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Second report on general principles of law

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Contents

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Introduction

1. During its seventieth session, the Commission decided to include the topic "General principles of law" in its current programme of work.[1]

2. At its seventy-first session, in 2019, the Commission held a general debate[2] on the basis of the Special Rapporteur's first report,[3] which was introductory in nature. At the end of that debate, the Special Rapporteur concluded, *inter alia*, that:

(a) there was consensus among Commission members about the scope and form of the final outcome of the topic. The topic is to cover the legal nature of general principles of law as a source of international law; the origins and corresponding categories of general principles of law; the functions of general principles of law and their relationship with other sources of international law; and the identification of general principles of law. As regards the final outcome, it was agreed that it should take the form of conclusions accompanied by commentaries;

(b) there was general agreement that the starting point of the work of the Commission is Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, analysed in the light of the practice of States and the jurisprudence of international courts and tribunals;

(c) there was widespread agreement that "recognition" is the essential condition for the existence of a general principle of law;

(d) members of the Commission agreed that the term "civilized nations" is anachronistic and should no longer be employed. In today's world, all nations must be considered to be civilized;

(e) Commission members unanimously supported the category of general principles of law derived from national legal systems and agreed with the general approach that, to identify such principles, a two-step analysis is required;

(f) many members of the Commission supported the category of general principles of law formed within the international legal system. At the same time, various concerns were raised as regards, among other questions, how such principles are to be identified and how they relate to customary international law.[4]

3. Similar views were expressed by States in the Sixth Committee. Several delegations agreed with the proposed scope of the topic. Some delegations also agreed that the starting point of the work of the Commission should be Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, but that the term "civilized nations" was anachronistic and should no longer be employed.[5] Delegations also generally agreed with the description of the first category of general principles of law and its relevance to the topic. Most States were supportive of the second category of general principles of law, but some doubts were expressed as to whether that category fell within the scope of the topic, whether there was enough State practice to reach meaningful conclusions, or whether such principles fell under a different source of international law.[6] Delegations also stressed that the Commission should pay attention to the distinction between general principles of law and customary international law.[7]

[1] A/72/10, para. 267.
[2] A/CN.4/SR.3488-3494.
[3] A/CN.4/732.
[4] A/CN.4/SR.3494.
[5] A/CN.4/734, para. 33.
[6] *Ibid*., para. 34.
[7] *Ibid*.

4. At its seventy-first session, the Commission requested States to provide information on their practice relating to general principles of law.[8] As of the writing of the present report, written contributions have been received from four States, for which the Special Rapporteur is very grateful. Further contributions would be welcome at any time.

5. The present report deals with the identification of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. Part One addresses some general issues concerning identification. It recalls the preliminary conclusions reached in the 2019 debate with respect to identification and explains briefly the overall approach of the Special Rapporteur in the present report.

6. Part Two addresses the identification of general principles of law derived from national legal systems. Chapter I briefly sets out the basic approach to this issue, namely that, to identify a general principle of law derived from national legal systems, a two-step analysis is required. Chapters II and III deal with each of the steps of this analysis: the determination of the existence of a principle common to the principal legal systems of the world, on the one hand, and the ascertainment that such principle is transposed to the international legal system, on the other. Finally, chapter IV addresses the distinction between the methodology for the identification of general principles of law derived from national legal systems and the methodology for the identification of customary international law.

7. Part Three of the report concerns the identification of general principles of law formed within the international legal system. Chapter I recalls the main issues that were raised with respect to this category of general principles of law during the 2019 debate within the Commission and the Sixth Committee, and explains the general approach of the Special Rapporteur in this respect. Chapter II addresses the methodology to determine the existence of general principles of law formed within the international legal system. Chapter III deals with the distinction between the latter methodology and the methodology for the identification of customary international law.

8. Part Four addresses the subsidiary means for the identification of general principles of law. Finally, Part Five briefly sets out a future programme of work.

Part One: General

9. Before turning to the specific aspects of the issue now under consideration, five general observations are warranted.

10. First, since the purpose of the present topic is to provide practical guidance to all those who may be called upon to apply general principles of law, the Special Rapporteur considers that the Commission does not need to deal with the complex processes through which general principles of law emerge, change or cease to exist in a systematic manner. As a matter of course, the Commission will touch upon such processes indirectly when clarifying the methodology to identify general principles of law, since these issues are clearly interconnected. The focus of the work of the Commission, however, should remain on clarifying, in a practical manner, how to

[8] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 30.

demonstrate the existence of a general principle of law, and its content, at a specific point in time.[9]

11. Second, as mentioned above, there was general agreement both within the Commission and the Sixth Committee that recognition is the essential condition for the existence of a general principle of law.[10] 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, therefore, one must carefully examine all the available evidence showing that a general principle of law has been "recognized by civilized nations". This is an objective criterion which Parts Two and Three below seek to clarify, based on existing practice and case law, together with the relevant literature.

12. The third general observation concerns the term "civilized nations" employed in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, which, as mentioned in the first report, refers to whose recognition is required for a general principle of law to exist.[11] Various useful proposals were put forward by Commission members during the 2019 debate to find an alternative term that is up to date.[12]

13. In the view of the Special Rapporteur, the term "community of nations" is the most appropriate one to employ. This is the formulation used in article 15, paragraph 2, of the International Covenant on Civil and Political Rights ("general principles of law recognized by the *community of nations*" [emphasis added]), a treaty to which 173 States are parties and which is therefore widely accepted.[13] As article 15, paragraph 2, clearly refers to the source of international law listed in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, it can be considered as reflecting today's interpretation of the term "civilized nations". Accordingly, throughout the present report, "community of nations" is employed instead of "civilized nations" when referring to whose recognition is required for a general principle of law to exist.

14. Fourth, it may be recalled that the first report distinguished between two different categories of general principles of law falling under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice that the Commission should address in its work: general principles of law derived from national legal systems and general principles of law formed within the international legal system. Having carefully considered all the views expressed within the Commission and the Sixth Committee, the Special Rapporteur considers that the distinction between these two categories should be maintained.

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[9] This approach was also adopted by the Commission in the topic "Identification of customary international law" (see para. (5) of the commentary to conclusion 1 of the conclusions on the topic, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), at p. 124).

[10] A/CN.4/732, para. 164.

[11] *Ibid*., para. 176.

[12] Terms such as "international community", "international community of States", "international community of States as a whole", "international community as a whole" and "community of nations" were proposed. See statements by Ms. Galvão Teles (A/CN.4/SR.3489, p. 21); Mr. Gómez-Robledo (A/CN.4/SR.3492, p. 10); Mr. Hassouna (A/CN.4/SR.3490, p. 24); Mr. Hmoud (A/CN.4/SR.3489, p. 15); Mr. Nguyen (A/CN.4/SR.3491, p. 14); Mr. Nolte (A/CN.4/SR.3492, p. 18); Mr. Ruda Santolaria (A/CN.4/SR.3492, p. 13); Mr. Šturma (A/CN.4/SR.3493, p. 15). See also Sienho Yee, "We are all 'civilized nations': Arguments for cleaning up Article 38(1)(c) of the Statute of the International Court of Justice", in Yee (ed.), *Towards an International Law of Co-progressiveness, Part II: Membership, Leadership and Responsibility* (Leiden, Brill, 2014), pp. 21–35.

[13] International Covenant on Civil and Political Rights (New York, 16 December 1969), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171. See also the statement by Germany (A/C.6/74/SR.28, para. 105); Peru (available from the PaperSmart portal, at https://papersmart.unmeetings.org/); Sierra Leone (A/C.6/74/SR.31, para. 110); United States (available from the PaperSmart portal).

15. Finally, the Special Rapporteur wishes to reiterate his view that the criteria for determining the existence of a general principle of law must be strict and the criteria must not be used as an easy shortcut to identifying norms of international law. At the same time, those criteria must be flexible enough that the identification of general principles is not regarded as an impossible task. Finding a suitable balance will be key to the success of the Commission's work on the present topic.[14]

Part Two: Identification of general principles of law derived from national legal systems

16. The first report showed that it is well established in practice and in the literature that general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice comprise those derived from national legal systems.[15] As mentioned above, during the debate on the topic in 2019, virtually all members of the Commission agreed with this position. Several States in the Sixth Committee similarly expressed their agreement in this regard. This was, in particular, the case of Australia,[16] Austria,[17] Belarus,[18] Chile,[19] China,[20] Cuba,[21] the Czech Republic,[22] Ecuador,[23] Egypt,[24] El Salvador,[25] Estonia,[26] France,[27] the Islamic Republic of Iran,[28] Italy,[29] Malaysia,[30] the Federated States of Micronesia,[31] the Netherlands,[32] Norway (on behalf of the Nordic countries),[33] Peru,[34] the Philippines,[35] Portugal,[36] the Russian Federation,[37] Sierra Leone,[38] Slovakia,[39] Spain,[40] Sudan,[41] the United Kingdom of Great Britain and Northern Ireland,[42] the United States of America[43] and Viet Nam.[44] The broad support for this category of general principles of law provides, in the view of the Special Rapporteur, a solid basis for the Commission to continue its work.

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[14] A/CN.4/SR.3494, p. 6.
[15] A/CN.4/732, paras. 190–230.
[16] Available from the PaperSmart portal.
[17] A/C.6/74/SR.31, para. 88.
[18] *Ibid*., para. 95.
[19] A/C.6/74/SR.32, paras. 49–51.
[20] A/C.6/74/SR.27, paras. 95–96.
[21] A/C.6/74/SR.31, para. 135.
[22] A/C.6/74/SR.32, para. 104.
[23] A/C.6/74/SR.27, para. 37.
[24] A/C.6/74/SR.32, para. 90.
[25] *Ibid*., para. 111.
[26] *Ibid*., para. 118.
[27] A/C.6/74/SR.31, para. 122.
[28] Available from the PaperSmart portal.
[29] A/C.6/74/SR.32, para. 33.
[30] Available from the PaperSmart portal.
[31] A/C.6/74/SR.32, para. 54.
[32] A/C.6/74/SR.31, para. 153.
[33] *Ibid*., para. 77.
[34] Available from the PaperSmart portal.
[35] A/C.6/74/SR.32, para. 3.
[36] *Ibid*., para. 85.
[37] *Ibid*., para. 78.
[38] A/C.6/74/SR.31, para. 109.
[39] *Ibid*., para. 118.
[40] A/C.6/74/SR.32, para. 39.
[41] *Ibid*., para. 28.
[42] *Ibid*., para. 15.
[43] Available from the PaperSmart portal.
[44] A/C.6/74/SR.32, para. 59.

17. There was also agreement that the basic approach for the identification of general principles of law derived from national legal systems consists of a two-step analysis: first, determining the existence of a principle common to the principal legal systems of the world; second, ascertaining the transposition of that principle to the international legal system.[45] A number of questions have been raised with respect to this methodology, in particular:

(a) the precise manner in which recognition is expressed;

(b) the degree to which a principle must be present in national legal systems;

(c) what is the precise meaning of "community of nations" in this context; and

(d) how to distinguish the methodology for identifying general principles of law from the methodology for the identification of customary international law.

18. These questions have been duly taken into account by the Special Rapporteur and will be addressed below.

I. Basic approach: a two-step analysis

19. The first report noted that the methodology for the identification of general principles of law derived from national legal systems is generally considered to consist of a two-step analysis: first, determining the existence of a principle common to the principal legal systems of the world; second, ascertaining the transposition of that principle to the international legal system.

20. The two-step analysis is a combined operation aimed at demonstrating that the requirement of recognition under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice has been met. It provides an objective basis to determine that a general principle of law derived from national legal systems exists, and what the content of that general principle of law is. The two-step analysis is a stringent test; the existence of a general principle of law cannot and should not be easily assumed.

21. The first report raised the question of what is the precise meaning of "recognition" under Article 38, paragraph 1 (*c*), in the context of this category of general principles of law. It noted that it has been at times suggested that the requirement of recognition is fulfilled when a principle is present in the principal legal systems of the world.[46] The first report also queried, however, what is the role of recognition, if any, in ascertaining whether such principle is transposed to the international legal system.[47]

22. As will be explained in further detail below, recognition in this context refers to the existence in national legal systems of principles that form part of international law subject to certain conditions. The first step of the analysis serves to demonstrate the general recognition of a legal principle by the community of nations, and what the essential content of that principle is. The second step of the analysis is aimed at showing that those principles are also recognized by the community of nations as forming part of international law if they are compatible with the fundamental principles of international law, on the one hand, and if the conditions exist for their adequate application in the international legal system, on the other.

[45] A/CN.4/SR.3494, p. 6.

[46] A/CN.4/732, paras. 167–168.

[47] *Ibid*., para. 170. See also statements by Mr. Murphy (A/CN.4/SR.3490, p. 13) and Sir Michael Wood (*ibid*., p. 7).

II. Determination of the existence of a principle common to the principal legal systems of the world

23. The first step of the analysis for the identification of general principles of law derived from national legal systems is determining the existence of a principle common to the principal legal systems of the world. This methodology is well-established in State practice, international jurisprudence and the literature, and requires, in essence, conducting a comparative analysis of national legal systems in order to show that a principle is common to them and has been thus recognized by the community of nations. It is at this stage of the two-step analysis that the essential content of a general principle of law derived from national legal systems can be determined.

24. In order to shed light on this part of the methodology, the sections below address which national legal systems must be consulted, how to determine that a principle is common to them, and which materials are relevant for purposes of the comparative analysis.

A. "Principal legal systems of the world"

25. A first question to address is which national legal systems must be consulted in order to identify a general principle of law falling under the first category. As will be shown, the decisive criterion to ensure that the requirement of recognition is met is that the comparative analysis must be wide and representative, reflecting what may be called the "principal legal systems of the world".[48]

26. The starting point for the present analysis is Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, which in itself provides some guidance. The provision requires that a general principle of law be recognized by the community of nations (in French, *l'ensemble des nations*), which suggests that, for a general principle of law to exist, it must be generally recognized by the members of the community nations.[49] This approach is supported by the principle of sovereign equality of States, set out in Article 2, paragraph 1, of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[50] and by the fact that, as shown in the first report and acknowledged by members of the Commission, general principles of law form part of general international law.[51] Since, as indicated by the International Court of Justice in the *North Sea Continental Shelf* case, rules of general international law "have equal force for all members of the international community",[52] it follows that such rules must be recognized by those members generally. In the context of the first step of the analysis for the identification of general principles of law derived from national legal systems, this translates into a

[48] See para. 54 below.

[49] See also art. 15, para. 2, of the International Covenant on Civil and Political Rights ("general principles of law recognized by the community of nations"); art. 21, para. 1 (c), of the Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3 ("general principles of law derived … from national laws of legal systems of the world"). In his Separate Opinion in the *North Sea Continental Shelf* case, Judge Ammoun noted that the text of Article 38, paragraph 1 (c), of Statute of the International Court of Justice must be interpreted as "attributing to it a universal scope involving no discrimination between the members of a single community based upon sovereign equality". See *North Sea Continental Shelf*, *Judgment, I.C.J. Reports 1969*, p. 3, Separate Opinion of Judge Fouad Ammoun, p. 101, at p. 135.

[50] General Assembly resolution 2625 (XXV) of 24 October 1970, annex. The resolution affirms, in particular, that "States are juridically equal".

[51] A/CN.4/732, paras. 160–161; A/CN.4/SR.3494, p. 4.

[52] *North Sea Continental Shelf* (see footnote 49 above), p. 39, para. 63.

requirement to cover as many national legal systems as possible to ensure that a principle has effectively been recognized by the community of nations.

27. This approach is confirmed by practice, where one can find various examples of references to the widespread recognition that a principle must have in national legal systems. In the *Barcelona Traction* case, for example, the International Court of Justice referred to "rules generally accepted by municipal legal systems".[53] States and other international courts and tribunals have also noted the requirement that a principle must be recognized in national legal systems generally,[54] or that it must exist

[53] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 38, para. 50. See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 605, paras. 60–62; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 675 para. 104.

[54] See, for example, *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960*, International Court of Justice, *I.C.J. Reports 1960*, p. 192, Counter-Memorial of Nicaragua, para. 56 ("ce qui se passe en général dans le droit interne" [that which generally occurs in national law]); *Questech, Inc. v. Iran*, Case No. 59, Award No. 191-59-1, 20 September 1985, Iran-United States Claims Tribunal, *Iran – United States Claims Tribunal Reports* (IUSCTR), vol. 9, pp. 107 *et seq*., p. 122 ("incorporated into so many legal systems"); *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment*, International Court of Justice, *I.C.J. Reports 1997*, p. 7, Reply of Slovakia, vol. I, para. 6.27 ("commonplace in domestic contracts"); Germany, Constitutional Court, Judgment, 4 September 2004, 2 BvR 1475/07, para. 20. ("recognised legal principles that are shared by domestic legal systems"); *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Case No. 2008-7, Award, 22 July 2009, Permanent Court of Arbitration, *Reports of International Arbitral Awards* (UNRIAA), vol. XXX, pp. 145–416, at p. 299, para. 401 ("principles of review applicable in public international law and national legal systems, insofar as the latter's practices are commonly shared"); *El Paso Energy International Company v. The Argentine Republic*, Case No. ARB/03/15, Award, 31 October 2011, International Centre for Settlement of Investment Disputes, para. 622 ("rules largely applied *in foro domestico*"); Philippines, Supreme Court of the Philippines, *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC*, Decision of 8 March 2016 (G.R. No. 221697; GR Nos. 221698-700), pp. 19, 21 ("basic to legal systems generally"). See also *Isaiah v. Bank Mellat*, Case No. 219, Award No. 35-219-2, 30 March 1983, Iran-United States Claims Tribunal, IUSCTR, vol. 2, pp. 237 *et seq*.; *Rockwell International Systems, Inc. v. Iran*, Case No. 430, Award No. 438-430-1, 5 September 1989, Iran-United States Claims Tribunal, IUSCTR, vol. 23, p. 171, para. 92; *Prosecutor v. Dragoljub Kunarac, Radomir Kunac and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T Judgment, 22 February 2001, International Criminal Tribunal for the Former Yugoslavia, para. 439; Germany, Constitutional Court, Judgment, 8 May 2007, BVerGE 118, 124, para. 63.

in “all” legal systems,[55] the “main” or “major” legal systems,[56] or in “many”[57] or a “majority”[58] of legal systems.

28. The above position does not mean, however, that one must consult every single national legal system of the world in order to identify a general principle of law.[59] This would make the identification of general principles of law extremely burdensome, if not impossible. Rather, a more pragmatic approach appears in practice, where States and

[55] See, for example, the *Queen* case between Brazil, Norway and Sweden (1871) (“recognized by the legislation of all countries”) (in Henri La Fontaine, *Pasicrisie internationale 1794-1900: Histoire documentaire des arbitrages internationaux* (Bern, Stämpfli, 1902), p. 155); *Corfu Channel case, Judgment of April 9th 1949,* International Court of Justice, *I.C.J. Reports 1949*, p. 4, at p. 18 (“admitted in all systems of law”); *Prosecutor* v. *Zejnil Delalić* et al., Case No. IT-96-21-T, Decision on the motion to allow witnesses K, L and M to give their testimony by means of video-link conference, 28 May 1997, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 7–8 (“accepted in the domestic laws of all civilised States”); *Prosecutor* v. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T Judgment, 2 September 1998, International Criminal Tribunal for Rwanda, para. 46 (“recognised in all legal systems throughout the world”); *Prosecutor* v. *Duško Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 225 (“it would be necessary to show that most, if not all, countries adopt the same notion”); *Prosecutor* v. *Zejnil Delalić* et al., Case No. IT-96-21-A, Judgment, 20 February 2001, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 179 (“recognised by all legal systems”).

[56] See, for example, *Prosecutor* v. *Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 178 (“all the major legal systems of the world”); *Prosecutor* v. *Duško Tadić*, Case No. IT-94-1-A, Judgment on allegations of contempt against prior counsel, Milan Vujin, 31 January 2000, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 15 (“common to the major legal systems of the world”); *Prosecutor* v. *Zoran Kupreškić* et al., Case No. IT-95-16-T, Judgment, 14 January 2000, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 677 (“principal penal systems of the world”); *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6, Memorial of Liechtenstein, at p. 144, para. 6.5. (“it is applied in the main systems of municipal law”); Switzerland, Federal Council, “Rapport additionnel du Conseil fédéral au rapport du 5 mars 2010 sur la relation entre droit international et droit interne” (30 March 2011), *Federal Gazette*, p. 3401, at p. 3411; *Prosecutor* v. *Nikola Šainović* et al., Case No. IT-05-87-A, Judgment, 23 January 2014, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 1644 (“major legal systems of the world”).

[57] See, for example, *LaGrand (Germany* v. *United States of America), Judgment,* International Court of Justice *I.C.J. Reports 2001*, p. 466, Memorial of Germany, para. 4.125 (“great number of national legal systems”); *Prosecutor* v. *Radislav Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 141 (“[m]any domestic jurisdictions”); *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, Counter-Memorial of Australia, vol. I, paras. 4.15, 4.18, 4.21 (“many domestic legal systems”).

[58] See, for example, *Fabiani* case (1896) (*Pasicrisie internationale* (footnote 55 above), p. 356) (“majority of legislations”); *Libyan American Oil Company (Liamco)* v. *Libyan Arab Republic Relating to Petroleum Concessions*, Award, 12 April 1977, *International Legal Materials*, vol. 20 (January 1981), pp. 1–87, at p. 37 [72] (“most recognized legal systems”); *Sea-Land Service, Inc.* v. *Iran*, Award No. 135-33-1, 20 June 1984, IUSCTR, vol. 6, p. 168 (“codified or judicially recognised in the great majority of the municipal legal systems of the world”); *Aloeboetoe* et al. v. *Suriname*, Judgment (Reparations and Costs), 10 September 1993, Inter-American Court of Human Rights, Series C, No. 15, para. 62 (“most legal systems”); *El Paso* v. *Argentina* (footnote 54 above), para. 623 (“rules and principles applied by the majority of national legal systems”).

[59] Nor is it, as noted by a Commission member, a matter of mathematical calculation. See the statement by Mr. Wood (A/CN.4/SR.3490, p. 8). Similarly, Judge Tanaka was of the view that “the recognition of a principle by civilized nations … does not mean recognition by *all* civilized nations” (*South West Africa, Second Phase, Judgment*, International Court of Justice, *I.C.J. Reports 1996*, p. 6, Dissenting Opinion of Judge Tanaka, p. 250, at p. 299).

international courts and tribunals have sought to carry out wide and representative comparative analyses, covering different legal families and regions of the world.

29. State practice in this regard can be found, in particular, in the pleadings of States before international courts and tribunals. In the *Alabama Claims* arbitration, for example, the United States, in determining the meaning of the term "due diligence" employed in the Treaty of Washington of 1871, referred to Roman law and the laws of England, "America" and the "Continent of Europe".[60] Similarly, in the *Pious Fund* case, Mexico and the United States relied on Roman law and the laws and jurisprudence of Belgium, France, Germany, Mexico, the Netherlands, Prussia, Spain and the United States in order to determine the content of the principle of *res judicata*.[61]

30. Some contemporary State practice contains more wide-ranging comparative analyses. Thus, in the *Right of Passage* case, in order to demonstrate the existence of a general principle of law that would give it a right to access an enclaved territory, Portugal produced a comparative study of 64 national legal systems, and argued that all legal families were represented therein: "legislations of so-called civil law (Latin or Germanic), 'common law', laws of popular democracies, Islamic law, Scandinavian law, Asian law".[62] In *Certain Phosphate Lands*, Nauru also produced a comparative study on the "extent to which trusts and trust-like institutions are recognized in the various legal systems of the world". The study included common and civil law systems from different regions of the world, including Argentina, Australia, Bangladesh, Belgium, Canada, Chile, China, Colombia, Cyprus, Denmark, Ethiopia, Finland, France, Germany, Ghana, Greece, Hungary, India, Ireland, Italy, Japan, Liechtenstein, Mexico, the Netherlands, New Zealand, Nigeria, Pakistan, Romania, Senegal, South Africa, Spain, Sri Lanka, Sweden, Switzerland, the United Kingdom and the United States.[63]

31. Likewise, in *Avena and Other Mexican Nationals*, in showing the existence of a general principle of law relating to the exclusion of illegal evidence, Mexico conducted a comparative analysis covering civil and common law systems, and referred in particular to the legislation and case law of, *inter alia*, Canada, France, Germany, Italy, Japan, Mexico, the United Kingdom and the United States.[64]

32. In *Certain Property*, seeking to ascertain the existence of unjust enrichment as a general principle of law, Liechtenstein relied on Roman law and noted that "all or virtually all domestic legal systems incorporate this principle".[65] Liechtenstein referred, in particular, to the legislation and jurisprudence of Australia, Austria,

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[60] *Alabama claims of the United States of America against Great Britain*, Award of 14 September 1872, UNRIAA, vol. XXIX, pleading of the United States (at *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* (United States, Department of State, 1871), pp. 150–158).

[61] *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, D.C., Government Printing Office, 1902), Mexico's Response, 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. See also *Affaire de l'indemnité russe (Russie, Turquie),* Award, 11 November 1912, UNRIAA, vol. XI, pp. 421–447, at pp. 439–440, where the Ottoman Empire argued against the existence of an obligation of States to pay moratory interests, and referred to Roman law and civil law legislations inspired from it in support of its position.

[62] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960*, International Court of Justice, *I.C.J. Reports 1960*, p. 6, Reply of Portugal, para. 543.

[63] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment*, International Court of Justice, *I.C.J. Reports 1992*, p. 240, Memorial of Nauru, appendix 3.

[64] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment*, International Court of Justice, *I.C.J. Reports 2004*, p. 12, Memorial of Mexico, paras. 374–376.

[65] *Certain Property* (see footnote 56 above), Memorial of Liechtenstein paras. 6.7–6.8.

Canada, France, Germany, Italy, the Netherlands, Switzerland, the United Kingdom and the United States, as well as "legal systems based on Islamic law".[66]

33. In *Questions relating to the Seizure and Detention of Certain Documents and Data*, Timor-Leste relied on three non-exhaustive reviews of national legal systems in order to identify a principle of legal professional privilege. These reviews covered 46 legal systems, which included common law and civil law systems, as well as different regions of the world (Africa, Asia-Pacific, Europe, Latin America, the Middle East and North America).[67] In contesting the content of the general principle of law invoked by Timor-Leste, Australia produced its own comparative study covering 17 national legal systems.[68]

34. In a recent case before the Supreme Court of the Philippines, it was found that:

> Petitioners' evidence shows that at least sixty countries in Asia, North and South America, and Europe have passed legislation recognizing foundlings as its citizen[s]. Forty-two (42) of those countries follow the *jus sanguinis* regime. Of the sixty, only thirty-tree (33) are parties to the 1961 Convention on [the Reduction of] Statelessness; twenty-six (26) are not signatories to the Convention. Also, the Chief Justice … pointed out that in 166 out of 189 countries surveyed (or 87.83%), foundlings are recognized as citizens. These circumstances, including the practice of *jus sanguinis* countries, show that it is a generally accepted principle of international law to presume foundlings as having been born of nationals of the country in which the foundling is found.[69]

35. The jurisprudence of international courts and tribunals reaffirms the approach that appears in the State practice set out above. Particularly relevant in this regard is the case law of international criminal tribunals, where wide-ranging comparative analyses of national legal systems may be found.

36. In *Delalić*, for example, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia rejected a defence based on diminished mental responsibility (a ground not provided for in the Statute of the Tribunal). To that effect, it analysed common law systems (Australia, Bahamas, Barbados, Singapore, South Africa, United States, and England, Scotland, and Hong Kong, China) and civil law systems (Croatia, France, Germany, Italy, Japan, Russian Federation, Turkey, and the former Yugoslavia).[70]

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[66] *Ibid*., paras. 6.8–6.13.

[67] *Questions relating to the Seizure and Detention of Certain Documents and Data* (see footnote 57 above), Memorial of Timor-Leste, annexes 22 to 24. The 46 legal systems included in the studies were: Australia, Austria, Belgium, Brazil, Bulgaria, China, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Indonesia, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Singapore, South Africa, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Turkey, United Kingdom and United States of America, European Union, and Hong Kong, China.

[68] *Ibid*., Counter-Memorial of Australia, vol. II, annex 51. The study covered the legislation and case law of: Australia, Belgium, Denmark, France, Germany, India, Indonesia, Mexico, Morocco, New Zealand, Russian Federation, Slovakia, Switzerland, Timor-Leste, Uganda, United Kingdom and United States of America. Malta prepared a similar comparative study invoking general principles of law to interpret Article 62 of the Statute of the International Court of Justice. See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981*, p. 3, Oral Arguments on the Application for Permission to Intervene, Third Sitting, 20 March 1981, morning, p. 341.

[69] Supreme Court of the Philippines, Decision of 8 March 2016 (see footnote 54 above), p. 21. The Supreme Court expressly referred to Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.

[70] *Delalić* (2001) (see footnote 55 above), paras. 584–589.

37. In *Pavle Strugar*, in confirming a Trial Chamber's finding in relation to the accused's fitness to stand trial (also a matter not expressly regulated by the Statute of the Tribunal), the Appeals Chamber analysed the legislation and case law of common law jurisdictions (Australia, Canada, India, Malaysia, United Kingdom, United States) and civil law jurisdictions (Austria, Belgium, Bosnia and Herzegovina, Chile, Croatia, Germany, Japan, Montenegro, Netherlands, Republic of Korea, Russian Federation, Serbia).[71]

38. Similarly, in *Erdemović*, in order to determine whether duress may constitute a complete defence, the Appeals Chamber conducted a comparative analysis of civil law systems (Belgium, Chile, Finland, France, Germany, Italy, Mexico, Netherlands, Nicaragua, Norway, Panama, Poland, Spain, Sweden, Venezuela (the Bolivarian Republic of), and the former Yugoslavia) and common law systems (Australia, Canada, India, Malaysia, Nigeria, South Africa, United States, and England), as well as the criminal law of "Other States" (China, Ethiopia, Japan, Morocco, Somalia).[72]

39. In *Furundžija*, a Trial Chamber of the Tribunal likewise relied on several national legal systems (Argentina, Austria, Bosnia and Herzegovina, Chile, China, France, Germany, India, Italy, Japan, Netherlands, Pakistan, Uganda, Zambia, and England and Wales, the former Yugoslavia, and New South Wales (Australia)) to find a common definition of rape.[73] Later, in the *Kunarac* case, another Trial Chamber conducted a similar analysis to widen the definition of rape reached by the Trial Chamber in the *Furundžija* case.[74]

40. Examples like those given above are, however, not very common. In other cases, courts and tribunals have carried out more limited comparative analyses, albeit also seeking to ensure, to some extent, that different legal families, as well as the various regions of the world, are taken into account.

41. As regards inter-State arbitration, for example, the tribunal in the *Russian Indemnity* case relied on "Roman law and its derivatives" to conclude that the general principle of the responsibility of States implies a special responsibility in cases of delay in payment of a monetary debt.[75] In the *Abyei* arbitration, in order to determine the legal principles concerning institutional review, the tribunal referred, *inter alia*, to "[c]ertain continental European legal systems" (in particular Germany) and to the legal systems of the United Kingdom and the United States.[76]

42. In *Tadić*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, in addressing its power to deal with contempt, relied on common law systems (United Kingdom) and civil law systems (China, France, Germany,

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[71] *Prosecutor* v. *Pavle Strugar*, Case No. IT-01-42-A, Judgment, 17 July 2008, paras. 52–54.

[72] *Prosecutor* v. *Dražen Erdemović*, Case No. IT-96-22-A, Judgment, 7 October 1997, para. 19, referring to the Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras. 59–65. See also *Prosecutor* v. *Kupreškić* et al., Judgment, Trial Chamber (see footnote 56 above), paras. 680–688 and 693.

[73] *Furundžija* (see footnote 56 above), para. 180.

[74] *Kunarac* (see footnote 54 above), paras. 437–460 (referring to the legal systems of Argentina, Australia, Austria, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Canada, China, Costa Rica, Denmark, Estonia, Finland, France, Germany, India, Italy, Japan, New Zealand, Norway, Philippines, Portugal, Republic of Korea, Sierra Leone, South Africa, Spain, Sweden, Switzerland, Uruguay, United Kingdom, United States and Zambia).

[75] *Affaire de l'indemnité russe* (footnote 61 above), pp. 441–442.

[76] *Abyei* arbitration (see footnote 54 above), pp. 299–300, para. 402.

Russian Federation).[77] Similarly, a Trial Chamber of the International Criminal Tribunal for Rwanda in the *Musema* case referred to some civil and common law systems, and considered that there were sufficient similarities in them to define the crime of conspiracy to commit genocide.[78]

43. In the *Comoros* case before the International Criminal Court, a Pre-Trial Chamber determined that it is "a principle of law recognised in different legal systems that parties to legal proceedings must comply with judicial decisions", and that such principle "applies to all phases of the proceedings before th[e] Court". To do so, the Chamber referred, in addition to international jurisprudence, to the legislation and case law of France, India and Nigeria.[79]

44. Examples like this may also be found in investment arbitration. In *Amco* v. *Indonesia*, for instance, the tribunal considered that the principle *pacta sunt servanda* is a general principle of law recognized in civil law (France), common law (United States) and Islamic law (Libya and Saudi Arabia) systems.[80] Similarly, to determine the principles governing the calculation of damages, the tribunal referred to civil law systems (France and Indonesia) and common law systems (United Kingdom and United States).[81] In *Total* v. *Argentina*, the tribunal considered that the protection of legitimate expectations is a general principle of law, and that it has been "recognized lately both in civil law and in common law jurisdictions within well defined limits". In support of this, the tribunal relied, *inter alia*, on the legal systems of Argentina, England and Germany.[82] The tribunal in *Gold Reserve* v. *Venezuela* similarly considered that "the

[77] *Tadić* (2000) (see footnote 56 above), paras. 15–17. See also *Prosecutor* v. *Zoran Kupreškić* et al., Case No. IT-95-16-A, Judgment, 23 October 2001, Appeals Chamber, paras. 34–40; *Slobodan Milosević* v. *Prosecutor*, Case No. IT-02-54-AR73.7, Decision on interlocutory appeal of the Trial Chamber's decision on the assignment of defense counsel, 1 November 2004, Appeals Chamber, para. 12; *Prosecutor* v. *Sefer Halilović*, Case No. IT-01-48-AR73.2, Decision on interlocutory appeal concerning admission of record of interview of the accused from the bar table, 19 August 2005, Appeals Chamber, paras. 16–17; *Prosecutor* v. *Ante Gotovina* et al., Case No. IT-06-90-AR73.2, Decision on Ivan Čermak's interlocutory appeal against Trial Chamber's decision on conflict of interest of attorneys Čedo Prodanović and Jadranka Sloković, 29 June 2007, Appeals Chamber, paras. 44–47.

[78] *Prosecutor* v. *Alfred Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, paras. 186–191. The Prosecutor of the Tribunal, in the *Bagosara* case, argued that, based on a survey of civil law systems (France, Senegal, Germany) and common law systems (United Kingdom and United States), there was a general principle of law of an inherent right of appeal in the absence of an express provision to the contrary. See *Prosecutor* v. *Théoneste Bagosora* et al., Case No. ICTR-98-37-A, Decision on the admissibility of the Prosecutor's appeal from the decision of a confirming judge dismissing an indictment against Théoneste Bagosora and 28 others, 8 June 1998, paras. 46–47.

[79] *Situation on the registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Case No. ICC-01/13, Decision on the "Application for judicial review by the Government of the Union of Comoros", 15 November 2018, Pre-Trial Chamber I, para. 107.

[80] *Amco Asia Corporation and Others* v. *Republic of Indonesia*, Award, 20 November 1984, para. 248.

[81] *Ibid.*, paras. 266–267.

[82] *Total S.A.* v. *Argentine Republic*, Case No. ARB/04/01, Decision on Liability, 27 December 2010, International Centre for Settlement of Investment Disputes, para. 128. See also *Toto Costruzioni Generali S.p.A.* v. *Republic of Lebanon*, Case No. ARB/07/12, Award, 7 June 2012, International Centre for Settlement of Investment Disputes, para. 166; *Crystallex International Corporation* v. *Bolivarian Republic of Venezuela*, Case No. ARB(AF)11/2, Award, 4 April 2016, International Centre for Settlement of Investment Disputes, para. 546.

concept of legitimate expectations is found in different legal traditions", and referred to Argentinian, English, French, German and Venezuelan law.[83]

45. Judges in their individual opinions have also adopted the approach of conducting (more or less) wide and representative comparative analyses when identifying a general principle of law. In the *North Sea Continental Shelf* case, for instance, Judge Ammoun sought to show that the principle of equity was "[i]ncorporated into the great legal systems of the modern world referred to in Article 9 of the Statute of the Court", and which "manifests itself in the law of Western Europe and of Latin America …; in the common law …; in Muslim law …; Chinese law … Soviet law … Hindu law …; finally the law of the other Asian countries, and of the African countries".[84]

46. In the *Oil Platforms* case, in relation to joint-and-separate responsibility, Judge Simma conducted "research into various common law jurisdictions as well as French, Swiss and German tort law" and concluded that a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice existed.[85] Later, in *Application of the Interim Accord of 13 September 1995*, Judge Simma, in assessing whether the *exceptio non adimpleti contractus* could be considered a general principle of law, referred to the roots of the principle in Roman law and its "widespread acceptance … in the main legal traditions of the civil and common law systems".[86]

47. Some of the examples above appear to be in contrast with cases in which a general principle of law was deemed not to exist because of the limited number of national legal systems where it may be found, or the narrow comparative analysis presented by a party to the dispute. In the South West Africa case, for example, the International Court of Justice noted that *actio popularis* "may be known to certain municipal systems of law", but that it could not be considered a general principle of law in the sense of Article 38, paragraph 1 (*c*), of its Statute.[87] The reference to "certain municipal systems of law" may suggest that the Court did not consider *actio popularis* to have been sufficiently recognized in national legal systems at the time it rendered its decision.[88]

48. The Appeals Chamber of the International Criminal Court, in a judgment of 10 November 2011, considered that the case law of one State presented by the Prosecutor could not be of assistance in resolving the issue before it, and that in any event it had not been argued that such case law should be interpreted as founding a general principle of law in the sense of article 21, paragraph 1 (*c*), of the Rome

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[83] *Gold Reserve Inc.* v. *Bolivarian Republic of Venezuela*, Case No. ARB(AF)/09/1, Award, 22 September 2014, International Centre for Settlement of Investment Disputes, para. 576. See also Srinath Reddy Kethireddy, "Still the law of nations: Legitimate expectations and the sovereigntist turn in international investment law", *Yale Journal of International Law*, vol. 44 (2019), p. 315, at p. 326.

[84] *North Sea Continental Shelf* (see footnote 49 above), Separate Opinion of Judge Ammoun, p. 101, at pp. 140–141.

[85] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 161, Separate Opinion of Judge Simma, p. 324, at p. 354–358, paras. 66–74.

[86] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 695, Separate Opinion of Judge Simma, at para. 12.

[87] *South West Africa* (see footnote 59 above), para. 88.

[88] See Giorgio Gaja, "General principles in the jurisprudence of the ICJ", in Mads Andenas *et al.* (eds.), *General Principles and the Coherence of International Law* (Leiden, Brill, 2019), pp. 35–43, at p. 39 (noting that a more thorough examination of municipal laws would give greater solidity to the identification of a general principle of law).

Statute.[89] Similarly, a Pre-Trial Chamber of the Court, in a decision dated 20 July 2011, determined that, assuming that a lacuna in the Rome Statute existed, "a general principle of law cannot be extracted on the basis of examining only five national jurisdictions, the practice of which is even inconsistent".[90]

49. In *Lubanga*, a Trial Chamber of the International Criminal Court likewise considered that the existence of a principle in two common law systems was insufficient for purposes of identifying a general principle of law pursuant to article 21, paragraph 1 (*c*), of the Rome Statute:

> Although this practice [witness proofing] is accepted to an extent in two legal systems, both of which are founded upon common law traditions, this does not provide a sufficient basis for any conclusion that a general principle based on established practice of national legal systems exists. The Trial Chamber notes that the prosecution's submissions with regard to national jurisprudence did not include any citations from the Romano-Germanic legal system.[91]

50. While the practice of States and the jurisprudence of international courts and tribunals referred to above admittedly present some divergences (in terminology and in the precise methodology employed), the Special Rapporteur considers that an overall approach can be drawn from them: the comparative analysis for purposes of determining the existence of a general principle of law must be wide and representative, covering different legal families and the various regions of the world. This serves to ensure that the requirement of recognition under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice has, subject to the additional conditions that will be addressed in the next chapter, been met.

51. Much of the literature adopts a similar approach. In addition to the scholars that have made the general point that, for a general principle of law to exist, it must be generally recognized in national legal systems,[92] others have noted, for example, that "one of the conditions for the identification of a general principle is its presence in a large number and variety of domestic legal systems",[93] and that "doctrine and jurisprudence refer to the notion of representativeness, which is to be attained by determining whether a given principle is common to the major legal systems of the world".[94] It has likewise been argued that "all modern domestic laws can be gathered into a few families or systems of law which, insofar as general principles are

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[89] *Situation in the Republic of Kenya, Prosecutor* v. *Kenyatta* et al., No. ICC-01/09-02/11 OA3, Judgment, 10 November 2011, para. 62.

[90] *Situation in the Republic of Kenya, The Prosecutor* v. *Kenyatta* et al., No. ICC-01/09-02/11, Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 20 July 2011, paras. 25–27.

[91] *Situation in the Democratic Republic of the Congo, Prosecutor* v. *Lubanga*, No. ICC-01/04-01/06-1049, Decision Regarding the Practices Used to Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, Trial Chamber I, para. 41. See also *Chevron Corporation (USA) and Texaco Petroleum Company (USA)* v. *Ecuador*, Case No. 34877, Partial Award on the Merits, 30 March 2010, Permanent Court of Arbitration, para. 382 ("the 'loss of chance' principle does not have wide acceptance across legal systems such that it can be considered a 'general principle of law recognized by civilized nations'").

[92] See A/CN.4/732, para. 167. Cheng, in particular, noted that "[t]he recognition of these principles in the municipal law of civilised peoples … gives the necessary confirmation and evidence of the juridical character of the principle concerned. The qualification 'recognised by civilised nations' was intended to safeguard against subjectivity and possible arbitrariness on the part of the judge". See Bin Cheng, G*eneral Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953/2006), p. 25.

[93] Jaye Ellis, "General principles and comparative law", *European Journal of International Law*, vol. 22 (2011), pp. 949–971, at p. 955.

[94] *Ibid*., p. 957. See also Patrick Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (Oxford University Press, 2020), pp. 110–111.

concerned, are coherent enough to be considered as 'legal systems'".[95] Furthermore, as noted by the International Law Association:

> [I]t is also not enough to "identify" a general principle among the main legal systems if there is not enough geographical representation, e.g. a general principle shared by Civil Law countries in Europe should also be identified in other Civil Law countries located in different geographical areas and belonging to different civilizations.[96]

52. The categorization of national legal systems into legal families is a well-known method in comparative law. As noted by one author, "[t]he effort to group jurisdictions around the world into a handful of legal families based on underlying common characteristics of their laws has traditionally occupied a central role in comparative law".[97] While the precise definition of a "legal family" may vary depending on the criteria that one uses[98] and comparative law scholarship continues to evolve in this respect,[99] an often-used categorization nowadays comprises "Anglo-American", "Far Eastern", "Germanic", "Hindu", "Islamic", "Nordic (Scandinavian)" and "Romanistic" legal families.[100]

53. Even if States and international courts and tribunals do not seem to follow a specific categorization of legal families, comparative law can be a useful tool to be taken into account when identifying a general principle of law. The purpose of using this method is clear: by grouping national legal systems into families, there is a certain presumption that rules and principles are shared across those systems, thus facilitating the identification of a common principle. This presumption, however, is not absolute, and much will depend on each specific case. Furthermore, the criterion that different regions of the world should also be reflected in the comparative analysis must, in the view of the Special Rapporteur, in any event be taken into account.

54. As regards the terminology to employ for purposes of the work of the Commission, the Special Rapporteur is of the view that the term "principal legal systems of the world", employed both in Article 9 of the Statute of the International Court of Justice[101] and in article 8 of the Statute of the International Law

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[95] Alain Pellet and Daniel Müller, "Article 38", in Andreas Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford University Press, 2019), p. 928, para. 264. See also Michael 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. 46; Alain Pellet, *Recherche sur les principes généraux de droit en droit international* (Université de droit, d'économie et de sciences sociales, 1974), p. 239.

[96] International Law Association, Report of the Study Group on the use of domestic law principles in the development of international law, *Report of the Seventy-Eighth Conference, Sydney* (2018), pp. 1170–1242, at para. 214.

[97] Mariana Pargendler, "The rise and decline of legal families", American *Journal of Comparative Law*, vol. 60 (2012), pp. 1043–1074, at p. 1043. See also H. Patrick Glenn, "Comparative legal families and comparative legal traditions", in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford University Press, 2019), p. 425; Jaakko Husa, "Classification of legal families today: Is it time for a memorial hymn?", *Revue internationale de droit comparé*, vol. 56 (2004), pp. 11–38, at pp. 12–13.

[98] Pargendler, "The rise and decline of legal families" (see footnote 97 above), pp. 1047–1060.

[99] *Ibid*., pp. 1044–1047; Glenn, "Comparative legal families and comparative legal traditions" (see footnote 97 above), p. 426.

[100] Pargendler, "The rise and decline of legal families" (see footnote 97 above), p. 1060. See also Husa, "Classification of legal families today: Is it time for a memorial hymn?" (footnote 97 above), p. 14; Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3rd ed. (Tübingen, Mohr Siebeck, 1996).

[101] Article 9 reads: "At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured".

Commission,[102] is appropriate to convey the idea that the comparative analysis must be wide and representative, covering different legal families and regions of the world. Therefore, when addressing the first step of the analysis for the identification of general principles of law derived from national legal systems, the formulation "principles common to the principal legal systems of the world" is suggested.

B. Principles that are "common"

55. Next in the analysis is determining the existence of principles that are common to the principal legal systems of the world. This is essentially an empirical assessment through which rules existing in national legal systems are compared in order to find a principle that is shared across those systems. It is through this analysis that the essential content of a general principle of law derived from national legal systems can be objectively determined.

56. In general terms, the exercise now under consideration, while not a light one, is relatively clear: one has to compare rules existing in national legal systems and extract the principle that is common to them, or distill the principle underlying those rules.[103] The result of this exercise is, subject to the conditions that are analysed in Section II below, capable of being elevated to a general principle of law forming part of

[102] Article 8 reads: "At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured".

[103] See Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (footnote 94 above), pp. 97–127; Daniel 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 Andenas *et al*., *General Principles and the Coherence of International Law* (see footnote 88 above), pp. 177–194, at p. 185; Brianna Gorence, "The constructive role of general principles in international arbitration", T*he Law and Practice of International Courts and Tribunals*, vol. 17 (2018), pp. 455–498, at p. 463; Eirik Bjorge, "Public law sources and analogies of international law", *Victoria University of Wellington Law Review*, vol. 49 (2018), pp. 533–560, p. 537; Charles T. Kotuby and Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press, 2017), pp 19–21; Catherine Redgwell, "General principles of international law", in Stefan Vogenauer and Stephen Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Oxford, Hart, 2017), pp. 5–19, at p. 16; Beatrice I. Bonafé and Paolo Palchetti, "Relying on general principles in international law", in Catherine Brölmann and Yannick Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham, Edward Edgar, 2016), pp. 160–176, at p. 162; Stephan W. Schill, "General principles of law and international investment law", in Tarcisio Gazzini and Eric De Brabandere (eds.), *International Investment Law: The Sources of Rights and Obligations* (Brill, 2012), pp. 133–181, at p. 148; Samantha Besson, "General principles in international law – Whose principles?", in Samantha Besson and Pascal Pichonnaz (eds.), *Les principes en droit européen – Principles in European Law* (Geneva, Schulthess, 2011), p. 36; Ellis, "General principles and comparative law" (footnote 93 above), p. 954; Tarcisio 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. 107; Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden, Martinus Nijhoff, 2008) pp. 45–50; Julio A. Barberis, "Los Principios Generales de Derecho como Fuente del Derecho Internacional", *Revista IIDH*, vol. 14 (1991), pp. 11–41, at p. 32; Bogdan, "General principles of law and the problem of lacunae in the law of nations" (footnote 95 above), pp. 48–50; Paul de Visscher, "Cours général de droit international public", in *Recueil des cours*, vol. 136 (1972), pp. 116–117; Hermann Mosler, "Rechtsvergleichung vor völkerrechtlichen Gerichten", Rene Marcic *et al*. (eds.), *Internationale Festschrift für Alfred Verdross* (Munich, Wilhelm Fink, 1971), pp. 381–412, at pp. 384–385; Frances T. Freeman Jalet, "The quest for the general principles of law recognized by civilized nations – A study", *UCLA Law Review*, vol. 10 (1963), pp. 1041–1086, at p. 1081.

international law – a legal principle that is generally regarded as just by the community of nations or as reflecting its collective consciousness, or a principle inherent to any legal system.[104]

57. Some practice and case law shed light on this matter. In the *Right of Passage* case, for example, Portugal argued that the comparative analysis of national legal systems does not require a "unanimity" of the rules existing therein.[105] According to Portugal, while there may certainly be differences between the domestic laws of different States, since they need to adapt to the particular context in which they are applied, what matters for purposes of the comparative analysis is the principle that can be "derived" from those rules through a process of "abstraction" and "generalization".[106] India did not contest this position, but argued that the principle invoked by Portugal could not possibly form part of international law.[107]

58. In *Certain Property*, Liechtenstein likewise maintained that the prohibition of unjust enrichment was a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, and noted that "[e]ven if there are certain differences in the application of this principle in the different legal systems, the underlying principle is the same".[108]

59. A similar methodology has been spelled out in the jurisprudence, particularly in the field of international criminal law. In the *Furundžija* case, for example, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia noted that:

> 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 legal systems so as to pinpoint the basic notions they share.[109]

60. This reasoning was set out in greater detail by another Trial Chamber in the *Kunarac* case:

> The value of these [domestic] 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.[110]

61. In the *Erdemović* case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia likewise considered that the identification of a general principle:

> involve[s] a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle

[104] Pellet and Müller, "Article 38" (see footnote 95 above), p. 930; Prosper Weil, "Le droit international en quête de son identité : Cours général de droit international public", in *Recueil des cours*, vol. 237 (1992), pp. 146–147.
[105] *Right of Passage* (see footnote 62 above), Reply of Portugal, para. 328.
[106] *Ibid*.
[107] See para. 77 below.
[108] *Certain Property* (see footnote 56 above), Memorial of Liechtenstein, para. 6.14.
[109] *Furundžija* (see footnote 56 above), para. 178.
[110] *Kunarac* (see footnote 54 above), para. 439.

> underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal.[111]

62. The Appellate Body of the World Trade Organization, while not expressly mentioning general principles of law, has referred to the "widely accepted common element" in national rules regarding the taxation of non-residents in order to interpret the term "foreign-source income" in footnote 59 of the Agreement on Subsidies and Countervailing Measures:[112]

> [T]he detailed rules on taxation of non-residents differ considerably from State-to-State, with some States applying rules which may be more likely to tax the income of non-residents than the rules applied by other States. However, despite the differences, there seems to us to be a widely accepted common element to these rules. The common element is that a "foreign" State will tax a non-resident on income which is generated by activities of the non-resident that have some link with that State.[113]

63. Some individual judges have adopted a similar approach. Thus, in the *South West Africa* advisory opinion, in addressing the legal nature of the mandates system under Article 22 of the Covenant of the League of Nations, Judge McNair considered that:

> International law has recruited and continues to recruit many of its rules and institutions from private systems of law … 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" … 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.[114]

64. In *Oil Platforms*, Judge Simma considered that a general principle of law relating to joint-and-several responsibility may form part of international law since the question "has been taken up and solved by [national] legal systems with a consistency that is striking".[115] In *North Sea Continental Shelf*, Judge Ammoun noted

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[111] *Erdemović* (see footnote 72 above), para. 19, referring to the Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 57. In the same case, Judge Stephen noted that "[i]n searching for a general principle of law the enquiry must go beyond the actual rules and must seek the reason for their creation and the manner of their application … The general principle governing duress is therefore more likely to be found in these general rules than in specific exceptions which exist for particular crimes" (Separate and Dissenting Opinion of Judge Stephen, para. 63).

[112] Agreement on Subsidies and Countervailing Measures (Marrakesh, 15 April 1995), World Trade Organization, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, annex 1A: Multilateral Agreements on Trades and Goods, p. 299.

[113] *United States – Tax Treatment for "Foreign Sales Corporations"*, Appellate Body Report, 14 January 2002 (WT/DS108/AB/RW), para. 143. In its written pleadings, the United States had provided examples of rules applied in Brazil, Canada, Chile, Malaysia, Panama, Saudi Arabia, the United Kingdom and the United States, and Taiwan, China (*ibid*., fn. 121). The Appellate Body also noted that "widely recognized principles of taxation emerge" from bilateral and multilateral treaties dealing with double taxation (*ibid*., paras. 141–142).

[114] *International status of South-West Africa, Advisory Opinion*, International Court of Justice, *I.C.J. Reports 1950*, p. 128, Separate Opinion of Judge McNair, p. 146, at p. 148. Based on this, he found certain "general principles" common to "[n]early every legal system" (*ibid*., p. 149).

[115] *Oil Platforms* (footnote 85 above), Separate Opinion of Judge Simma, para. 66.

that general principles are "common to the different legislations of the world, united by the identity of the legal reason therefor, or the *ratio legis*".[116]

65. When there is no sufficient commonality across national legal systems, the obvious result is that a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice cannot be deemed to exist. In the *Avena and Other Mexican Nationals* case, the United States contested the principle of exclusion of illegally obtained evidence invoked by Mexico on the basis that the latter "ha[d] overstated the pervasiveness of the exclusionary rule in legal systems throughout the world, has not taken into account its varying forms, and ignores the fact that it has never been used to mandate exclusion of statements made by a defendant prior to receiving consular information".[117] The United States also noted that "the practice [of use of the exclusionary rule in national legal systems] is not by any means widespread or consistent enough to be considered a 'general principle of law'",[118] and went on to stress the different ways in which the rule in question had been applied domestically.[119] In the case concerning the *Application of the Interim Accord*, North Macedonia also noted, with respect to the *exceptio non adimpleti contractus*, that there was "no consistent understanding of the status, availability and effect of the *exceptio* in domestic legal systems, making it impossible to support the … far-reaching conclusion that it has achieved the status of a general principle of law recognized by civilized nations".[120]

66. Similarly, the Eritrea-Ethiopia Claims Commission determined in its award of 17 August 2009 that:

> Eritrea presented this as a claim for "consequential damages." However, international law does not recognize a separate category of compensable "consequential damages" involving different standards of legal causation or other distinctive legal elements. The concept of consequential damages has a significant role in some national legal systems, but does not exist in others, and so cannot be viewed as a general principle of law.[121]

67. In the *Lubanga* case, the Pre-Trial Chamber of the International Criminal Court considered, with respect to witness preparation or familiarization, that no relevant general principle of law could be identified given the "differences in approach by national jurisdictions".[122] Also in the *Lubanga* case, the Appeals Chamber of the Court, in considering the principle prohibiting abuse of process, found such divergences across national legal systems that it concluded that "[t]he power to stay proceedings for abuse

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[116] *North Sea Continental Shelf* (see footnote 49 above), Separate Opinion of Judge Ammoun, p. 101, at p. 135.

[117] *Avena and Other Mexican Nationals* (see footnote 64 above), Counter-Memorial of the United States, para. 8.28.

[118] *Ibid*., para. 8.29.

[119] *Ibid*., paras. 8.29–8.33. In *Questions relating to the Seizure and Detention of Certain Documents and Data* (see footnote 57 above), Australia similarly challenged what it considered the "broad and unqualified formulation" by Timor-Leste of the principle of legal professional privilege, without taking into account the "important caveats on the scope and content of the privilege" in national legal systems, nor the "exceptions to a claim for legal professional privilege [that] are widely adopted [in] domestic law so as to ensure that the privilege cannot be abused" (Counter-Memorial of Australia, vol. I, paras. 4.36 and 4.39).

[120] *Application of the Interim Accord* (see footnote 86 above), Reply of North Macedonia (then the former Yugoslav Republic of Macedonia), para. 5.59.

[121] Eritrea-Ethiopia Claims Commission, Final Award on Eritrea's Damages Claims, 17 August 2009, UNRIAA, vol. XXVI, pp. 505–630, at p. 575, para. 203.

[122] *Situation in the Democratic Republic of the Congo in the Case of Prosecutor* v. *Lubanga*, No. ICC-01/04-01-06, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, para. 37.

of process, as indicated, is not generally recognised as an indispensable power of a court of law, an inseverable attribute of the judicial power".[123]

68. In another case, the Appeals Chamber of the Court found, after analysing various national legal systems, 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".[124] In the *Banda and Jerbo* case, called upon to determine whether there is a general principle of law establishing a ban for former prosecutors to join the defence immediately after leaving the prosecution, the Appeals Chamber again noted that the practice in national legal systems presented to it was not consistent and dismissed the general principle of law invoked.[125]

69. It thus appears that, if rules across national legal systems are fundamentally different, a general principle of law cannot be deemed to exist.

C. Relevant materials

70. Given that the identification of general principles of law derived from national legal systems requires, as a first step, a comparative analysis of the latter, the question of which materials for purposes of the analysis are relevant is straightforward. In virtually all the examples mentioned above, the analysis was based, essentially, on domestic legal sources emanating from States, such as legislation and decisions of national courts. As a matter of course, account must be taken of the features of each national legal system in order to select specific materials and to determine their authority in a given case.

71. It further appears from the practice set out above that all branches of national legal systems, including what may be termed "private law" and "public law", are

[123] *Situation in the Democratic Republic of the Congo in the Case of Prosecutor* v. *Lubanga*, No. ICC-01/04-01/06, Judgment, 14 December 2006, paras. 32–35.

[124] *Situation in the Democratic Republic of the Congo*, No. ICC-01/04, 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, para. 32.

[125] *Situation in Darfur, Sudan, in the Case of the Prosecutor* v. *Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, No. ICC-02/05-03/09 OA, Judgment, 11 November 2011, para. 33. See also *Prosecutor* v. *Jadranko Prlić* et al., No. IT-04-74-AR73.6, Decision on appeals against decision admitting transcript of Jadranko Prlić's questioning into evidence, 23 November 2007, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 50; *Prosecutor* v. *Ljube Boškoski and Johan Tarčulovski*, No. IT-04-82-A Judgment, 19 May 2010, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 194 ("the Appeals Chamber notes that Tarčulovski has failed to identify a 'general principle of law' to support his argument. The fact that the statements were inadmissible before [the former Yugoslav Republic of Macedonia] courts is insufficient to support the claim that such a general principle of law exists. In this context, the Appeals Chamber observes that out-of-court statements made by an accused are admissible in a number of common law and civil law jurisdictions"). See also *Canfor Corporation, Tembec et al. and Terminal Forests Ltd.* v. *United States of America*, Order of the Consolidation Tribunal, 7 September 2005, para. 165.

potentially relevant when identifying a general principle of law.[126] This appears to be the general understanding among scholars as well.[127]

72. During the 2019 debate, the question of the possible role of international organizations in the formation of general principles of law derived from national legal systems was raised.[128] In the view of the Special Rapporteur, the practice of international organizations could be relevant for purposes of the identification of a general principle of law, in particular as regards the first step of the two-step analysis dealt with in the present chapter. While practice and jurisprudence in this regard appear to be scant,[129] when an international organization (such as the European Union)[130] is conferred the power to issue rules that are binding on their Member States and directly applicable in the legal systems of the latter, those rules may be taken into account when carrying out the comparative analysis.

III. Ascertainment of transposition to the international legal system

73. The second step of the analysis for the identification of general principles of law falling under the first category is ascertaining whether a principle common to the principal legal systems of the world is transposed to the international legal system. The rationale behind this analysis is self-evident: municipal law and international law have unique features and differ in many important aspects, and the principles existing in the former cannot be presumed to be always capable of operating in the former. Transposition, therefore, does not occur automatically.

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[126] See, in particular, *El Paso* v. *Argentina* (footnote 54 above), para. 622 ("rules largely applied *in foro domestico*, in private or public, substantive or procedural matters"); *South West Africa* (see footnote 59 above), Dissenting Opinion of Judge Tanaka, p. 294 ("[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."). In the cases before international criminal tribunals, the identification of general principles of law was made with reference to national criminal law, which can be considered as forming part of "public law".

[127] See, for example, Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (see footnote 94 above), p. 33; International Law Association, Report of the Study Group on the use of domestic law principles in the development of international law (footnote 96 above), para. 9; Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford, Oxford University Press, 2015), p. 33; Barberis, "Los Principios Generales de Derecho como Fuente del Derecho Internacional" (footnote 103 above), p. 30; Hersch Lauterpacht, "Some observations on the prohibition of '*non liquet*' and the completeness of the law", in Elihu Lauterpacht (ed.) *International Law: Being the Collected Papers of Hersch Lauterpacht*, vol. 2 (Cambridge, Cambridge University Press, 1975), pp. 213–237, at pp. 221–222; Wolfgang Friedmann, "The uses of 'general principles' in the development of international law", *American Journal of International Law*, vol. 57 (1963), pp. 279–299, at pp. 281–282.

[128] See, for example, the statements by Ms. Galvão Teles (A/CN.4/SR.3489, p. 21); Mr. Gómez-Robledo (A/CN.4/SR.3492, p. 9); Mr. Nguyen (A/CN.4/SR.3491, p. 12); Mr. Park (A/CN.4/SR.3489, p. 19).

[129] See *Questions relating to the Seizure and Detention of Certain Documents and Data* (footnote 57 above), Memorial of Australia, fn. 148; *Total* v. *Argentina* (footnote 82 above), para. 130 ("From a comparative law perspective, the tenets of the legal system of the European Community (now European Union), reflecting the legal traditions of twenty-seven European countries, both civil law and common law … are of relevance, especially since the recognition of the principle of legitimate expectations there has been explicitly based on the international law principle of good faith"); *Gold Reserve* v. *Venezuela* (see footnote 83 above), para. 576.

[130] See, for example, Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases and Materials*, 6th ed. (Oxford, Oxford University Press, 2015), pp. 198–223, on the direct effect of secondary law of the European Union (regulations, decisions and directives).

74. This part of the methodology is often referred to in the literature, albeit in broad terms and often without entering into the details of what it precisely entails.[131] State practice and case law provide however useful guidance. As will be shown below, the transposition of a principle *in foro domestico* to the international legal system occurs if: (a) the principle is compatible with fundamental principles of international law; and (b) the conditions exist for the adequate application of the principle in the international legal system.

A. Compatibility with the fundamental principles of international law

75. State practice and jurisprudence show that, for a principle common to the principal legal systems of the world to be elevated to a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, that principle must be compatible with the fundamental principles of international law. This compatibility test serves to ensure that a legal principle is not only recognized by the community of nations as just, but also as capable of existing within the broader framework of international law.

76. Early arbitral practice already referred to this condition for transposition. In the *North Atlantic Coast Fisheries* case, for example, the arbitral tribunal rejected the principle of "international servitude" invoked by the United States, noting that such a principle would be incompatible with the principle of sovereignty:

> [T]his doctrine being but little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain and the United States, and to the present International relations of Sovereign States, has found little, if any, support from modern publicists. It could therefore in the great interest of the Community of Nations, and of the Parties to this Treaty, be affirmed by this Tribunal only on the express evidence of an International contract.[132]

77. A similar reasoning may be found in the pleadings of India in the *Right of Passage* case. India contested the general principle of law invoked by Portugal on the basis that it would be incompatible with the notion of territorial sovereignty under international law:

> There is no real analogy between an individual's ownership of private property and the sovereignty of a State over its territory, this latter being regarded in our

[131] See, for example, Pellet and Müller, "Article 38" (see footnote 95 above), pp. 930–932; Mads Andenas and Ludovica Chiussi, "Cohesion, convergence and coherence of international law", in Andenas *et al*., *General Principles and the Coherence of International Law* (see footnote 88 above), pp. 9–34, at p. 26; Ben Juratowitch and James Shaerf, "Unjust enrichment as a primary rule of international law", *ibid*., pp. 227–246, at p. 232; Abdulqawi A. Yusuf, "Concluding remarks", *ibid*., pp. 448 ff., at p. 451; Mathias Forteau, "General principles of international procedural law", *Max Planck Encyclopedia of International Procedural Law* (2018), para. 16; Bjorge, "Public law sources and analogies of international law" (footnote 103 above), p. 537; Bonafé and Palchetti, "Relying on general principles in international law" (see footnote 103 above), p. 163; Sienho 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 p. 487; Besson, "General principles in international law – Whose principles?" (footnote 103 above), p. 37; Gazzini, "General principles of law in the field of foreign investment"(footnote 103 above), p. 104; Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, vol. I, 9th ed. (Harlow, Longman, 1992), p. 37. For a more detailed analysis of this issue, see Pellet, *Recherche sur les principes généraux de droit en droit international* (see footnote 95 above), pp. 272–320.

[132] *North Atlantic Coast Fisheries Case (Great Britain, United States)*, Award, 7 September 1910, UNRIAA, vol. XI, pp. 167–226, at p. 182.

> days as the space within which the organs of the state are authorized by international law to exercise their jurisdiction within the limits and according to the rules which the law imposes upon them.[133]

78. In *Certain Phosphate Lands*, Australia likewise rejected the attempt of Nauru to "import" the domestic law notion of "trust" in order to interpret the trusteeship obligations under the Charter of the United Nations in the following terms:

> in considering the nature of the obligations of the Administering Authority, it is the actual provisions of the Charter and Trusteeship Agreement to which the Court must have regard. Australia rejects the attempt by Nauru to import into these treaty provisions the whole set of legal rights and duties connected with the notion of a "trust" in domestic law, particularly the common law. To do that is to mistake completely the fundamental elements of the United Nations Trusteeship System. Domestic analogies have limited value in this area.[134]

79. The *North Sea Continental Shelf* cases provides another example. Germany sought to demonstrate that a "principle of the just and equitable share" was a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, applicable to the delimitation of the continental shelf.[135] Denmark and the Netherlands contested the existence of such a general principle of law as follows:

> In short, the Federal Republic of Germany is asking the Court to apply in the present case a so-called "general principle of law", alleged to exist in national legal systems, that is incompatible with the principles on which, in the international legal system, the positive law regulating the matter is based. The two Governments, while not in any way questioning the significance of Article 38 (1) (c), consider that to appeal to it under those conditions is completely inadmissible. The general principles of law derived from national legal systems which have been applied under Article 38 (1) (c) have always been principles recognized to be equally appropriate in the relations between States. The Federal Republic of Germany itself speaks of the general principles of law applicable under Article 38 (1) (c) as "the outcome of legal convictions and values acknowledged all over the world". How can this be said of a principle which runs directly counter to the principles recognized in international law itself as representing "the legal convictions of States" in the matter? Least of all can it be so said when the "legal convictions" of States have been deliberately

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[133] *Right of Passage* (see footnote 62 above), Counter-Memorial of India, para. 300. India further noted: "Does it follow that there are no other restrictions upon territorial sovereignty than those laid down in agreements? Not at all, and Professor Guggenheim was careful in his oral statement before the Court to recall the restrictions upon maritime navigation, whose basis in custom is beyond all doubt. What we deny is that such limitations can be derived from general principles of law in favour of highly questionable analogies with servitudes recognized in private law" (*ibid*., para. 304). India also added that "the contemporary conception of territory is of a space in which a given State has an exclusive competence to exercise its authority, subject to any exceptional rights agreed to by it in favour of other States and those much fewer rights resulting from rules of law, like the right of innocent passage. Manifestly, that has nothing in common with the rights of enjoyment and disposal which form the constituent elements of private property" (*ibid*., Rejoinder of India, para. 568).

[134] *Certain Phosphate Lands in Nauru* (see footnote 63 above), Counter-Memorial of Australia, para. 292. See also Separate Opinion of Judge Shahabuddeen, p. 285.

[135] *North Sea Continental Shelf* (see footnote 49 above), Memorial of Germany of 21 August 1967, para. 30 ("This principle, hereafter called *the principle of the just and equitable share*, is a basic legal principle emanating from the concept of distributive justice and a generally recognized principle inherent in all legal systems, including the legal system of the international community"). See also Reply of Germany of 31 May 1968, paras. 7–11.

> and recently expressed in a sense contrary to the alleged principle in a general convention intended to codify the law.[136]

80. The Court agreed with Denmark and the Netherlands, and rejected the principle invoked by Germany. It explained that the alleged principle of just and equitable share could not be considered a general principle of law as it would be "quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement":

> More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, – namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources …
>
> It follows that even in such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected.[137]

81. In *Questions relating to the Seizure and Detention of Certain Documents and Data*, Timor-Leste, without specifically mentioning the condition of compatibility, sought to justify that the principle it invoked formed part of international law in the following terms:

> The principle of legal professional privilege is fundamental to the international rule of law, as it enables States to obtain legal advice and assistance freely, without fear of outside interference, *inter alia* so as to be able to participate in dispute settlement processes, including those specified in Article 33 of the UN Charter (which include those more particularly at issue in this case – negotiation, arbitration and judicial settlement). It thus underlies the principle of the pacific settlement of international disputes, enshrined in Article 2.3 of the United Nations Charter and declared in the … Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States to be one of the principles of international law.[138]

82. This condition of compatibility has also been referred to in some of the literature. According to one author for example, only principles *in foro domestico* that are "non-incompatibles avec les exigences de l'ordre international" [not incompatible

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[136] *Ibid*., Common Rejoinder of Denmark and the Netherlands of 30 August 1968, para. 117.

[137] *North Sea Continental Shelf* (see footnote 49 above), paras. 19–20. Denmark and the Netherlands had similarly argued that "the alleged principle, as formulated by the Federal Republic of Germany, is in flat contradiction to Article 1, 2 and 3 of the Geneva Convention on the Continental Shelf, which, in accordance with previous and later State practice, determine the sovereign rights of the coastal States by reference to a delimited *space*" (Common Rejoinder of Denmark and the Netherlands of 30 August 1968, para. 20).

[138] *Questions relating to the Seizure and Detention of Certain Documents and Data* (see footnote 57 above), Memorial of Timor-Leste, para. 6.4.

with the exigencies of the international order] can be transposed.[139] It has also been observed that, "[w]hen the [World] Court finds that there is convergence in the relevant aspects of municipal laws, an additional test should concern the compatibility of the 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".[140] As an example of an "impossible transposition", the principle of consent to jurisdiction has been referred to: "while, in the domestic sphere, the fundamental rule is that any dispute may be brought before a judge, in international law, in the absence of an express consent of the respondent State, the opposite principle prevails".[141]

83. In light of the foregoing, it can be concluded that, for a principle common to the principal legal systems of the world to be transposed to the international legal system, it must be compatible with fundamental principles of international law, or, to borrow the terms used by Denmark and the Netherlands in the *North Sea Continental Shelf* case, the "principles on which, in the international legal system, the positive law regulating the matter is based". These include, as noted above, the principle of sovereignty, the notion of territorial sovereignty, the basic concept of continental shelf entitlement, and the principles set out in the Friendly Relations Declaration. This compatibility test is necessary to demonstrate that a principle is recognized by the community of nations as capable of operating within the broader framework of international law.

84. It should be stressed that this condition for transposition requires a principle *in foro domestico* to be compatible only with fundamental principles of international law as defined above. In the view of the Special Rapporteur, since there is no hierarchy between the sources of international law listed in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, general rules of conventional and customary international law that do not have that character cannot in themselves prevent the transposition of a principle to the international legal system. Any eventual conflict between a general principle of law and the latter would need to be resolved by employing conflict avoidance rules such as that of *lex specialis*. This is a question relating to the functions of general principles of law and their relationship with other sources of international law, which the Special Rapporteur intends to address in greater detail in a future report.

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[139] Weil, "Le droit international en quête de son identité" (footnote 104 above), p. 147, referring to Jules Basdevant, "Règles générales du droit de la paix", *Recueil des cours*, vol. 58 (1936), pp. 471 ff., at pp. 501–502 ("Il faudrait … constater que ces principes sont effectivement susceptibles d'être transportés dans l'ordre international, qu'ils ne contredisent pas une règle établie de droit international, car on est d'accord que cette transposition ne peut être effectuée qu'à défaut de règle conventionnelle ou coutumière" [It should be … noted that these principles may indeed be transposed to the international order, and that they do not violate an established rule of international law, since it is agreed that such transposition is only possible in the absence of a treaty or customary rule]). See also Bjorge, "Public law sources and analogies of international law" (footnote 103 above)2, p. 538.

[140] Gaja, "General principles in the jurisprudence of the ICJ" (see footnote 88 above), p. 39. See also Barberis, "Los Principios Generales de Derecho como Fuente del Derecho Internacional" (footnote 103 above), pp. 36–38. See also Antonio Remiro Brotons, *Derecho Internacional* (Tirant lo Blanch, 2007), p. 515.

[141] Pellet and Müller, "Article 38" (see footnote 95 above), para. 270; Basdevant, "Règles générales du droit de la paix" (see footnote 139 above), p. 502. See also *Mamatkulov and Askarov* v. *Turkey*, Nos. 46827/99 and 46951/99, Judgment, 4 February 2005, Grand Chamber, European Court of Human Rights, Joint Partly Dissenting Opinion of Judges Caflisch, Türmen and Kovler, para. 161 ("Regarding *general principles of law recognised by civilised nations*, there may well be a widespread rule on obligatory interim measures on the domestic level, based on the rule of compulsory jurisdiction applicable on that level. By contrast … that rule does not prevail on the international level, which is why it cannot be applied as such on that level. In other words, the principle cannot be transposed to the business of international courts").

B. Conditions for the adequate application of the principle in the international legal system

85. A second requirement for the transposition of a principle common to the principal legal systems of the world is that the conditions exist to allow the adequate application of the principle in the international legal system. This serves to ensure that the principle can properly serve its purpose in international law, avoiding distortions or possible abuses. In practice, this part of the methodology is often spelled out as the need to look at the structure of national legal systems, in particular the procedural frameworks within which rules or principles apply, and to determine whether the structure that exists at the international level permits the adequate application of the principle.

86. An example in this regard is the *Tadić* case, where the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia addressed the argument that, according to international human rights conventions, a criminal charge must be determined by a tribunal "established by law".[142] The Appeals Chamber noted that the principle that a tribunal must be established by law is a "general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting". At the same time, it considered that an international criminal tribunal "ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be 'established by law.'".[143]

87. The Chamber then went on to analyse different possible interpretations of the term "established by law". A first possible interpretation was that of the European Court of Human Rights of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedom (European Convention on Human Rights),[144] according to which "established by law" means established by a legislature. The Appeals Chamber dismissed this interpretation as applicable to its own establishment as follows:

> It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" … There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.
>
> It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law

[142] *Prosecutor* v. *Duško Tadić a/k/a "DULE"*, Case No. IT-94-1-A, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 41.

[143] *Ibid*., para. 42.

[144] Convention for the Protection of Human Rights and Fundamental Freedom (Rome, 4 November 1950), vol. 213, No. 2889, p. 221.

setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.[145]

88. The Chamber then considered an interpretation according to which "established by law" means "in accordance with the rule of law". Referring to the *travaux* of the International Covenant on Civil and Political Rights and decisions of the Human Rights Committee, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, it upheld this interpretation:

> This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.
>
> This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of [article 14 of] the International Covenant on Civil and Political Rights … The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should [*sic*] that it observes the requirements of procedural fairness.[146]

89. In *Delalić* et al., a Trial Chamber of the Tribunal considered that the "principles of legality [*nullum crimen sine lege* and *nulla poena sine lege*] exist and are recognised in all the world's major criminal justice systems", but that it was "not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems … because of the different methods of criminalisation of conduct in national and international criminal justice systems".[147] The Trial Chamber then considered that:

> Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States.
>
> … It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order. To this end, the affected State or States must take into account the following factors, *inter alia*: the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States.[148]

90. Likewise, in the *Furundžija* case, the Trial Chamber noted that

> since "international trials exhibit a number of features that differentiate them from national criminal proceedings", account must be taken of the specificity of

[145] *Tadić*, Decision, 2 October 1995 (see footnote 142 above), para. 43.
[146] *Ibid*., para. 45.
[147] *Prosecutor* v. *Zejnil Delalić* et al., Case No. IT-96-21-T Judgment, 16 November 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 403.
[148] *Ibid*., paras. 404–405.

> 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.[149]

91. In his Separate Opinion in the *Barcelona Traction* case, Judge Fitzmaurice also addressed this matter as follows:

> [I]t is above all necessary to have regard to the concept and structure of companies according to the systems of their origin, which are systems of private or domestic law, - and furthermore to insist on the principle that when private law concepts are utilized, or private law institutions are dealt with in the international legal field, they should not there be distorted or handled in a manner not in conformity with their true character, as it exists under the system or systems of their creation. But, although this is so, it is scarcely less important to bear in mind 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. Neglect of this precaution may result in an opposite distortion, – namely that qualifications or mitigations of the rule, provided for on the internal plane, may fail to be adequately reflected on the international, – leading to a resulting situation of paradox, anomaly and injustice.[150]

92. Cases in which a principle common to principal legal systems of the world was not considered to be transposed to the international legal system because the conditions for its adequate application did not exist at the international level also provide guidance. In *Arbitral Award made by the King of Spain*, for example, Nicaragua considered that certain notions of nullity of judgments or awards in municipal law could not be properly applied in international law due to the absence of a judicial system analogous to those existing in States:

> Nicaragua a estimé utile d'indiquer … la raison pour laquelle le droit des gens s'écarte sur ce point de la solution admise en droit interne, qui dans certains cas admet la nullité relative ou annulabilité. Cette raison doit être cherchée dans l'absence en règle générale de recours qui, à l'initiative d'une des parties, puissent valablement vérifier la réalité des griefs invoqués, tandis qu'en droit interne il est en général loisible aux intéressés d'utiliser à cet effet les mêmes voies de recours que celles qui sont ouvertes en vue du contrôle de la justice de la décision.[151]
>
> [(Nicaragua) considered it useful to indicate ... the reason why the law of nations diverges on this point from the solution recognized in domestic law, which in some cases allows for relative nullity or annullability. As a general rule, this reason must be sought in the absence of a recourse which, on the initiative of one of the parties, may validly verify the reality of the complaints lodged, whereas in domestic law it is generally up to the parties concerned to decide whether to use, to that end, the same recourses as those available for a judicial review of the decision.]

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[149] *Furundžija* (see footnote 56 above), para. 178. See also *El Paso* v. *Argentina* (footnote 54 above), para. 622 ("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").

[150] *Barcelona Traction* (see footnote 53 above), Separate Opinion of Judge Fitzmaurice, p. 65, at p. 67, para. 5.

[151] *Award made by the King of Spain* (see footnote 54 above), Rejoinder of Nicaragua, para. 51.

93. In *Questions relating to the Seizure and Detention of Certain Documents and Data*, Australia adopted a similar approach with respect to the principle of legal professional privilege invoked by Timor-Leste. Australia noted that:

> The Court should take a … measured approach to recognising any such principle at international law. This is particularly the case given that there are no established fora or mechanisms for testing a claim to privilege under international law. To Australia's knowledge, this is the first time that a State has claimed anything approximating legal professional privilege before the Court, and as Timor-Leste implicitly acknowledges, there are no procedures or procedural safeguards in place to assist the Court in independently ruling on such claims. In contrast, domestic legal systems have sophisticated and established mechanisms for the resolution of claims to privilege which can take into account, among other factors, the proper characterisation of relevant documents, and the application of appropriate exceptions (including the criminal offence exception).[152]

94. Another illustrative example is a recent case before the German Federal Constitutional Court, where Argentina argued that there is a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, based on "domestically recognized principles of insolvency law", according to which States have a right to refuse debt service on bonds held by private creditors who, contrary to the majority of creditors, have not accepted a debt swap made by the issuing State in the context of national debt crisis and seek full payment of the debt. The Constitutional Court dismissed the argument of Argentina as follows:

> The purported general principle of law invoked by the complainant, however, presupposes the existence of a comprehensive set of rules governing State bankruptcy at the level of international law. Specifically, the complainant invokes the principle of good faith in the context of (imminent) state insolvency. Even if it were assumed that the specific requirements derived by the complainant from the principle of good faith – namely the equal treatment of creditors and the integrity of orderly insolvency proceedings – amounted to a principle which was generally recognized in domestic legal orders, and even if it was true that these specific requirements were recognised within the major legal families … the transfer of the principle to situations governed by international law would require at least the existence of a comprehensive set of rules governing State bankruptcy … The specific requirements that, according to the complainant, derive from the principle of good faith with regard to insolvency law could only be applied accordingly at the level of international law if there was also an independent regulatory or supervisory authority competent to monitor compliance with these rules and capable of ensuring an equitable balancing of the interests of all affected parties …
>
> The principles of insolvency law asserted by the complainant form an integral part of the detailed domestic insolvency law regime, which contains procedural rules, also for the protection of minority creditors, whose compliance is

[152] *Questions relating to the Seizure and Detention of Certain Documents and Data* (see footnote 57 above), Counter-Memorial of Australia, para. 4.38. In *Certain Phosphate Lands*, Australia similarly argued, with respect to the transposition of the notion of "trust" in domestic legal systems: "The need for caution in translating rules from the private law area into international law is underlined by the essentially different nature of the relationship. In a private law trust one is normally dealing with a business or personal relationship involving limited and identified property or assets. By contrast, under a trusteeship under the Charter one is dealing with the discharge of a complete range of governmental functions on behalf of a whole self-determination unit. The two situations are not comparable" (*Certain Phosphate Lands* (see footnote 63 above), Counter-Memorial of Australia, para. 298).

> monitored by a neutral court, usually by a bankruptcy court. Without a procedural framework based on the rule of law which allows for the review of decisions adversely affecting the minority [of creditors], an essential prerequisite for a transfer [of the principle] to the level of international law is missing. It follows that it is not possible to invoke individual principles derived from insolvency law in accordance with Article 38(1)(c) of the ICJ Statute.[153]

95. Similarly, Judge Simma noted, with respect to the *exceptio non adimpleti contractus*, that:

> The question is, of course, 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 be able to play a constructive role also at the international level. The problem that we face in this regard is that in fully developed national legal systems the functional synallagma will operate under the control of the courts, that is, at least, such control will always be available if a party affected by its application does not accept the presence of the conditions required to have recourse to our principle. What we encounter at the level of international law, however, will all too often be instances of non-performance of treaty obligations accompanied by invocation of our principle, but without availability of recourse to impartial adjudication of the legality of these measures. Absent the leash of judicial control, our principle will thus become prone to abuse; the issue of legality will often remain contested.[154]

96. Scholars have referred to this condition for the transposition of principles common to the principal legal systems of the world to the international legal system, albeit employing different terminology and addressing the issue in more or less detail. It has been suggested, for example, that the "suitability [of a common principle] to the international legal order has to be verified",[155] or that only principles *in foro domestico* which are "appropriate in the context of international relations" can be elevated to a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.[156] Others have noted that principles *in foro domestico* become general principles of law "insofar as they are applicable to relations of States",[157] and that one cannot "apply to international law the same

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[153] Germany, Federal Constitutional Court, Judgment, 3 July 2019 (2 BvR 824/15), paras. 38–39.

[154] *Application of Interim Accord* (see footnote 86 above), Separate Opinion of Judge Simma, para.13. See also Marcelo G. Kohen, *Possession contestée et souveraineté territoriale* (Presses Universitaires de France, 1997), pp. 20–21, giving similar reasons as to why the principle of prescription existing in national legal systems may not be transposed to the international legal system.

[155] Andenas and Chiussi, "Cohesion, convergence and coherence of international law" (see footnote 131 above), p. 27.

[156] Bjorge, "Public law sources and analogies of international law" (footnote 103 above), p. 538. See also Lord Lloyd-Jones, "General principles of law in international law and common law", Speech at the Conseil d'État, Paris, 16 February 2018 ("insofar as they may appropriately be applied in the very different context of international law").

[157] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford, Oxford University Press, 2019), p. 32; Redgwell, "General principles of international law" (footnote 103 above), p. 16; Jennings and Watts, *Oppenheim's International Law* (footnote 131 above), p. 37.

normative concept one applies to national law", cautioning against "all facile copying national law principles for use in international relations".[158]

C. Evidence confirming transposition

97. It appears from the practice of States and the jurisprudence of international courts and tribunals that, in some cases, international instruments, in particular treaties, can be considered as evidence confirming that a principle common to the principal legal systems of the world is transposed to the international legal system.

98. In the *North Sea Continental Shelf* cases, for example, Denmark and the Netherlands contested the alleged general principle of law invoked by Germany because, *inter alia*, the latter did not "try to adduce examples of the application of this alleged 'principle' in international conventions".[159]

99. In *Avena and Other Mexican Nationals*, Mexico argued that the principle of exclusion of illegally obtained evidence, in addition to being generally recognized in national legal systems, had also been recognized in instruments governing international criminal tribunals, article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[160] and article 8, paragraph 3, of the American Convention of Human Rights.[161]

100. In *Certain Property*, Liechtenstein, after showing that unjust enrichment was a principle common to national legal systems which was not incompatible with international law, further argued that the principle had been "incorporated into international law" because it "inspires various legal regimes in public international law", such as the rules of international law on State succession, compensation for expropriation of property and evaluation for compensation.[162]

101. In *Application of Interim Accord*, North Macedonia contested the existence of the alleged general principle of law invoked by Greece (the *exceptio non adimpleti contractus*) on the basis, *inter alia*, that the arguments of Greece were based "on limited and old authorities that predate the adoption of the modern rules of international law on treaties and on State responsibility",[163] and that the principle "was not included in the 1969 Vienna Convention on the Law of Treaties, outside of Article 60".[164]

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[158] Maarten Bos, "The recognized manifestations of international law", *German Yearbook of International Law*, vol. 20 (1977), pp. 9–76, at p. 41. See also An Hertogen, "The persuasiveness of domestic law analogies in international law", *European Journal of International Law*, vol. 29 (2018), pp. 1127–1148; International Law Association, Report of the Study Group on the use of domestic law principles in the development of international law (footnote 96 above), para. 211; Rumiana Yotova, "Challenges in identification of the 'general principles of law recognized by civilized nations': The approach of the International Court of Justice", *Cambridge Journal of Comparative and Contemporary International Law*, vol. 3 (2017), pp. 269–323, at p. 320; Bonafé and Palchetti, "Relying on general principles in international law" (see footnote 103 above), p. 164; Christian Tomuschat, "Obligations arising for States with or against their will", in *Recueil des cours*, vol. 241 (1993), p. 315; Michael Akehurst, "Equity and general principles of law", *International and Comparative Law Quarterly*, vol. 25 (1976), pp. 801–825, at p. 816.

[159] *North Sea Continental Shelf* (see footnote 49 above), Common Rejoinder of Denmark and the Netherlands of 30 August 1968, para. 19.

[160] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85.

[161] *Avena and Other Mexican Nationals* (see footnote 64 above), Memorial of Mexico, paras. 377–379. American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123.

[162] *Certain Property* (see footnote 56 above), Memorial of Liechtenstein, paras. 6.23–6.25.

[163] *Application of Interim Accord* (see footnote 86 above), Reply of North Macedonia, para. 5.55.

[164] *Ibid*., para. 5.56.

102. The International Court of Justice has also observed on various occasions that the principle of *res judicata*, "as reflected in Articles 59 and 60 of its Statute", is a general principle of law which protects the judicial function of a court or tribunal and the parties to a case which has led to a final judgment.[165]

103. In *Tadić*, a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia considered that the principle of *non-bis-in-idem*, which "appears in some form as part of the internal legal code of many nations … has gained a certain international status since it is articulated in Article 14(7) of the International Covenant on Civil and Political Rights".[166] In the same case, the Appeals Chamber decided on the issue of contempt of court in the light of "the general principles of law common to the major legal systems of the world, as developed and refined (where applicable) in international jurisprudence".[167] After an overview of domestic rules on contempt of court in different jurisdictions, the Appeals Chamber further considered relevant provisions in its Rules of Procedure and Evidence as well as its drafting history.[168]

104. A similar approach may be found in the jurisprudence of the Iran-United States Claims Tribunal. In *Sea-Land Service* v. *Iran*, for example, the Iran-United States Claims Tribunal, having found that unjust enrichment was "codified or judicially recognised in the great majority of the municipal legal systems of the world", noted that it was also "widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals".[169] 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 a widely recognized expression in Article 62 of the Vienna Convention on the Law of Treaties".[170]

105. Other arbitral tribunals have also relied on international instruments to confirm the transposition of general principles of law to the international legal system. In *Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *Jordan*, the tribunal found that the principle according to which it is for a claimant to prove the facts on which it relies in support of its claim (*actori incumbat probatio*) was a "well established principle of law" because, *inter alia*, it had been "incorporated in basic instruments such as article 24(1) of the UNICTRAL Arbitration Rules or Article 24(1) of the Statute of the Iran – United States Tribunal".[171] Likewise, in *Saluka Investments B.V.* v. *Czech*

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[165] See, for example, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018*, p. 139, at para. 68; *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 para. 58. But see also *International status of South-West Africa* (footnote 114 above), at p. 132, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at para. 419, where principles *in foro domestico* appear not to have been considered transposed in light of the special meaning given to terms in certain treaties.

[166] *Prosecutor* v. *Duško Tadić a/k/a "DULE"*, Case No. IT-94-1-T, Decision on the defence motion on the principle of *non-bis-in-idem*, 14 November 1995, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 9. The Tribunal, however, did not apply the principle as a general principle of law, but as a principle binding upon it "to the extent that it appears in the Statute, and in the form that it appears there" (*ibid*.).

[167] *Tadić* (2000) (see footnote 56 above), para. 15.

[168] *Ibid*., paras. 19–29.

[169] *Sea-Land Service* v. *Iran* (see footnote 58 above), p. 168.

[170] *Questech, Inc.* v. *Iran* (see footnote 54 above), p. 122. See also *Rockwell* v. *Iran* (footnote 54 above), p. 171, para. 92; *Isaiah* v. *Bank Mellat* (footnote 54 above), p. 237.

[171] *Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *The Hashemite Kingdom of Jordan*, Case No. ARB/02/13, Award, 31 January 2006, International Centre for Settlement of Investment Disputes, para. 73.

Republic, in relation to the requirement of close connection for raising a counterclaim, the tribunal referred to relevant provisions of the Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[172] and the Iran-United States Claims Settlement Declaration, and observed that "those provisions, as interpreted and applied by the decisions which have been referred to, reflect a general legal principle as to the nature of the close connexion which a counterclaim must have with the primary claim if a tribunal with jurisdiction over the primary claim is to have jurisdiction also over the counterclaim".[173]

106. In light of the above, it can be concluded that, when a principle common to the principal legal systems of the world is reflected at the international level, be it in treaties or other international instruments, this may serve as evidence which confirms that the principle is transposed to the international legal system. The logic behind this appears to be that, if the community of nations expresses its recognition of the applicability of such a principle at the international level in this manner, this implies that the principle is considered to be compatible with the fundamental principles of international law, and that the international legal system provides conditions for the adequate application of the principle.

IV. Distinction from the methodology for the identification of customary international law

107. A final point to address is the distinction between the methodology for the identification of general principles of law derived from national legal systems and the methodology for the identification of customary international law. In the view of the Special Rapporteur, that distinction is, in light of the chapters above, clear and no confusion should exist between the two sources.

108. In its conclusions on identification of customary international law, taken note of in General Assembly resolution 73/203 of 20 December 2018, the Commission determined, in conclusion 2, that, "[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)". With respect to the possible forms of practice, conclusion 6 refers to, *inter alia*, "legislative and administrative acts", as well as "decisions of national courts". Furthermore, as regards the forms of evidence of *opinio juris*, conclusion 10 includes "decisions of national courts".[174]

109. These forms of practice and evidence of *opinio juris* overlap with the materials that are relevant for purposes of the identification of general principles of law derived from national legal systems, which, as explained above, are essentially domestic legal sources, such as national legislation and decisions of national courts. This overlap, however, has to be qualified.

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[172] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965), vol. 575, No. 8359, p. 159.

[173] *Saluka Investments B.V.* v. *Czech Republic*, Case No. 2001-03, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, Arbitral Tribunal, Permanent Court of Arbitration, para. 76. See also *United States – Countervailing Measures Concerning Certain Products from the European Community*, Panel Report, 31 July 2002 (WT/DS212/R), World Trade Organization, paras. 7.49–7.50.

[174] See also para. (5) of the commentary to conclusion 10 of the conclusions on identification of customary international law, A/73/10, at p. 141 ("National legislation, while it is most often the product of political choices, may be valuable as evidence of acceptance as law, particularly where it has been specified (for example, in connection with the passage of the legislation) that it is mandated under or gives effect to customary international law. Decisions of national courts may also contain such statements when pronouncing upon questions of international law").

110. First, for national legislation and decisions of national courts to be relevant for purposes of the identification of customary international law, they must be accompanied by *opinio juris*, or the belief that the State is acting pursuant to a right or obligation under international law. This, however, is not necessary for the emergence of a general principle of law: what is relevant is how national legislations and courts regulate and solve essentially domestic matters.[175]

111. Furthermore, the second step of the analysis for the identification of general principles of law derived from national legal systems (that is, the ascertainment of transposition) is unique to this source of international law. No such analysis is required when identifying a rule of customary international law.

112. In light of the developments thus far, the Special Rapporteur proposes the following draft conclusions:

Draft conclusion 4
Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

(a) the existence of a principle common to the principal legal systems of the world; and

(b) its transposition to the international legal system.

Draft conclusion 5
Determination of the existence of a principle common to the principal legal systems of the world

1. To determine the existence of a principle common to the principal legal systems of the world, a comparative analysis of national legal systems is required.

2. The comparative analysis must be wide and representative, including different legal families and regions of the world.

3. The comparative analysis includes an assessment of national legislations and decisions of national courts.

Draft conclusion 6
Ascertainment of transposition to the international legal system

A principle common to the principal legal systems of the world is transposed to the international legal system if:

(a) it is compatible with fundamental principles of international law; and

[175] See also Michael Wood, "Customary international law and the general principles of law recognized by civilized nations", *International Community Law Review*, vol. 21 (2019), pp. 307–324, at p. 318 ("what one must look at is how States regulate legal relationships that occur at the domestic level"); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (footnote 92 above), p. 24 ("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"). See also Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (see footnote 94 above), p. 20; 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" (see footnote 103 above), p. 185; Bonafé and Palchetti, "Relying on general principles in international law" (see footnote 103 above), p. 167.

(b) the conditions exist for its adequate application in the international legal system.

Part Three: Identification of general principles of law formed within the international legal system

I. General considerations

113. The first report on the topic addressed, in addition to general principles of law derived from national legal systems, a second category of general principles of law under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice: those formed within the international legal system.[176] This part of the report addresses the methodology for their identification.

114. At the outset, it must be recalled that there have been diverging views regarding this category of general principles of law within the Commission. Many members generally supported the idea that there may be principles which find their origin exclusively within the international legal system.[177] Other members, however, while not outright excluding the possibility of the existence of a second category, expressed some concerns with respect to it.[178] Those concerns are, in essence, the apparent insufficient or inconclusive practice regarding this category of general principles of law; the difficulty of distinguishing it from customary international law; and the danger that the criteria for the identification of these general principles of law may not be stringent enough, with the result that rules of international law may be all too easily invoked.

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[176] A/CN.4/732, paras. 231–253.

[177] See the statements by Mr. Aurescu (A/CN.4/SR.3491, p. 11); Mr. Cissé (A/CN.4/SR.3492, p. 21) (stating that "[t]he text of Article 38 (1) (c), the relevant *travaux préparatoires* and the history of the provision were at odds with the arguments of some authors who maintained that only the [category of general principles derived from national legal systems] should be included. The general nature of the text and the absence of any clear indication that the drafters had intended to restrict the paragraph to that category alone justified a broader, more liberal interpretation of the concept"); Ms. Galvão Teles (A/CN.4/SR.3489, p. 21–22) (noting that "[a]nother set of general principles might originate in the international legal system or international relations themselves. That idea was also largely supported in practice and in the literature"); Mr. Gómez-Robledo (A/CN.4/SR.3492, p. 10); Mr. Grossman (A/CN.4/SR.3493, p. 7) (noting that "[t]he existence of general principles of law formed within the international legal system also responded to the need to identify certain overarching features within that system. They could provide appropriate solutions to situations that did not arise in domestic systems and thus would otherwise be left unresolved … [They] could also serve to regulate issues on which there was widespread consensus but in respect of which there was little opportunity for the development of State practice"); Mr. Huang (A/CN.4/SR.3493, p. 12); Mr. Jalloh (A/CN.4/SR.3491, p. 7); Ms. Lehto (A/CN.4/SR.3492, p. 15) (noting that "[t]he text of Article 38, which had subsequently become Article 38 (1) (c) of the Statute of the International Court of Justice, did not, however, exclude other types of general principles, and the drafting history showed that [the] text, too, was a compromise between two conceptions of general principles"); Mr. Nguyen (A/CN.4/SR.3491, p. 13); Mr. Nolte (A/CN.4/SR.3492, p. 19) (stating that "[d]epending on the preconditions for their formation, the category of 'general principles formed within the international legal system' could be conceived as a form of general principles under Article 38 (1) (*c*)"); Ms. Oral (A/CN.4/SR.3492, p. 7); Mr. Ruda Santolaria (A/CN.4/SR.3492, p. 12); Mr. Saboia (A/CN.4/SR.3491, p. 17); Mr. Tladi (A/CN.4/SR.3489, p. 3); Mr. Valencia-Ospina (A/CN.4/SR.3489, p. 10) (noting that "[other principles] were inherent to the international legal order (such as the principle of consent to jurisdiction)").

[178] See the statements by Mr. Argüello Gómez (A/CN.4/SR.3492, p. 4); Mr. Hmoud (A/CN.4/SR.3489, pp. 14–15); Mr. Murase (A/CN.4/SR.3489, p. 8); Mr. Murphy (A/CN.4/SR.3490, p. 14); Mr. Park (A/CN.4/SR.3489, pp. 16–17); Mr. Rajput (A/CN.4/SR.3490, p. 19); Mr. Šturma (A/CN.4/SR.3493, p. 16); Mr. Wood (A/CN.4/SR.3490, pp. 4 and 9).

115. Different views were also expressed within the Sixth Committee. Most States agreed, on a general level, that a second category of general principles of law falling under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice exists.[179] Others called upon the Commission to further study the question without taking a clear position.[180] Some other delegations expressed doubts as to its existence.[181]

116. Some general observations regarding the concerns that have been raised within the Commission and the Sixth Committee are warranted. The Special Rapporteur agrees that the issue of basing the Commission's work on sufficient practice must be treated with great care, especially in a topic dealing with one of the sources of international law. In the context of the second category of general principles of law in particular, the difficulty in identifying relevant practice lies, first, in the fact that Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice has been expressly referred to when invoking such principles on very few occasions. Second, the terminology employed in practice is admittedly imprecise. It is therefore often open to interpretation whether, in a given case, a general principle of law formed within the international legal system was invoked or applied, or rather a rule of conventional or customary international law. Third, there may be, in some cases, a certain overlap between the first and second categories of general principles of law, to the extent that a principle that could be considered as falling under the second category may also be reflected in national legal systems (this may be said, for example, of the principle of *pacta sunt servanda*).

117. In the view of the Special Rapporteur, the paucity of references to Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice in practice is not an insurmountable obstacle. The first report explained that the drafting history and the text of Article 38, paragraph 1 (*c*), support the existence of a second category of general principles of law. As will be shown in the next chapter, there are examples in practice which appear to confirm this. The views expressed by States in the Sixth

[179] See the statements by Austria (A/C.6/74/SR.31, para. 88) (stating that "under certain circumstances, there might also be general principles of law 'formed within the international legal system'"); Belarus (A/C.6/74/SR.31, para. 95); China (A/C.6/74/SR.27, para. 96); Ecuador (A/C.6/74.SR.27, para. 37); Estonia (available from the PaperSmart portal); Italy (A/C.6/74/SR.32, para. 34); the Netherlands (A/C.6/74/SR.31, para. 153) (stating that "some general principles of law had originated in the international legal system, a position that was supported by State practice and the case law of international courts and tribunals. The freedom of the high seas was one example of a general principle of international law"); Norway (on behalf of the Nordic countries) (A/C.6/74/SR.31, para. 77) (noting that "Article 38, paragraph (1) (*c*), did not exclude the possibility of general principles of law emanating from sources other than national legal systems"); Peru (available from the PaperSmart portal) (stating that "a general principle of law may arise either from the national legal systems, through the transposition from such systems to international law, or from the international legal system itself"); Portugal (A/C.6/74/SR.32, para. 87); Russian Federation (*ibid*., para. 79); Sierra Leone (A/C.6/74/SR.31, para. 106) (stating that "[i]n some areas of international law, such as international criminal law, general principles of law derived from national law and international law were particularly important"); Spain (A/C.6/74/SR.32, para. 39, and statement from the PaperSmart portal) (noting that "there are two broad categories of general principles of law, namely those derived from national legal systems and those which have instead been formed in the international legal system"); Sudan (*ibid*., para. 28); Uzbekistan (available from the PaperSmart portal).

[180] See the statements by Australia (available at PaperSmart); Chile (A/C.6/74/SR.32, para. 47); Croatia (A/C.6/74/SR.25, para. 57); Cuba (A/C.6/74/SR.31, paras. 138–139); Republic of Korea (A/C.6/74/SR.32, para. 121); Micronesia (Federated States of) (*ibid*., para. 54); Philippines (*ibid*., para. 4); Viet Nam (*ibid*., para. 59).

[181] See the statements by the Czech Republic (A/C.6/74/SR.32, para. 104); Iran (Islamic Republic of) (available from the PaperSmart portal); Slovakia (A/C.6/74/SR.31, para. 118); United Kingdom (A/C.6/74/SR.32, para. 15); United States (available from the PaperSmart portal).

Committee also suggest that the scope of Article 38, paragraph 1 (*c*), goes beyond general principles of law derived from national legal systems.

118. As regards the imprecise terminology employed in practice, as well as in the literature (in particular the use of terms such as "general principles of international law" and "principles of international law"), the Special Rapporteur considers that each case must be carefully analysed in its context. These terms may refer to general principles of law formed within the international legal system in some cases. In others, those employing them may have in mind rules of conventional or customary international law, or even general principles of law derived from national legal systems. To address this difficulty, an important criterion is determining whether, in a specific case, a norm is identified following a methodology that is distinct.

119. With respect to the issue of overlap between the two categories of general principles of law falling under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, the Special Rapporteur considers that blurring the distinction between them should be avoided. As shown in the first report and in the present report, general principles of law derived from national legal systems have been widely accepted in practice and in the literature, and the methodology for their identification has its own characteristics. The methodology to identify general principles of law formed within the international legal system is different. What is required is determining the existence of a principle that is recognized by the community of nations by ascertaining that a principle: is widely acknowledged in treaties and other international instruments; underlies general rules of conventional or customary international law; or is inherent in the basic features and fundamental requirements of the international legal system.

120. Like virtually all Commission members and States in the Sixth Committee, the Special Rapporteur also considers that general principles of law formed within the international legal system and rules of customary international law must be clearly distinguished. This issue arises in relation to the concern that the criteria for the identification of general principles of law falling under the second category must be sufficiently stringent, and that these general principles must not be regarded as an easy way to invoke rules of international law. Chapter III below addresses this matter in some detail.

II. Methodology

121. State practice and jurisprudence shed some light on how general principles of law formed within the international legal system are to be identified. Since these principles fall, in the view of the Special Rapporteur, under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, the essential condition for their existence is that of recognition, which, as for the first category, must be wide and representative, reflecting a common understanding of the community of nations. In the present context, recognition can be considered to take three different forms. First, a principle may be widely recognized in treaties and other international instruments. Second, a principle may underlie general rules of conventional or customary international law. Finally, a principle may be inherent in the basic features and fundamental requirements of the international legal system. It must be noted, however, that these forms of recognition are not mutually exclusive. As will be shown below, they may coexist in some cases.

A. Principles widely recognized in treaties and other international instruments

122. A first way in which general principles of law formed within the international legal system may be identified is by ascertaining that a principle has been widely incorporated into treaties and other international instruments, such as General Assembly resolutions.

123. The Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg principles) can be considered as an example of general principles of law that emerged in this manner. The Nürnberg principles were incorporated in the Charter of the International Military Tribunal of 1945[182] and applied by the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (Nürnberg Tribunal). On 11 December 1946, the General Assembly, through resolution 95 (I), which was unanimously adopted, "[a]ffirm[ed] the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal".[183] The General Assembly also directed the Committee on the Progressive Development of International Law and its Codification to formulate these principles.[184]

124. During its first session, the Commission considered whether it should ascertain to what extent the Nürnberg principles constituted "principles of international law", and decided 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 principles of international law but merely to formulate them".[185]

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[182] Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the Prosecution and Punishment of the Major War Criminals of the European Axis, United Nations, Treaty Series, vol. 82, p. 279.

[183] General Assembly 95 (I) of 11 December 1946.

[184] *Ibid*.

[185] *Yearbook of the International Law Commission 1950*, vol. II, p. 374, para. 96. See also *Yearbook … 1949*, vol. I, p. 133, para. 35; *Yearbook … 1950*, vol. II, p. 189, para. 36. The Nürnberg principles provide as follows:

"*Principle I*

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

125. The Nürnberg principles appear to have been later considered by States as general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice at the time of the adoption of the International Covenant on Civil and Political Rights and the European Convention on Human Rights. As noted in the first report, the *travaux* of both treaties show that, when including article 15, paragraph 2, and article 7, paragraph 2, in each of these instruments, the intention of the parties was to further "confirm and strengthen" the Nürnberg principles.[186] In relation to the legal nature of the principles, States drew attention to, *inter alia*, the fact that they were included in the Charter of the International Military Tribunal and affirmed in General Assembly resolution 95 (I), and that they were in conformity with the purposes of the Charter of the United Nations, General Assembly resolution 96 (I) affirming genocide as a crime under international law, and the Convention on the Prevention and Punishment of the Crime of Genocide.[187]

126. The legal nature of the Nürnberg principles as general principles of law has also been referred to in the case law. For instance, in *Kolk and Kislyiy* v. *Estonia*, the European Court of Human Rights observed that:

> Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, *inter alia*, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission. Accordingly, responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War. In this context the Court would emphasise that it is expressly stated in Article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity that no statutory limitations shall apply to crimes against humanity, irrespective of the date of their commission and whether committed in time of war or in time of peace. After accession to the above Convention, the Republic of Estonia became bound to implement the said principles.

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are 3 done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

[186] See A/2929, para. 96; A/4625, paras. 15–16; A/C.3/SR.1008, paras. 2–3 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; Council of Europe, 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.

[187] See A/C.3/SR.1008, p. 135, para. 14; A/C.3/SR.1012, para. 15; A/C.3/SR.1013, paras. 14–15. Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948). Ibid., vol. 78, No. 1021, p. 277.

> Article 7 § 2 of the Convention expressly provides that this Article shall not prejudice the trial and punishment of a person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations. This is true of crimes against humanity, in respect of which the rule that they cannot be time-barred was laid down by the Charter of the Nuremberg International Tribunal.[188]

127. It may be concluded, on the basis of the above, that the Nürnberg principles were recognized by the community of nations as general principles of law formed within the international legal system by a combination of acts: their inclusion in the Charter of the International Military Tribunal, their application by the Nürnberg Tribunal and their unanimous affirmation by General Assembly resolution 95 (I). The status of the Nürnberg principles as general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice appears to be confirmed by the *travaux* of the International Covenant for Civil and Political Rights and the European Convention on Human Rights.

128. *In Reservations to the Convention on Genocide*, the International Court of Justice appears to have considered the existence of certain general principles of law recognized by the community of nations, not derived from national legal systems, in determining what kind of reservations may be made to the Convention on the Prevention and Punishment of the Crime of Genocide and what kind of objections may be taken thereto. In its advisory opinion, the Court stated, *inter alia*, that:

> The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the 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 (1) 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. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It

[188] *Kolk and Kislyiy* v. *Estonia* (dec.), Application Nos. 23052/04 and 24018/04, Decision on Admissibility, 17 January 2006, Fourth Section, European Court of Human Rights, *Reports of Judgments and Decisions* (ECHR), 2006-I. See also *Vasiliauskas* v. *Lithuania* [Grand Chamber], Application No. 35343/05, Judgment, 20 October 2015, Grand Chamber, European Court of Human Rights, ECHR 2015, paras. 187–190 (reaffirming its previous case law that Article 7, paragraph 2, of the European Convention is only a "contextual clarification of the liability limb of [Article 7, paragraph 1], included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war … It is thus clear that the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity").

> was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.[189]

129. General Assembly resolution 96 (I), referred to by the Court, also noted that the crime of genocide "is contrary to moral law and to the spirit and aims of the United Nations", and affirmed that "genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable".[190]

130. In the view of the Special Rapporteur, the language used by the Court can be interpreted as referring to general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute ("recognized by civilized nations as binding on States"). As noted by the Court, the principles in question (regarding the condemnation and punishment of the crime of genocide) "underlie" the Convention and are binding on States even in the absence of the Convention. The recognition of these principles by the community of nations can be considered to have been reflected in the Convention on the Prevention and Punishment of the Crime of Genocide, as well as in General Assembly resolution 96 (I).

131. Another example of general principles of law falling under the second category that emerged through their incorporation in treaties are the principles embodied in the Martens clause, which appeared for the first time in the preambles of the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land and the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land.[191] It reads:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

132. This clause has been incorporated in several other treaties subsequent to the Hague Conventions, such as the 1949 Geneva Conventions and their Additional

[189] *Reservations to the Convention on Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 15, at p. 23.

[190] General Assembly resolution 96 (I) of 11 December 1946.

[191] Hague Conventions respecting the laws and customs of war on land (The Hague, 18 October 1907): Convention (II) respecting the limitation of the employment of force for the recovery of contract debts (Hague Convention II); Convention (IV) respecting the laws and customs of war on land (Hague Convention IV), *The Hague Conventions and Declarations of 1899 and 1907*, J. B. Scott (ed.) (New York, Oxford University Press, 1915).

Protocols.[192] A more recent formulation of the Martens clause refers to "principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".[193]

133. The Martens clause refers to "the principles of international law, as they result … from the laws of humanity and the requirements of the public conscience" as part of the laws of war, applicable in parallel with "the principles of international law, as they result from the usages established between civilized nations" (i.e. custom). The laws (or principles) of humanity and the requirements (or dictates) of public conscience have been considered by some States as general principles of law recognized by the community of nations, not derived from national legal systems. In *Legality of the Threat or Use of Nuclear Weapons*, for example, Nauru advanced that:

> The 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.[194]

134. Similarly, during the 2019 debate in the Sixth Committee, Norway (on behalf of the Nordic countries) suggested that the Martens clause "was an example of a principle that had been formed within the international legal system".[195]

135. General principles of law that have emerged through their incorporation into treaties and other international instruments may also be found in the field of international environmental law.[196] One possible example is the polluter pays-principle, which is expressly stipulated or embodied in several environmental treaties,

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[192] See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31, art. 63; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 971, p. 85, art. 62; Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), *ibid*., No. 972, p. 135, art. 142; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 973, p. 287, art. 158; Protocol additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3, art. 1, para. 2; Protocol additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17513, p. 609, preamble; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Geneva, 10 October 1980), United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 137, preamble.

[193] See Protocol (I) additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 1, para. 2.

[194] *Legality of the Threat or Use of Nuclear Weapons*, Letter dated 15 June 1995 from counsel appointed by Nauru, together with Written Statement of the Government of Nauru, p. 13.

[195] Statement by Norway (on behalf of the Nordic countries) (A/C.6/74/SR.31, para. 77).

[196] For the view that there may be certain general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice specific to the field of environmental law, and not necessarily derived from national legal systems, see, for example, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment, International Court of Justice, *I.C.J. Reports 2010*, p. 14, Separate Opinion of Judge Cançado Trindade, p. 135, at paras. 6, 28, 48, 52; Makane Moïse Mbengue and Brian McGarry, "General principles of international environmental law in the case law of international courts and tribunals", in Andenas *et al.*, *General Principles and the Coherence of International Law* (see footnote 88 above), pp. 408–441, at pp. 408–413. The authors also note, however, that "since the main corpus of international environmental law is referred to as 'principles' because it largely emerged from universal soft law instruments (such as the Rio Declaration), in this sense these norms may be viewed as a body of customary international law" (p. 420).

requiring that the polluter bear the costs of pollution prevention, control and reduction.[197] Some recent treaties have referred in their preambles to the polluter-pays principle as a "general principle of international environmental law".[198]

136. Apart from treaties, the polluter-pays principle has been included in certain international instruments. Notably, principle 16 of the Rio Declaration on Environment and Development[199] provides that:

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interests and without distorting international trade and investment.[200]

137. In the view of Special Rapporteur, the polluter-pays principle could be considered a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, on the basis that its recognition by

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[197] See, for example, the Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) United Nations, *Treaty Series*, vol. 956, No. 13706, p. 251; Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963), *ibid.*, vol. 1063, No. 16197, p. 265; Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 February 1976), *ibid.*, vol. 1102, No. 16908, p. 27, art. 12; ASEAN Agreement on the Conservation of Nature and Natural Resources (Kuala Lumpur, 9 July 1985), UNEP *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, 1991) vol. 2, p. 144, art. 10 (d); Convention on the Protection of Alps (Salzburg, Austria, 7 November 1991), United Nations, Treaty Series, vol. 1917, No. 32724, p. 135, art. 2, para. 1; Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992), *ibid.*, vol. 2354, No. 42279, p. 67, art. 2, para. 2 (b); Agreement on the European Economic Area (Brussels, 13 December 1993), *Official Journal of the European Communities*, vol. 37, No. L 1, p. 3, art. 73, para. 2; Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992), United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269, art. 2, para. 5 (b); Agreements on the Protection of the Rivers Meuse and Scheldt (Charleville Mezieres, France, 26 April 1994), *International Legal Materials*, vol. 34 (1995), p. 851, art. 3, para. 2 (d); Convention on Cooperation for the Protection and Sustainable Use of the Danube River (Sofia, 29 June 1994), *Official Journal of the European Communities*, vol. 52, No. L 342, p. 19, art. 2, para. 4; Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, 7 November 1996), *London Convention 1972: Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and 1996 Protocol* (London, International Maritime Organization, 2003), p. 15, art. 3, para. 2; Convention on the Protection of the Rhine (Bern, 12 April 1999), *Official Journal of the European Communities*, vol. 43, No. L 289, p. 31, art. 4 (d). See also Philippe Sands, *Principles of International Environmental Law*, 2nd ed. (Cambridge University Press, 2003), pp. 279–281.

[198] See, for example, the International Convention on Oil Pollution Preparedness, Response and Cooperation (London, 30 November 1990), United Nations, *Treaty Series*, vol. 1891, No. 32194, p. 77.

[199] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, Volume I: *Resolutions Adopted by the Conference* (A/CONF.151/26/Rev.1 (Vol. I); United Nations publication, Sales No. E.93.1.8), resolution 1, annex, p. 3, at p. 6.

[200] See also Organization for Economic Cooperation and Development: Recommendation of the Council on Guiding Principles concerning International Aspects of Environmental Policies, OECD/LEGAL/0102 (1972), annex, paras. 2–5; Recommendation of the Council on the Implementation of the Polluter-Pays Principle, OECD/LEGAL/0132 (1974); Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution, OECD/LEGAL/0251 (1989); Recommendation of the Council on the Use of Economic Instruments in Environmental Policy, OECD/LEGAL/0258 (1991).

the community of nations can be ascertained through the incorporation of the principle in several widely accepted treaties and other international instruments.[201]

B. Principles underlying general rules of conventional or customary international law

138. General principles of law formed within the international legal system may also be identified by establishing that they underlie general rules of conventional or customary international law.[202] In these cases, the recognition required for the existence of the general principle under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice appears to be inferred from the general acceptance of the rules which they underlie. This methodology is, essentially, deductive.

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

> The 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 States obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[203]

140. The Court did not apply the Hague Convention, which is applicable only in time of war and, in any event, Albania was not a party to it. It nevertheless identified certain obligations based on "general and well-recognized principles", which could be considered to have been deduced from existing rules of conventional or customary international law,[204] and applied those principles to decide the case at hand.

141. In *Legality of the Threat or Use of Nuclear Weapons*, Indonesia appears to have similarly sought to identify a general principle of law by way of deduction from treaty provisions. It advanced that: "support for the principle that the threat to commit an

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[201] See also Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law*, 2nd ed. (Cambridge, Cambridge University Press, 2018), p. 81 ("At first sight, [the polluter-pays principle] would appear as a mere version of the duty to repair the damage caused to others as applied in an environmental context. However, such a limited understanding would deprive this principle of any autonomous content, given that such duty is well-established in customary international law through both the no-harm and the prevention principles").

[202] Bonafé and Palchetti, "Relying on general principles in international law" (see footnote 103 above), p. 162. The authors add that "international law is the starting point for obtaining general principles that can subsequently be applied to other situations that do not fall under the original purview of the relevant rules" (*ibid*.).

[203] *Corfu Channel* (see footnote 55 above), p. 22. In its submissions, the United Kingdom had requested the Court to declare, *inter alia*, that Albania "did not notify the existence of [the] mines as required by the Hague Convention VIII of 1907 in accordance with the general principles of international law and humanity" (*ibid*., p. 10). In its Counter-Memorial, Albania declared that, even if it had not become a party to the Convention, it accepted that it was bound by the rules set out therein, even in time of peace, due to their "declaratory character" (Counter-Memorial of Albania, para. 84). See also Rejoinder of Albania, para. 27.

[204] See Bonafé and Palchetti, "Relying on general principles in international law" (see footnote 103 above), p. 163; Yotova, "Challenges in identification of the 'general principles of law recognized by civilized nations'" (footnote 158 above), p. 299.

illegal act is also illegal can be found in international legal instruments and *opinio juris* as well as the general principles of law recognized by civilized nations".[205]

142. In making this argument, Indonesia referred generally to treaties prohibiting the possession and manufacture of weapons of mass destruction, the Nürnberg principles, Protocol I of the Geneva Convention and the Convention on the Prevention and Punishment of the Crime of Genocide.[206]

143. In *Furundžija*, faced with a "major discrepancy" on how States criminalize forced oral penetration domestically,[207] the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia considered that it had to "establish whether an appropriate solution [could] 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".[208] Although it did not explain the difference between these two terms, nor indicate which one of them it was relying on, the Chamber held that:

> [T]he forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. 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.[209]

144. The Trial Chamber thus appears to have identified and applied a "general principle of respect for human dignity" on the basis that it underlies "international humanitarian law and human rights law".

145. In light of the above, the Special Rapporteur concludes that a principle can be considered to be formed within the international legal system when it underlies general rules of conventional and customary international law. These principles are "recognized" in the sense of Article 38, paragraph 1 (*c*), of the Statute by their wide acknowledgment through the treaties and customary rules in question. The methodology for their identification is essentially deductive: one must look at specific rules of international law and deduce the principles underlying them. The principle thus identified can be applied independently of the relevant rules of conventional or customary international law, and even in the absence of the latter. The principle does not, in others words, form part of the rules from which it was deduced.

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[205] *Legality of the Threat or Use of Nuclear Weapons*, CR 1995/25, 3 November 1995, p. 37, para. 77.

[206] *Ibid*., paras. 78–79.

[207] *Furundžija* (see footnote 56 above), para. 182.

[208] *Ibid*.

[209] *Ibid*., para. 183.

C. Principles inherent in the basic features and fundamental requirements of the international legal system

146. A third way in which general principles of law falling under the second category may be identified is by ascertaining that they are inherent in the basic features and fundamental requirements of the international legal system, which is a creation of the community of nations.

147. An example in this regard is the principle of consent to jurisdiction, which can be considered as inherent in the international legal system due to the structure of the latter: it is a necessary consequence of the fact that sovereign States are equal and a judiciary to which disputes may be submitted in a compulsory manner, similar to those in national legal systems, is absent. This principle inspires and finds reflection in various international instruments, and has been often referred to in the case law. In the *Monetary gold* case, for example, the International Court of Justice noted that "[t]o adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent".[210] The principle was also invoked by Nicaragua in the *Land, Island and Maritime Frontier Dispute* case as a "principle of general international law" which was "embodied in the provisions of Article 62 [of the Statute of the International Court of Justice]".[211] The Chamber of the Court noted that, in order to answer the question whether a jurisdictional link was required for Nicaragua's intervention under Article 62 of the Statute, it had to "consider the general principle of consensual jurisdiction in its relation with the institution of intervention".[212] In this respect, the Chamber observed that "[t]here can be no doubt of the importance of this general principle", and referred to the *Mavrommatis Palestine Concessions* case, where the Permanent Court had considered that it operated "bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given".[213] In the meanwhile, it could also be said that the principle of consent to jurisdiction is widely recognized in treaties, and thus it also fulfils the requirement for the first form of recognition at the international level. As mentioned above, different forms of recognition are not mutually exclusive.

148. In *Right of Passage*, Portugal argued that general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice include not only general principles derived from national legal systems, but also general principles inherent in the international legal order.[214] As regards the latter, Portugal maintained that:

> Parmi les principes du droit international, il en est un certain nombre dont le caractère fondamental résulte de ce qu'ils sont intimement liés à la structure de ce droit. Ce sont, dit justement Sörensen, des principes 'inhérents au système

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[210] *Case of the monetary gold removed from Rome in 1943 (Preliminary Question), Judgment of June 15th, 1954, I.C.J. Reports 1954*, p. 19, at p. 32.

[211] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, General List No. 75 (1986), Application for Permission to Intervene by the Government of Nicaragua, International Court of Justice, p. 6.

[212] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 92, at pp. 132–133, para. 94.

[213] *Ibid*., p. 133, para. 95. See also para. 99.

[214] *Right of Passage* (see footnote 62 above), Reply of Portugal, para. 335. Portugal added: "Ce sont 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" [These are general principles unique to the international legal order; it would therefore be pointless to look for their manifestation in domestic legal orders] (*ibid*.).

> juridique international tel que nous le connaissons à l'époque contemporaine'. "Sans eux", précise-t-il, "la structure de la communauté internationale serait radicalement changée, et historiquement ils ont donc fait partie du droit international dès le début de l'ordre juridique international sous sa forme moderne" …. Et il ajoute: "Parmi les plus significatifs de ces principes axiomatiques, tels qu'ils ressortent de la jurisprudence de la Cour, il y a lieu de signaler les principes de l'indépendance et de l'égalité des États qui, à leur tour, font partie de la notion traditionnelle de la souveraineté".[215]
>
> [Some principles of international law are of a fundamental character in that they are intricately linked to the structure of that law. They are, as Sörensen rightly put it, principles "inherent in the international legal system as we know it today". "Without them", he said, "the structure of the international community would be radically changed; they have therefore historically been part of international law from the very inception of the international legal order in its modern form" .... And, he added: "Among the most significant of these axiomatic principles, as they emerge from the Court's jurisprudence, are the principles of the independence and equality of States, which, in turn, form part of the traditional notion of sovereignty".]

149. India, however, rejected the views of Portugal, stating, *inter alia*, that "principles of public international law" do not fall under Article 38, paragraph 1 (*c*), of the Statute (which it saw as including only principles derived from national legal systems), and that "general principles of public international law have no other content than that which arises out of rules of custom and treaty".[216] The International Court of Justice did not decide on this matter.

150. In *Frontier Dispute (Burkina Faso/Mali)*, a Chamber of the International Court of Justice referred to the principle of *uti possidetis juris* as a general principle logically connected to the phenomenon of independence. The Chamber noted:

> Since the two Parties have … expressly requested the Chamber to resolve their dispute on the basis, in particular, of the "principle of the intangibility of frontiers inherited from colonization", the Chamber cannot disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers. Although there is no need, for the purposes of the present case, to show that this is a firmly established principle of international law where decolonization is concerned, the Chamber nonetheless wishes to emphasize its general scope, in view of its exceptional importance for the African continent and for the two Parties. In this connection it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed

[215] *Ibid*., para. 338.

[216] *Ibid*., Counter-Memorial of India, paras. 295–296. India further noted that it did not dispute the existence of the general principles of public international invoked by Portugal, which in its view "play an important part in doctrine and in international life" and "express essential tendencies of the law, fundamental feelings and ideas which determine its growth". In the view of India, however, "they are only part of positive law to the extent that their application is attested by consultation with one or other of the sources in Article 38" (*ibid*., para. 297). In its Rejoinder, India added that "[t]hese general principles, refined as they are from existing rules of positive law, have their basis in positive law. It follows that, when an alleged general principle is disputed, it is essential to prove its existence by indicating the rules of positive law which are claimed to provide the basis for formulating the general principle. Nor can it be allowed that the general principle should be formulated in a vague and sweeping manner departing materially from the basic rules of positive law nor that corollaries may be deduced from the general principle by a purely logical process without the slightest regard for the underlying elements of positive law" (*ibid*., Rejoinder of India, para. 571. See also para. 574).

> the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless, the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.[217]

The Chamber further maintained 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".[218] It similarly recalled that the principle had been reflected in statements by African leaders, the Charter of the Organization of African Unity, and in resolution AGH/Res.16 (I), adopted at the first session of the Conference of African Heads of State in 1964.[219] The Chamber also referred to the "several different aspects to this principle, in its well-known application in Spanish America", and put emphasis on the fact that "[t]he essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved". According to the Chamber, the principle was applicable not only in the Americas, but also to the parties to the dispute, *uti possidetis* being "a principle of a general kind which is logically connected with this form of decolonization wherever it occurs".[220] The Chamber added that the obligation to respect pre-existing boundaries in the event of a State succession "derives from a general rule of international law, whether or not the rule is expressed in the formula of *uti possidetis*. Hence the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States … are evidently declaratory rather than constitutive: they recognize and confirm an existing principle".[221]

151. This decision sheds light on the difference between the process of formation of general principles of law formed within the international legal system and that of rules of customary international law. For a rule of customary international law to emerge, there must be a general practice accepted as law (accompanied by *opinion juris*), while for a general principle of law to emerge, "recognition" by the community of nations is key. The Chamber's reasoning suggests that, at the time the judgment was rendered, *uti possidetis* was not yet considered a rule of customary international law, but a "general principle" which was "logically connected with the phenomenon of independence". This principle, according to the Chamber, was applicable to African States even before they expressly accepted it in declarations, the Charter of the Organization of African Unity and resolution AGH/Res.16 (I). In light of this, it may be concluded that the principle of *uti possidetis juris* was identified as a general principle of law based on the ascertainment that it was logically connected with, or inherent in, the phenomenon of independence, which only occurs in the operation of the international legal system, which is a creation of the community of nations.

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

[218] *Ibid*., para. 21.

[219] *Ibid*., pp. 565–566, para. 22.

[220] *Ibid*., p. 566, para. 23.

[221] *Ibid*., para. 24. See also p. 567, para. 26 ("the applicability of *uti possidetis* in the present case cannot be challenged merely because in 1960, the year when Mali and Burkina Faso achieved independence, the Organization of African Unity which was to proclaim this principle did not yet exist, and the above-mentioned resolution calling for respect for the pre-existing frontiers dates only from 1964").

Evidence confirming such recognition may be found in the attitude of States acknowledging the existence of the principle.[222]

152. Nowadays, the principle of *uti possidetis* is generally considered also a rule of customary international law. The principle may thus be regarded as an example of a general principle of law that, after being consistently applied by States, obtained the additional status of customary international law. There appears to be nothing preventing a norm from being both a general principle of law and a rule of customary international law at the same time.[223]

153. Another case in which the International Court of Justice appears to have applied a similar reasoning is the *Fisheries Case* between Norway and the United Kingdom. In determining whether certain lines of delimitation of the Norwegian fisheries zone (in particular the base-lines employed) were compatible with the international law existing at the relevant time (1935–1951), the Court found that:

> It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.
>
> In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.[224]

154. Based on this, the Court referred to considerations such as the "close dependence of the territorial sea upon the land domain", the "more or less close relationship existing between certain sea areas and the land formations which divide or surround them" and "certain economic interests peculiar to a region" to address the issue before it.[225]

155. In *Kupreškić*, after considering that no general principle of criminal law common to all major legal systems of the world could be found, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia resorted to "a general principle of law consonant with the fundamental features and the basic requirements of international criminal justice".[226] In order to identify this principle, it found that:

> In this regard, two basic requirements … acquire paramount importance on account of the present status of international criminal law. One is the

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[222] Giorgio Gaja, "General principles of law", *Max Planck Encyclopedia of Public International Law* (2013), para. 19 ("Art. 38 (1) (c) ICJ Statute requires a general principle of law to be 'recognized by civilized nations'. When a given principle is only part of international law, recognition of that principle would reflect the attitude that is taken in its regard by the international community, and thus essentially by States. In other words, for a principle to exist it would be necessary that States acknowledge, albeit implicitly, that this principle applies to their *international relations*").

[223] It may be noted that, in a later case, El Salvador argued that the principle of *uti possidetis* is a rule of customary international law as well as a general principle of law. See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Memorial of El Salvador, para. 3.4. El Salvador also noted that the principle is applicable to "any boundary delimitation between States which have become independent after a period of subjection to the same colonial power" (*ibid*.).

[224] *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at pp. 132–133.

[225] *Ibid*., p. 133.

[226] *Kupreškić* et al., Judgment, Trial Chamber (see footnote 56 above), para. 738.

> requirement that the rights of the accused be fully safeguarded. The other requirement is that the Prosecutor and, more generally, the International Tribunal be in a position to exercise all the powers expressly or implicitly deriving from the Statute, or inherent in their functions, that are necessary for them to fulfil their mission efficiently and in the interests of justice.[227]

156. In relation to the first requirement, the Trial Chamber noted the "rudimentary state" of international criminal rules, and, "[i]n this state of flux the rights of the accused would not be satisfactorily safeguarded" if the Trial Chamber were to convict persons of specific crimes and any other crimes based on the same facts not mentioned in the indictment.[228] It also considered that such an approach would violate article 21, paragraph 4 (a), of the Statute of the Tribunal, which provides that an accused shall be informed "promptly and in detail" of the "nature and cause of the charge against him".[229] In relation to the second requirement, it considered that

> the efficient discharge of the Tribunal's functions in the interest of justice warrants the conclusion that any possible errors of the Prosecution should not stultify criminal proceedings whenever a case nevertheless appears to have been made by the Prosecution and its possible flaws in the formulation of the charge are not such as to impair or curtail the rights of the Defence.[230]

Based on the balance of these two requirements, the Trial Chamber reached a series of guidelines for the purposes of its decision.[231]

157. Thus, in this case, general principles of law appear to have been identified based on the "fundamental features and the basic requirements" of international criminal law. The "recognition" by the community of nations can be considered to have been inferred from the fundamental features and requirements of that body of law.

158. In light of the above, it can be concluded that general principles of law formed within the international legal system may be identified by inferring a principle from the basic features and fundamental requirements of the international legal system, which, again, is a creation of the community of nations.

III. Distinction from the methodology for the identification of customary international law

159. As mentioned above, there was general agreement within the Commission and the Sixth Committee that general principles of law formed within the international legal system and customary international law must be clearly distinguished. The following addresses this issue.

160. The distinction between these two sources is based, first of all, on the method for their identification. As noted above, for a rule of customary international law to exist, there must be a general practice accepted as law (accompanied by *opinio juris*). General principles of law, in contrast, must be recognized by the community of nations.

161. The forms which recognition may take for purposes of general principles of law falling under the second category have already been explained above. As regards principles that are widely recognized in treaties and other international instruments,

[227] *Ibid*., para. 739.
[228] *Ibid*., para. 740.
[229] *Ibid*.
[230] *Ibid*., para. 741.
[231] *Ibid*., paras. 742–743. Another possible example of a principle inherent in the basic features and fundamental requirements of the international legal system is that of the freedom of the high seas, mentioned by the Netherlands during the 2019 Sixth Committee debate (A/C.6/74/SR.31, para. 153).

some overlap may appear to exist, given that the materials through which the requirement of recognition can be ascertained also serve as evidence to determine the existence of a rule of customary international law.

162. According to conclusion 11 of the conclusions on identification of customary international law, treaty rules may be relevant in relation to the identification of a rule of customary international law in three cases: first, when it codifies a pre-existing customary rule, that is, when there is a general practice accepted as law that generated a rule that already existed at the time of the conclusion of the treaty; second, when the treaty rule leads to the crystallization of a rule of customary international law that was emerging prior to the conclusion of the treaty, in other words, the treaty prompts the continuation of the practice accepted as law until a customary rule emerges; third, the treaty rule gives rise to a general practice accepted as law, generating a new rule of customary international law.

163. Furthermore, conclusion 12 explains that resolutions of international organizations and intergovernmental conferences may provide evidence for determining the existence of a rule of customary international law or contribute to its development. A provision in a resolution may be considered to reflect a rule of customary international law as long as it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

164. In all the cases mentioned, what ultimately matters is the need to establish that there is a general practice that is accepted as law (accompanied by *opinio juris*), the two constituent elements of customary international law.

165. In the case of general principles of law falling under the second category, one does not need to look for a general practice and its acceptance as law (*opinio juris*). What matters is the clear acknowledgment through treaties and other international instruments of the existence of a legal principle of general scope of application. The recognition by the community of nations of the existence of an independent general principle with universal validity has to be inferred from those instruments. Every case has to be analysed in its context, having regard to the text of the instrument in question and the intention of the negotiating parties.

166. With respect to principles underlying general rules of conventional and customary international law, these too are to be identified using a distinct methodology. As explained above, the approach here is essentially deductive. In this respect, it may be recalled that, in its commentaries to the conclusions on identification of customary international law, the Commission noted that:

> The two-element approach does not in fact preclude a measure of deduction as an aid, to be employed with caution, in the application of the two-element approach, in particular when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law, or when concluding that possible rules of international law form part of an "indivisible regime".[232]

167. In the view of the Special Rapporteur, the deduction to which the Commission referred to is different from the deduction allowed for the identification of general principles of law formed within the international legal system. It has to be noted that the "measure of deduction" for purposes of the two-element approach seems to be very narrow. It can be employed only "as an aid" in the application of the two-element approach, that is, when ascertaining that there is a general practice accepted as law (accompanied by *opinio juris*).

[232] Para. (5) of the commentary to conclusion 2, A/73/10, at p. 126.

168. In the case of general principles of law formed within the international legal system, the deductive method is not limited to general rules of customary international law, but includes also general rules of conventional law. This deduction exercise is not an aid to ascertain the existence of a general practice accepted as law, but the main criterion to establish the existence of a legal principle that has a general scope and may be applied to a situation not initially envisaged by the rules from which it was derived. Similar considerations may apply to principles inherent in the basic features and fundamental requirements of the international legal system, for which the methodology for identification is, as explained above, also deductive.

169. A final point to take into consideration is the nature of general principles of law falling under the second category. At least some of these principles appear as norms of a broad character that do not necessarily imply any specific obligation to act in a manner which protects their general thrust. This has been suggested by the International Court of Justice in its recent judgment in the *Immunities and Criminal Proceedings* case, where it stated that:

> Article 4 [of the United Nations Convention against Transnational Organized Crime] does not refer to the customary international rules, including State immunity, that derive from sovereign equality but to the principle of sovereign equality itself. Article 4 refers only to general principles of international law. In its ordinary meaning, Article 4 (1) does not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications of those rules.[233]

170. This issue will be addressed in greater detail in a future report dealing with the functions of general principles of law.

171. In light of the above, the Special Rapporteur proposes the following draft conclusion:

Draft conclusion 7
Identification of general principles of law formed within the international legal system

To determine the existence and content of a general principle of law formed within the international legal system, it is necessary to ascertain that:

(a) a principle is widely recognized in treaties and other international instruments;

(b) a principle underlies general rules of conventional or customary international law; or

(c) a principle is inherent in the basic features and fundamental requirements of the international legal system.

Part Four: Subsidiary means for the determination of general principles of law

172. Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice provides that:

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

[233] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 292, at p. 321, para. 93.

…

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

173. In its conclusions on identification of customary international law, the Commission addressed in detail the weight that must be given to subsidiary means for the determination of rules of law. Conclusion 13 reads:

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

174. The commentary to this conclusion further explains, *inter alia*, that the role of judicial decisions is an "aid" in the identification of rules of customary international law,[234] and that the term "subsidiary means" denotes "the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law (as are treaties, customary international law and general principles of law)". At the same time, the use of that term "does not … suggest that such decisions are not important for the identification of customary international law".[235]

175. Conclusion 14 provides that:

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

176. The commentary similarly explains that teachings "are not themselves a source of international law, but may offer guidance for the determination of the existence and content of rules of customary international law".[236]

177. The Special Rapporteur sees no reason to depart from the above approach for purposes of the present topic. The term "rules of law" in Article 38, paragraph 1 (*d*), of the Statute, read in its context, clearly includes all three sources of international law mentioned in that provision. Therefore, judicial decisions and the teachings of the most highly qualified publicists may serve as a subsidiary means for the determination of general principles of law.

178. Judicial decisions are often relied upon in order to determine the existence (or not) of general principles of law, in particular those derived from national legal systems, as well as their content. To cite but a few examples, in the *Corfu Channel* case, the International Court of Justice found that the use of indirect evidence, in addition to being admitted in "all systems of law", was "recognized by international decisions".[237] In *Pedra Branca/Pulau Batu Puteh*, the Court similarly noted that "[i]t is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claims must establish that fact".[238] In the *Chagos Marine Protected Area* arbitration, the tribunal noted that the "frequent

[234] Para. (1) of the commentary to conclusion 13, A/73/10, at p. 149.
[235] Para. (2), *ibid*.
[236] Para. (2) of the commentary to conclusion 14, *ibid*., at p. 151.
[237] *Corfu Channel* (see footnote 55 above), p. 18.
[238] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 12, at p. 31, para. 45.

invocation [of the principle of estoppel] in international proceedings has added definition to the scope of the principle".[239] In the *Yukos* case, the arbitral tribunal rejected the "clean hands" doctrine invoked by the Russian Federation, noting, in particular, that the latter did not refer to any "majority decision where an international court or arbitral tribunal has applied the principle of 'unclean hands' in an inter-State or investor-State dispute".[240]

179. Teachings of scholars have also been used on many occasions in the identification of general principles. This subsidiary means has been relied upon, for instance, in order to demonstrate that a principle is common to principal legal systems of the world.[241] Scholarly writings may be particularly useful to overcome linguistic barriers in the comparative survey of national legal systems. As noted by the Commission in its conclusions on identification of customary international law, however, caution is needed when drawing upon writings, as their value for determining the existence of a rule of international law may vary.[242]

180. Other types of materials, such as public and private codification initiatives, have also been considered when determining the existence and content of a principle common to national legal systems. For instance, some tribunals have relied on the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts in relation to principles that may be derived from domestic contract law, noting that they are "a sort of international restatement of the law of contracts reflecting rules and principles applied by the majority of national legal

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[239] *Chagos Marine Protected Area (Mauritius* v. *United Kingdom)*, Case No. 2011-03, Award, 18 March 2015, Permanent Court of Arbitration, para. 436. In *Certain Property*, Liechtenstein similarly sought to explain the content of the principle of unjust enrichment by reference to the case law of the Iran-United States Claims Tribunal. See *Certain Property* (see footnote 56 above), Memorial of Liechtenstein, paras. 6.33–6.34.

[240] *Yukos Universal Limited (Isle of Man)* v. *The Russian Federation*, Case No. AA 227, Final Award, 18 July 2014, Permanent Court of Arbitration, para. 1362. In *Obligation to Negotiate Access to the Pacific Ocean*, the International Court of Justice noted that, in spite of the references to legitimate expectations that may be found in arbitral awards concerning investor-State disputes, "[i]t does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation". See, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018,* p. 507, at p. 559, para. 162.

[241] See, for example, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, 12 October 1998 (WT/DS58/AB/R), para. 158; *Certain Property* (footnote 56 above), Memorial of Liechtenstein, paras. 6.10–6.15; *North Sea Continental Shelf* (footnote 49 above), Separate Opinion of Judge Ammoun, p. 101, at pp. 140–141; *Oil Platforms* (footnote 85 above), Separate Opinion of Judge Simma, paras. 66–73; *Erdemović* (footnote 72 above), Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras. 59–60; *Gold Reserve* v. *Venezuela* (footnote 83 above), para. 576; *Sea-Land Service* v. *Iran* (see footnote 58 above), paras. 60–61.

[242] Para. (2) of the commentary to conclusion 14, A/73/10, at p. 151. Bogdan, for example, noted: "It must be kept in mind that the general principles of law follow the developments in municipal legal systems. Older comparative research may therefore be used only with care, since it may in large parts already be obsolete". See Bogdan, "General principles of law and the problem of lacunae in the law of nations" (footnote 95 above), p. 51.

systems".[243] Similarly, in order to identify rules and principles existing in the United States' legal system, reference has been made to the Restatement (Second) of Contracts,[244] the Restatement of Torts,[245] and Restatement of the Law of Restitution.[246]

181. In light of the above, the Special Rapporteur proposes the following draft conclusions:

Draft conclusion 8
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of general principles of law are a subsidiary means for the determination of such principles.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of general principles of law, as a subsidiary means for the determination of such principles.

Conclusion 9
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of general principles of law.

Part Five: Future programme of work

182. In line with the debates within the Commission and the Sixth Committee thus far, the next report on the topic will deal with the functions of general principles of law and their relationship with other sources of international law.

[243] *El Paso* v. *Argentina* (footnote 54 above), para. 623. See also *Eureko B.V.* v. *Republic of Poland*, Partial Award, 19 August 2005, para. 174. See also Jarrod Hepburn, "The UNIDROIT Principles of International Commercial Contracts and investment treaty arbitration: A limited relationship", *International and Comparative Law Quarterly*, vol. 64 (2015), pp. 905–934, at pp. 914–915. Other instruments aiming to codify generally recognized principles in national legal systems may include the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, 17 December 1997; available from http://www.oecd.org/corruption/oecdantibriberyconvention.htm) and the United Nations Conference on Trade and Development (UNCTAD) Principles on Promoting Responsible Sovereign Lending and Borrowing (See International Law Association, Report of the Study Group on the use of domestic law principles in the development of international law (footnote 96 above), para. 202).

[244] *Amco* v. *Indonesia* (see footnote 80 above), para. 266.

[245] *Oil Platforms* (footnote 85 above), Separate Opinion of Judge Simma, para. 68.

[246] *Certain Property* (see footnote 56 above), Memorial of Liechtenstein, para. 6.12. See also Rudolf B. Schlesinger, "Research on the general principles of law recognized by civilized nations", *American Journal of International Law*, vol. 51 (1957), pp. 734–753.

Annex

Proposed draft conclusions

Draft conclusion 4
Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

(a) the existence of a principle common to the principal legal systems of the world; and

(b) its transposition to the international legal system.

Draft conclusion 5
Determination of the existence of a principle common to the principal legal systems of the world

1. To determine the existence of a principle common to the principal legal systems of the world, a comparative analysis of national legal systems is required.

2. The comparative analysis must be wide and representative, including different legal families and regions of the world.

3. The comparative analysis includes an assessment of national legislations and decisions of national courts.

Draft conclusion 6
Ascertainment of transposition to the international legal system

A principle common to the principal legal systems of the world is transposed to the international legal system if:

(a) it is compatible with fundamental principles of international law; and

(b) the conditions exist for its adequate application in the international legal system.

Draft conclusion 7
Identification of general principles of law formed within the international legal system

To determine the existence and content of a general principle of law formed within the international legal system, it is necessary to ascertain that:

(a) a principle is widely recognized in treaties and other international instruments;

(b) a principle underlies general rules of conventional or customary international law; or

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Draft conclusion 9
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of general principles of law.

Consolidated 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 [the community of nations].

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.

Draft conclusion 4
Identification of general principles of law derived from national legal systems

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