Report of Jackson H. Ralston, Agent of the United States and of Counsel, in the matter of the case of the Pious Fund of the Californias* (Washington, Government Printing Office, 1902), Answer of Mexico, pp. 7–8; Replication of the United States, pp. 7, 10; Conclusions of Mexico, p. 11; Statement and Brief on Behalf of the United States, pp. 32, 46–47, 50–52; Record of Proceedings, pp. 123, 130, 131, 235, 309.

¹²⁵ *Pious Fund* (footnote 123 above), p. 12. The principle of *compétence-compétence* was also discussed and applied in this case.

¹²⁶ The dispute was submitted to arbitration on the basis of a *compromis* concluded between Venezuela, on the one hand, and Germany, Great Britain and Italy, on the other, in 1903. The *compromis* included no applicable law provision, but did contain a reference to the 1899 Hague Convention. See *The Venezuelan Preferential Case (Germany, Great Britain, Italy, Venezuela et al)*, Award of 22 February 1904, UNRIAA, vol. IX, pp. 105–106.

¹²⁷ *Ibid.*, pp. 108–110.

¹²⁸ *The North Atlantic Coast Fisheries Case (Great Britain, United States)*, Award of 7 September 1910, UNRIAA, vol. XI, pp. 167–226. The dispute was submitted to arbitration based on a *compromis* which contained no applicable law provision, but did contain a reference to the 1907 Hague Convention (see pp. 173–178).

¹²⁹ *Ibid.*, pp. 181–182. The tribunal also referred to principle of good faith (pp. 186–189).

¹³⁰ *The Walfish Bay Boundary Case (Germany, Great Britain)*, Award of 23 May 1911, UNRIAA, vol. XI, pp. 263–308. The dispute was submitted to arbitration based on a *compromis* with no applicable law provision (see pp. 265–266).

¹³¹ *Ibid.*, p. 294.

¹³² *Affaire de l’indemnité russe (Russie, Turquie)*, Award of 11 November 1912, UNRIAA, vol. XI, pp. 421–447. The *compromis* between the parties did not contain an applicable law provision, but included a reference to the 1907 Hague Convention (see pp. 427–430).

¹³³ *Ibid.*, pp. 439–440, 442.

moins d'établir l'existence d'une coutume internationale contraire" [the general principle of the responsibility of States implies a special responsibility in the matter of delay in the payment of a monetary debt, unless the existence of a contrary international custom is established].¹³⁴ Also having regard to national legal systems, the tribunal concluded that Russia had renounced the payment of such interests. In particular, it pointed out that:

Dès l'instant où le Tribunal a reconnu que, d'après les principes généraux et la coutume en droit international public, il y avait similitude des situations entre un Etat et un particulier débiteurs d'une somme conventionnelle liquide et exigible, il est équitable et juridique d'appliquer aussi par analogie les règles de droit privé commun aux cas où la demeure doit être considérée comme purgée et le bénéfice de celle-ci supprimée. – En droit privé, les effets de la demeure sont supprimés lorsque le créancier, après avoir constitué le débiteur en demeure, accorde un ou plusieurs délais pour satisfaire à l'obligation principale sans réserver les droits acquis par la demeure.¹³⁵

[Since the Tribunal has recognized that, according to the general principles and the custom of public international law, there is a similarity between the condition of a State and that of an individual with regard to indebtedness for a fixed and exigible conventional sum, it is consistent with equitable and statutory rules also to apply the rules of ordinary private law, by analogy, to cases where the demand for payment must be considered as cleared and the benefit to be derived therefrom as extinguished. – In private law, the effects of a demand for payment are extinguished when the creditor, after having made the legal demand upon the debtor, grants one or more extensions for the payment of the principal obligation, without reserving the rights acquired by means of the legal demand.]

89. The practice set out above, while admittedly not always clear, constitutes the background against which Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice was drafted. Some authors go further and maintain that

¹³⁴ *Ibid.*, p. 441.

¹³⁵ *Ibid.*, p. 446. See also the following cases (mentioned in Lauterpacht, *Private Law Sources and Analogies of International Law* (footnote 113 above), Part III): *Dispute between Great Britain and Portugal in the case of Yuille, Shortridge & Cie* (1861) (Award of 21 October 1861, UNRIAA, vol. XXIX, pp. 57–71); *Delagoa Bay Railway Arbitration* (1875) (Moore, *History and Digest of the International Arbitrations ...* (footnote 114 above), vol. 2, p. 1865); the *Van Bokkelen* case (1888) (La Fontaine, *Pasicrisie internationale* (footnote 114 above), pp. 301–322); *Behring Sea Arbitration* (1893) (Award of 15 August 1893, UNRIAA, vol. XXVIII, pp. 263–276); *British Guiana Boundary Arbitration* (1899) (Award of 3 October 1899, UNRIAA, vol. XXVIII, pp. 331–340); *Cape Horn Pigeon, James Hamilton Lewis, C. H. White and Kate and Anna* case (1902) (19 October 1901–29 November 1902, UNRIAA, vol. IX, pp. 51–78); *Alaska Boundary* case (1903) (20 October 1903, UNRIAA, vol. XV, pp. 481–540); *Japanese House Tax* case (1905) (22 May 1905, UNRIAA, vol. XI, pp. 41–58); *Grisbadarna* case (1909) (Award of 23 October 1909, UNRIAA, vol. XI, pp. 147–166). See also *U.S. v. Schooner La Jeune Eugenie* (1822), Fed. Case No. 15551, p. 28 ("Now the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states").

Article 38, paragraph 3, in fact constitutes a codification of that previous practice.¹³⁶ A few points seem clear: first, rules or principles which were considered to be distinct from, but also sometimes interrelated with, those found in treaties and custom were invoked and applied; second, reliance on such rules or principles may have been authorized by references to broad concepts such as “justice” and “equity” in arbitration agreements, but the absence of such authorization did not preclude their use;¹³⁷ third, in applying those rules or principles, arbitrators did not decide *ex aequo et bono*;¹³⁸ and fourth, States and arbitrators often relied on national legal systems and Roman law to identify the rules or principles in question.

II. “General principles of law recognized by civilized nations” in Article 38 of the Statutes of the Permanent Court of International Justice and the International Court of Justice

90. The Statutes of the Permanent Court of International Justice and the International Court of Justice were drafted in various forums: the Advisory Committee of Jurists (1920), the Council and the Assembly of League of Nations (1920), the United Nations Committee of Jurists (1945) and the Committee IV/1 of the United Nations Conference on International Organization (1945). While definitive conclusions may not necessarily be drawn from the *travaux* alone, they nonetheless provide some useful guidance as regards the inclusion of “general principles of law recognized by civilized nations” in Article 38 of the Statutes.

91. Proposals that the Statute of the Permanent Court of International Justice make reference to “general principles of law” (or broader concepts) as a source additional to treaties and custom were made well before the Advisory Committee of Jurists began its work. Germany, for example, proposed that the judgments of the Court shall be “passed according to international agreements, international customary law and according to general principles of law and equity”.¹³⁹ Similarly, Denmark, Norway and Sweden proposed that, in the absence of treaties and “established rules of International Law”, the Court shall apply “the general principles of Law”.¹⁴⁰ Switzerland, on the other hand, proposed that, in the absence of a treaty or a “principle of the law of nations”, the Court shall decide in accordance with “justice and

¹³⁶ See, for example, Pellet and Müller, “Article 38” (footnote 13 above), p. 923; R. Jennings and A. Watts (eds.), *Oppenheim’s International Law*, vol. I, 9th ed. (Harlow, United Kingdom, Longman, 1996), pp. 38–39; Jenks, *The Common Law of Mankind* (footnote 17 above), pp. 266–268; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (footnote 20 above), pp. 19–20; A. Verdross, “Les principes généraux du droit dans la jurisprudence internationale”, *Collected Courses of the Hague Academy of International Law*, vol. 52 (1935), pp. 191–251, at p. 220; Lauterpacht, *Private Law Sources and Analogies of International Law* (footnote 113 above), pp. 67–69. For a different view, see J. d’Aspremont, “What was not meant to be: general principles of law as a source of international law”, in R. Pisillo Mazzeschi and P. de Sena (eds.), *Global Justice, Human Rights and the Modernization of International Law* (Cham, Springer, 2018), pp. 163–184.

¹³⁷ Kolb, *La bonne foi en droit international public* (footnote 25 above), pp. 36–37.

¹³⁸ Raimondo, *General Principles of Law ...* (footnote 13 above), p. 10; V.D. Degan, *Sources of International Law* (The Hague, Martinus Nijhoff, 1997), p. 35; Pellet, *Recherche sur les principes généraux de droit en droit international* (footnote 113 above), pp. 40–41; Lauterpacht, *Private Law Sources and Analogies of International Law* (footnote 113 above), pp. 63–67.

¹³⁹ Permanent Court of International Justice, Advisory Committee of Jurists, *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice*, p. 129.

¹⁴⁰ *Ibid.*, p. 179. The alternative to this read: “the Court will decide according to what, in its opinion, should be the rules of International Law”. See also p. 205.

equity”.¹⁴¹ Departing from these formulations, the joint proposal by the “Five neutral Powers” (Denmark, the Netherlands, Norway, Sweden and Switzerland) suggested that, in the absence of a treaty or “recognised rules of international law”, the Court “shall enter judgment according to its own opinion of what the rule of international law on the subject should be”.¹⁴²

92. The Advisory Committee of Jurists¹⁴³ started to discuss the question of the law to be applied by the Court at its 13th meeting. Treaties and custom were taken up quickly and without much discussion. In contrast, general principles of law were the subject of long debates and gave rise to diverging views within the Committee. The Special Rapporteur considers it therefore useful to describe those debates in some detail.

93. The President of the Committee, Descamps, proposed at the outset the following provision:

The following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the undermentioned order:

1. conventional international law, whether general or special, being rules expressly adopted by the States;
2. international custom, being practice between nations accepted by them as law;
3. the rules of international law as recognised by the legal conscience of civilised nations;
4. international jurisprudence as a means for the application and development of law.¹⁴⁴

94. The third and fourth paragraphs of this proposal provoked different reactions. The third paragraph was opposed to by Root, who did not regard it as clear and considered it potentially dangerous.¹⁴⁵ In his view, the Committee had to “limit itself to rules contained in Conventions and positive international law”.¹⁴⁶ Phillimore was of a similar position, and expressed the view that the proposal “gave the Court a legislative power”.¹⁴⁷

95. De Lapradelle proposed a shorter formulation: “the Court shall judge in accordance with law, justice and equity”.¹⁴⁸ At the same time, he considered that it was not really necessary to define the law to be applied by the Court, and that it would be useful to specify that the Court must not act as a legislator. He also put forward that the Court should be allowed to consider whether a particular legal solution was “just and equitable”.¹⁴⁹ Hagerup, making reference to article 7 of the Hague Convention (XII) relative to the Creation of an International Prize Court, stated the

¹⁴¹ *Ibid.*, p. 267.

¹⁴² *Ibid.*, p. 301.

¹⁴³ The Advisory Committee of Jurists was established by the Council of the League of Nations pursuant to Article 14 of the Covenant of the League, and met from 16 June to 24 July 1920. Its members were Mineichiro Adatci (Japan), Rafael Altamira (Spain), Clovis Bevilacqua (Brazil) (later replaced by Raoul Fernandes), Baron Descamps (Belgium), Francis Hagerup (Norway), Albert de Lapradelle (France), B. C. J. Loder (Netherlands), Lord Phillimore (United Kingdom), Arturo Ricci-Busatti (Italy) and Elihu Root (United States).

¹⁴⁴ *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920* (footnote 116 above), 13th meeting, p. 293 and, annex 3 thereto, p. 306.

¹⁴⁵ *Ibid.*, pp. 293–294.

¹⁴⁶ *Ibid.*, p. 294.

¹⁴⁷ *Ibid.*, p. 295.

¹⁴⁸ *Ibid.*, p. 295.

¹⁴⁹ *Ibid.*, pp. 295–296.

need to avoid findings of *non liquet* and considered that the Court should only have recourse to equity if authorized to do so.¹⁵⁰

96. Loder disagreed with Root and stated that “[r]ules recognised and respected by the whole world had been mentioned, rules which were, however, not yet in the nature of positive law, but it was precisely the Court’s duty to develop law, to ‘ripen’ customs and principles universally recognised, and to crystallise them into positive rules; in a word, to establish international jurisprudence”.¹⁵¹

97. The debate continued at the 14th meeting of the Committee. Descamps raised the question whether “after having recorded as law conventions and custom, objective justice should be added as a complement to the others under conditions which are calculated to prevent arbitrary decisions”.¹⁵² He explained that, in his view, “it would be a great mistake to imagine that nations can be bound only by engagements which they have entered into by mutual consent”, and that “objective justice is the natural principle to be applied by the judge”.¹⁵³ He further considered that Root’s approach of limiting the law to be applied by the Court to treaties and custom may amount to a “refusal of justice” and would leave the judge in a “state of compulsory blindness”.¹⁵⁴ He continued to justify his initial proposal, this time by reference to article 7 of the Hague Convention (XII) Relative to the Creation of an International Prize Court and to the Martens Clause.¹⁵⁵

98. Hagerup agreed with the views of Descamps. With respect to Root’s position, he understood that it would limit the Court’s competence and place it “in an entirely different position from that of an ordinary Court, which may not declare *non liquet*”. He also repeated his view that “one of the tasks of the new Court would be to develop jurisprudence”.¹⁵⁶

99. Root responded that, in his view, “the world was prepared to accept the compulsory jurisdiction of a Court which applied the universally recognised rules of International Law”, but not that of a Court “which would apply principles, differently understood in different countries”.¹⁵⁷ He added that “[i]t is inconceivable that a Government would agree to allow itself to be arraigned before a Court which bases its sentences on its subjective conceptions of the principles of justice. The Court must not have the power to legislate”.¹⁵⁸ To this Descamps responded that, even if it might be true that principles of justice varied from country to country, at least with respect to certain rules “of secondary importance”, “it is no longer true when it concerns 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 civilised nations”.¹⁵⁹ He also added that “far from giving too much liberty to the judges’ decision, his proposal would limit it ... it would impose on the judges a duty which would prevent them from relying too much on their own subjective opinion; it would be incumbent on them to consider whether the dictates of their conscience were in agreement with the conception of justice of civilised nations”.¹⁶⁰

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*, p. 294.

¹⁵² *Ibid.*, 14th meeting, annex 1, pp. 322–323.

¹⁵³ *Ibid.*, p. 323.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*, pp. 323–324.

¹⁵⁶ *Ibid.*, 14th meeting, p. 307.

¹⁵⁷ *Ibid.*, p. 308.

¹⁵⁸ *Ibid.*, p. 309.

¹⁵⁹ *Ibid.*, pp. 310–311.

¹⁶⁰ *Ibid.*, p. 311.

100. Ricci-Busatti agreed to some extent with Root, especially on the point that the Court should not act as a legislator, and further considered that “[b]y declaring the absence of a positive rule of international law ... nevertheless a legal situation is established. That which is not forbidden is allowed; that is one of the general principles of law which the Court shall have to apply. If a case is brought before the Court and if the latter finds that no rules exist concerning it, the Court shall declare that one party has no right against the other, that the conduct of the accused State was not contrary to any admitted rule”.¹⁶¹ De Lapradelle¹⁶² and Descamps disagreed with this view. The latter stated that, if there is no applicable conventional or customary rule, “the judge must then apply general principles of law. But he must be saved from the temptation of applying these principles as he pleased. For that reason he urged that the judge render decisions in keeping with the dictates of the legal conscience of civilised peoples”.¹⁶³

101. At the 15th meeting of the Committee, Root presented a new proposal for the article in question, which included as the third source to be applied by the Court “the general principles of law recognised by civilised nations”.¹⁶⁴ As noted above, Descamps had already used the term “general principles of law” at the previous meeting, and he agreed with the proposal.¹⁶⁵ Based on an analogy of the application of general principles by domestic courts, Fernandes stated that “[w]hat is true and legitimate in national affairs, for reasons founded in logic and not in the arbitrary exercise of sovereignty, cannot be false and illegal in international affairs, where, moreover, legislation is lacking and customary law is being formed very slowly, so that the practical necessity of recognising the application of such principles is much greater”.¹⁶⁶ He mentioned as an example the “American declaration of rights and duties of Nations”, and further explained that the Court shall have the power to base its sentences, in the absence of a treaty or custom, “on 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”.¹⁶⁷ Phillimore pointed out 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*”,¹⁶⁸ and that by “general principles of law” he had intended to mean “maxims of law”.¹⁶⁹ De Lapradelle noted that “the principles which formed the bases of national law, were also sources of international law. The only generally recognised principles which exist, however, are those which have obtained unanimous or quasi-unanimous support”.¹⁷⁰ At the same time, he thought it preferable not to indicate “exactly the sources from which these principles should be derived”.¹⁷¹

102. Root’s proposal was adopted by the Committee at its 27th meeting without modification.¹⁷² Article 35, paragraph 3, of the Committee’s Draft Scheme thus read:

¹⁶¹ *Ibid.*, p. 314. Phillimore seems to have agreed with this view (see p. 316).

¹⁶² *Ibid.*, p. 315.

¹⁶³ *Ibid.*, pp. 318–319.

¹⁶⁴ *Ibid.*, 15th meeting, p. 331 and, annex 1 thereto, p. 344. It appears that Root had accepted this wording because “[it was] based on a ruling of the Supreme Court of the United States”. See O. Spiermann, “‘Who attempts too much does nothing well’: The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice”, *British Yearbook of International Law*, vol. 73 (2002), pp. 187–260, at p. 217.

¹⁶⁵ *Procès-verbaux* (footnote 144 above), 14th meeting, p. 331.

¹⁶⁶ *Ibid.*, p. 331, and annex 2 thereto, p. 346.

¹⁶⁷ *Ibid.*, p. 346.

¹⁶⁸ *Ibid.*, p. 335. He had previously referred to the *Pious Fund* case (*ibid.*, p. 316).

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, p. 336.

¹⁷² *Ibid.*, 27th meeting, p. 584 and, 31st meeting, p. 648.

The Court shall, within the limits of its jurisdiction as defined in Article 34, apply in the order following:

...

3. the general principles of law recognised by civilised nations.¹⁷³

103. The Draft Scheme was submitted to the League of Nations for its consideration by States, and some proposals with respect to article 35, paragraph 3, were made. Within the Sub-Committee of the Third Committee of the First Assembly, France proposed including the formulation “the general principles of law and justice”.¹⁷⁴ It explained that this amendment would “enable the Court to state as the sole reason for its judgments that the award had seemed to it to be just”, but that “[t]his did not imply that the Court might disregard existing rules”.¹⁷⁵ This proposal was provisionally adopted.¹⁷⁶ Later, Greece objected to the amendment and suggested that article 35, paragraph 3, should instead read: “The general principles of law and with the consent of the parties, the general principles of justice recognised by civilised nations”.¹⁷⁷ After some discussion, it was decided to retain article 35, paragraph 3, as initially drafted by the Advisory Committee of Jurists, and the following sentence was added at end of the provision:

This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono* if the parties agree thereto.¹⁷⁸

104. As regards the words “in the order following” that appeared in the *chapeau* of article 35 of the Draft Scheme, the Sub-Committee decided to delete them.¹⁷⁹

105. Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice did not undergo any changes when the Statute of the International Court of Justice was drafted, other than appearing now as Article 38, paragraph 1 (c). Within the United Nations Committee of Jurists, a proposal was made by Costa Rica to delete the word “general”, but it was not discussed. Furthermore, France pointed out that “while Article 38 was not well drafted, it would be difficult to make a better draft in the time at the disposal of the Committee”. It also noted that the Permanent Court of International Justice had operated well under Article 38 of the Statute.¹⁸⁰

106. At the 1945 United Nations Conference on International Organization in San Francisco, Chile noted that Article 38 of the Statute of the Permanent Court of International Justice made no reference to international law and made a proposal to change the formulation of Article 38, paragraph 3, to “general principles of law recognized by civilized nations and especially the principles of international law”. Delegations responded that such an addition was not necessary because Article 38 had always been regarded as implying an obligation to apply international law.¹⁸¹ Following a new proposal by Chile, the *chapeau* of Article 38 was changed from “The

¹⁷³ *Ibid.*, 32nd meeting, annex, p. 680. The final report of the Committee did not provide major explanations concerning the provision (see *ibid.*, 34th meeting, annex 1, pp. 729–730).

¹⁷⁴ *Documents concerning the action taken by the Council of the League of Nations under Article 14 the Covenant and the adoption by the Assembly of the Statute of the Permanent Court* (Geneva, 1921), Sub-Committee of the Third Committee, 7th meeting, 1 December 1920, p. 145.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*, 10th meeting, 7 December 1920, p. 157.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, 7th meeting, 1 December 1920, p. 145.

¹⁸⁰ *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, vol. XIV, 7th meeting, 13 April 1945, p. 162, at p. 170.

¹⁸¹ *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, vol. XIII, 5th meeting of Committee IV/1, 10 May 1945, p. 162, at p. 164.

Court shall apply” to “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply”.¹⁸²

107. The question of the order in which the sources listed in Article 38 should be applied also arose briefly in San Francisco. Colombia suggested that the sources should be applied in the order in which they appeared, but this proposal was subsequently dropped.¹⁸³

108. The drafting history of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice and its predecessor shows the following. First, as some authors have noted,¹⁸⁴ it appears that the drafters did not believe that, by including “general principles of law recognized by civilized nations” in the Statute, they were creating a new source of international law, but rather codifying an already existing one. Second, the inclusion of this third source seems to have been partly driven by a concern that the Court may decline to exercise its jurisdiction and find a *non liquet*, but it was also generally agreed that the Court should not have a power to create the law.¹⁸⁵

109. Third, the drafting history provides some important clarifications as regards the origins of general principles of law. On the one hand, there was general agreement among members of the Advisory Committee of Jurists that general principles of law may derive from principles found *in foro domestico*. On the other hand, the Committee did not exclude the possibility that general principles of law may find their origins elsewhere as well.¹⁸⁶ Finally, the *travaux* also show that general principles of law form part of international law, that there is no formal hierarchy between the different sources of international law listed in the provision, and that general principles of law are clearly distinguishable from *ex aequo et bono*.

III. General principles of law after the adoption of the Statutes of the Permanent Court of International Justice and the International Court of Justice

110. General principles of law as a source of international law have been referred to and applied in State and judicial practice after the adoption of the Statutes of the Permanent Court of International Justice and the International Court of Justice on numerous occasions. The aim of the present section is to provide a brief overview of the application of general principles of law in recent practice and to show the continuing relevance of this source of international law to date, as well as the variety of contexts in which it may play a role.

¹⁸² *Ibid.*, 19th meeting of Committee IV/1, 6 June 1945, p. 279, at pp. 284–285. See also *ibid.*, Report of the Rapporteur of Committee IV/1, Nasrat Al-Fasry, p. 381, at p. 392.

¹⁸³ *Ibid.*, 19th meeting of Committee IV/1, 6 June 1945, p. 279, at p. 287.

¹⁸⁴ See footnote 132 above.

¹⁸⁵ Pellet and Müller, “Article 38” (footnote 13 above), p. 923; O. Spiermann, “The history of Article 38 of the Statute of the International Court of Justice: ‘A purely platonic discussion?’”, in J. d’Aspremont and S. Besson (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford, Oxford University Press, 2017), pp. 167 and 171; Spiermann, “‘Who attempts too much does nothing well’ ...” (footnote 164 above), p. 215.

¹⁸⁶ G. Gaja, “General principles in the jurisprudence of the ICJ”, in M. Andenas *et al.* (eds.), *General Principles and the Coherence of International Law* (Brill, 2019), p. 37.

A. References to general principles of law in international instruments

111. References to general principles of law can be found in many treaties concluded after the adoption of the Statutes of the Permanent Court of International Justice and the International Court of Justice, be it for purposes of establishing the law to be applied by courts and tribunals or for determining the scope of specific substantive provisions.

112. Some treaties refer to general principles of law by incorporating the exact language of Article 38 of the Statute.¹⁸⁷ Other treaties use similar though not identical language to Article 38. The 1921 Treaty of Arbitration and Conciliation between Switzerland and Germany, for example, provides in article 5 that:

The Tribunal shall apply:

First: the conventions in force between the Parties, whether general or special, and the principles of law arising therefrom;

Secondly: international custom as evidence of a general practice accepted as law;

Thirdly: the general principles of law recognised by civilised nations.

If, in a particular case, the legal bases mentioned above are inadequate, the Tribunal shall give an award in accordance with the principles of law which, in its opinion, should govern international law. For this purpose it shall be guided by decisions sanctioned by legal authorities and by jurisprudence.

If the Parties agree, the Tribunal may, instead of basing its decision on legal principles, give an award in accordance with considerations of equity.¹⁸⁸

113. In the field of international criminal law, the Rome Statute deserves some attention.¹⁸⁹ Article 21 of the Statute, entitled “Applicable law”, provides:

¹⁸⁷ See, for example, art. 19 of the Treaty of Conciliation and Arbitration between Poland and Czechoslovakia (Warsaw, 23 April 1925, *Arbitration and Security: Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security Deposited with the League of Nations*, 2nd ed. (Publication of the League of Nations 1927.V.29, Geneva, 1927), p. 236); art. 4 of the Convention of Arbitration and Conciliation between Germany and The Netherlands (The Hague, 20 May 1926, *ibid.*, p. 291, at p. 292); art. 19 of the Treaty of Conciliation and Arbitration between Poland and the Kingdom of the Serbs, Croats and Slovenes (Geneva, 18 September 1926, *ibid.*, p. 342, at p. 345); art. 2 of the 1936 Arbitration Agreement between Belgium and France (Award of 1 March 1937, UNRIIAA, vol. III, pp. 1701–1716, at p. 1704); art. 19, para. 2, of the 2002 Rules of Procedure of the Eritrea – Ethiopia Claims Commission; art. 2 of the 2012 Submission Agreement between Singapore and Malaysia of 2012. See also article 10 of the Model Rules on Arbitral Procedure finalized by the Commission in 1958 (*Yearbook... 1958*, vol. II, pp. 84 *ff.*, para. 22).

¹⁸⁸ Treaty of Arbitration and Conciliation between the Swiss Confederation and the German Reich (Bern, 3 December 1921), *Arbitration and Security* (footnote 187 above), p. 201, at p. 202. See also article 5 of the 1925 Convention of Arbitration and Conciliation between Germany and Finland (Berlin, 14 March 1925, *ibid.*, p. 226, at p. 227); article 5 of the 1925 Convention of Arbitration and Conciliation between Germany and Estonia (Berlin, 10 August 1925, *ibid.*, p. 284, at pp. 285–286); article 4 of the 1926 Treaty of Arbitration and Conciliation between Germany and Denmark (Berlin, 2 June 1926, *ibid.*, p. 269, at pp. 269–270).

¹⁸⁹ Unlike the Rome Statute, the statutes of other international criminal tribunals do not include applicable law provisions. As will be shown in the next section, however, this has not precluded those tribunals from applying general principles of law. See the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704), para. 58 (“The [International Tribunal for the former Yugoslavia] itself will have to decide on various personal defenses which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations”).

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards ...

114. The *travaux* of the Rome Statute may provide some guidance as regards the meaning of paragraph 1, subparagraphs (b) and (c), of article 21. The Commission's draft statute for an international criminal court listed three sources of law without specifying a hierarchy between them: the Statute, "[a]pplicable treaties and the principles and rules of general international law", and "[t]o the extent applicable, any rule of national law".¹⁹⁰ As noted in Part Two above, in the commentary to this provision the Commission stated that "[t]he expression 'principles and rules' of general international law includes general principles of law, so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty".¹⁹¹

115. At the Preparatory Committee on the Establishment of an International Criminal Court, the question of "whether the Court should be empowered to elaborate/legislate further the general principles of criminal law that are not written in the Statute" was discussed,¹⁹² and various proposals were advanced by delegations. Some favoured granting some degree of judicial latitude to the Court (for instance, to elaborate the elements of crimes and principles of liability and defence), while others opposed the idea of the Court acting as legislator and preferred having references to national law.¹⁹³

116. The final draft of the Preparatory Committee contained a provision on applicable law (draft article 20), which was similar to what finally became article 21 of the Rome Statute. It contained, however, two options for the third source of law to be applied by the Court. The first option provided that the Court would apply "general principles of law derived by the Court from national laws of legal systems of the world". The second option required the Court to apply the national law of particular States to be selected on various bases.¹⁹⁴

117. At the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome in 1998, States reached a compromise solution by essentially combining both options. A working paper of the Working Group on applicable law explains that "[m]ost delegations favoured

¹⁹⁰ Art. 33 of the draft statute for an international criminal court, *Yearbook...1994*, vol. II (Two), para. 91, at p. 51.

¹⁹¹ Para. (2) of the commentary to art. 33, *ibid.*

¹⁹² Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 22A (A/51/22)*, p. 104.

¹⁹³ *Ibid.*, pp. 104–107. See also Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. I, *ibid.*, *Supplement No. 22 (A/51/22)*, paras. 179–188.

¹⁹⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, *A/CONF.183/2/Add.1*, pp. 46–47.

option 1, but some still favour option 2. A view was expressed that the laws indicated in option 2 could be given as examples of the national laws referred to in option 1, so that the two options could be combined”.¹⁹⁵ The report of the Working Group further notes that “[s]ome delegations express the view that, as a matter of principle, no reference to any national laws of States should be made. The Court ought to derive its principles from a general survey of legal systems and their respective national laws”.¹⁹⁶

118. Article 21 of the Rome Statute has been interpreted differently by scholars. According to one view, general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice are included in paragraph 1 (b) (“principles and rules of international law”).¹⁹⁷ Another view considers that paragraph 1 (c) (“general principles of law derived by the Court from national laws of legal systems of the world”) is a more precise formulation of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.¹⁹⁸ A third view is that general principles of law in the sense of Article 38, paragraph 1 (c), are included in both paragraphs of article 21 of the Rome Statute.¹⁹⁹

¹⁹⁵ A/CONF.183/C.1/WGAL/L.1, p. 2.

¹⁹⁶ A/CONF.183/C.1/WGAL/L.2 and Corr.1, p. 2. See also *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, Official Records, vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.183/13 (Vol. II))*, Committee of the Whole, 12th and 13th meetings, pp. 217–224.

¹⁹⁷ W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed. (Oxford, Oxford University Press, 2016), p. 520 (“Article 21(1)(c) seems to imply the use of ‘general principles’ not as a means of determining the content of public international law, but rather in the context of comparative criminal law. The reference in article 21(1)(c) to such principles not being inconsistent with international law and internationally recognized norms and standards would lead to an illogical result if that provision was intended to encompass ‘general principles’ when this term is used to refer to one of the three primary sources of public international law. For this reason, ‘general principles of law recognized by civilized nations’ should be considered under article 21(1)(b) rather than 21(1)(c)”). Schabas also noted, however, that a reference by the Appeals Chamber to article 21, paragraph 1 (c), of the Rome Statute in a recent judgment with respect to general principles of law (see paras. 213–214 below) “leaves this matter somewhat uncertain” (pp. 520–521). See also J-P. Perez-Leon-Acevedo, “Reparation Principles at the International Criminal Court”, in M. Andenas *et al.* (eds.), *General Principles and the Coherence of International Law* (Brill, 2019), pp. 332–333; J. Powderly, “The Rome Statute and the attempted corseting of the interpretative judicial function: reflections on sources of law and interpretative technique”, in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford, Oxford University Press, 2015), pp. 478 and 482.

¹⁹⁸ A. Pellet, “Article 21”, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court* (Oxford, Oxford University Press, 2002), p. 1051, at pp. 1071–1073 (“It may be that the letter of Article 21(1)(b) of the Statute should not be accorded an unmerited importance. In reality, there is little doubt that this provision refers, exclusively, to customary international law, of which the ‘established principles of the international law of armed conflict’ clearly form an integral part ... Article 21 of the ICC Statute defines [general principles of law] better and more precisely than Article 38 of the Statute of the [International Court of Justice] since it indicates that these principles are ‘derived by the Court from national laws of legal systems of the world’, which dispels all uncertainty as to their nature and clearly differentiates them from the general principles of international law”).

¹⁹⁹ R. Wolfrum, “General international law (principles, rules, and standards)”, in *Max Planck Encyclopedia of Public International Law* (2010), para. 28 (“On the basis of the wording of Art. 38 (1) (c) ICJ Statute, its legislative history, as well as its object and purpose, the view seems to be more tenable that general principles may be derived not only from municipal law, but also from international law. This reasoning is enforced by Art 21 ICC Statute, which clearly distinguishes between general principles derived from international and those from national law”). See also M. deGuzman, “Article 21”, in O. Triffterer and K. Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd ed. (Munich and Oxford, C. H. Beck, Hart, Nomos, 2016), pp. 932–948, at pp. 939–944.

119. As noted by one author, the sources listed in article 21 of the Rome Statute seem to derive generally from those found in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, but with certain “modifications to account for the particularities of criminal law, in particular the need for clarity and specificity”.²⁰⁰ The same author correctly notes that article 21 reflects a compromise reached during the negotiations of the Rome Statute, the main issue at stake being how much discretion should be granted to judges in the light of the principle of legality, on the one hand, and the possible *lacunae* in international criminal law, on the other.²⁰¹

120. The debates and compromises reached during the drafting of article 21 of the Rome Statute show that article 21, paragraph 1 (c), of the Rome Statute is unique in the sense that it was designed to take into account the special character and considerations of international criminal law. It may therefore be inappropriate to consider it a more precise formulation of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. However, since the former paragraph 1 (c) expressly refers to “general principles of law” and, as will be seen in Part Four below, State and judicial practice support the position that general principles of law may be derived from national legal systems, it could be considered that it reflects part of the scope of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. With respect to paragraph 1 (b) of article 21 of the Rome Statute, it may be concluded that it also includes general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice given its similarity to the initial draft prepared by the Commission.

121. In the area of human rights law, article 15, paragraph 2, of the International Covenant on Civil and Political Rights provides that “[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”. Similarly, article 7, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)²⁰² provides that “[t]his Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations”. The *travaux* of both treaties show that these articles were introduced in order to further confirm and strengthen the principles affirmed in General Assembly resolution 95 (I) of 11 December 1946 (the Nürnberg principles).²⁰³

122. In this connection, it is worth mentioning that, following the formulation of article 15, paragraph 2, of the International Covenant on Civil and Political Rights, section 11 (g) of the Canadian Constitution Act, 1982, provides that “[a]ny person charged with an offence has the right ... not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations”. The Constitution of Sri Lanka contains a similar provision (article 13, paragraph 6), also referring to “the general principles of law recognized by the community of nations”.

²⁰⁰ deGuzman, “Article 21” (see previous footnote), p. 933.

²⁰¹ *Ibid.*

²⁰² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.

²⁰³ See A/2929, p. 127, para. 96; A/4625, paras. 15–16; A/C.3/SR.1008, paras. 2 and 14; A/C.3/SR.1010, para. 9; A/C.3/SR.1012, para. 15; A/C.3/SR.1013, paras. 14–15, 17; European Commission of Human Rights, Preparatory work on article 7 of the European Convention on Human Rights, Information document prepared by the Secretariat of the Commission (DH (57) 6), p. 4.

123. Further examples can be found in the area of international economic law. For instance, Article 143, paragraph 2, of the 2008 China-New Zealand Free Trade Agreement provides that “[f]air and equitable treatment includes the obligation to ensure that, having regard to general principles of law, investors are not denied justice or treated unfairly or inequitably in any legal or administrative proceeding affecting the investments of the investor”. Other investment agreements provide that “‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world”.²⁰⁴

124. General principles of law have also been referred to in State concession agreements. For instance, according to the applicable law provision contained in the 1935 Agreement between Petroleum Development (Qatar) Ltd. and the Sheik of Qatar, “[t]he award shall be consistent with the legal principles familiar to civilized nations”. The Concession granted by the Persian Government to the Anglo-Persian Oil Company, Ltd in 1933 contained a clause providing that “[t]he award shall be based on the judicial principles contained in Article 38 of the Statute of the Permanent Court of International Justice”.

125. Some regional treaties contain provisions that seem to refer to general principles with a limited scope of application. Article 340 of the 2007 Treaty on the Functioning of the European Union, for example, provides that “[i]n the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties”.²⁰⁵ Article 61 of the African Charter on Human and Peoples’ Rights²⁰⁶ provides that “[t]he Commission shall also take into consideration, as subsidiary measures to determine the principles of law ... general principles of law recognized by African States”. Similarly, article 29 of the 1997 Rules of Procedure of the Economic Court of the Commonwealth of Independent States provides that the Court shall apply, *inter alia*, “general principles of law recognized by the Member States of the Commonwealth”.

B. General principles of law in international judicial practice

126. General principles of law as a source of international law have been referred to in contemporary judicial practice on several occasions and across different jurisdictions. While, as mentioned above, the Special Rapporteur does not intend to provide here a complete and detailed account of such practice (something that will be done when discussing specific issues later in the present and in future reports), it is nonetheless useful to show, briefly, the variety of contexts in which general principles of law have played a role. At this stage, the Special Rapporteur wishes to highlight that the fact that the present sub-section focuses on litigation-related practice (for the simple reason that it is more readily available than other materials) in no way implies that this is the only context in which general principles of law apply. As a source of

²⁰⁴ See, for example, art. 9.5, para. 2 (a), of the 2018 Central America-Korea Free Trade Agreement; art. 11.5, para. 2 (a) of the 2014 Australia-Korea Free Trade Agreement; art. 5, para. 2 (a), of the 2008 United States-Rwanda Bilateral Investment Treaty; art. 5, para. 2 (a), of the of the 2005 United States-Uruguay Bilateral Investment Treaty.

²⁰⁵ Treaty on the Functioning of the European Union (13 December 2007), consolidated version in *Official Journal of the European Union*, No. C 326, p. 47. See also art. 215 of the Treaty Establishing the European Economic Community (Rome, 25 March 1957, United Nations, *Treaty Series*, vol. 298, No. 4300, p. 3).

²⁰⁶ African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.

international law, they ought to apply in the relations between subjects of international law generally.

127. The International Court of Justice and its predecessor appear to have clearly referred to general principles of law in the sense of Article 38, paragraph 3, and Article 38, paragraph 1 (c), of the respective Statutes in only a few cases. This may appear to be in some contrast to States' attitude towards this source of international law: they have invoked general principles of law in their pleadings on many occasions, although at times their arguments, for one reason or another, were eventually not upheld or even discussed by the Court. Similarly, individual judges have often relied on general principles of law in their opinions.²⁰⁷

128. The Permanent Court of International Justice, for example, appears to have rejected the application of general principles of law, without denying their existence, in the *Jaworzina* advisory opinion,²⁰⁸ the *Mavrommatis Jerusalem Concessions* case²⁰⁹ and the *Serbian Loans* case.²¹⁰ Application of general principles of law may be found in the *Greco-Turkish Agreement* advisory opinion²¹¹ and the *Chorzów Factory* case.²¹² Furthermore, brief references to what may be regarded as general principles of law, but without any clear consequences being drawn from them, are found in some cases, such as the advisory opinion concerning the interpretation of *Article 3, paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*.²¹³ In none of the cases referred to in this paragraph did the Court make reference to Article 38, paragraph 3, of its Statute.

129. As regards the International Court of Justice, it appears to have applied general principles of law in the *Corfu Channel* case,²¹⁴ the advisory opinion on *Reservations to the Convention on Genocide*,²¹⁵ the advisory opinion concerning the *Effect of*

²⁰⁷ Opinions of individual judges are referred to in Part Four below.

²⁰⁸ *Question of Jaworzina*, Advisory Opinion of 6 December 1923, PCIJ Series B, No. 8, pp. 37–38 (rejecting a claim by Poland based on the “traditional principle” of *ejus est interpretare legem cuius condere*).

²⁰⁹ *The Mavrommatis Jerusalem Concessions*, Judgment of 26 March 1925, PCIJ Series A, No. 5, p. 30 (referring to “principles which seem to be generally accepted in regard to contracts”).

²¹⁰ *Case Concerning the Payment of Various Serbian Loans Issued in France*, Judgment of 12 July 1929, PCIJ Series A, No. 20/21, pp. 38–39 (rejecting the application of the principle of estoppel).

²¹¹ *Interpretation of Greco-Turkish Agreement of December 1st, 1926*, Advisory Opinion of 28 August 1928, PCIJ Series B, No. 16, p. 20 (applying the principle of *compétence-compétence*).

²¹² *Case concerning the Factory at Chorzów (Germany/Poland)*, Judgment of 26 July 1927, PCIJ Series A, No. 9, p. 31 (considering that it is “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”); *Case concerning the Factory at Chorzów (Merits)*, Judgment of 13 September 1928, PCIJ Series A, No. 17, p. 29. (stating that “[i]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation”).

²¹³ *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion of 21 November 1925, PCIJ Series B, No. 12, p. 32 (considering that Article 15, paragraphs 6 and 7, of the Covenant of the League of Nations reflected the “well-known rule that no one can be judge in his own suit”).

²¹⁴ *Corfu Channel case*, Judgment of April 9th, 1949, *I.C.J. Reports 1949*, p. 4, at p. 18. (with respect to the admission of indirect evidence).

²¹⁵ *Reservations to the Convention on Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, p. 15, at p. 23 (referring to the principles underlying the Genocide Convention as “principles which are recognized by civilized nations as binding on States, even without any conventional obligation”).

awards of compensation made by the U.N. Administrative Tribunal,²¹⁶ the *Barcelona Traction* case,²¹⁷ the advisory opinion on the *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*,²¹⁸ and the cases concerning *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*²¹⁹ and *Land Boundary in the Northern Part of Isla Portillos*.²²⁰

130. In other cases, the Court has rejected arguments based on general principles of law,²²¹ or simply considered that, since rules of conventional or customary international law addressed the situation at hand, it was not necessary for it to determine the existence of a general principle of law.²²²

²¹⁶ *Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13th, 1954, I.C.J. Reports 1954*, p. 47, at p. 53. (applying the “well-established and generally recognized principle of law” of *res judicata*).

²¹⁷ *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 37, para. 50 (applying the “rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares”).

²¹⁸ *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166, at p. 181, para. 36 (considering that “[g]eneral principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should each have an opportunity, on the basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal”). See also *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325, at pp. 338–339, para. 29.

²¹⁹ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 100, at p. 125, para. 58 (referring to the principle of *res judicata*).

²²⁰ *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment of 2 February 2018, para. 68 (also referring to the principle of *res judicata*).

²²¹ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 21–22, paras. 17–18 (rejecting Germany’s argument that the principle of just and equitable share was a general principle of law in the sense of Article 38, paragraph 1 (c) of the Statute); *Application for Review of Judgment No. 158* (footnote 218 above), p. 181, para. 36 (considering that there is no general principle of law requiring that in review proceedings the parties must necessarily have an opportunity to submit oral statements); *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 47, para. 88 (considering that *actio popularis* cannot be regarded as a general principle of law in the sense of Article 38, paragraph 1 (c), of the Statute).

²²² *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 43.

131. As regards the invocation of general principles of law by States appearing before the Court, such invocation varies from brief references²²³ to detailed arguments regarding this source of international law. Examples of the latter, which will be further discussed below, include the pleadings of Portugal and India in the case concerning *Right of Passage over Indian Territory*,²²⁴ Liechtenstein in the *Certain Property* case,²²⁵ and Australia and Timor-Leste in the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data*.²²⁶

132. General principles of law have also played a role beyond the International Court of Justice. In inter-State arbitration, for example, they have been relied upon, or broadly referred to, in the *Eastern Extension, Australasia and China Telegraph Co.* case,²²⁷ the *Goldenberg* case,²²⁸ a decision of the Franco-Italian Conciliation Commission,²²⁹ the *Diverted Cargoes* case,²³⁰ the *Lighthouses Arbitration*,²³¹ the *Argentine-Chile Frontier* case,²³² the *Lac Lanoux* case,²³³ the *OSPAR Arbitration*,²³⁴

²²³ To name but a few recent examples, see the arguments concerning estoppel and legitimate expectations in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* (Reply of Bolivia, paras. 320 ff.; Rejoinder of Chile, para. 2.28); good faith in *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)* (Memorial of the Marshall Islands, para. 182); abuse of rights in *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Counter-Memorial of Japan, paras. 9.40 ff.); calculation of damages in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)* (Memorial on Compensation of Guinea, para. 13); the *exceptio non adimpleti contractus* in *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)* (Counter-Memorial of Greece, paras. 8.1 ff.; Reply of North Macedonia, paras. 5.54 ff.; Rejoinder of Greece, paras. 8.6 ff.); exclusion of illegally obtained evidence in criminal proceedings in *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Memorial of Mexico, paras. 21, 374, 380; Counter-Memorial of the United States, paras. 8.27 ff.); admissibility of evidence in the form of admissions in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Memorial of Nicaragua (merits), para. 160; nullity of arbitral awards in *Arbitral Award Made by the King of Spain on 23 December 1906* (Counter-Memorial of Nicaragua, paras. 56 ff.).

²²⁴ *Right of Passage* (footnote 222 above).

²²⁵ *Certain Property (Liechtenstein v. Germany)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2005*, p. 6.

²²⁶ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, *Provisional Measures, Order of 3 March 2014*, *I.C.J. Reports 2014*, p. 147.

²²⁷ *Eastern Extension, Australasia and China Telegraph Company, Ltd. (Great Britain v. United States)*, Award of 9 November 1923, UNRIAA, vol. VI, pp. 112–118, at pp. 114–115.

²²⁸ *Affaire Goldenberg (Allemagne contre Roumanie)*, Award of 27 September 1928, UNRIAA, vol. II, pp. 901–910, at p. 909 (considering that the term “droit des gens” employed in paragraph 4 of the annex to articles 297 and 298 of the Treaty of Versailles included general principles of law recognized by civilized nations, and making reference to the “general principle” prohibiting the expropriation of the property of aliens without just compensation).

²²⁹ *Différend Sociétés « Les Petits-Fils de C.J. Bonnet » – « Tessitura Serica Piemontese »*, Decisions of 16 March 1949, 1 December 1950, and 3 March 1952, UNRIAA, vol. XIII, pp. 75–87, at p. 83 (making reference to general principles of law for purposes of treaty interpretation).

²³⁰ *The Diverted Cargoes Case (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award of 10 June 1955, UNRIAA, vol. XII, pp. 53–81, at p. 70.

²³¹ *Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France)*, Award of 24/27 July 1956, UNRIAA, vol. XII, pp. 155–269, at pp. 197, 199 and 241 (making reference to general principles of law with respect to unjust enrichment and succession of responsibility).

²³² *Argentine-Chile Frontier Case*, Award of 9 December 1966, UNRIAA, vol. XVI, pp. 109–182, at p. 164. (referring to the principle of estoppel).

²³³ *Affaire du lac Lanoux*, Award of 16 November 1957, UNRIAA, vol. XII, pp. 281–317, at p. 308 (considering, among others, the principle according to which bad faith cannot be presumed). See also *International Law Reports*, vol. 24 (1994), pp. 101–142, at pp. 129–130, for English.

²³⁴ *Proceedings pursuant to the OSPAR Convention (Ireland–United Kingdom)*, Award of 2 July 2003, UNRIAA, vol. XXIII, pp. 59–151, at p. 87, para. 84.

the *Abyei Arbitration*,²³⁵ the *Chagos Marine Protected Area* case,²³⁶ and the recent arbitration between Croatia and Slovenia.²³⁷

133. Various references to general principles of law have also been made in the context of international criminal law, a field in which, as some authors have noted, this source of international law may play a particularly important role.²³⁸ Examples can be found in judgments and decisions of the International Criminal Court,²³⁹ the International Tribunal for the Former Yugoslavia,²⁴⁰ the International Tribunal for Rwanda,²⁴¹ and the Special Court of Sierra Leone.²⁴²

134. General principles of law have also been relied upon in investor-State dispute settlement, where one can find references (sometimes expressly mentioning Article 38, paragraph 1 (c), of the Statute of the International Court of Justice) to

²³⁵ *Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Award of 22 July 2009, UNRIAA, vol. XXX, pp. 145–416, at p. 299, para. 401 (regarding, *inter alia*, the question of excess of jurisdiction).

²³⁶ *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, UNRIAA, vol. XXXI, pp. 359–606, at pp. 542–544, paras. 435–438 (regarding the principle of estoppel).

²³⁷ *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Permanent Court of Arbitration, Case No. 2012-04, Award of 29 June 2017, para. 347.

²³⁸ A. Cassese, “The contribution of the International Criminal Tribunal for the former Yugoslavia to the ascertainment of general principles of law recognized by the community of nations”, in S. Yee and W. Tieya (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (London, Routledge, 2001), pp. 46–55, p. 46.

²³⁹ See, for example, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006 (ICC-01/04), para. 32 (rejecting the argument that a general principle of law may give a right to appeal on a basis not provided for in the Rome Statute); *Situation in the Democratic Republic of the Congo, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, 30 September 2008 (ICC-01/04-01/07), para. 190 (referring to the principle of *res judicata*); *Situation in the Republic of Kenya, Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014 (ICC-01/09-01/11), paras. 65 ff. (regarding the competence of Trial Chambers to subpoena witnesses).

²⁴⁰ See, for example, *Prosecutor v. Anto Furundžija*, Judgment of 10 December 1998 (IT-95-17/1-T), Trial Chamber, *Judicial Reports 1998*, paras. 177–186 (relying on general principles of law to provide a definition of rape); *Prosecutor v. Zoran Kupreškić et al.*, Judgment of 14 January 2000, Trial Chamber (IT-95-16-T), paras. 539, 677 ff. (referring to general principles of law as part of the law to be applied by the Tribunal, and addressing general principles regarding multiple offences); *Prosecutor v. Dragoljub Kunarac et al.*, Judgment of 22 February 2001, Trial Chamber (IT-96-23-T & IT-96-23/1-T), paras. 437–460 (also relying on general principles of law to provide a definition of rape); *Prosecutor v. Mucić et al. (Čelebići case)*, Judgment of 20 February 2001, Appeals Chamber (IT-96-21-A), paras. 583–590 (addressing a “special defence” of diminished responsibility).

²⁴¹ See, for example, *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, Trial Chamber (ICTR-96-10-T & ICTR-96-17-T), para. 42 (referring to the principle of *res judicata*); *Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, Trial Chamber (ICTR-96-4-T), para. 501 (referring to “general principles of criminal law” to decide on the basis of an interpretation more favourable to the accused).

²⁴² See, for example, *Prosecutor v. Issa Hassan Sesay et al.*, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, 12 July 2004, Trial Chamber (SCSL-04-15-T), paras. 9–10 (regarding trial *in absentia*).

principles such as *res judicata*,²⁴³ *compétence-compétence*,²⁴⁴ burden of proof,²⁴⁵ legitimate expectations,²⁴⁶ unjust enrichment²⁴⁷ and good faith.²⁴⁸ Similarly, general principles of law have been referred to, though less frequently, in the case law of the dispute settlement mechanism of the World Trade Organization.²⁴⁹

135. General principles of law have similarly appeared in the field of human rights. The Inter-American Court of Human Rights, for example, has considered on various occasions that general principles of law form part of the body of human rights law that it must apply.²⁵⁰ The Court has briefly referred to the principle of estoppel,²⁵¹ *pacta sunt servanda*,²⁵² *iura novit curia*,²⁵³ the “principle of international law” that

²⁴³ *Waste Management, Inc. v. United Mexican States (“Number 2”)*, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB(AF)/00/3, Decision of 26 June 2002, paras. 38 ff.

²⁴⁴ *Sociedad Anónima Eduardo Vieira v. República de Chile*, ICSID Case No. ARB/04/7, Award of 21 August 2007, para. 203.

²⁴⁵ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award of 31 January 2006, paras. 70 ff.; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award of 23 September 2003, para. 110; *International Thunderbird Gaming Corporation v. United Mexican States*, Award of 26 January 2006, para. 95; *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of 27 June 1990, para. 56.

²⁴⁶ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014, paras. 575–576; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on liability of 27 December 2010, paras. 128–130; *Toto Costruzioni S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award of 7 June 2012, para. 166.

²⁴⁷ *Sea-Land Service, Inc. v. Iran*, Case No. 33, Award No. 135-33-1 (20 June 1984), *Iran–United States Claims Tribunal Reports* (IUSCTR), vol. 6, p. 168; *Saluka Investments B.V. v. Czech Republic*, United Nations Commission on International Trade Law (UNCITRAL), Partial Award of 17 March 2006, para. 449.

²⁴⁸ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 153; *Canfor Corporation v. United States, Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision on preliminary question of 6 June 2006, para. 182; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, para. 297.

²⁴⁹ See, for example, WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 158; WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, para. 224 (referring to good faith and abuse of rights).

²⁵⁰ *Advisory Opinion on the Environment and Human Rights*, 15 November 2017 (OC-23/17), Series A, No. 23, para. 45; *Advisory Opinion on the Rights of Legal Persons*, 26 February 2016 (OC-22/16), Series A, No. 22, para. 29; *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need for International Protection*, 19 August 2014 (OC-21/14), Series A, No. 21, para. 60.

²⁵¹ *Almonacid Arellano and Others v. Chile*, Judgment (Preliminary objections, merits, reparations and costs) of 26 September 2006, Series C, No. 154, para. 65; *Moiwana Community v. Suriname*, Judgment (Preliminary objections, merits, reparations and costs) of 15 June 2005, Series C, No. 124, para. 58; *Neira Alegria et al. v. Peru*, Judgment (Preliminary objections) of 11 December 1991, Series C, No. 13, para. 29.

²⁵² *Bulacio v. Argentina*, Judgment (Merits, reparations and costs) of 18 September 2003, Series C, No. 100, paras. 117–118; *Advisory Opinion on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 1 October 1999 (OC-16/99), Series A, No. 16, para. 128.

²⁵³ *Durand and Ugarte v. Peru*, Judgment of 16 August 2000, Series C, No. 68, para. 76; *Castillo Petrucci et al. v. Peru*, Judgment (Merits, reparations and costs) of 30 May 1999, Series C, No. 52, paras. 116 and 166; *Blake v. Guatemala*, Judgment (Merits) of 24 January 1998, Series C, No. 36, para. 112; *Godínez Cruz v. Honduras*, Judgment (Merits) of 20 January 1989, Series C, No. 5, para. 172; *Velásquez-Rodríguez v. Honduras*, Judgment (Merits) of 29 July 1988, Series C, No. 4, para. 163.

any violation of an international obligation entails an obligation to make reparation,²⁵⁴ a principle that allows for the revision of judgments,²⁵⁵ and principles relating to consequential damages and loss of profits as damages.²⁵⁶ In only one case has the Court made express reference to Article 38, paragraph 1 (c), of the Statute of the International Court of Justice in order to determine who are the successors of a person for purposes of reparation.²⁵⁷ In another case, the Court considered that the principle of “equality before the law, equal protection before the law and non-discrimination” is a general principle of law which, moreover, constitutes a peremptory norm of general international law (*jus cogens*).²⁵⁸

136. The European Court of Human Rights, in *Golder v. the United Kingdom*, made reference to Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, and similarly determined that general principles of law must be taken into account when interpreting the European Convention on Human Rights.²⁵⁹

137. One may also find in practice references to what appear to be general principles of law with a regional scope of application (an issue which, as mentioned above, may be addressed in a future report). This is notably the case of the European Court of Justice, which on several occasions has applied “general principles of Community law” based on constitutional traditions common to its member States or on the European Union legal order.²⁶⁰

138. Furthermore, “general principles” also appear to have been applied to some extent by international administrative tribunals.²⁶¹

²⁵⁴ *Goiburú et al. v. Paraguay*, Judgment (Merits, reparations and costs) of 22 September 2006, Series C, No. 153, paras. 140–141; “*Panel blanca*” (*Paniagua Morales et al.*) v. *Guatemala*, Judgment (Reparations and costs) of 25 May 2001, Series C, No. 76, para. 75; *Velásquez-Rodríguez v. Honduras*, Judgment (Reparations and costs) of 21 July 1989, Series C, No. 7, para. 25.

²⁵⁵ *Genie Lacayo v. Nicaragua*, Order of 13 September 1997, Series C, No. 45, para. 9.

²⁵⁶ *Aloeboetoe et al. v. Suriname*, Judgment (Reparations and costs) of 10 September 1993, para. 50.

²⁵⁷ *Ibid.*, paras. 61–62.

²⁵⁸ *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants*, 17 September 2003 (OC-18/03), Series A, No. 18, para. 101.

²⁵⁹ *Golder v. the United Kingdom*, Judgment, 21 February 1975, Series A, No. 18, para. 35. See also *Enea v. Italy* [Grand Chamber], No. 74912/01, Judgment, 17 September 2009, *Reports of Judgments and Decisions of the European Court of Human Rights 2009*, para. 104; *Demir and Baykara v. Turkey* [Grand Chamber], No. 34503/97, Judgment, 12 November 2008, *Reports of Judgments and Decisions of the European Court of Human Rights 2008*, para. 71. See also M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford, Oxford University Press, 2010), p. 360; J. G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester, Manchester University Press, 1988), pp. 160–183.

²⁶⁰ See, for example, E. Castellarin, “General Principles of EU Law and General International Law”, in M. Andenas et al. (eds.), *General Principles and the Coherence of International Law* (Brill, 2019), pp. 131–148; S. Vogenauer and S. Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Hart, 2017); K. Lenaerts and J.A. Gutiérrez-Fons, “The constitutional allocation of powers and general principles of EU law”, *Common Market Law Review*, vol. 47 (2010), pp. 1629–1669; T. Tridimas, *The General Principles of EU Law*, 2nd ed. (Oxford, Oxford University Press, 2016); C. Semmelmann, “General principles of EU law between a compensatory role and an intrinsic value”, *European Law Journal*, vol. 19 (2013), pp. 457–487; U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (The Hague, Kluwer Law International, 2000); J.A. Usher, *General Principles of EC Law* (London, Longman, 1998).

²⁶¹ See, for example, G. Ullrich, *The Law of the International Civil Service* (Berlin, Duncker and Humblot, 2018), Part 2, chap. 2; A. Reinisch, “Sources of international organizations’ law: why custom and general principles are crucial”, in J. d’Aspremont and S. Besson (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017), p. 1022.

139. This brief overview of some of the recent practice relating to general principles of law shows that, since the adoption of the Statute of the Permanent Court of International Justice in 1920, States and international courts and tribunals have referred to this source of international law on several occasions and in different contexts, leaving no doubt as to its relevance for the international legal order.

Part Four: Elements and origins of general principles of law

140. In the light of the above overview of the development of general principles of law in the practice of States and the decisions of international courts and tribunals over time, the Special Rapporteur now turns to an analysis of certain basic aspects of the present topic: the elements of general principles of law found in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice and the origins of general principles of law as a source of international law. In addition, some clarifications as regards terminology are provided.

I. The elements of general principles of law in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice

141. As mentioned in Part One, the starting point for the work of the Commission on the present topic is Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. The present section aims to provide an initial assessment of that provision by addressing what, in the view of the Special Rapporteur, may be considered the elements contained therein. In particular, the following sub-sections deal with the term “general principles of law”, the requirement of “recognition”, and the term “civilized nations”.

A. “General principles of law”

142. The Special Rapporteur considers it useful to start with an analysis of the first element of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, namely the term “general principles of law”. Two issues are addressed in the present sub-section: first, whether the term “general principles of law” tells us anything about the possible characteristics, origins, functions or otherwise of this source of international law; second, the relationship between general principles of law and general international law.

143. As an introductory remark, the Special Rapporteur notes that “general principles of law” are not unique to the international legal system. A similar notion exists also in most, if not all, domestic legal systems, although the same terminology is not always employed. The Austrian General Civil Code, for example, provides that when a case cannot be solved by statutory rules or by analogy, a decision must be made on

the basis of *natürliche Rechtsgrundsätze* (“natural legal principles”).²⁶² The Italian Civil Code establishes that, when a dispute cannot be solved with a specific statutory rule, recourse may be had to analogy and, if that fails, to the general principles of the State’s legal system.²⁶³ According to the Mexican Federal Civil Code, when a civil dispute cannot be solved by statutory rules or by interpreting them, it shall be solved in accordance with the general principles of law.²⁶⁴ The Spanish Civil Code similarly authorizes the application of general principles of law in the absence of applicable statutes or custom.²⁶⁵ The Egyptian Civil Code authorizes judges to decide on the basis of principles of natural law and principles of justice in the absence of applicable legislative texts, custom or principles of Islamic Law.²⁶⁶

²⁶² Article 7 (“Lässt sich ein Rechtsfall weder aus den Worten, noch aus dem natürlichen Sinne eines Gesetzes entscheiden, so muss auf ähnliche, in den Gesetzen bestimmt entschiedene Fälle, und auf die Gründe anderer damit verwandten Gesetze Rücksicht genommen werden. Bleibt der Rechtsfall noch zweifelhaft, so muss solcher mit Hinsicht auf die sorgfältig gesammelten und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen entschieden werden”); Unofficial translation: “If a legal dispute cannot be decided on the basis of the terms or the natural sense of the law, consideration must be given to similar situations regulated by the law and to the *raison d’être* of other related laws. If the legal dispute remains doubtful, it shall be decided in accordance with the natural legal principles, taking into account the carefully collected and well-considered circumstances.”) [When a legal case cannot be adjudicated with reference either to the wording or to the natural meaning of a law, consideration shall be given to similar cases that are provided for in law and to the reasoning of other related laws. If the case remains in doubt, it shall be adjudicated with reference to carefully gathered and thoroughly considered facts in accordance with the principles of natural law.].

²⁶³ Article 12 (“Nell’applicare la legge non si può ad essa attribuire altro senso che quello fatto palese dal significato proprio delle parole secondo la connessione di esse, e dalla intenzione del legislatore. Se una controversia non può essere decisa con una precisa disposizione, si ha riguardo alle disposizioni che regolano casi simili o materie analoghe; se il caso rimane ancora dubbio, si decide secondo i principi generali dell’ordinamento giuridico dello Stato” Unofficial translation: “In apply the law, it cannot be attributed to it a meaning other than that deriving from the clear meaning of its terms read in their textual context, and from the intention of the legislator. If a legal dispute cannot be decided with a particular rule, consideration must be given to the rules that regulate similar cases or analogous matters; if the case remains doubtful, it shall be decided in accordance with the general principles of the legal system of the State.”) [In the application of the law, no interpretation shall be attributed to it other than that which emerges clearly from the inherent meaning of the words and their interrelation, and from its legislative intent . If a dispute cannot be adjudicated through the application of a specific statutory provision, account shall be taken of provisions governing similar cases or analogous subject matter; if the case remains in doubt, it shall be adjudicated in accordance with the general principles of the legal system of the State.].

²⁶⁴ Article 19 (“Las controversias judiciales del orden civil deberán resolverse conforme a la letra de la ley o a su interpretación jurídica. A falta de ley se resolverán conforme a los principios generales de derecho”) [Legal disputes of a civil nature shall be adjudicated in accordance with statutory rules or the legal interpretation thereof. In the absence of such rules, they shall be adjudicated in accordance with the general principles of law].

²⁶⁵ Article 1(4) (“Los principios generales del derecho se aplicarán en defecto de ley o costumbre, sin perjuicio de su carácter informador del ordenamiento jurídico”) [The general principles of law shall apply in the absence of applicable statutes or custom, without prejudice to their role in informing the legal system].

²⁶⁶ Article 1(2) (مبادئ قيمتضى ، يوجد لم فإذا ، العرف بمقتضى القاضي حكم ، تطبيقه يمكن تشريعي نص يوجد لم فإذا)؛ Unofficial translation: “If there is no applicable legislation, the judge shall decide on the basis of custom. In the absence of custom, the judge shall decide on the basis of the principles of Islamic Law. In the absence of any such principle, the judge shall decide on the basis of the principles of natural law and the principles of justice.”) In the absence of applicable legal provisions, the judge shall decide in accordance with custom, and in the absence of custom, in accordance with the principles of Islamic law. In the absence of such principles, the judge shall apply the principles of natural law and the rules of equity.].

144. The question may arise whether general principles within domestic legal systems like the ones mentioned above and general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice share any characteristics. Some authors seem to be of this view.²⁶⁷ The drafting history of Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice set out in Part Three above shows that one of the reasons for the inclusion of that provision in the Statute was the perceived need to fill gaps in conventional and customary international law and to avoid findings of *non liquet*.²⁶⁸ If filling gaps is indeed one function of general principles of law, then this may be something that they have in common with general principles within domestic legal systems. At the same time, however, one must not lose sight of the fact that general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, being a source of international law, are likely to have their own unique features due to the structural differences between the international legal system and domestic legal orders.

145. The term “general principles of law” in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice has been interpreted on various occasions, either as a whole or each word separately, to try to clarify certain aspects of this source of international law, including its characteristics, origins and functions. The Special Rapporteur considers that this exercise is useful as an initial approach to the present topic. It is important to highlight, however, that any conclusions drawn in this manner can only be preliminary and need to be further assessed in the light of existing practice.

146. The term “principle” and its relationship with the term “rule” has attracted considerable attention. To cite but a few views, one author suggests that “[t]he difference between legal principles and legal rules is a logical distinction. 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. Rules are applicable in an all-or-nothing fashion ... the principle is one which [one] must take into account, if it is relevant, as a consideration inclining in one direction or another”.²⁶⁹ For another author, “[b]y a principle, or 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 underlies a rule, and explains or provides the reason for it. A rule answers the question ‘what’; a principle in effect answers the question ‘why’”.²⁷⁰ Yet another author suggests that principles “restent synonymes de règles juridiques abstraites, fournissant les bases d’un régime juridique susceptible de s’appliquer à de multiples situations concrètes, soit pour les régler de façon permanente, soit pour résoudre les difficultés qu’elles font naître” [are understood as abstract legal rules underpinning a legal regime that may be applied to a variety of specific

²⁶⁷ See, for example, S. Besson, “General principles of international law – whose principles?”, in S. Besson and P. Pichonnaz (eds.), *Les principes en droit européen – Principles in European Law* (Geneva, Schulthess, 2011), pp. 32–34. The author is of the view that “[g]eneral principles of international law ... share the main characteristics of general principles of domestic law ...: they are general and abstract, but also fundamental and indeterminate legal norms” (p. 32).

²⁶⁸ See para. 108 above.

²⁶⁹ R. Dworkin, *Taking Rights Seriously* (London, Bloomsbury, 2013), pp. 40 and 42.

²⁷⁰ G. Fitzmaurice, “The general principles of international law considered from the standpoint of the rule of law”, *Collected Courses of the Hague Academy of International Law*, vol. 92 (1957), pp. 5–128, at p. 7. Commenting on this view, Thirlway suggests that “[t]his does not mean that a principle is on too elevated a plane to be capable of being applied to a legal problem, but it does mean that the principle will, by being applied to the case, in effect generate a rule for solving it” (Thirlway, *The Sources of International Law* (footnote 13 above), p. 107).

situations, either to govern them on an ongoing basis or to resolve the difficulties to which they give rise].²⁷¹

147. It has also been suggested in the literature that, “when associated with ‘general’ the word ‘principle’ implies a wide-ranging norm”,²⁷² or that the term “general principle” relates to the number of domestic legal systems that one must look at to identify a general principle of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.²⁷³ On the other hand, the view has been expressed that a “principle of law differs from a legal rule as commonly understood not on account of its wide validity, but rather owing to the generality of its content”.²⁷⁴ Furthermore, some authors suggest that general principles embody important or fundamental values.²⁷⁵

148. Judge Cançado Trindade, also elaborating on the term “principles”, stated that:

Every legal system has fundamental principles, which inspire, inform and conform to their norms. It is the principles (derived etymologically from the Latin *principium*) that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (*prima principia*) which confer to the legal order (both national and international) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves.²⁷⁶

149. In contrast, other authors do not see much of a difference between the terms “rules” and “principles”. For instance, it has been noted that “although there is quite a debate among legal theorists as to the difference and hierarchical relation between rules and principles, none of this finds any reflection in the utterances of the [International Court of Justice], which tends to treat the two terms as synonymous”.²⁷⁷ Another author suggests that “[i]t is almost impossible to draw a clear line between positive legal rules that are general principles and other positive legal rules”.²⁷⁸

²⁷¹ M. Virally, “Le rôle des « principes » dans le développement du droit international”, in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva, IUHEI, 1968), pp. 531–556, at pp. 533–534.

²⁷² Pellet and Müller, “Article 38” (footnote 13 above), p. 925.

²⁷³ D. Costelloe, “The role of domestic law in the identification of general principles of law under article 38(1)(c) of the Statute of the International Court of Justice”, in M. Andenas *et al.* (eds.), *General Principles and the Coherence of International Law* (Brill, 2019), p. 183.

²⁷⁴ G. Herczegh, *General Principles of Law and the International Legal Order* (Budapest, Akadémiai Kiadó, 1969), p. 43. He adds that “general principles of international law denote rules of general content rather than provisions governing details” (*ibid.*).

²⁷⁵ Besson, “General principles of international law – whose principles?” (footnote 267 above), pp. 32–33; M. Sørensen, “Principes de droit international public: cours général”, *Collected Courses of the Hague Academy of International Law*, vol. 101 (1960), pp. 16–30, at p. 16. For Thirlway, “there is about the concept of ‘general principles’ such an air of permanence, of stability, of having been selected for their evident and perpetual rightness, that an interpretation of the phrase as meaning ‘whatever principles may in future come to be regarded as general principles’ is somehow disquieting” (Thirlway, *The Sources of International Law* (footnote 13 above), p. 111).

²⁷⁶ *Pulp Mills* (footnote 17 above), Separate Opinion of Judge Cançado Trindade, p. 210, para. 201.

²⁷⁷ M. Mendelson, “The International Court of Justice and the sources of international law”, in V. Lowe and M. Fitzmaurice (eds.), *Fifty years of the International Court of Justice: Essays in honour of Sir Robert Jennings* (Cambridge, Cambridge University Press, 1996), pp. 63–89, at p. 80.

²⁷⁸ Bogdan, “General principles of law and the problem of lacunae in the law of nations” (footnote 13 above), p. 47. See also Kolb, *La bonne foi en droit international public* (footnote 25 above), pp. 53–54.

150. The drafting history of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice does not provide much guidance on this matter. It was not discussed by the members of the Advisory Committee of Jurists, States or others. Members of the Advisory Committee of Jurists, for instance, appear to have used the terms “rules” and “principles” interchangeably during their deliberations.²⁷⁹ Article 38 of the Statute of the International Court of Justice itself does not make a clear distinction between “rules” and “principles”, since the “rules of law” to be determined through the subsidiary means under Article 38, paragraph 1 (d), clearly include general principles of law.²⁸⁰

151. The International Court of Justice and the Commission do not seem to make a clear distinction between “rules” and “principles”, but they agree that the latter may be regarded as norms with a more general and more fundamental character. In the *Gulf of Maine* case, for example, the Chamber of the International Court of Justice stated that:

[T]he association of the term “rules” and “principles” [in the Special Agreement] is no more than the use of a dual expression to convey one and the same idea, since in this context “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.²⁸¹

152. Similarly, in its draft conclusions on the identification of customary international law, the Commission explained that “[t]he reference to ‘rules’ of customary international law in the present draft conclusions and commentaries includes rules of customary international law that may be referred to as ‘principles’ because of their more general and more fundamental character”.²⁸²

153. In the light of the above, it may be concluded that the term “general principles of law” in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice makes reference to norms that have a “general” and “fundamental” character. They are “general” in the sense that their content has a certain degree of abstraction, and “fundamental” in the sense that they underlie specific rules or embody important values.

154. It cannot be excluded, however, that some general principles of law may not have a “general” and “fundamental” character in the sense described above. As shown in Part Three above and will be further discussed below, States have invoked a great variety of norms that they considered to be general principles of law in the context of litigation, such as good faith, abuse of rights, the “clean hands” doctrine, unjust enrichment, the obligation to make full reparation, *res judicata*, a right of passage over the territory of another State, and a right of lawyer-client confidentiality. The same variety can be found in the decisions of international courts and tribunals, which have relied on general principles of law to, *inter alia*, determine the separate

²⁷⁹ For example, the initial proposal made by Descamps was “the rules of international law as recognised by the legal conscience of civilized nations” (see para. 93 above). Similarly, according to Loder, “rules recognized and respected by the whole world had been mentioned, rules which were, however, not yet of the nature of positive law, but it was precisely the Court’s duty to develop law, to “‘ripen’ customs and principles universally recognised, and to crystallize them into positive rules” (see para. 96 above).

²⁸⁰ S. Yee, “Article 38 of the ICJ Statute and applicable law: selected issues in recent cases”, *Journal of International Dispute Settlement*, vol. 7 (2016), pp. 472–498, at pp. 488–489.

²⁸¹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 288–290, para. 79.

²⁸² Para. (3) of the commentary to conclusion 1 of the draft conclusion on identification of customary international law, A/73/10, paras. 65–66, at p. 124. See also para. 67 above.

personality of a company from its shareholders, provide a definition of “rape” for the purposes of determining the commission of an international crime, and provide a definition of “successors” for purposes of reparation. Although some of these principles, such as good faith, may be considered “general” and “fundamental”, it is questionable whether others, such as a right of lawyer-client confidentiality or a right of passage over the territory of another State, or certain principles relating to procedural matters, are of comparable character.

155. With respect to the view that the term “general” employed in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice suggests a broad scope of application, i.e., that general principles of law apply to all States, this may well be the case.²⁸³ However, exceptions to this general rule appear to be supported by references in practice to general principles with a regional scope of application. As mentioned in Part Three above, examples of this include practice in Africa, Asia and Europe.²⁸⁴

156. As regards the term “law” in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, it has been suggested in the literature that, taken in its ordinary meaning, it can refer both to national law and to international law, so that a general principle of law can arise both from national legal systems and from the international legal system.²⁸⁵ Moreover, assuming that the purpose of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice is to fill the gaps in conventional and customary international law, the same author suggests that there is no reason to believe that the drafters intended to limit the origins of general principles of law to national legal systems. Instead, they “must be deemed to have by implication assented to the use of general principles of international law”.²⁸⁶ This view may be assisted by the way in which general principles are applied in some domestic legal systems. As shown above, national courts are sometimes allowed to rely on general principles proper to their own legal system when a dispute cannot be solved on the basis of other rules. Following this logic, one could consider that general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice ought to include general principles formed within the international legal system as well.

157. Others have argued that the term “law” suggests rather that, when identifying general principles of law derived from national legal systems, all branches of the latter are relevant. Judge Tanaka, for instance, was of the view that “[s]o far as the ‘general principles of law’ are not qualified, the ‘law’ must be understood to embrace all branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc.”.²⁸⁷

158. While these interpretations of the term “law” are plausible, the Special Rapporteur considers, as mentioned above, that they need to be further assessed as the topic progresses and taking into account the practice of States and the decisions of international courts and tribunals.

159. A last issue to address in the present sub-section is the relationship between general principles of law and “general international law”.

160. The fact that general international law encompasses general principles of law has been confirmed within the Commission on a number of occasions. Thus, the use of the term “general international law” may refer, in certain cases, depending on the

²⁸³ See also para. 161 below.

²⁸⁴ See paras. 125 and 137 above.

²⁸⁵ Lammers, “General principles of law recognized by civilized nations” (footnote 13 above), p. 67.

²⁸⁶ *Ibid.*

²⁸⁷ *South West Africa* (footnote 221 above), Dissenting Opinion of Judge Tanaka, p. 294.

context, to general principles of law. For example, in its commentary to draft article 33 of the draft statute for an international criminal court, the Commission specified that “the expression ‘principles and rules’ of general international law includes general principles of law”.²⁸⁸ Later, the report of the Study Group on fragmentation of international law stated that “[g]eneral international law’ clearly refers to general customary law as well as ‘general principles of law recognized by civilized nations’ under Article 38, paragraph 1 (c), of the Statute of the International Court of Justice”.²⁸⁹ Similarly, in its commentaries to the draft conclusions on the identification of customary international law, the Commission noted that “‘general international law’ is used in various ways (not always clearly specified) including to refer to rules of international law of general application, whether treaty law or customary international law or general principles of law”.²⁹⁰ Moreover, the second report of the Special Rapporteur for the topic “Peremptory norms of general international law (*jus cogens*)” indicated that “[g]eneral principles of law, like rules of customary international law, are generally applicable”,²⁹¹ and that general international law includes general principles of law.²⁹² On that topic, the Drafting Committee provisionally adopted draft conclusion 5, paragraph 2, according to which general principles of law, together with customary international law and treaty provisions, may serve as a basis for peremptory norms of general international law (*jus cogens*).²⁹³

161. In the *North Sea Continental Shelf* case, the International Court of Justice stated that norms of general international law “must have equal force for all members of the international community”.²⁹⁴ Given the ample support that general international law encompasses general principles of law, it can be concluded that general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice are universally applicable. This is without prejudice to the possibility of general principles of law with a regional or bilateral scope of application.

162. In the light of the preceding paragraphs, it can be concluded that general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice may share some characteristics with the general principles that exist within domestic legal systems, but the structural differences between the latter and the international legal system must not be overlooked. Furthermore, general principles of law as a source of international law may have a more “general” and more “fundamental” character than other rules of international law. Moreover, the ordinary meaning of the term “general principles of law”, together with the generally accepted function of this source of international law (gap-filling), suggests that general principles of law are not limited to those derived from national legal systems. Finally, general principles of law, being part of general international law, are universally applicable.

²⁸⁸ Para. (2) of the commentary to art. 33 of the draft statute for an international court, *Yearbook ... 1994*, vol. II (Part Two), para. 91, at p. 51.

²⁸⁹ “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1) (see footnote 84 above), p. 254. See also para. 174.

²⁹⁰ A/73/10, p. 123, footnote 667.

²⁹¹ A/CN.4/706, para. 48.

²⁹² *Ibid.*, para. 49.

²⁹³ Statement of the Chair of the Drafting Committee, 26 July 2017, annex, p. 11.

²⁹⁴ *North Sea Continental Shelf* (footnote 221 above), p. 38, para. 63.

B. “Recognized”

163. The second element of general principles of law found in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice is the requirement of “recognition”. In the view of the Special Rapporteur, this second element is closely related to the issue of the identification of general principles of law, which will be addressed in a future report, and to the origins of general principles of law as a source of international law, which is further discussed below. The present section is therefore limited to some general remarks concerning recognition.

164. At the outset, a comparison between paragraphs 1 (b) and paragraph 1 (c) of Article 38 of the Statute of the International Court of Justice seems warranted, as it may be useful to understand the requirement of recognition. In its draft conclusions on the identification of customary international law, the Commission followed the “two-element approach”, based on the two elements that appear in Article 38, paragraph 1 (b): a general practice and its acceptance as law (*opinio juris*). In this regard, the Commission clarified that these “are the essential conditions for the existence of a rule of customary international law”.²⁹⁵

165. Article 38, paragraph 1 (c), of the Statute of the International Court of Justice is worded quite differently: it does not mention a general practice accepted as law, but speaks of principles recognized by “civilized nations”. In the view of the Special Rapporteur, recognition is similarly the essential condition for the existence of a general principle of law as a source of international law.²⁹⁶ Therefore, to identify a general principle of law, a careful examination of available evidence showing that it has been recognized is required.

166. The drafting history of Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice, and in particular the *procès-verbaux* of the Advisory Committee of Jurists, confirms that recognition is the essential condition for the existence of general principles of law. While some disagreements existed among the members of the Committee, they agreed that the formal validity of general principles of law depends on their recognition by “civilized nations”. The rationale behind this was to avoid granting judges overly broad discretion in determining the law, or even the power to legislate.²⁹⁷ In other words, the existence of a general principle of law must be determined on an objective basis. This is all the more warranted because, as mentioned above, general principles of law as a source of international law must apply in the relations between subjects of international law generally.

167. What forms may recognition take? The answer to this question may depend on the category of general principles of law. With respect to general principles of law derived from national legal systems, a position that is generally accepted in the literature and, as will be shown in the next section, is supported by practice is that the

²⁹⁵ Para. (2) of the commentary to conclusion 2 of the draft conclusion on identification of customary international law, A/73/10, paras. 65–66, at p. 125. The Commission further clarified that “[t]he identification of such a rule thus involves a careful examination of available evidence to establish their presence in any given case” (*ibid.*).

²⁹⁶ One author has noted in this regard that: “In the definition of the third source of international law there is also the element of recognition on the part of civilised peoples but the requirement of a general practice is absent. The object of recognition is, therefore, no longer the legal character of the rule implied in an international usage, but the existence of certain principles intrinsically legal in nature” (Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (footnote 20 above), p. 24).

²⁹⁷ See Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (footnote 20 above), p. 24 (“how is it possible to ascertain whether a given principle is a principle of law and not of another cognate social discipline, such as religion or morality? The recognition of its legal character by civilised peoples supplies the necessary element of determination”).

requirement of recognition is fulfilled when a principle exists within a sufficiently large number of national legal systems.²⁹⁸ Some scholars make an express link between recognition and the existence of the principle *in foro domestico*. Others do not mention the requirement of recognition, but advance more broadly that general principles of law “derive from”, or are those “accepted in”, “found in”, “applied in” or “borrowed from” national legal systems, which could be interpreted as implying that this is how recognition takes place. In explaining the logic behind this form of recognition, it has been observed, for example, that the existence of a principle within

²⁹⁸ Pellet and Müller, “Article 38” (footnote 13 above), p. 925; Andenas and Chiussi, “Cohesion, convergence and coherence of international law” (footnote 13 above), p. 26; Palchetti, “The role of general principles in promoting the development of customary international rules” (footnote 21 above), p. 48; Costelloe, “The role of domestic law in the identification of general principles of law under article 38(1)(c) of the Statute of the International Court of Justice” (footnote 273 above), p. 178; B. Juratowitch and J. Shaerf, “Unjust enrichment as a primary rule of international law”, in M. Andenas *et al.* (eds.), *General Principles and the Coherence of International Law* (Leiden, Brill, 2019), pp. 231–232; A. Yusuf, “Concluding remarks”, in *ibid.*, p. 450; A. Orakhelashvili, *Akehurst’s Modern Introduction to International Law* (Routledge, 2019), p. 46; E. Bjorge, “Public law sources and analogies of international law”, in *Victoria University of Wellington Law Review*, vol. 49 (2018), pp. 533–560, at p. 536; Redgwell, “General principles of international law” (footnote 13 above), pp. 5–19; O. Casanovas and A. Rodrigo, *Compendio de Derecho Internacional Público*, 6th ed. (Tecnos, 2017), p. 72; B.I. Bonafé and P. Palchetti, “Relying on general principles in international law”, in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham, Edward Edgar, 2016), pp. 160–176, at p. 163; Yee, “Article 38 of the ICJ Statute and applicable law ...” (footnote 280 above), p. 487; A. Verdross and B. Simma, *Universelles Völkerrecht* (Berlin, Dunker and Humboldt, 2010), p. 383; Besson, “General principles of international law – whose principles?” (footnote 267 above), pp. 33 and 35; Wolfrum, “General international law (principles, rules, and standards)” (footnote 199 above), paras. 30–32; T. Gazzini, “General principles of law in the field of foreign investment”, *Journal of World Investment and Trade*, vol. 10 (2009), pp. 103–120, at p. 104; A. Boyle and C. Chinkin, *The Making of International Law* (Oxford, Oxford University Press, 2007), p. 223; Jennings and Watts, *Oppenheim’s International Law* (footnote 136 above), pp. 36–37; Barberis, “Los Principios Generales de Derecho como Fuente del Derecho Internacional” (footnote 13 above), pp. 30–31; G. Abi-Saab, “Cours général de droit international public”, *Collected Courses of the Hague Academy of International Law*, vol. 207 (1987), pp. 188–189; American Law Institute, *Restatement of the Law (Third), the Foreign Relations Law of the United States*, vol. 1 (St. Paul, Minnesota, 1987), p. 24; Lammers, “General principles of law recognized by civilized nations” (footnote 13 above), pp. 59–66, 74; Bogdan, “General principles of law and the problem of lacunae in the law of nations” (footnote 13 above), pp. 42–43; Pellet, *Recherche sur les principes généraux de droit en droit international* (footnote 113 above), pp. 9, 195–196 and 239; P. de Visscher, “Cours général de droit international public”, *Collected Courses of the Hague Academy of International Law*, vol. 136 (1972), pp. 114 and 116; C. de Visscher, *Théories et réalités en droit international public*, 4th ed. (Paris, Pedone, 1970), p. 419; Herczegh, *General Principles of Law and the International Legal Order* (footnote 274 above), p. 97; Blondel, “Les principes généraux de droit devant la Cour permanente de Justice internationale et la Cour internationale de Justice” (footnote 13 above), pp. 203 and 213; Verdross, “Les principes généraux du droit dans la jurisprudence internationale” (footnote 136 above), pp. 223–224; W. Bishop, “General course of public international law”, *Collected Courses of the Hague Academy of International Law*, vol. 115 (1965), p. 238; Jenks, *The Common Law of Mankind* (footnote 17 above), p. 312; Waldock, “General course on public international law” (footnote 113 above), pp. 55–56; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (footnote 20 above), p. 25; L. Le Fur, “Règles générales du droit de la paix”, *Collected Courses of the Hague Academy of International Law*, vol. 54 (1935), p. 205; G. Ripert, “Les règles du droit civil applicables aux rapports internationaux”, *Collected Courses of the Hague Academy of International Law*, vol. 44 (1933), pp. 579–580; Anzilotti, *Cours de droit international* (footnote 13 above), p. 117. See also the International Law Association, 2018 draft report on “The use of domestic law principles in the development of international law” (footnote 29 above).

national legal systems corresponds to “the dictates of the legal conscience of civilised nations”.²⁹⁹

168. Similar expressions have been used by international courts and tribunals. In the *Barcelona Traction* case, for example, the International Court of Justice determined that “[i]t is 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, that international law refers”.³⁰⁰ Similarly, in *Sea-Land Service v. Iran*, the Iran-United States Claims Tribunal found that unjust enrichment “is codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals”.³⁰¹

169. That the requirement of recognition may be fulfilled through the existence of a principle that is common to national legal systems is of course a broad proposition, and a number of questions remain open. For example, the degree of recognition for a general principle of law to emerge needs to be considered. Furthermore, it is often suggested that, after a principle common to national legal systems is identified, it must be further determined that it is applicable in the international legal system. This is sometimes referred to as “transposition”.³⁰² The rationale behind this is “that conditions in the international field are sometimes very different from what they are in the domestic, and that rules which these latter conditions fully justify may be less capable of vindication if strictly applied when transposed onto the international level”.³⁰³

170. A key issue in this regard is whether the requirement of recognition is also relevant for determining whether a principle common to national legal systems is applicable at the international level and, if so, how. This important question will be analysed in a future report addressing the identification of general principles of law.

171. As mentioned above, another category of general principles of law often referred to in the literature as falling within the scope of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice is that of general principles of law that may be formed within the international legal system and that do not have their origin in national legal systems. Assuming that this category is distinct from the one addressed in the preceding paragraphs, recognition may need to be established in a different manner.

172. Some authors make broad statements that this second category falls within the scope of Article 38, paragraph 1 (c), but they do not enter into the details of how

²⁹⁹ Pellet and Müller, “Article 38” (footnote 13 above), p. 925, referring to the initial proposal by Descamps within the Advisory Committee of Jurists (see para. 93 above).

³⁰⁰ *Barcelona Traction* (footnote 217 above), p. 37, para. 50.

³⁰¹ *Sea-Land Service v. Iran* (footnote 247 above), p. 168. See further examples in the next section.

³⁰² Pellet and Müller, “Article 38” (footnote 13 above), pp. 930–932; Andenas and Chiussi, “Cohesion, convergence and coherence of international law” (footnote 13 above), p. 26; Juratowitch and Shaerf, “Unjust enrichment as a primary rule of international law” (footnote 298 above), p. 232; Yusuf, “Concluding remarks” (footnote 298 above), p. 451; Bonafé and Palchetti, “Relying on general principles in international law” (footnote 298 above), p. 163; Yee, “Article 38 of the ICJ Statute and applicable law ...” (footnote 280 above), p. 487; Gazzini, “General principles of law in the field of foreign investment” (footnote 298 above), p. 104; Jennings and Watts, *Oppenheim’s International Law* (footnote 136 above), p. 37; Pellet, *Recherche sur les principes généraux de droit en droit international* (footnote 113 above), pp. 272–320.

³⁰³ *Barcelona Traction* (footnote 217 above), Separate Opinion of Judge Fitzmaurice, p. 66.

recognition takes place.³⁰⁴ Those who do attempt to explain how the requirement of recognition is met for this category advance a number of arguments.

173. For example, some maintain that the general principles of law under this category emerge through a process of deduction or abstraction from existing rules of conventional and customary international law. The requirement of recognition would be met by having recourse to those existing rules, which have already been accepted (or recognized) by States.³⁰⁵ Others suggest that recognition could take the form of acts of international organizations or similar instruments showing the consensus of States on specific matters, such as resolutions of the General Assembly.³⁰⁶ It has been suggested that in this context “[t]he basic element should be the attitude of States to consider themselves bound”.³⁰⁷

174. For purposes of the present section, it suffices to note that, despite the different approaches in the literature, there seems to be agreement on the point that recognition in the sense of Article 38, paragraph 1 (c), can take place at the international level, without the need to look at the national legal systems of States. As will be shown in the next section, this position appears to be supported to some extent by the practice of States and the decisions of international courts and tribunals.

175. In the light of the above, it can be concluded that recognition in the sense of Article 38, paragraph 1 (c), is the essential condition for the existence of a general principle of law. The precise forms that such recognition can take may depend on the category of general principles of law in question.

C. “Civilized nations”

176. Article 38, paragraph 1 (c), of the Statute of the International Court of Justice provides that general principles of law are those recognized by “civilized nations”. This third element concerns the question of whose recognition is required for a general principle of law to be part of international law.

177. The term “civilized nations” is the product of political and legal conceptions that can be traced back to the early history of international law. During that time, the view was held that only so-called “civilized nations” participated in the formation of international law and were obliged by it.³⁰⁸ For example, only the practice of

³⁰⁴ Boyle and Chinkin, *The Making of International Law* (footnote 298 above), p. 223; Anzilotti, *Cours de droit international* (footnote 13 above), p. 117.

³⁰⁵ Palchetti, “The role of general principles in promoting the development of customary international law” (footnote 21 above), p. 50; R. Yotova, “Challenges in the identification of the ‘general principles of law recognized by civilized nations’: the approach of the International Court”, *Canadian Journal of Comparative and Contemporary Law*, vol. 3 (2017), pp. 269–325, at p. 310; Bonafé and Palchetti, “Relying on general principles in international law” (footnote 298 above), p. 163; Wolfrum, “General international law (principles, rules, and standards)” (footnote 199 above), paras. 33–34; A. Cassese, *International Law in a Divided World* (Oxford, Clarendon, 1986), p. 174; Lammers, “General principles of law recognized by civilized nations” (footnote 13 above), p. 74.

³⁰⁶ Yotova, “Challenges in the identification of the ‘general principles of law recognized by civilized nations’” (footnote 305 above), p. 310; Wolfrum, “General international law (principles, rules, and standards)” (footnote 199 above), para. 36; Verdross and Simma, *Universelles Völkerrecht* (footnote 298 above), p. 386.

³⁰⁷ Gaja, “General principles in the jurisprudence of the ICJ” (footnote 186 above), pp. 42–43. Gaja then notes that “[t]o a certain extent, this attitude may result from the adoption of General Assembly resolutions, but would need to be viewed in relation to other elements of State practice. Giving relevance to State practice when asserting the existence of this type of principles would bring these principles close to customary rules” (*ibid.*).

³⁰⁸ J. Sloan, “Civilized nations”, *Max Planck Encyclopedia of Public International Law* (2011), para. 2.

“civilized nations” would be taken into account for purposes of determining the existence of customary international law.³⁰⁹ One author has observed that, in the context of general principles of law, the term “civilized nations” was intended to exclude from consideration the legal systems of countries not considered to be civilized.³¹⁰ According to another author, when courts and tribunals resorted to “principles common to civilized countries” to fill the gaps in treaties and custom, they “enunciated principles that had a very general purport and were indisputably common to all major Western legal systems”.³¹¹

178. Today there is wide agreement in the literature that there is no need to attribute any particular meaning to the term “civilized nations” in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. It is often considered that the term is anachronistic and should therefore be avoided.³¹² This position is also supported by practice, where no distinction between “civilized” and “uncivilized” nations is made. As pointed out by Judge Ammoun:

the [text of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice] cannot be interpreted otherwise than by attributing to it a universal scope involving no discrimination between the members of a single community based upon sovereign equality. The criterion of the distinction between civilized nations and those which are allegedly not so has thus been a political criterion, – power politics, – and anything but an ethical or legal one ...

...

... the Court, when quoting, as necessary, paragraph 1 (c) of Article 38, could omit the adjective referred to, and content itself with the words “the general principles of law recognized by ... [the] nations”; or could make use of the form of words used by Sir Humphrey Waldock in his address of 30 October 1968, namely: “the general principles of law recognized in national legal systems”. One might also say, quite simply: “the general principles of law”.³¹³

179. It has also been observed that “this inappropriate wording [of ‘civilized nations’] may partly explain why the [International Court of Justice] has been so far

³⁰⁹ *Ibid.*, para. 25.

³¹⁰ Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (footnote 20 above), p. 25.

³¹¹ Cassese, “The contribution of the International Criminal Tribunal for the former Yugoslavia to the ascertainment of general principles of law recognized by the community of nations” (footnote 238 above), p. 43.

³¹² Pellet and Müller, “Article 38” (footnote 13 above), p. 927; Yusuf, “Concluding remarks” (footnote 298 above), pp. 449–450; Besson, “General principles of international law – whose principles?” (footnote 267 above), pp. 37–38; Barberis, “Los Principios Generales de Derecho como Fuente del Derecho Internacional” (footnote 13 above), p. 33; Bogdan, “General principles of law and the problem of lacunae in the law of nations” (footnote 13 above), p. 45; Herczegh, *General Principles of Law and the International Legal Order* (footnote 274 above), p. 41; Verdross, “Les principes généraux du droit dans la jurisprudence internationale” (footnote 136 above), p. 523; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (footnote 20 above), p. 25.

³¹³ *North Sea Continental Shelf* (footnote 221 above), Separate Opinion of Judge Ammoun, pp. 134–135. See also *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, dissenting opinion of Judge Krylov, at p. 219 (referring to general principles of law “recognized by the nations”); *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, Separate Opinion of Judge Weeramantry, at p. 236, footnote 9 (referring to the term “civilized nations” as inappropriate phraseology).

reluctant to refer to specific rules of one or other municipal system, lest it imply that some other systems had to be regarded as less civilized”.³¹⁴

180. Some calls to amend Article 38, paragraph 1 (c), of the Statute of the International Court of Justice have been made. In 1971, for example, the Secretary-General, upon request of the General Assembly, prepared a report containing the views and suggestions of States concerning the role of the International Court of Justice.³¹⁵ Mexico and Guatemala suggested the amendment or deletion of the term “civilized nations” in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. In particular, Mexico considered this term as “a verbal relic of the old colonialism”, and suggested that the term “international community” or another similar term be used instead.³¹⁶

181. On the assumption that general principles of law must be generally recognized, some scholars have made a connection between the term “civilized nations” and Article 9 of the Statute of the International Court of Justice. According to one author, “[Article 9] affords sufficient safeguards, the judges having been elected so as to ensure ‘the representation of the main forms of civilization and the principal legal systems of the world’ ... in view of this it may be conceded that anything which all the judges of the Court are prepared to accept as ‘general principles of law’ must in fact be ‘recognized by all civilized nations’”.³¹⁷ A similar point was made by Judge Ammoun in the *North Sea Continental Shelf* case. According to him, the requirement of the participation of “the main forms of civilization and the principal legal systems of the world” in the composition of the International Court of Justice reaffirms the sovereign equality of all Member States envisaged in the Charter of the United Nations, and that all nations should participate in the formation of general principles of law.³¹⁸

182. A few scholars maintain that the term “civilized nations” in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice still carries some meaning. It has been suggested, for example, that only those States whose national legal systems are in conformity with fundamental human rights standards, or which are “democratic”, should be regarded as “civilized”.³¹⁹ This position, however, does not find support in the practice of States or in the decisions of international courts and tribunals. Maintaining a distinction between “civilized” and “uncivilized” nations may lead to subjective and arbitrary choices when identifying general principles of law, and would be contrary to the fundamental principle of sovereign equality. Moreover, subjecting the identification of general principles of law to a previous test of conformity of national legal systems with international human rights norms or with democratic standards would make it too burdensome, if not impossible, to identify such principles.

183. As shown in Part Three above, certain treaties subsequent to the Statutes of the Permanent Court of International Justice and the International Court of Justice contain

³¹⁴ G. Gaja, “General principles of law”, *Max Planck Encyclopedia of Public International Law* (2013), para. 2. See also Yusuf, “Concluding remarks” (footnote 298 above), p. 449.

³¹⁵ A/8382.

³¹⁶ *Ibid.*, pp. 24–25.

³¹⁷ M. Virally, “The sources of international law”, in M. Sørensen (ed.), *Manual of Public International Law* (London, Macmillan, 1968), pp. 116–174, at p. 146.

³¹⁸ *North Sea Continental Shelf* (footnote 221 above), Separate Opinion of Judge Ammoun, pp. 133–134.

³¹⁹ Besson, “General principles of international law – whose principles?” (footnote 267 above), p. 38; Raimondo, *General Principles of Law ...* (footnote 13 above), p. 52–53; Sloan, “Civilized nations” (footnote 308 above), para. 3. See also B. Conforti, *International Law and the Role of Domestic Legal Systems* (Dordrecht, Martinus Nijhoff, 1993), p. 64; A. Favre, “Les principes généraux du droit, fonds commun du droit des gens”, in *Recueil d'études de droit international en hommage à Paul Guggenheim* (IUHEI, 1968), pp. 366–390, at p. 371.

formulations that no longer employ the term “civilized nations”. For example, the fair and equitable treatment clause in some international investment agreements refers to “the principle of due process embodied in the principal legal systems of the world”.³²⁰ Similarly, article 21, paragraph 1 (c), of the Rome Statute refers to “general principles of law derived by the Court from national laws of legal systems of the world”. These formulations clearly refer to principles that exist within national legal systems and suggest that the latter should be widely representative.

184. The phrase “community of nations” has also been employed as an alternative for “civilized nations”. This is notably the case of the International Covenant on Civil and Political Rights, which has 172 States Parties, and article 15, paragraph 2, of which reads: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”. When this provision was drafted, the formulation “general principles of law recognized by civilized nations” was proposed,³²¹ but it was objected to by delegations.³²²

185. In sum, there is wide agreement that a distinction between “civilized” and “uncivilized” nations cannot be maintained. In order to avoid the historical connotations that the term “civilized nations” in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice may still carry,³²³ alternative formulations such as “States”, “nations” and “the community of nations” have been adopted.

186. The Special Rapporteur is of the opinion that, in addition to all the above considerations, general principles of law as a source of international law must be seen in the context of the fundamental principle of sovereign equality of States. Therefore, the term “civilized nations” in Article 38, paragraph 1 (c), should be avoided and, in any case, interpreted as referring to States generally. In this regard, the formulation that should be preferred is “the general principles of law recognized by States”.

187. This basic conclusion naturally does not exhaust the issue of whose recognition is required, and a number of questions remain to be addressed, such as how representative the recognition by States must be, or whether there are other ways of establishing the existence of a general principle of law; and whether international organizations and other actors may also participate in the formation of general principles of law.³²⁴ The Special Rapporteur will deal with these issues in greater depth in a future report. The following draft conclusion is proposed:

³²⁰ See footnote 204 above.

³²¹ E/CN.4/SR.324, p. 4.

³²² *Ibid.*, pp. 5–14.

³²³ Yusuf, “Concluding remarks” (footnote 298 above), p. 449.

³²⁴ Reinisch, “Sources of international organizations’ law ...” (footnote 261 above), p. 1022 (“General principles of law may provide a valid ground for establishing obligations also for international organizations. The binding nature of general principles of law, which are normally considered to derive from principles common to various domestic legal orders of States, may be difficult to establish for international organizations because – as with custom – international organizations will not have had an opportunity to participate in their creation. Nevertheless, there are sufficient examples of areas where international organizations have been ready to accept that general principles of law derived from the domestic law of their Member States ... The relevance of general principles of law is not limited to the special case of the [European Union]. As witnessed by their widespread use as gap-fillers in the internal employment law of international organizations, particularly by international administrative tribunals, general principles of law are often considered to be directly applicable law for international organizations”).

“Draft conclusion 2: Requirement of recognition

For a general principle of law to exist, it must be generally recognized by States.”

II. The origins of general principles of law as a source of international law

188. As mentioned earlier in the present report, there is some controversy, at least in the literature, as regards the origins of general principles of law as a source of international law. This issue is often framed as one regarding the categories of general principles of law that are covered by Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, and it has been briefly touched upon in the preceding section when dealing with the requirement of recognition.

189. While various categories of general principles of law have been proposed in the literature,³²⁵ two appear to be supported by practice and widely accepted by scholars: general principles of law derived from national legal systems and general principles of law formed within the international legal system. The Special Rapporteur deals with these separately in the present section, without prejudice to further findings as the topic progresses. It should be noted that the present section is intended to address the existence of these categories of general principles of law only. It does not seek to provide definitive answers regarding the forms that recognition may take. That is for later.

A. General principles of law derived from national legal systems³²⁶

190. As shown above, it appears to be quite widely accepted in the literature that one of the possible origins of general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice is the national legal systems of States. The sole existence of principles common to a majority of national legal systems appears to be regarded by many authors as fulfilling the requirement of recognition under that provision.³²⁷

191. That general principles of law as a source of international law can arise from national legal systems finds support in the *travaux* of the Statute of the Permanent Court of International Justice, and in particular the work of the Advisory Committee of Jurists, where there was general agreement that general principles of law were those found *in foro domestico*.³²⁸ Similarly, the practice prior to the adoption of that Statute, being the background against which the latter was adopted, is worth recalling: in various cases, both States and adjudicative bodies relied on rules or principles

³²⁵ See para. 23 above.

³²⁶ This category is sometimes referred to as “general principles of municipal law”, “general principles of national law”, “general principles recognized *in foro domestico*” or “general principles with a parallel in domestic legal systems”. The Special Rapporteur finds the term “general principles of law derived from national legal systems” more convenient as it is more closely related to the way in which such principles are to be identified.

³²⁷ See para. 167 above.

³²⁸ See para. 109 above. One author has pointed out that the interpretation of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice as including this category of general principles of law may be regarded as the “static and historical” interpretation of that provision. See Kolb, *La bonne foi en droit international public* (footnote 25 above), p. 56.

found in national legal systems and in Roman law to justify the application of a corresponding principle at the international level.³²⁹

192. This category of general principles of law is also reflected in the recent practice of States and in the decisions of international courts and tribunals. As regards State practice, one can find many instances of States relying on general principles of law derived from national legal systems in the context of litigation. A well-known example is that of Portugal and India in the *Right of Passage* case. Portugal explained its claimed right of passage as follows:

le droit du Portugal de transiter à travers l'Union indienne ... se présente comme une nécessité logique, impliquée dans la notion même de souveraineté ... Mais ce n'est pas seulement de là qu'il découle. Ses bases conventionnelles et coutumières ne sont ni moins certaines, ni moins solides que le principe général auquel il se rattache.³³⁰

[the right of Portugal to transit through the Indian Union ... is a logical necessity, implied in the very notion of sovereignty ... But it is not only from there that it flows. Its conventional and customary bases are no less certain or solid than the general principle to which it is attached.]

193. In its reply to India's counter-memorial,³³¹ Portugal further explained that:

Un désaccord existe entre les Parties relativement à la notion de « principes généraux de droit », le Gouvernement de l'Inde estimant que seuls les principes qui sont attestés par la conformité des droits internes méritent cette appellation, tandis que le Gouvernement portugais considère ces limites comme trop étroites. Il est en tout cas certain que les principes admis *in foro domestico* par les nations civilisées sont inclus dans l'ordre juridique international.³³²

[There is a disagreement between the Parties with regard to the concept of "general principles of law", as the Government of India takes the view that only those principles that are reflected in national laws are worthy of the name, whereas the Government of Portugal regards these parameters as being too narrow. What is certain, in any event, is that the principles recognized by civilized nations *in foro domestico* are included in the international legal system.]

194. In order to demonstrate the existence of its claimed right of passage, Portugal produced a comparative study of 64 national legal systems, which was annexed to its

³²⁹ See in particular the *Alabama Claims* arbitration (footnote 120 above), the *Fabiani* case (footnote 122 above), the *Pious Fund* case (footnote 123 above), the *North Atlantic Coast Fisheries* case (footnote 128 above), and the *Russian Indemnity* case (footnote 132 above), all cited in Part Three above. See also the *Queen* case between Brazil, Norway and Sweden (1871), where the arbitrator applied the principle "recognized by the legislation of all countries" according to which the claimant must prove his or her claims ("ao conhecimento da presente questão deve ser applicado, como regra dominante de decidir, o preceito de jurisprudencia, reconhecido pela legislação de todos os paizes, de que á parte reclamante incumbe a prova da sua pretensão"); Unofficial translation: "[...] in assessing the present question, one must apply, as the decisive rule, the principle of jurisprudence, recognized by the legislation of all countries, that the claimant has the burden of proving its claim" [the overriding rule to be applied in the adjudication of the question at hand is the jurisprudential principle, recognized by the legislation of all countries, that the burden of proving a claim is borne by the claimant] (La Fontaine, *Pasicrisie internationale* (footnote 114 above), p. 155).

³³⁰ *Right of Passage* (footnote 222 above), Memorial of Portugal, para. 41.

³³¹ *Ibid.*, Counter-Memorial of India, paras. 294–306; Rejoinder of India, paras. 565–569.

³³² *Ibid.*, Reply of Portugal, para. 327.

reply.³³³ However, having found the existence of a bilateral custom between the parties, the Court considered it unnecessary to examine whether a general principle of law may lead to the same result.

195. In the *Certain Property* case, Liechtenstein argued that unjust enrichment constituted a general principle of law within the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Liechtenstein noted that “a rule must be considered as a general principle of law (i) if it is applied in the main systems of municipal law and (ii) if it is ‘transposable’ in international law”.³³⁴ To show that the first condition was fulfilled, Liechtenstein relied on Roman law and on the legal systems of, *inter alia*, Austria, France, Italy, the Islamic Republic of Iran, Switzerland, the United Kingdom and the United States.³³⁵ These arguments were not however addressed by the International Court of Justice since it found that it had no jurisdiction to hear the case.

196. In the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data* (discontinued in 2015), Timor-Leste claimed, *inter alia*, that Australia had violated a principle of non-interference with communications with legal advisers (legal professional privilege). Timor-Leste advanced that its claimed right may be regarded as a rule of customary international law or a general principle of law.³³⁶ According to the applicant: “It need hardly be said that most States recognise some form of legal professional privilege to protect the professional secrecy of confidential communications between legal advisers and their clients”.³³⁷

197. Australia responded that “[g]eneral principles of law within the meaning of Article 38 (1) (c) of the Statute are generally derived from general principles of municipal jurisprudence, appropriately adapted to the international law sphere to avoid ‘distortion’”.³³⁸ But it rejected the arguments of Timor-Leste because “the mere fact that a form of legal professional privilege exists in many domestic legal systems is not sufficient to generate a new general principle of international law”,³³⁹ and Timor-Leste made “no effort ... to explain how the domestic law principles should be appropriately adapted to the international law sphere without distortion, or how the specific and often complex procedures in domestic legal systems for the claiming and testing of privilege should be replicated under international law”.³⁴⁰

198. Article 21, paragraph 1 (c), of the Rome Statute is also relevant in this regard. It stipulates that, in the absence of rules established in the Statute, Elements of Crimes, Rules of Procedure and Evidence, other treaty rules, and “principles and rules of international law”, the Court shall apply “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards”. As explained in Part Three above, the phrase “general principles of law derived by the Court from

³³³ *Ibid.*, Reply of Portugal, p. 858, to be read together with annex 20 to Portugal’s observations and conclusions on the Preliminary Objections of the Government of India, pp. 714 ff.

³³⁴ *Certain Property* (footnote 225 above), Memorial of Liechtenstein, para. 6.5.

³³⁵ *Ibid.*, paras. 6.7–6.15.

³³⁶ *Questions relating to the Seizure and Detention of Certain Documents and Data* (footnote 226 above), Memorial of Timor-Leste, para. 6.2.

³³⁷ In support of this, Timor-Leste provided three studies on the matter, covering 45 domestic legal systems (annexes 22–24 of its Memorial).

³³⁸ *Questions relating to the Seizure and Detention of Certain Documents and Data* (footnote 226 above), Counter-Memorial of Australia, para. 4.20.

³³⁹ *Ibid.*, para. 4.21.

³⁴⁰ *Ibid.*, para. 4.22. See also paras. 4.34–4.38; 4.43–4.47. Australia provided a “Summary of national laws on legal professional privilege/confidentiality: scope and exceptions” (annex 51).

national laws of legal systems of the world” may be regarded as reflecting part of the scope of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

199. Similarly, some bilateral investment treaties refer to the obligation not to deny justice “in accordance with the principle of due process embodied in the principal legal systems of the world”.³⁴¹

200. Further State practice can be found in some decisions of national courts and other similar materials. The German Federal Constitutional Court, for example, in a judgment of 4 September 2004, considered that the term “general rules of international law” employed in article 25 of the German Constitution includes general principles of law, which are “recognised legal principles that are shared by domestic legal systems and which are transposable to inter-State relations”.³⁴²

201. In a case concerning the liability of a corporation for alleged human rights violations, a Court of Appeals (4th Circuit) of the United States defined the scope of the term “law of nations” (contained in the Alien Tort Statute) by reference to Article 38, paragraph 1, of the Statute of the International Court of Justice. In so doing, the Court of Appeals referred also to section 102 of the Restatement (Third) of Foreign Relations Law, which describes general principles of law as those accepted by the international community of States “by derivation from general principles common to the major legal systems”.³⁴³

202. Similarly, the Swiss Federal Council, in a report of 2010, defined general principles of law as principles “comprising the principles common to the major legal systems of the world and which acquire universal value. Often derived from national laws, they apply, as a general rule, whenever neither conventional nor customary law serve to settle a dispute”.³⁴⁴

203. Finally, it is also worth recalling that views with respect to this category of general principles of law have already been expressed by States in the Sixth Committee. This is the case of Brazil, who considered that the identification of general principles of law is based on “all legal systems of the world”.³⁴⁵

204. International courts and tribunals have also relied on this category of general principles of law on various occasions. In the *Corfu Channel* case, for example, the International Court of Justice considered, as regards the burden of proof, that a State “should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is

³⁴¹ See footnote 204 above.

³⁴² 2 BvR 1475/07, para. 20 (“Allgemeine Rechtsgrundsätze sind anerkannte Rechtsprinzipien, die übereinstimmend in den innerstaatlichen Rechtsordnungen zu finden und auf den zwischenstaatlichen Verkehr übertragbar sind” [General principles of law are recognized legal principles that are shared by domestic legal systems and that are transposable to inter-State relations]). See also BVerGE 118, 124, para. 63.

³⁴³ *Aziz and ors v. Alcolac Incorporated and ors*, Appeal judgment of 19 September 2011, ILDC 1878 (US 2011), paras. 40–42. See also *Agent Orange Product Liability Litigation, Re, Vietnam Association For Victims of Agent Orange/Dioxin and ors v. Dow Chemical Company and ors*, Judgment of 10 March 2005, ILDC 123 (US 2005), paras. 328–330.

³⁴⁴ “Rapport du Conseil fédéral en réponse au postulat 07.3764 de la Commission des affaires juridiques du Conseil des Etats du 16 octobre 2007 et au postulat 08.3765 de la Commission des institutions politiques du Conseil national du 20 novembre 2008” (5 March 2010), p. 2084. In an additional report of 2011, the Federal Council defined general principles of law as “norms of universal validity since they are recognized by all the major legal systems of the world”. See “Rapport additionnel du Conseil fédéral au rapport du 5 mars 2010 sur la relation entre droit international et droit interne” (30 March 2011), p. 3412.

³⁴⁵ A/C.6/72/SR.21, para. 15; A/C.6/73/SR.21, para. 41.

recognized by international decisions”.³⁴⁶ The term “all systems of law” may be understood as including national legal systems.

205. In the *Barcelona Traction* case, the Court referred to municipal law in order to apply the rules of international law on diplomatic protection. It stated that:

In turning now to the international legal aspects of the case, the Court must, as already indicated, start from the fact that the present case essentially involves factors derived from municipal law – the distinction and the community between the company and the shareholder – which the Parties, however widely their interpretations may differ, each take as the point of departure of their reasoning. If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is 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, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.³⁴⁷

206. In the *South West Africa* case, one of the few cases in which express reference was made to Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, the Court considered that:

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.³⁴⁸

207. While the Court rejected the existence of a general principle of law in this case, the passage can be interpreted as suggesting that *actio popularis* might have been considered a general principle of law if it had existed in a sufficiently large number of municipal systems, and not just in a certain number of them. The term “imported” used by the Court also suggests that one has to look into national legal systems to identify general principles of law.³⁴⁹

208. As regards inter-State arbitration, in the *Diverted Cargoes* case the arbitrator noted that: “les principes du droit international qui gouvernent l’interprétation des traités ou accords internationaux ainsi que l’administration des preuves, ont été dégagés par la doctrine et surtout par la jurisprudence internationale en correspondance étroite avec les règles d’interprétation des contrats adoptées à l’intérieur des nations civilisées” [the principles of international law that govern the interpretation of treaties or international agreements and the taking of evidence have been identified in doctrine and, in particular, in international jurisprudence, in close correspondence with the rules adopted by civilized nations with regard to the interpretation of contracts.].³⁵⁰ In connection with this, the tribunal made reference to

³⁴⁶ *Corfu Channel* (footnote 214 above), p. 18.

³⁴⁷ *Barcelona Traction* (footnote 217 above), p. 37, para. 50. See also pp. 39–40, para. 56.

³⁴⁸ *South West Africa* (footnote 221 above), p. 47, para. 88.

³⁴⁹ According to Gaja, “[i]n this passage the Court implied that a principle that is common to municipal laws is not automatically transposed into international law”. See Gaja, “General principles in the jurisprudence of the ICJ” (footnote 186 above), p. 38.

³⁵⁰ *Diverted Cargoes* (footnote 230 above), p. 70.

principles of interpretation (such as good faith and *effet utile*) and of burden of proof.³⁵¹

209. In the *Lighthouses Arbitration*, the Tribunal considered, with respect to an argument of non-transmission of debts arising out of torts advanced by Greece, that:

Si cet argument formulait en vérité un principe général de droit, il devrait également jouer et au même titre dans le droit civil, mais il est loin d'en être ainsi. Bien au contraire, les dettes délictuelles de personnes privées, qui présenteraient exactement le même caractère « hautement personnel », passent généralement aux héritiers. Ce n'est pas à dire que les principes de droit privé soient applicables comme tels en matière de succession d'Etats, mais seulement que le seul argument qui soit quelquefois invoqué pour nier la transmission de dettes délictuelles n'a pas de valeur.³⁵²

[If this argument truly formulated a general principle of law, it would have to operate as such under civil law, but this is hardly the case. On the contrary, the criminal debts of private individuals, which would appear to be of exactly the same 'highly personal' nature, are generally transferred to heirs. This is not to say that the principles of private law are applicable as such to matters concerning the succession of States, but only that the sole argument that is sometimes invoked to deny the transmission of criminal debts is invalid.]

210. In the *Argentine-Chile Frontier* case, the Tribunal applied the principle of estoppel and made reference to its relationship to national legal systems. Referring to the case concerning the *Temple of Preah Vihear*, it stated that:

there is in international law a principle, which is moreover a principle of substantive law and not just a technical rule of evidence, according to which "a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation" ... This principle is designated by a number of different terms, of which "estoppel" and "preclusion" are the most common. But it is also clear that these terms are not to be understood in quite the same sense as they are in municipal law.³⁵³

A similar conclusion was reached by the Tribunal in the *Chagos Marine Protected Area* case.³⁵⁴

211. In the *Abyei Arbitration* between Sudan and Sudan People's Liberation Movement/Army, concerning whether the experts of the Abyei Boundaries Commission exceeded their mandate under the Comprehensive Peace Agreement between the parties, general principles applicable in national legal systems were also considered. The arbitral agreement expressly required the tribunal to apply "general principles of law and practices" (art. 3). The Tribunal first determined that:

Given the paucity of authority on what "excess of mandate" concretely represents in law, the Tribunal agrees that principles of review applicable in public international law and national legal systems, insofar as the latter's practices are commonly shared, may be relevant as "general principles of law and practices" to its Article 2(a) inquiry.³⁵⁵

³⁵¹ *Ibid.*

³⁵² *Affaire relative à la concession des phares de l'Empire ottoman* (footnote 231 above), p. 199.

³⁵³ *Argentine-Chile Frontier Case* (footnote 232 above), p. 164.

³⁵⁴ *Chagos Marine Protected Area* (footnote 236 above), pp. 542–544, paras. 435–438.

³⁵⁵ *Abyei Arbitration* (footnote 235 above), p. 299, para. 401.

212. The Tribunal then analysed the process of judicial review in relation to administrative bodies in national legal systems,³⁵⁶ as well as in public international law.³⁵⁷

213. International criminal tribunals have also had the opportunity to make reference to or apply general principles of law derived from national legal systems. In a judgment of 13 July 2006, for example, the Appeals Chamber of the International Criminal Court decided an appeal by the Prosecution regarding an “extraordinary review”, not envisaged in the Statute or the Rules of Procedure and Evidence of the Court, of a decision by a Pre-Trial Chamber.³⁵⁸ In the Prosecution’s view, “the absence of mechanism for review of negative decisions under consideration cannot be regarded as anything other than a lacuna in the law. As such, it must be remedied by the general principles of law finding application in such a situation provided for in the instant case by article 21 (1) (c) of the Statute”.³⁵⁹

214. The Appeals Chamber considered that article 21, paragraph 1 (c), of the Rome Statute seeks to incorporate general principles of law derived from national laws of legal systems of the world as a source of law.³⁶⁰ It then analysed the arguments presented by the Prosecution regarding the reviewability of decisions disallowing an appeal in various domestic legal systems,³⁶¹ and concluded that “nothing in the nature of a general principle of law exists or is universally adopted entailing the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal”.³⁶²

215. The International Tribunal for the Former Yugoslavia has relied more often on general principles of law derived from national legal systems. In the *Furundžija* case, for example, a Trial Chamber, after noting that “[n]o definition of rape can be found in international law”,³⁶³ sought to find indications as regards a possible definition in treaties and in the case law of other international criminal tribunals.³⁶⁴ After this, it stated that:

no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (*Bestimmtheitsgrundsatz*, also referred to by the maxim “*nullum crimen sine lege stricta*”), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.

... Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these

³⁵⁶ *Ibid.*, pp. 299–300, para. 402. The tribunal analysed the practice of the United States, the United Kingdom, and “certain continental European legal systems”.

³⁵⁷ *Ibid.*, p. 300, paras. 403–404.

³⁵⁸ *Situation in the Democratic Republic of the Congo*, Judgment (footnote 239 above), para. 3.

³⁵⁹ *Ibid.*, para. 22.

³⁶⁰ *Ibid.*, para. 24.

³⁶¹ *Ibid.*, paras. 26–31.

³⁶² *Ibid.*, para. 32.

³⁶³ *Prosecutor v. Furundžija* (footnote 240 above), para. 175.

³⁶⁴ *Ibid.*, paras. 175–176.

legal systems so as to pinpoint the basic notions they share; (ii) since “international trials exhibit a number of features that differentiate them from national criminal proceedings”, account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.³⁶⁵

216. After assessing the national legal systems of various States, the Trial Chamber was able to establish certain elements of the definition of rape.³⁶⁶

217. In the *Kunarac* case, another Trial Chamber relied on general principles of law to widen the definition of rape set out in the *Furundžija* case, which it found to be “appropriate to the circumstances of that case”, but “more narrowly stated than is required by international law”.³⁶⁷ It stated as follows:

the identification of the relevant international law on the nature of the circumstances in which the defined acts of sexual penetration will constitute rape is assisted, in the absence of customary or conventional international law on the subject, by reference to the general principles of law common to the major national legal systems of the world. The value of these sources is that they may disclose “general concepts and legal institutions” which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject. In considering these national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles, or in the words of the *Furundžija* judgement, “common denominators”, in those legal systems which embody the *principles* which must be adopted in the international context.³⁶⁸

218. The Chamber then went on to analyse the national legal systems of several States,³⁶⁹ and concluded, *inter alia*, that “[t]he basic principle which is truly common to these legal systems is that serious violations of sexual *autonomy* are to be penalised”.³⁷⁰

219. In the *Čelebići* case, the Appeals Chamber of the Tribunal upheld the reasoning of a Trial Chamber with respect to the principle of legality. The Trial Chamber had found that:

It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to “general principles of law” recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the [International Covenant on Civil and Political Rights] should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts

³⁶⁵ *Ibid.*, paras. 177–180.

³⁶⁶ *Ibid.*, para. 181. But see also paras. 182–186 (discussed in the next section below).

³⁶⁷ *Prosecutor v. Kunarac et al.* (footnote 240 above), para. 438.

³⁶⁸ *Ibid.*, para. 439.

³⁶⁹ *Ibid.*, paras. 443–456.

³⁷⁰ *Ibid.*, para. 457.

alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.³⁷¹

220. The Inter-American Court of Human Rights, in the *Aloeboetoe et al.* case, was called upon to determine who were the successors of a person for purposes of reparation. The Court made express reference to Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, and determined who were such successors relying on the “most legal systems”.³⁷²

221. In investor-State dispute settlement, references to general principles of law derived from national legal systems can be found, for example, in *Inceysa v. El Salvador*, where the arbitral tribunal maintained that “in general, [general principles of law] have been understood as general rules on which there is international consensus to consider them as universal standards and rules of conduct that must always be applied and which, in the opinion of important commentators, are rules of law on which the legal systems of the States are based”.³⁷³ In *El Paso v. Argentina*, the tribunal noted that general principles of law are “rules largely applied *in foro domestico*, in private or public, substantive or procedural matters, provided that, after adaptation, they are suitable for application on the level of public international law”.³⁷⁴ It then considered:

[t]hat there is a general principle on the preclusion of wrongfulness in certain situations can be hardly doubted, as is confirmed by the [International Institute for the Unification of Private Law] Principles on International Commercial Contracts, a sort of international restatement of the law of contracts reflecting rules and principles applied by the majority of national legal systems.³⁷⁵

222. In *Sea-Land Service v. Iran*, the Iran-United States Claims Tribunal found that unjust enrichment “is codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals”.³⁷⁶ In another case, the Tribunal found that “[the] concept of changed circumstances ... has in its basic form been incorporated into so many legal systems that it may be regarded as a general principle of law; it has also found widely recognized expression in article 62 of the Vienna Convention on the Law of Treaties”.³⁷⁷

223. The examples mentioned above clearly show that general principles of law may be derived from national legal systems. While a precise number of national legal systems in which a principle must exist is not indicated, terms such as “great majority of the municipal legal systems of the world”, “majority of national legal systems”,

³⁷¹ *Prosecutor v. Mucić et al.* (footnote 240 above), paras. 179–180. See also *Prosecutor v. Kupreškić et al.* (footnote 240 above), paras. 677, 680–695; *Prosecutor v. Drazen Erdemović*, Judgment of 29 November 1996 (IT-96-22-T), paras. 19 and 31.

³⁷² *Aloeboetoe et al. v. Suriname* (footnote 256 above), paras. 61–62.

³⁷³ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, para. 227.

³⁷⁴ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011, para. 622.

³⁷⁵ *Ibid.*, para. 623. See also *Total v. Argentina* (footnote 246 above), paras. 128–130; *Toto Costruzioni v. Lebanon* (footnote 246 above), para. 166.

³⁷⁶ *Sea-Land Service v. Iran* (footnote 247 above), p. 168.

³⁷⁷ *Questech, Inc. v. Iran*, Award No. 191-59-1 (20 September 1985), IUSCTR, vol. 9, p. 107, at p. 122. See also *Rockwell International Systems, Inc. v. Iran*, Award No. 438-430-1 (5 September 1989), IUSCTR, vol. 23, p. 171, para. 92; *Isaiah v. Bank Mellat*, Award No. 35-219-2 (30 March 1983), IUSCTR, vol. 2, p. 237.

“majority of legislations”, and “principal legal systems of the world” have been employed.

224. In some cases, a comparative survey of national legal systems was expressly conducted for purposes of identifying the general principle of law in question. In this regard, some authors have suggested that, when such a survey is not expressly conducted, it may be the case that the identification of principles of law common to national legal systems by courts and tribunals is done “implicitly”, “spontaneously” or “intuitively”.³⁷⁸

225. The existence of a principle in a majority of national legal systems alone, however, is not sufficient for that principle to become a general principle of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. As mentioned in the previous section, it is generally accepted in the literature that such a principle must additionally be “transposed” to the international legal system.³⁷⁹ In the oft-cited words of Judge McNair:

International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38 (1) (c) of the Statute of the Court bears witness that this process is still active ... The 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.³⁸⁰

226. A similar view was expressed by Judge Simma. When considering whether the *exceptio non adimpleti contractus* may constitute a general principle of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, he referred to “the transferability of such a concept developed *in foro domestico* to the international legal plane, respectively the amendments that it will have to undergo in order for such a general principle to play a constructive role also at the international level”.³⁸¹ It has also been suggested that general principles of law are “a body of international law the content of which has been influenced by domestic law but which is still its own creation”,³⁸² and that:

Should the [World] Court find that there is convergence in the relevant aspects of municipal laws, an additional test should concern the compatibility of the

³⁷⁸ With respect to the International Court of Justice in particular, this has been justified by reference to Article 9 of its Statute, which requires the composition of the Court to represent “the main forms of civilization” and “the principal legal systems of the world”. See, for example, Pellet and Müller, “Article 38” (footnote 13 above), p. 930; Bogdan, “General principles of law and the problem of lacunae in the law of nations” (footnote 13 above), p. 50; Waldock, “General course on public international law” (footnote 113 above), p. 67; Virally, “The sources of international law” (footnote 317 above), p. 146. On the question of using a comparative law method for the identification of general principles of law, see: J. Ellis, “General principles and comparative law”, *European Journal of International Law*, vol. 22 (2011), pp. 949–971.

³⁷⁹ See para. 169 above.

³⁸⁰ *International status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128, Separate Opinion of Judge McNair, at p. 148. See also para. 169 above.

³⁸¹ *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, (footnote 223 above), Separate Opinion of Judge Simma, para. 13.

³⁸² J. Crawford, *Brownlie’s Principles of Public International Law*, 8th ed. (Oxford, Oxford University Press, 2012), p. 35. He also suggests that an international tribunal “chooses, edits, and adapts elements from other developed systems” (*ibid.*).

principle emerging from municipal laws with the framework of the principles and rules of international law within which the principle would have to be applied.³⁸³

227. Some of the practice referred to in the preceding paragraphs confirms, with important nuances, that a further process of transposition or a test of applicability at the international law level is required for a principle found in national legal systems to become a general principle of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.³⁸⁴ In the *Certain Property* case, for example, Liechtenstein advanced that a principle common to national legal systems must be “transposable” to international law, and explained, *inter alia*, that there is “no incompatibility between the unjust enrichment principle and public international law” and that it “is received in public international law”.³⁸⁵ In the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data*, Australia considered that principles that exist within national legal systems have to be “appropriately adapted to the international law sphere to avoid ‘distortion’”.³⁸⁶ Similarly, the German Federal Constitutional Court noted that principles that exist within national legal systems must be “transposable to inter-State relations”.³⁸⁷

228. The International Court of Justice, in the *Barcelona Traction* case, determined that it cannot “modify” nor “deform” principles that exist within national legal systems.³⁸⁸ Two of the arbitral tribunals mentioned above considered, in contrast, that the principle of estoppel is not to be understood in exactly the same sense as it is in domestic legal systems.³⁸⁹ Furthermore, the International Tribunal for the Former Yugoslavia noted that “a mechanical importation or transposition” of principles that exist within national legal systems must be avoided.³⁹⁰ Finally, the Iran-United States Claims Tribunal considered that a principle that exists within national legal systems must be “widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international Tribunals”.³⁹¹

229. The key question that needs to be addressed is how to determine that a principle that is common to national legal systems is applicable at the international level. This is an issue that requires careful reflection and will be analysed in a future report addressing the identification of general principles of law.

230. In the light of the above, it can be concluded that one of the categories of general principles of law within the scope of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice is general principles of law derived from the national legal systems of States, to the extent that principles common to a majority of those legal systems can be identified.

³⁸³ Gaja, “General principles in the jurisprudence of the ICJ” (footnote 186 above), p. 40.

³⁸⁴ The idea that a principle common to national legal systems cannot be applied in international law without further consideration had in fact already been expressed even before the Statute of the Permanent Court of Justice was adopted. See in particular the *North Atlantic Coast Fisheries* case (para. 86 above), where the arbitral tribunal considered that the notion of ‘servitude’ would not suit inter-State relations.

³⁸⁵ *Certain Property* (footnote 225 above), Memorial of Liechtenstein, paras. 6.20–6.21.

³⁸⁶ See para. 197 above.

³⁸⁷ See para. 200 above.

³⁸⁸ See para. 205 above.

³⁸⁹ See para. 210 above.

³⁹⁰ See para. 215 above.

³⁹¹ See para. 222 above.

B. General principles of law formed within the international legal system³⁹²

231. The second category of general principles of law relates to those principles that do not find their origins in the national legal systems of States, but rather in the international legal system itself. Like the category addressed in the previous section, the existence of general principles of law formed within the international legal system also find support in practice and in the literature.

232. This category of general principles of law has been justified on various bases. As mentioned above, it has been suggested in the literature that the ordinary meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice does not exclude the existence of general principles of law that arise from the international legal system.³⁹³ Furthermore, assuming that the *raison d'être* and purpose of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice is to fill gaps in conventional and customary international law, one author has argued that “[t]he framers of that paragraph must be deemed to have by implication assented to the use of general principles of international law for that same purpose, for it can hardly be believed that they would have permitted the filling of gaps ... with principles of national law, but not with those of international law”.³⁹⁴

233. An important question that is sometimes discussed in the literature is the relationship between general principles of law formed within the international legal system and customary international law. It has been suggested, for instance, that the general principles of law falling under this category are formed through a process of “express articulation of principles in the first instance, *ab initio* or progressively being ‘accepted and recognized’ as binding ... by the ‘international community of States as a whole’”.³⁹⁵ According to this view, this process does not immediately lead to the emergence of rules of customary international law but of general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.³⁹⁶ Other authors, in contrast, consider that general principles of law formed

³⁹² This category is also sometimes referred to as “general principles of international law”, “general principles of law derived from the specific nature of the international community” or “general principles specific to international law”.

³⁹³ Lammers, “General principles of law recognized by civilized nations” (footnote 13 above), p. 67.

³⁹⁴ *Ibid.* Siorat, who saw Article 38, paragraph 1 (c), of the Statute of the International Court of Justice as relating to the “power of systematization” of the judge through analogy, considered that “[l]’admission expresse de l’analogie avec des règles du droit interne entraîne *a fortiori* la reconnaissance tacite de l’analogie avec des règles du droit international ... Qui peut le plus peut le moins: permettre formellement à la Cour de fonder un raisonnement analogique sur des règles d’un autre système juridique que celui dont elle fait partie, c’est aussi l’autoriser implicitement à le fonder sur les règles du droit international, conventionnel et coutumier, qu’elle a pour tâche première d’appliquer” [expressly allowing recourse to analogy with the rules of national law entails *a fortiori* a tacit recognition of analogy with the rules of international law ... Those with the power to do more have the power to do less: officially allowing the Court to reason analogically on the basis of the rules of a legal system other than the one to which it belongs also, by implication, authorizes it to base its reasoning on the rules of international, conventional and customary law, the application of which is its primary task] (L. Siorat, *Le problème des lacunes en droit international* (Paris, Librairie générale de droit et de jurisprudence, 1958) p. 286).

³⁹⁵ See B. Simma and P. Alston, “The sources of human rights law: custom, jus cogens, and general principles”, *Australian Year Book of International Law*, vol. 12 (1989), pp. 82–108, at p. 104, citing a report of the American branch of the International Law Association entitled “The role of State practice in the formation of customary and jus cogens norms of international law” (19 January 1989).

³⁹⁶ *Ibid.*

within the international legal system are not distinguishable from rules of conventional or customary international law.³⁹⁷

234. As a category of general principles of law that can fall within Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, general principles of law formed within the international legal system are also subject to the requirement of recognition. As mentioned above, it has been suggested that such recognition could take place by deduction or abstraction from existing rules of conventional and customary international law, or through acts of international organizations, such as resolutions of the General Assembly, showing the consensus of States on specific matters.³⁹⁸ In the context of human rights law, two authors have described the process of determining the existence of general principles arising from principles formed within the international legal system as “a decidedly *consensual* process, giving ‘a sufficient expression in legal form’ to the underlying humanitarian considerations”.³⁹⁹

235. The existence of a category of general principles of law that find their origin in the international legal system is corroborated by the practice of States and the decisions of international courts and tribunals. A few traits characterize the examples that are given below. First, reference is made to “principles” (sometimes using language close to Article 38, paragraph 1 (c)) that form part of international law but which do not appear to be rules of conventional or customary international law. Second, in general, no reference is made to principles common to national legal systems to identify such principles. Third, the existence of such principles appears to have been determined on various bases, such as by having recourse to international materials and by identifying principles underlying other rules of international law. In particular, the recognition by States of those principles seems to have been evidenced, *inter alia*, in the *travaux préparatoires* of treaties, in treaty provisions, as well as in the recognition expressed in General Assembly resolutions, and in declarations.

236. In the *Corfu Channel* case, for example, the International Court of Justice considered that:

[t]he obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the 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.⁴⁰⁰

³⁹⁷ Yee, “Article 38 of the ICJ Statute and applicable law ...” (footnote 280 above), p. 490; Raimondo, *General Principles of Law ...* (footnote 13 above), p. 42; Degan, *Sources of International Law* (footnote 138 above), p. 83; Barberis, “Los Principios Generales de Derecho como Fuente del Derecho Internacional” (footnote 13 above), pp. 24–26; Bogdan, “General principles of law and the problem of lacunae in the law of nations” (footnote 13 above), p. 42; Blondel, “Les principes généraux de droit devant la Cour permanente de Justice internationale et la Cour internationale de Justice” (footnote 13 above), p. 204. *Cf.* Lammers, “General principles of law recognized by civilized nations” (footnote 13 above), pp. 67–69.

³⁹⁸ See paras. 171–173 above.

³⁹⁹ Simma and Alston, “The sources of human rights law: custom, jus cogens, and general principles” (footnote 395 above), p. 107.

⁴⁰⁰ *Corfu Channel* (footnote 214 above), p. 22. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (footnote 223 above), p. 112, para. 215; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 257, para. 79.

237. In the advisory opinion on *Reservations to the Convention on Genocide*, the International Court of Justice stated as follows:

The origins of the [Genocide] Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.⁴⁰¹

238. The statement by the Court that the principles underlying the Genocide Convention are “principles which are recognized by civilized nations” binding on States, even without any conventional obligation, seems to point directly to Article 38, paragraph 1 (c), of the Statute.⁴⁰² There is no reference to principles common to national legal systems. It appears that the Court “found the basis for the existence of a principle in the *recognition* by States, noting that such recognition was expressed in resolution 96 (I) of the General Assembly, which marked ‘the intention of the United Nations to condemn and punish genocide as a ‘crime under international law’”.⁴⁰³

239. In the *Right of Passage* case, Portugal argued that its claimed right of passage was based, in addition to a general principle of law derived from national legal systems, on “general principles inherent to the international legal order”. It explained that these are “des principes généraux qui sont propres à l’ordre juridique international et dont il serait donc vain de chercher la manifestation dans les ordres juridiques internes” [general principles that are inherent in the international legal system and, in consequence, are not to be found in national legal systems].⁴⁰⁴ As examples of such principles, Portugal referred to a right of States to existence, an obligation to respect other States’ sovereignty and an obligation not to allow one’s territory be used for acts contrary to the rights of other States.⁴⁰⁵

240. In the *South West Africa* case, Ethiopia and Liberia claimed that the policy of apartheid was “repugnant to the generally accepted political and moral standards of the international community, as well as violative of norms, as accepted by international custom and as reflected in the general principles of law universally recognized by civilized nations”.⁴⁰⁶ They referred to a variety of materials, including national and international jurisprudence, conventions, resolutions of the General Assembly and resolutions of the Security Council in support of their submission that “[t]he ‘international custom’ outlawing discrimination and separation ... together with the wide introduction of such a norm into ‘the general principles of law

⁴⁰¹ *Reservations to the Convention on Genocide* (footnote 215 above), p. 23.

⁴⁰² W. Schabas, “Genocide Convention, Reservations (Advisory Opinion)”, *Max Planck Encyclopedia of Public International Law* (2010), para. 10 (“the language used clearly alludes to Art. 38 (1) (c) rather than Art. 38 (1) (b) ICJ Statute, and therefore refers to general principles of law”). Cf. Wolfrum, “General international law (principles, rules, and standards)” (footnote 199 above), para. 15.

⁴⁰³ Gaja, “General principles in the jurisprudence of the ICJ” (footnote 186 above), p. 41.

⁴⁰⁴ *Right of Passage* (footnote 221 above), Reply of Portugal, para. 335.

⁴⁰⁵ *Ibid.*, para. 336. At the same time, Portugal considered that since India did not deny the existence of those principles in general, it was unnecessary to determine whether they fell under paragraph 1 (b) or 1 (c) of Article 38 of the Statute of the International Court of Justice (*ibid.*). See also the Preliminary Objections of India, paras. 190–196; Counter-Memorial of India, paras. 295–297; Rejoinder of India, paras. 570–577.

⁴⁰⁶ *South West Africa* (footnote 221 above), Reply of Ethiopia and Liberia, p. 271.

recognized by civilized nations,' warrants a determination that the policy of *apartheid* ... is a violation of international law".⁴⁰⁷

241. In the same case, Judge Tanaka considered that the recognition of the principle of equality before the law was not limited to its existence *in foro domestico*, but could be realized at the international level:

The manifestation of the recognition of this principle does not need to be limited to the act of legislation as indicated above; it may include the attitude of delegations of member States in cases of participation in resolutions, declarations, etc., against racial discrimination adopted by the organs of the League of Nations, the United Nations and other organizations which ... constitute an important element in the generation of customary international law.⁴⁰⁸

242. In the *Frontier Dispute (Burkina Faso/Mali)* case, the Court referred to the principle of *uti possidetis* as a "general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs".⁴⁰⁹ The Court further noted that "[t]he fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope".⁴¹⁰ According to the Court, resolution 16 (1) of the Organization of African Union (1964) "deliberately defined and stressed the principle of *uti possidetis juris* contained only in an implicit sense in the Charter of [the] organization".⁴¹¹

243. The Court has applied the principle of *uti possidetis* in later cases,⁴¹² but it has not clarified its exact source. Some States seem to consider the principle of *uti possidetis* to be a general principle of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. In the *Land, Island and Maritime Frontier Dispute*, for example, El Salvador argued that the principle is a rule of customary international law as well as general principle of law.⁴¹³ Similarly, the Constitutional Court of Slovenia considered that the *uti possidetis* principle, as developed during the gaining of independence of American and African States, is a "generally recognized principle of international law and is, as such, also binding on Slovenia".⁴¹⁴ The Arbitration Commission of the International Conference on the Former Yugoslavia, referring, *inter alia*, to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, considered that "[u]ti possidetis, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle".⁴¹⁵ More recently, the arbitral tribunal in the

⁴⁰⁷ *Ibid.*, p. 519.

⁴⁰⁸ *South West Africa* (footnote 221 above), Dissenting Opinion of Judge Tanaka, p. 300.

⁴⁰⁹ *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, para. 20.

⁴¹⁰ *Ibid.*, para. 21.

⁴¹¹ *Ibid.*, at pp. 565–566, para. 22.

⁴¹² See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *Judgment, I.C.J. Reports 2007*, p. 659, at p. 706, para. 151; *Frontier Dispute (Benin/Niger)*, *Judgment, I.C.J. Reports 2005*, p. 90, at p. 108, para. 23; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening, I.C.J. Reports 1992)*, p. 350, at pp. 386–387, paras. 40–42.

⁴¹³ *Land, Island and Maritime Frontier Dispute* (see previous footnote), Memorial of El Salvador, para. 3.4.

⁴¹⁴ *Arbitration between the Croatia and Slovenia* (footnote 237 above), para. 260 and footnote 396.

⁴¹⁵ Conference of Yugoslavia Arbitration Commission, Opinion No. 3 (11 January 1992), *International Legal Materials*, vol. 31 (1992), pp. 1494–1526, at p. 1500.

territorial and maritime dispute between Croatia and Slovenia referred to *uti possidetis* as a “well-established principle of international law”.⁴¹⁶

244. In the *Legality of the Threat or Use of Nuclear Weapons* case, Nauru considered that:

[t]he Martens clause seems to require the application of general principles of law. It speaks of the laws of humanity and the dictates of public conscience. General principles of law recognised by civilised nations would therefore seem to embody the principles of humanity and the public conscience. Inhuman weapons and weapons which offend the public conscience are therefore prohibited.⁴¹⁷

In its argument, Nauru supported the existence of the invoked general principles of law (the principles of humanity and the public conscience) not by the existence of principles common to a majority of national legal systems, but by their recognition by States through the Martens Clause. Sweden similarly referred to “general, fundamental legal principles, recognized by civilized nations”, including those “expressed ... in the Declaration made by the 1972 [United Nations] Conference on the Human Environment” and those stipulated in the Hague Conventions.⁴¹⁸

245. In the *Furundžija* case, the Trial Chamber of the International Tribunal for the Former Yugoslavia, after noting that no clear answer as regards the definition of rape could be found in conventional and customary international law, nor in a comparative analysis of national legal systems due to lack of uniformity, decided that it had to “establish whether an appropriate solution can be reached by resorting to the general principles of international criminal law or, if such principles are of no avail, to the general principles of international law”.⁴¹⁹ In this regard, the Chamber noted:

The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.⁴²⁰

246. In this case, the Tribunal seems to have considered that the recognition by States of the general principle of respect for human dignity was realized by virtue of the fact that this principle is the “basic underpinning” or “*raison d'être*” of international humanitarian law and human rights law.

247. In the *Kupreškić* case, another Trial Chamber of the International Tribunal for the Former Yugoslavia considered that, since it could not find any “general principle of law common to all major legal systems of the world”, it had to “endeavour to look

⁴¹⁶ *Arbitration between Croatia and Slovenia* (footnote 237 above), para. 256.

⁴¹⁷ *Legality of the Threat or Use of Nuclear Weapons* (footnote 400 above), Response to Submissions of Other States by Nauru, p. 13.

⁴¹⁸ *Ibid.*, Note Verbale dated 20 June 1995 from the Embassy of Sweden, together with Written Statement of the Government of Sweden, pp. 4–5.

⁴¹⁹ *Prosecutor v. Furundžija* (footnote 240 above), para. 182.

⁴²⁰ *Ibid.*, para. 183.

for a general principle of law consonant with the fundamental features and the basic requirements of international criminal justice”.⁴²¹

248. In the Nürnberg trials, the Tribunal had recourse to certain principles of criminal law to render its decisions.⁴²² Subsequently, the General Assembly affirmed in resolution 95 (I) “the principles of international law recognized by the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal”.⁴²³

249. Moreover, as mentioned in Part Three above, the Nürnberg principles were reaffirmed as “general principles of law recognized by the community of nations” and “general principles of law recognised by civilised nations” in the International Covenant on Civil and Political Rights and the European Convention on Human Rights respectively.⁴²⁴

250. In some cases, general principles of law that are formed through an interaction between the international legal system and national legal systems have been invoked. For instance, in the *EC-Hormones* case, the European Union argued that:

In case the Appellate Body does not determine that such a customary rule [on the precautionary principle] has already been firmly established, it is submitted that, at any rate, the precautionary principle is a general principle of law, recognized both in domestic and international law. General principles of law express principles articulated in domestic as well as international law not necessarily fulfilling the tests of practice and *opinio juris*, but expressing common values inherent in human life and society and being now generally accepted by all States and the international community. It is explicitly stated in Article 130r(2) of the EC Treaty and recognized by the international community, e.g., in the famous Rio Declaration as well as in numerous international conventions and other instruments, and in national jurisdictions.⁴²⁵

251. Furthermore, in its oral submissions, the European Union was of the view that:

the precautionary principle is in any case a *general principle* of law, in the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice. These are principles which often emerge as an interaction between international law, national law and the dictates of reason, common sense or moral considerations. A series of international and national instruments as well as pronouncements by courts and expert bodies, attest to the status of the precautionary principle as a general principle of law.⁴²⁶

252. On the other hand, the United States considered that the precautionary principle represents an “approach” rather than a “principle”,⁴²⁷ and Canada was of the view that “the ‘precautionary approach’ or ‘concept’ is an *emerging* principle of law which may in the future crystallize into one of the ‘general principles of law recognized by

⁴²¹ *Prosecutor v. Kupreškić et al.* (footnote 240 above), para. 738.

⁴²² For instance, when determining that the prosecution of international crimes was not in conflict with the principle of legality, the Tribunal referred to general principles of law. In particular, it stated that “[t]he law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts”. See International Military Tribunal (Nürnberg), Judgment of 1 October 1946, *American Journal of International Law*, vol. 41 (1947), pp. 172–333, at p. 219.

⁴²³ General Assembly resolution 95 (I) of 11 December 1946, preamble.

⁴²⁴ See para. 121 above.

⁴²⁵ *EC-Measures concerning meat and meat products (Hormones)* (AB-1997-4), Appeal of the European Communities, 6 October 1997, para. 91.

⁴²⁶ *Ibid.*, Oral Submissions of the European Communities, 4 November 1997, para. 18.

⁴²⁷ WTO Appellate Body Report, *EC-Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para. 122.

civilized nations' within the meaning of Article 38(1)(c) of the [Statute of the International Court of Justice]".⁴²⁸ The Appellate Body did not make a decision on these questions.

253. In the view of the Special Rapporteur, the practice set out in the preceding paragraphs supports the position that general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice comprise not only general principles of law derived from national legal systems, but also general principles of law formed within the international legal system. The precise forms which the recognition of this category of general principles of law may take will be further addressed in a future report by the Special Rapporteur.

"Draft conclusion 3: Categories of general principles of law

General principles of law comprise those:

- (a) derived from national legal systems;
- (b) formed within the international legal system."

III. Terminology

254. As pointed out in the section above on methodology, one of the difficulties in the present topic is identifying the relevant materials for its study. This is so because both in practice and in the literature terms such as "principle", "general principle", "general principle of law", "general principle of international law" and "principle of international law" are often employed indistinctively and without clarification regarding which source of international law such principles belong to. This is a problem of terminology with which the Special Rapporteur has had to deal when preparing the present report, and which is likely to pose challenges throughout the work of the Commission on the present topic.

255. In the light of this, the Special Rapporteur considers it useful, for purposes of clarity, to propose the terminology that the Commission should employ in undertaking its work on general principles of law.

256. When referring to general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, the term "general principles of law" is the most appropriate one, so as to follow closely the wording of that provision.

257. With respect to the different categories of general principles of law capable of falling within Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, the terms "general principles of law derived from national legal systems" and "general principles of law formed within the international legal system" have been employed throughout the present report.

258. As regards the term "civilized nations", the Special Rapporteur has explained that it should be avoided in the light of the fundamental principle of sovereign equality of States, the attitude of States and international courts and tribunals towards the term "civilized nations" nowadays and the general agreement in the literature that the term is inappropriate. Thus, the source of international law reflected in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice should be read as "the general principles of law recognized by States".

⁴²⁸ *Ibid.*

Part Five: Future programme of work

259. The Special Rapporteur proposes the following programme for the work of the Commission in the present topic.

260. In the second report, to be submitted in 2020, the Special Rapporteur will commence the debate on the functions of general principles of law and their relationship with other sources of international law.

261. The third report, to be submitted in 2021, will likely be dedicated to the identification of general principles of law, including the question of the requirement of recognition. That report may also address the possibility of general principles of law with a regional or bilateral scope of application.

Annex

Proposed draft conclusions

Draft conclusion 1

Scope

The present draft conclusions concern general principles of law as a source of international law.

Draft conclusion 2

Requirement of recognition

For a general principle of law to exist, it must be generally recognized by States.

Draft conclusion 3

Categories of general principles of law

General principles of law comprise those:

- (a) derived from national legal systems;
 - (b) formed within the international legal system.
-