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Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*

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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] A second general debate[4] was held by the Commission at its seventy-second session, in 2021, on the basis of the Special Rapporteur's second report.[5] In summing up that debate,[6] the Special Rapporteur concluded, *inter alia*, that:

(a) The point of departure of the work of the Commission in the present topic was Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, analysed in the light of practice and jurisprudence, as well as the relevant doctrine;

(b) Members of the Commission broadly agreed that the term "civilized nations" employed in Article 38, paragraph 1 (*c*), of the Statute was anachronistic and could be replaced in the work of the Commission with the term "community of nations", which appears in article 15, paragraph 2, of the International Covenant on Civil and Political Rights;

(c) There was general agreement among Commission members that there is a need to strike a proper balance between flexibility and rigour when determining the methodology for the identification of general principles of law;

(d) With respect to the first category of general principles of law, that is, general principles of law derived from national legal systems, there was broad agreement that the basic approach for their identification consists of a two-step analysis to ascertain: (i) the existence of a principle common to the various legal systems of the world, and (ii) its transposition to the international legal system;

(e) The second category of general principles of law continued to be subject to divergent views. Commission members reaffirmed the need to clearly distinguish such general principles from other sources of international law, in particular customary international law. Members generally recalled that the method for the identification of general principles of law formed within the international legal system should be objective and clear;

(f) Commission members generally agreed with the approach of the second report concerning the role of subsidiary means, in the sense of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, for the determination of general principles of law;

(g) The view was expressed by Commission members that general principles of law are supplementary in nature in the sense that their role is to fill gaps in international law and to prevent situations of *non liquet*. Similarly, members of the Commission generally noted that there was no hierarchy among the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice.

3. Following the debate within the plenary and the Drafting Committee, draft conclusions 1, 2 and 4, with commentaries, were provisionally adopted by the

[1] A/72/10, para. 267.
[2] A/CN.4/SR.3488–3494.
[3] A/CN.4/732.
[4] A/CN.4/SR.3536–3546.
[5] A/CN.4/741 and Corr.1.
[6] A/CN.4/SR.3545.

Commission.[7] Additionally, draft conclusion 5 was provisionally adopted by the Drafting Committee.[8]

4. During the seventy-sixth session of the Sixth Committee, States had the opportunity to comment on the work of the Commission. Various delegations agreed with the use of the term "community of nations" instead of "civilized nations".[9] Delegations also generally agreed with the two-step analysis methodology for the identification of general principles of law derived from national legal systems

[7] A/76/10, paras. 238–239. The draft conclusions read:

"**Conclusion 1**
Scope

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

Conclusion 2
Recognition

For a general principle of law to exist, it must be recognized by the community of nations.

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 various legal systems of the world; and

(b) its transposition to the international legal system."

[8] See the statement of the Chair of the Drafting Committee, 3 August 2021, pp. 9–12 (the original wording proposed by the Special Rapporteur can be found in A/CN.4/741 and Corr.1, para. 112). The draft conclusion reads:

"**Conclusion 5**
Determination of the existence of a principle common to the various legal systems of the world

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

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

3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials."

[9] See the statements by Chile (A/C.6/76/SR.23, para. 151); China (A/C.6/76/SR.23, para. 84); Denmark (on behalf of the Nordic countries) (A/C.6/76/SR.23, para. 38); India (A/C.6/76/SR.24, para. 31); Ireland (A/C.6/76/SR.24, para. 60); Italy (A/C.6/76/SR.25, para. 15); Jordan (A/C.6/76/SR.24, para. 129); Latvia (A/C.6/76/SR.24, para. 134); Malaysia (A/C.6/76/SR.24, para. 88) (but raising the concern that the term may not include international organizations); Micronesia (Federated States of) (A/C.6/76/SR.24, para. 75); Niger (A/C.6/76/SR.25, para. 27); Philippines (A/C.6/76/SR.25, para. 34); Portugal (A/C.6/76/SR.23, para. 78) (also noting that "community of nations" may not cover international organizations); Republic of Korea (A/C.6/76/SR.24, para. 105); Romania (A/C.6/76/SR.24, para. 51); Sierra Leone (A/C.6/76/SR.23, para. 47); Slovakia (A/C.6/76/SR.24, para. 99); South Africa (A/C.6/76/SR.23, para. 66). Some delegations suggested the use of other terms, such as "States", "international community", "community of States" or "international community of States". See the statements by Austria (A/C.6/76/SR.23, para. 143); Brazil (A/C.6/76/SR.25, para. 42); Cameroon (A/C.6/76/SR.25, para. 3); Denmark (on behalf of the Nordic countries) (A/C.6/76/SR.23, para. 38); Peru (A/C.6/76/SR.25, para. 55); Russian Federation (A/C.6/76/SR.24, para. 139); Slovakia (A/C.6/76/SR.24, para. 99); South Africa (A/C.6/76/SR.23, para. 66); United States (A/C.6/76/SR.23, para. 92).

provisionally adopted by the Commission.[10] Many States expressed openness regarding the existence of general principles of law formed within the international legal system, and stated that the matter should be further studied and that a clear distinction between such general principles and other sources of international law, in particular custom, should be made.[11] Some delegations expressed the view that general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice could only originate in national legal systems.[12] Other States generally agreed with the existence of general principles of law formed within the international legal system, and called upon the Commission to clarify how such principles could be identified.[13]

5. At its seventy-second session, the Commission reiterated its request to States to provide information regarding their practice relating to general principles of law. The Special Rapporteur would be grateful for further contributions of States, which are of crucial importance for the work of the Commission.

6. The present report seeks to complete the set of draft conclusions proposed by the Special Rapporteur on the present topic. In doing so, the report addresses certain issues that were raised during the debate on the second report, as well as matters not yet addressed by the Commission. Part One addresses the issue of transposition of principles common to the various legal systems of the world to the international legal system. Part Two clarifies certain matters regarding the methodology for the identification of general principles of law formed within the international legal system. Part Three deals with the functions of general principles of law, as well as their relationship with other sources of international law. Finally, Part Four suggests the future programme of work on the topic.

Part One. The issue of transposition

7. In his second report, the Special Rapporteur noted that State practice, jurisprudence and the literature show that, to identify a general principle of law

[10] See the statements by Algeria (A/C.6/76/SR.25, para. 17); Austria (A/C.6/76/SR.23, para. 144); Brazil (A/C.6/76/SR.25, para. 43); Chile (A/C.6/76/SR.23, para. 152); Denmark (on behalf of the Nordic countries) (A/C.6/76/SR.23, para. 40); Ecuador (A/C.6/76/SR.17, para. 83); Estonia (A/C.6/76/SR.24, para. 45); Germany (A/C.6/76/SR.24, para. 6); Greece (A/C.6/76/SR.23, para. 120); India (A/C.6/76/SR.24, para. 32); Iran (Islamic Republic of) (A/C.6/76/SR.25, para. 28); Ireland (A/C.6/76/SR.24, paras. 62–63); Israel (A/C.6/76/SR.23, paras. 98–99); Latvia (A/C.6/76/SR.24, para. 134); Malaysia (A/C.6/76/SR.24, para. 89); Mexico (A/C.6/76/SR.23, para. 148); New Zealand (A/C.6/76/SR.23, para. 123); Philippines (A/C.6/76/SR.25, para. 34); Portugal (A/C.6/76/SR.23, para. 79); Romania (A/C.6/76/SR.24, para. 51); Sierra Leone (A/C.6/76/SR.23, para. 48); Spain (A/C.6/76/SR.25, para. 11); Turkey (A/C.6/76/SR.25, para. 51).

[11] See the statements by Australia (A/C.6/76/SR.23, paras. 63–64); Austria (A/C.6/76/SR.23, para. 145); Chile (A/C.6/76/SR.23, para. 155); China (A/C.6/76/SR.23, para. 85); Croatia (A/C.6/76/SR.17, para. 63); Estonia (A/C.6/76/SR.24, para. 46); Germany (A/C.6/76/SR.24, paras. 5, 11); Greece (A/C.6/76/SR.23, para. 121); Ireland (A/C.6/76/SR.24, para. 64); Japan (A/C.6/76/SR.24, para. 15); Micronesia (A/C.6/76/SR.24, para. 78); New Zealand (A/C.6/76/SR.23, para. 124); Philippines (A/C.6/76/SR.25, para. 38); Republic of Korea (A/C.6/76/SR.24, para. 106); Russian Federation (A/C.6/76/SR.24, para. 143); Slovenia (A/C.6/76/SR.24, para. 40); United Kingdom (A/C.6/76/SR.24, para. 73).

[12] See the statements by Algeria (A/C.6/76/SR.25, para. 19); Czech Republic (A/C.6/76/SR.24, para. 23); France (A/C.6/76/SR.20, para. 50); Iran (Islamic Republic of) (A/C.6/76/SR.25, para. 31); Israel (A/C.6/76/SR.23, paras. 100–106); Jordan (A/C.6/76/SR.24, para. 130); Romania (A/C.6/76/SR.24, para. 50); Slovakia (A/C.6/76/SR.24, para. 101).

[13] See the statements by Denmark (on behalf of the Nordic countries) (A/C.6/76/SR.23, para. 40); Ecuador (A/C.6/76/SR.17, para. 83); Netherlands (A/C.6/76/SR.24, para. 112); Niger (A/C.6/76/SR.25, para. 26); South Africa (A/C.6/76/SR.23, para. 67); Spain (A/C.6/76/SR.25, para. 7).

derived from national legal systems, a two-step analysis is required.[14] Commission members generally agreed with this approach and the Commission provisionally adopted draft conclusion 4, with commentaries.[15] The draft conclusion provides that, 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 various legal systems of the world; and (b) its transposition to the international legal system. The issue of transposition was discussed during the plenary debate but, owing to time restraints, full consideration could not be given in the Drafting Committee to the relevant draft conclusion proposed in the second report (draft conclusion 6).[16] Nonetheless, the plenary debate, as well as the views expressed by States in the Sixth Committee, shed important light on this matter. The Special Rapporteur therefore finds it useful to briefly return to the issue of transposition in the present report.

8. The plenary debate revealed a number of issues regarding proposed draft conclusion 6 on which the views of Commission members seemed to diverge. Some members generally agreed with the approach of draft conclusion 6.[17] Other members noted that draft conclusion 6 appeared to be unnecessarily complex, and that it could be limited to a provision stating that a principle common to the various legal systems of the world must be "transposable" to the international legal system, with commentaries providing examples.[18] One member noted that the issue of transposition did not appear in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, and that recognition in the sense of that provision may not therefore play a role in determining whether a principle *in foro domestico* was transposable to the international legal system.[19] Other members noted that, since general principles of law were an unwritten source of international law, no formal act of transposition was required.[20] The contrary view was also expressed, namely that some formal or express act of transposition may be required for a general principle of law to emerge.[21]

9. Additionally, several members questioned the suggestion in draft conclusion 6 that a principle common to the various legal systems of the world must be compatible with the "fundamental principles of international law", as they found the latter term

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[14] A/CN.4/741 and Corr.1, Part Two.

[15] See footnote 8 above.

[16] A/CN.4/741 and Corr.1, para. 112. The proposed draft conclusion reads:

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.

[17] See the statements of Mr. Jalloh (A/CN.4/SR.3539, pp. 5–6); Mr. Nguyen (A/CN.4/SR.3539, pp. 8–9); Mr. Rajput (A/CN.4/SR.3541, p. 13); Mr. Ruda Santolaria (A/CN.4/SR.3543, p. 3); Mr. Saboia (A/CN.4/SR.3541, p. 4).

[18] See the statements of Ms. Lehto (A/CN.4/SR.3541, p. 5); Mr. Tladi (A/CN.4/SR.3538, pp. 3–4).

[19] See the statement of Mr. Valencia-Ospina (A/CN.4/SR.3538, p. 7).

[20] See the statements of Ms. Escobar Hernández (A/CN.4/SR.3543, p. 9); Mr. Reinisch (A/CN.4/SR.3542, p. 5).

[21] See the statements of Sir Michael Wood (A/CN.4/SR.3539, pp. 12–13); Mr. Zagaynov (A/CN.4/SR.3543, p. 6).

vague and unclear.[22] On this point, some members expressed the view that the compatibility test for purposes of transposition was not limited to such "fundamental principles of international law", but applied also with respect to other, more specific and specialized rules of international law.[23] As regards the second condition for transposition set out in draft conclusion 6, namely the existence of conditions for the adequate application of a principle at the international level, some members considered that the formulation was not entirely clear,[24] and questioned, for instance, why difficulty of application should prevent a principle from becoming part of international law, and whether there was a difference between the two conditions set out in the proposed draft conclusion.

10. Delegations in the Sixth Committee also expressed their views on these issues. Some States generally agreed with the approach of draft conclusion 6 as proposed in the second report.[25] Various delegations required further clarification regarding the meaning of the terms "fundamental principles of international law"[26] and "adequate application".[27] A delegation stated that a formal or express act of transposition is not required for a general principle of law to emerge.[28] Another delegation noted that, since transposition was not mentioned in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, further consideration should be given to the question of whether recognition plays a role in this context.[29]

11. The Special Rapporteur has carefully taken into account all the views and concerns expressed, as well as the suggestions made in the course of the debate, and considers that a few observations are warranted.

12. First, the Special Rapporteur agrees with the general suggestion that draft conclusion 6 could be simplified so as to avoid being overly prescriptive and to maintain a degree of flexibility in the identification of general principles of law derived from national legal systems. The Drafting Committee will be able to discuss different alternatives to achieve this during the Commission's seventy-third session, in 2022.

13. A second observation concerns whether recognition in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice plays a role in the context of transposition and, if so, how such recognition can be ascertained. As regards the first question, the second report noted that the two-step analysis is a

[22] See the statements of Ms. Escobar Hernández (A/CN.4/SR.3543, p. 9); Mr. Forteau (A/CN.4/SR.3538, p. 11); Ms. Galvão Teles (A/CN.4/SR.3539, p. 15); Mr. Grossman Guiloff (A/CN.4/SR.3542, p. 16); Mr. Hassouna (A/CN.4/3541, p. 7); Mr. Hmoud (A/CN.4/SR.3544, p. 7); Ms. Lehto (A/CN.4/SR.3541, p. 5); Mr. Ouazzani Chahdi (A/CN.4/SR.3541, p. 9); Mr. Park (A/CN.4/SR.3539, p. 17); Mr. Reinisch (A/CN.4/SR.3542, p. 5); Mr. Šturma (A/CN.4/SR.3542, p. 13); Mr. Valencia-Ospina (A/CN.4/SR.3538, p. 7); Sir Michael Wood (A/CN.4/SR.3539, p. 12); Mr. Zagaynov (A/CN.4/SR.3543, p. 6).

[23] See the statements of Mr. Forteau (A/CN.4/SR.3538, p. 11); Mr. Grossman Guiloff (A/CN.4/SR.3542, pp. 16–17); Mr. Hmoud (A/CN.4/SR.3544, p. 7); Mr. Zagaynov (A/CN.4/SR.3543, pp. 6–7).

[24] See the statements of Mr. Cissé (A/CN.4/SR.3541, p. 12); Ms. Escobar Hernández (A/CN.4/SR.3543, p. 9); Ms. Lehto (A/CN.4/SR.3541, p. 5); Ms. Oral (A/CN.4/SR.3542, p. 10); Mr. Valencia-Ospina (A/CN.4/SR.3538, p. 7); Sir Michael Wood (A/CN.4/SR.3539, p. 12).

[25] See the statements of Austria (A/C.6/76/SR.23, para. 144); Denmark (on behalf of the Nordic Countries) (A/C.6/76/SR.23, para. 40); Iran (Islamic Republic of) (A/C.6/76/SR.25, para. 28).

[26] See the statements of Australia (A/C.6/76/SR.23, para. 63); Cameroon (A/C.6/76/SR.24, para. 168); Chile (A/C.6/76/SR.23, para. 154); Germany (A/C.6/76/SR.24, para. 10); Greece (A/C.6/76/SR.23, para. 120); Jordan (A/C.6/76/SR.24, para. 129); Poland (A/C.6/76/SR.24, para. 117); Viet Nam (A/C.6/76/SR.24, para. 55).

[27] See the statement of Greece (A/C.6/76/SR.23, para. 120).

[28] See the statement of Ireland (A/C.6/76/SR.24, para. 63).

[29] See the statement of Poland (A/C.6/76/SR.24, para. 117).

combined operation aimed at demonstrating that a general principle of law has been recognized by the community of nations and forms, consequently, part of international law.[30] Thus, recognition should be regarded as taking place both at the national and international level. In the view of the Special Rapporteur, it would not suffice to say that the requirement of recognition in the sense of Article 38, paragraph 1 (*c*), of the Statute is met if a given principle exists across national legal systems. National legal systems and the international legal system have important differences, and municipal rules and principles are put in place taking into account the needs and characteristics of the former. Therefore, some form of recognition that a principle common to the various legal systems of the world is capable of applying at the international level appears to be necessary.

14. With respect to the second question, namely how recognition in the context of transposition can be ascertained, it was recalled during the 2021 debate in the Commission that general principles of law are "identified over the course of a non-formalized process".[31] The Special Rapporteur tends to agree with this view, which is consistent with the essentially non-written nature of this source of international law and with the approach that can be seen in judicial and State practice. In the examples mentioned in the first and second reports, the transposition of a principle *in foro domestico* was generally ascertained based on the existing conditions and certain rules and principles of international law, and a formal or express act of transposition by States or other actors was not regarded as necessary. In the opinion of the Special Rapporteur, for the purposes of transposition of a principle common to the various legal systems of the world, the recognition by the community of nations required by Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice is an implicit one that must be established by determining the suitability of that principle to apply in the international legal system.

15. A third observation relates to the precise criteria for ascertaining transposition. The Special Rapporteur has carefully considered the comments made by members of the Commission and States in the Sixth Committee. He is aware of the concerns regarding the text proposed in draft conclusion 6, subparagraphs (*a*) and (*b*), and is open to discuss further options in the Drafting Committee. However, as already mentioned in the second report[32] and agreed upon by several members, an important point to keep in mind is that the criteria for transposition should not establish some form of hierarchy among the sources listed in Article 38, paragraph 1, of the Statute of the International Court of Justice by suggesting that the emergence of a general principle of law is dependent on its compatibility with every single treaty and customary rule in the context of which it is to be applied. As will be further explained in Part Three, the essential function of general principles of law is to fill lacunae in conventional and customary international law, and they need to have an independent existence to properly perform this function.

16. Some Commission members have made proposals regarding the criteria for transposition set out in draft conclusion 6. It has been suggested, for example, that a principle common to the various legal systems of the world should not be incompatible with "the basic elements of the international legal system";[33] the "fundamental principles and values shared by the international community" or "fundamental principles and standards shared by the international community";[34] and "rules of general international law" or the "'the rules of general international law' on which, in the international legal system, the positive law regulating the matter is

[30] A/CN.4/741 and Corr.1, para. 20.
[31] See the statement of Ms. Escobar Hernández (A/CN.4/SR.3543, p. 9).
[32] A/CN.4/741 and Corr.1, para. 84.
[33] See the statement of Ms. Escobar Hernández (A/CN.4/SR.3543, p. 9).
[34] See the statement of Mr. Nguyen (A/CN.4/SR.3539, p. 8).

based", with the suggestion also made that a principle may not be suitable to apply in a specific context of the international legal system but may be in others.[35] Furthermore, it was stated that "what was key was that the principle should be adaptable for the purpose of its application in [the international legal] system";[36] that a principle *in foro domestico* cannot be transposed unless it is "appropriate for application in the international [legal] system";[37] and that the conditions must exist for the application of a principle in the international legal system.[38] The view was also expressed that "a starting point could be the absence of any objections from States".[39] It was further suggested that draft conclusion 6 should simply state that a principle common to various legal systems of the world must be transposable, and that the criteria for such transposability could be explained in the commentary.[40]

17. With these proposals and observations in mind, the Special Rapporteur wishes to re-emphasize that, when addressing the question of transposition of general principles of law, a balance needs to be struck between rigor and flexibility so that the methodology for identification is based on objective criteria, but without making it overly burdensome to identify general principles in a way that they cannot perform their functions.

Part Two. General principles of law formed within the international legal system

18. As noted at paragraph 4 above, the second category of general principles of law proposed in the first and second reports of the Special Rapporteur, that is, the general principles of law formed within the international legal system, continued to be subject to divergent views among Commission members and States in the Sixth Committee. In the light of the ongoing debate, the Special Rapporteur finds it useful to provide some observations on this important aspect of the topic.

19. The views expressed regarding the second category were similar to those expressed during the first debate on the topic. In general, three broad positions may be identified among States in the Sixth Committee and Commission members: those who agree with the existence of this category and who supported, in full or in part, the approach of the Special Rapporteur in the second report;[41] those who express openness or doubt as regards the possible existence of a second category but consider that the issue needs further thought and study;[42] and those who do not consider that a

[35] See the statement of Mr. Grossman Guiloff (A/CN.4/SR.3542, pp. 16–17).
[36] See the statement of Mr. Hmoud (A/CN.4/SR.3544, p. 7).
[37] See the statement of Mr. Grossman Guiloff (A/CN.4/SR.3542, p. 16).
[38] See the statement of Mr. Cissé (A/CN.4/SR.3541, p. 12).
[39] See the statement of Mr. Zagaynov (A/CN.4/SR.3543, p. 6).
[40] See the statement of Mr. Tladi (A/CN.4/SR.3538, p. 5).
[41] See the statements of Mr. Cissé (A/CN.4/SR.3541, p. 9); Ms. Escobar Hernández (A/CN.4/SR.3543, p. 8); Ms. Galvão Teles (A/CN.4/SR.3539, p. 15); Mr. Gómez-Robledo (A/CN.4/SR.3543, p. 10); Mr. Grossman Guiloff (A/CN.4/SR.3542, p. 17); Mr. Hassouna (A/CN.4/SR.3541, p. 7); Mr. Jalloh (A/CN.4/SR.3539, p. 6); Ms. Lehto (A/CN.4/SR.3541, pp. 5–6); Mr. Nguyen (A/CN.4/SR.3539, p. 9); Ms. Oral (A/CN.4/SR.3542, pp. 10–11); Mr. Ruda Santolaria (A/CN.4/SR.3543, p. 3); Mr. Saboia (A/CN.4/SR.3541, p. 3); Mr. Valencia Ospina (A/CN.4/SR.3538, pp. 8–9). See also note 12 above.
[42] See the statements of Mr. Forteau (A/CN.4/SR.3538, p. 11); Mr. Hmoud (A/CN.4/SR.3544, p. 8); Mr. Ouazzani Chahdi (A/CN.4/SR.3541, p. 9); Mr. Park (A/CN.4/SR.3539, p. 18); Mr. Reinisch (A/CN.4/SR.3542, p. 9); Mr. Šturma (A/CN.4/SR.3542, p. 14); Mr. Tladi (A/CN.4/SR.3538, p. 4); Sir Michael Wood (A/CN.4/SR.3539, pp. 11, 13); Mr. Zagaynov (A/CN.4/SR.3543, p. 7). See also note 10 above.

second category of general principles of law falling within the scope of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice exists.[43]

20. A number of general concerns were raised concerning Part Three of the second report. In particular, various Commission members and delegations expressed that a clearer distinction should be made between the second category of general principles of law and other sources of international law, in particular customary international law.[44] The concern was also raised that there would be no sufficiently relevant practice to arrive at sound conclusions on this matter (often with the view being expressed that the examples provided in the second report concerned in fact, in many instances, treaty rules, rules of customary international law or general principles of law derived from national legal systems).[45] Furthermore, various States and Commission members indicated that the criteria set out in draft conclusion 7[46] for the identification of this category of general principles were not sufficiently strict, which would make them too easy to invoke.[47] It was also noted that the three methodologies proposed in draft conclusion 7 were not easy to distinguish from one another.[48] Furthermore, the concern was expressed that care should be taken not to recategorize rules of conventional and customary international law, or *jus cogens* norms, as general principles of law formed within the international legal system, which may undermine the authority and scope of the former.[49] Finally, it was highlighted that the

[43] See the statements of Mr. Argüello Gómez (A/CN.4/SR.3543, p. 12); Mr. Murase (A/CN.4/SR.3542, p. 12); Mr. Petrić (A/CN.4/SR.3544, p. 4); Mr. Rajput (A/CN.4/SR.3542, p. 5). See also footnote 11 above.

[44] See the statements of Mr. Forteau (A/CN.4/SR.3538, p 11); Ms. Galvão Teles (A/CN.4/SR.3539, p. 15); Mr. Jalloh (A/CN.4/SR.3539, p. 6); Ms. Oral (A/CN.4/SR.3542, p. 9); Mr. Rajput (A/CN.4/.SR.3542, p. 4); Sir Michael Wood (A/CN.4/SR.3539, p. 14). See also the statements of Algeria (A/C.6/76/SR.25, para. 19); Australia (A/C.6/76/SR.23, para. 64); Chile (A/C.6/76/SR.23, para. 155); Croatia (A/C.6/76/SR.17, para. 63); Estonia (A/C.6/76/SR.24, para. 46); Italy (A/C.6/76/SR.25, para. 15); Japan (A/C.6/76/SR.24, para. 15); Ireland (A/C.6/76/SR.24, para. 65); Micronesia (Federated States of) (A/C.6/76/SR.24, para. 78); New Zealand (A/C.6/76/SR.23, para. 124); Philippines (A/C.6/76/SR.25, para. 38); Poland (A/C.6/76/SR.24, para. 118); Russian Federation (A/C.6/76/SR.24, para. 143); South Africa (A/C.6/76/SR.23, para. 67); United Kingdom (A/C.6/76/SR.24, para. 74).

[45] See the statements of Mr. Argüello Gómez (A/CN.4/SR.3543, p. 13); Mr. Forteau (A/CN.4/SR.3538, p. 11); Ms. Galvão Teles (A/CN.4/SR.3539, p. 15); Mr. Hassouna (A/CN.4/SR.3541, pp. 7–8); Mr. Hmoud (A/CN.4/SR.3544, p. 7); Mr. Jalloh (A/CN.4/SR.3539, p. 6); Mr. Park (A/CN.4/SR.3539, p. 18); Mr. Rajput (A/CN.4/SR.3541, pp. 14–15, and A/CN.4/.SR.3542, p. 3); Mr. Reinisch (A/CN.4/SR.3542, pp. 6–8); Mr. Šturma (A/CN.4/SR.3542, pp. 13–14); Mr. Tladi (A/CN.4/SR.3538, pp. 4–5); Sir Michael Wood (A/CN.4/SR.3539, p. 13). See also the statements of Algeria (A/C.6/76/SR.25, para. 19); Chile (A/C.6/76/SR.23, para. 155); Israel (A/C.6/76/SR.23, para. 100); United Kingdom (A/C.6/76/SR.24, para. 74); United States (A/C.6/76/SR.23, para. 94).

[46] Draft conclusion 7 proposed in the second report (A/CN.4/741 and Corr.1, para. 112) reads:

> "**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."

[47] See the statements of Mr. Forteau (A/CN.4/SR.3538, p. 12); Ms. Galvão Teles (A/CN.4/SR.3539, p. 17); Mr. Hmoud (A/CN.4/SR.3544, p. 7); Mr. Rajput (A/CN.4/.SR.3542, p. 4); Sir Michael Wood (A/CN.4/SR.3539, p. 13). See also the statement of the United Kingdom (A/C.6/76/SR.24, para. 74).

[48] See the statement of Ms. Escobar Hernández (A/CN.4/SR.3543, p. 9).

[49] See the statements of Mr. Forteau (A/CN.4/SR.3538, p. 11); Mr. Hmoud (A/CN.4/SR.3544, p. 6); Mr. Petrić (A/CN.4/SR.3544, p. 4).

Commission should be clear when it is codifying existing international law and when it is engaging in an exercise of progressive development,[50] with the note of caution sounded that, in a topic relating to the sources of international law, the Commission's mandate should be limited to codification.[51]

21. With respect to draft conclusion 7, subparagraph (a), some Commission members and delegations in the Sixth Committee noted that the proposed text may lead to the application of treaty provisions to States that are not parties to the relevant treaty, contrary to the principle that a treaty does not apply to third parties.[52] The view was also expressed that the term "other international instruments" was too vague or over-inclusive.[53] Some Commission members indicated that rules and principles laid down in treaties were simply that (treaty rules) or, if the conditions were met, rules of customary international law.[54] The concern was also expressed that the draft conclusion carried a risk of transforming non-binding sources into binding principles.[55] Some members stated that the examples of practice referred to in support of the draft conclusion were not relevant.[56] The view was also expressed that there appeared to be some overlap between subparagraphs (*a*) and (*b*) of draft conclusion 7.[57] Furthermore, the question was raised whether the treaties through which a general principle of law may come into existence need to have a special character or whether any type of treaty may give rise to such a principle.[58]

22. As regards draft conclusion 7, subparagraph (*b*), some Commission members agreed with the proposal of the Special Rapporteur.[59] The view was expressed, however, that the draft conclusion needed further consideration since its formulation and the deductive methodology proposed therein would be too vague and unclear, and could lead to subjective interpretations.[60] The question was also raised whether a principle that underlies a treaty or customary rule could really be considered as something detached from the said rule, and not part of it.[61] In that regard, a Commission member noted that further clarification was required regarding how the proposed methodology for identification differed from treaty interpretation.[62]

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[50] See the statement of Australia (A/C.6/76/SR.23, para. 64).

[51] See the statement of Mr. Hmoud (A/CN.4/SR.3544, p. 5).

[52] See the statements of Ms. Galvão Teles (A/CN.4/SR.3539, pp. 16–17). See also the statements of Germany (A/C.6/76/SR.24, para. 12); Israel (A/C.6/76/SR.23, para. 103); Viet Nam (A/C.6/76/SR.24, para. 56).

[53] See the statement of Mr. Grossman Guiloff (A/CN.4/SR.3542, p. 17); Ms. Lehto (A/CN.4/SR.3541, p. 5). See also the statement of Israel (A/C.6/76/SR.23, para. 103).

[54] See the statements of Mr. Nguyen (A/CN.4/SR.3539, p. 10); Mr. Petrić (A/CN.4/SR.3544, p. 4); Mr. Šturma (A/CN.4/SR.3542, p. 14); Mr. Valencia-Ospina (A/CN.4/SR.3538, p. 8); Sir Michael Wood (A/CN.4/SR.3539, p. 14).

[55] See the statements of Mr. Forteau (A/CN.4/SR.3538, p. 12); Mr. Nguyen (A/CN.4/SR.3539, p. 10); Sir Michael Wood (A/CN.4/SR.3539, p. 14).

[56] See the statements of Mr. Nguyen (A/CN.4/SR.3539, p. 10); Mr. Valencia-Ospina (A/CN.4/SR.3538, p. 8); Sir Michael Wood (A/CN.4/SR.3539, p. 13).

[57] See the statement of Ms. Lehto (A/CN.4/SR.3541, p. 5).

[58] See the statement of Mr. Reinisch (A/CN.4/SR.3542, pp. 6–7).

[59] See the statements of Ms. Lehto (A/CN.4/SR.3541, p. 6); Mr. Valencia-Ospina (A/CN.4/SR.3538, p. 8).

[60] See the statements of Mr. Forteau (A/CN.4/SR.3538, p. 12); Mr. Hmoud (A/CN.4/SR.3544, pp. 7–8); Mr. Park (A/CN.4/SR.3539, p. 18); Mr. Petrić (A/CN.4/SR.3544, p. 4); Mr. Rajput (A/CN.4/SR.3541, p. 14); Mr. Reinisch (A/CN.4/SR.3542, p. 8); Sir Michael Wood (A/CN.4/SR.3539, p. 14). See also the statements of Germany (A/C.6/76/SR.24, para. 14); Israel (A/C.6/76/SR.23, para. 104).

[61] See the statements of Mr. Argüello Gómez (A/CN.4/SR.3543, p. 12); Mr. Hassouna (A/CN.4/SR.3541, p. 7); Ms. Galvão Teles (A/CN.4/SR.3539, p. 17); Mr. Šturma (A/CN.4/SR.3542, p. 14); Sir Michael Wood (A/CN.4/SR.3539, p. 14).

[62] See the statement of Ms. Galvão Teles (A/CN.4/SR.3539, p. 17).

23. With respect to draft conclusion 7, subparagraph (*c*), some Commission members agreed with the approach of the second report.[63] It was also stated that this proposal indeed pointed to a possible basis for a second category of general principles of law.[64] The concern was expressed, however, that the formulation of the draft conclusion was vague and could lead to legal uncertainty and subjective interpretations, and that the deductive methodology for identification had not been properly explained.[65] Some members indicated that the examples of principles referred to in the second report concerned conventional and customary rules.[66] Furthermore, the view was expressed that some of the examples provided were no more than principles of logic or legal reasoning, or judicial techniques, and not an autonomous source of international law.[67]

24. The Special Rapporteur is sympathetic to the concerns expressed and understands that there is a division among Commission members and States in the Sixth Committee as regards the existence of general principles of law formed within the international legal system, and, should it be determined that such a category of general principles of law falling within the scope of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice exists, how to explain the methodology for their identification. The Special Rapporteur wishes to highlight once again that he too believes that it is important to clearly distinguish between the second category of general principles of law and other sources of international law, in particular customary international law.[68] Indeed, general principles of law, being supplementary in nature and performing a gap-filling function, should not be regarded as a way to avoid the methodology for the identification of rules of customary international law.

25. The Special Rapporteur acknowledges that, contrary to general principles of law derived from national legal systems, there is less practice relating to general principles of law formed within the international legal system. Notably, States and international courts and tribunals sometimes invoke or apply principles without explaining what their precise source is, which makes it challenging to identify relevant practice to establish the methodology for the identification of the second category of general principles of law. Furthermore, reference has rarely been made in practice to Article 38, paragraph 1 (*c*), of the Statute in this context.[69] Similarly, the literature tends to focus more on general principles of law derived from national legal systems. Therefore, this issue needs to be addressed with caution.

26. The Special Rapporteur also considers that the Commission's work on this topic, which relates to one of the sources of international law, is to clarify different aspects

[63] See the statements of Ms. Lehto (A/CN.4/SR.3541, p. 6); Mr. Nguyen (A/CN.4/SR.3539, p. 10); Mr. Valencia-Ospina (A/CN.4/SR.3538, p. 8).

[64] See the statement of Sir Michael Wood (A/CN.4/SR.3539, p. 14).

[65] See the statements of Ms. Escobar Hernández (A/CN.4/SR.3543, p. 9); Mr. Grossman Guiloff (A/CN.4/SR.3542, p. 17); Mr. Hassouna (A/CN.4/SR.3541, p. 7); Mr. Hmoud (A/CN.4/SR.3544, p. 8); Ms. Galvão Teles (A/CN.4/SR.3539, p. 17); Mr. Petrić (A/CN.4/SR.3544, p. 4); Mr. Reinisch (A/CN.4/SR.3542, p. 8); Sir Michael Wood (A/CN.4/SR.3539, p. 14). See also the statements of Germany (A/C.6/76/SR.24, para. 14); Israel (A/C.6/76/SR.23, para. 106).

[66] See the statements of Mr. Forteau (A/CN.4/SR.3538, p. 11); Mr. Reinisch (A/CN.4/SR.3542, p. 8).

[67] See the statements of Mr. Forteau (A/CN.4/SR.3538, p. 12); Mr. Šturma (A/CN.4/SR.3542, p. 14).

[68] On this matter, see further T. Kleinlein, "Customary international law and general principles: rethinking their relationship", in B.D. Lepard (ed.), *Reexamining Customary International Law* (Cambridge, Cambridge University Press, 2017), pp. 131–158.

[69] An exception is a recent arbitral award where the Tribunal made explicit reference to Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, and general principles of law of formed within the international legal system. See *Infinito Gold Ltd.* v. *Republic of Costa Rica*, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/14/5, International Centre for Settlement of Investment Disputes, Award, 3 June 2021, paras. 326 ff. But see also *ibid*., Separate Opinion on Jurisdiction and on the Merits, Brigitte Stern, Arbitrator, paras. 75–98.

of general principles of law in a way that guidance can be provided to all those who may be called upon to apply them. The intention of the Special Rapporteur is not to engage in an exercise of progressive development on this matter, and even less so to attempt to create a new source of international law.

27. Having considered all of the above, the Special Rapporteur is of the view that there is sufficient practice, case law and literature supporting a second category of general principles of law falling within the scope of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, and that it is the task of the Commission to address this issue. The existence of general principles of law formed within the international legal system has been supported by several Commission members, as well as by States in the Sixth Committee. In addition, various members of the Commission have noted that Article 38, paragraph 1 (*c*), of the Statute may not be limited to general principles of law derived from national legal systems, but considered that further study and reflection was needed. Indeed, nothing in that provision indicates that general principles of law are only those originating in national legal systems, and it is therefore necessary to turn to practice to understand how the provision ought to be interpreted.

28. Members of the Commission have stated in that connection, *inter alia*, that "[i]f legal practitioners such as judges, when faced with cases where there was no specific rule to be applied, sought to resolve the disputes before them by identifying abstract elements common to the various rules of the relevant legal system, and if general principles of law could be conceptualized as that process, there seemed to be no reason to conclude that abstract principles could not be extracted from international legal rules and that general principles of law could not exist in the international legal system. Such a conclusion would imply that the international legal system could not avail itself of the abstract categories used by all legal systems to fulfil one of the essential functions of the law: settling disputes and maintaining social peace";[70] that "the existence of that category of general principles of law was clear from the fact that certain overarching features of the international legal system could be identified. Such principles could provide solutions in situations that had no parallel in domestic systems and would otherwise remain unresolved";[71] that "before [general principles of law formed within the international legal system] were identified through the methodology proposed by the Special Rapporteur in draft conclusion 7, it was necessary to clarify [two preconditions]. The first was the appearance of a specific matter of international law that required regulation. The second was the non-existence of relevant general principles of law derived from national legal systems … It was clear that the Nürnberg Principles, for example, constituted 'principles of international law' formed within the international legal system, since they had not been derived from national legal systems [referring, as an specific example, to 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"]";[72] that "[g]eneral principles of law formed within the international legal system could … be seen as a sign of the increasing maturity and growing complexity of international law, which was coming to depend less on gap-filling sources coming from domestic law";[73] that "the text of paragraph 38 (1) (c) of the Statute of the International Court of Justice, *les travaux préparatoires* and the history of the paragraph are far from supporting the … argument which tends to maintain that only the category of principles arising from national legal systems is set out in paragraph 38 (1) (c). Indeed, the general nature of the text can only give rise to a broad and liberal interpretation of the concept of 'general principles of law' which is not limited to the principles arising from national legal systems alone. There are

[70] See the statement of Ms. Escobar Hernández (A/CN.4/SR.3543, pp. 7–8).
[71] See the statement of Mr. Grossman Guiloff (A/CN.4/SR.3542, p. 15).
[72] See the statement of Mr. Nguyen (A/CN.4/SR.3539, p. 9).
[73] See the statement of Ms. Galvão Teles (A/CN.4/SR.3539, p. 15).

indeed general principles of law specific to international law";[74] and that "the report offered many examples of such principles drawn from different areas of law, including international environmental law … it would be a very odd and indeed paradoxical outcome if the Commission concluded that the authority *par excellence* for laying out the principal sources of international law, namely Article 38 of the Statute of the International Court of Justice, excluded those norms created within the international legal system from the category of general principles. That would be tantamount to saying that the Statute of the Court excluded norms formed within the very legal system that the Statute was intended to serve".[75]

29. If agreement can be reached within the Commission that general principles of law formed within the international legal system exist and fall within the scope of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, the main issue remains how to explain, in a clear manner, the methodology for the identification of those principles. It is therefore useful to provide some observations on this matter ahead of the discussion of draft conclusion 7 in the Drafting Committee.

30. In relation to judicial practice, as was stated in his summing up of the debate of the second report in the Commission, the Special Rapporteur considers that it is important to examine each particular case in its context, bearing in mind the methodology used to identify the relevant legal principle. In the examples of general principles of law formed within the international legal system relied upon in the two reports to date, it is particularly noticeable that, at the time when the principles in question were invoked or applied, it could hardly be said that a customary rule existed, if the methodology for the identification of customary rules clarified by the Commission in 2018 is followed. It is precisely those cases in which certain principles were referred to, without there being a general practice accepted as law (accompanied with *opinio juris*), that must be analysed in greater depth. It is of course not impossible that some of those principles may have subsequently acquired the status of customary rules, but it is their origin, the first occasions of their application, to which more attention should be paid.

31. An analysis of the case law and practice included in the first and second reports shows that general principles of law of the second category may be reflected in treaties and other international instruments, may underlie treaty regimes or customary rules, or could be identified as being inherent in the international legal system. After considering all the views that have been expressed with respect to proposed draft conclusion 7, the Special Rapporteur considers that a unified methodology for the identification of general principles of law formed within the international legal system might be helpful in order to overcome the existing difficulties. This unified methodology would be first and foremost inductive, with an analysis of relevant treaties, customary rules and other international instruments (such as General Assembly resolutions or declarations adopted at intergovernmental conferences),[76] and then, when necessary, deductive, so as to derive the principle reflected therein. Regarding this deductive approach, it has been pointed out that "[t]he identification of the content of such a principle might or might not require an exercise of deduction, depending on whether the relevant treaty provision contained a principle or whether

[74] See the statement of Mr. Cissé (as delivered) (see also A/CN.4/SR.3492, p. 21).

[75] See the statement of Ms. Oral (A/CN.4/SR.3542, p. 11).

[76] Germany stated in this context that "[t]he question arises whether analogously to the determination of principles derived from the domestic legal order, a comparative analysis of international treaties and other instruments would be necessary and whether such analysis would then have to cover not only as many treaties and instruments as possible but also a variety of treaties or instruments from different areas, sub-areas or regimes of international law". See the statement of Germany (as delivered).

the content of the principle must be deduced from existing rules of treaty law or customary international law".[77]

32. In this process, it must be ascertained whether the principle in question has been recognized by the community of nations as a norm of general application, having an independent status from a particular treaty regime or customary rules, that is, as a general legal principle that can operate independently in international law.[78] Evidence of such recognition should be analysed on a case-by-case basis, within the particular context, considering the attitude of the community of nations to being bound by that principle.

33. In conclusion, the Special Rapporteur considers that draft conclusion 7 can be streamlined, taking into account all the concerns raised and suggestions made, while keeping in mind the need to strike a balance between rigour and flexibility in the identification of general principles of law formed within the international legal system.

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

34. As indicated in the first report,[79] part of the mandate of the Commission in this topic is to clarify the functions of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, as well as their relationship with other sources of international law.

35. Throughout the first and second debates on the topic, Commission members and States expressed their views, at least on a preliminary basis, on some of these matters. Several members referred to the gap-filling function of general principles of law,[80] as

[77] See the statement of Ms. Galvão Teles (A/CN.4/SR.3539, p. 17).

[78] See R. Wolfrum, "General international law (principles, rules, and standards)", in R. Wolfrum (ed.), *Max Planck Encyclopedias of International Law*, vol. IV (entry last updated in 2010; Oxford, Oxford University Press, 2012), pp. 344–368, at pp. 348–349, paras. 33–34 ("Concerning principles having their origin in international relations, a comparative method seems to be appropriate, coupled with a generalizing assessment of the international legal rules in question. It is not of relevance whether the same terms are used in various international norms, but rather whether these norms reflect identical principles … It has been argued that principles derived from treaty or customary international law cannot have the status of sources of international law since they belong to the source from which they have been developed. This is true for such principles which have a meaning only within a particular treaty regime and which do not form the basis for new rights and obligations. The situation, however, is different for such principles that have obtained an independent status of their own. They are a self-standing source of international law").

[79] A/CN.4/732, paras. 24–28.

[80] See the statements of Ms. Escobar Hernández (A/CN.4/SR.3543, pp. 7–8); Ms. Galvão Teles (A/CN.4/SR.3539, pp. 15–16); Mr. Jalloh (A/CN.4/SR.3539, pp. 3–4); Mr. Murase (A/CN.4/SR.3542, pp. 12–13); Mr. Nguyen (A/CN.4/SR.3539, pp. 8–9); Mr. Petrić (A/CN.4/SR.3544, p. 3); Mr. Rajput (A/CN.4/SR.3541, p. 14 and A/CN.4/SR.3542, p. 4); Mr. Zagaynov (A/CN.4/SR.3543, p. 4). See also the 2019 statements of Mr. Aurescu (A/CN.4/SR.3491, p. 8); Ms. Galvão Teles (A/CN.4/SR.3489, p. 20); Mr. Gómez-Robledo (A/CN.4/SR.3492, p. 10); Mr. Grossman Guiloff (A/CN.4/SR.3493, p. 5); Mr. Hmoud (A/CN.4/SR.3489, p. 15); Mr. Huang (SR.3493, p. 12); Mr. Murase (A/CN.4/SR.3489, p. 4); Ms. Oral (A/CN.4/SR.3492, p. 6); Mr. Park (A/CN.4/SR.3489, p. 16); Mr. Rajput (A/CN.4/SR.3490, p. 17); Mr. Saboia (A/CN.4/SR.3491, p. 14); Mr. Tladi (A/CN.4/SR.3489, p. 4).

well as the role they may play in avoiding situations of *non liquet*.[81] Some members mentioned that general principles of law may also serve as interpretative tools[82] or as means to reinforce legal reasoning,[83] and that they may ensure coherence and consistency in the international legal system.[84]

36. The importance of addressing the functions of general principles of law has also been highlighted by several States in the Sixth Committee. Most delegations referred to the role of general principles of law as gap-fillers or their function of preventing situations of *non liquet*.[85] Furthermore, some States mentioned the systemic function of general principles of law in the international legal system.[86]

37. Given the general consensus on the gap-filling role of general principles of law, the Special Rapporteur deems it convenient to start from that basis. As will be shown below, it is well established in practice and in the literature that general principles of law generally play a gap-filling role in relation to treaties and custom, despite the absence of a hierarchy among the three sources. It will also be demonstrated that, under the broad notion of "gap-filling", general principles of law can function as an independent source of rights and obligations, as well as a means to interpret and complement other rules of international law. Furthermore, general principles of law can also be considered to perform a systemic function in the international legal system.

38. The present part of the report is divided into three chapters. Chapter I addresses the gap-filling role of general principles of law, which may be regarded as their essential function in the international legal system. Chapter II deals with the relationship between general principles of law and the other sources of international law. That chapter clarifies, in particular, the absence of hierarchy between treaties, custom and general principles of law; the possibility of parallel existence of general principles and other rules of international law; and the operation of the principle of *lex specialis*. Finally, chapter III addresses certain specific functions of general principles of law.

[81] See the statements of Mr. Argüello Gómez (A/CN.4/SR.3543, p. 11); Ms. Escobar Hernández (A/CN.4/SR.3543, pp. 7–8); Mr. Jalloh (A/CN.4/SR.3539, p. 3); Mr. Murase (A/CN.4/SR.3542, p. 12); Mr. Petrić (A/CN.4/SR.3544, p. 3); Mr. Rajput (A/CN.4/SR.3542, p. 4); Mr. Zagaynov (A/CN.4/SR.3543, p. 4). See also the 2019 statements of Mr. Argüello Gómez (A/CN.4/SR.3492, p. 4); Mr. Aurescu (A/CN.4/SR.3491, p. 8); Mr. Cissé (A/CN.4/SR.3492, p. 20); Ms. Galvão Teles (A/CN.4/SR.3489, p. 20); Mr. Gómez-Robledo (A/CN.4/SR.3492, p. 10); Mr. Murase (A/CN.4/SR.3489, p. 7); Mr. Park (A/CN.4/SR.3489, p. 16); Sir Michael Wood (A/CN.4/SR.3490, p. 5).

[82] See the 2019 statements of Mr. Grossman Guiloff (A/CN.4/SR.3493, p. 5); Mr. Hmoud (A/CN.4/SR.3489, p. 15); Ms. Oral (A/CN.4/SR.3492, p. 6); Mr. Tladi (A/CN.4/SR.3489, p. 4).

[83] See the 2019 statements of Mr. Aurescu (A/CN.4/SR.3491, p. 8); Mr. Tladi (A/CN.4/SR.3489, p. 4).

[84] See the statement of Ms. Galvão Teles (A/CN.4/SR.3539, p. 15). See also the 2019 statement of Mr. Tladi (A/CN.4/SR.3489, p. 4).

[85] See the statements of Austria (A/C.6/76/SR.23, para. 65 and A/C.6/74/SR.31, para. 90); Cameroon (A/C.6/76/SR.24, paras. 160–161); Cuba (A/C.6/74/SR.31, para. 34); Czech Republic (A/C.6/76/SR.24, para. 26); Denmark (on behalf of the Nordic countries) (A/C.6/76/SR.23, para. 39); India (A/C.6/74/SR.32, para. 94); Iran (Islamic Republic of) (A/C.6/74/SR.33, para. 15); Israel (A/C.6/76/SR.23, para. 97); Malaysia (A/C.6/74/SR.33, para. 8); Philippines (A/C.6/74/SR.32, para. 3); Portugal (A/C.6/76/SR.23, para. 81); Russian Federation (A/C.6/76/SR.24, para. 142); Sierra Leone (A/C.6/74/SR.31, para. 105); Slovakia (A/C.6/76/SR.24, para. 97); Slovenia (A/C.6/76/SR.24, para. 39); Thailand (A/C.6/76/SR.24, para. 90).

[86] See the statements of Slovenia (A/C.6/76/SR.24, para. 40); Sierra Leone (A/C.6/74/SR.31, para. 105).

I. The gap-filling role of general principles of law

39. The first report, based on a preliminary study of the matter, noted that it is generally considered that the role of general principles of law is to fill gaps in international law and to prevent situations of *non liquet*.[87] The report also noted that other, more specific, functions are sometimes ascribed to general principles, such as serving as a direct source of rights and obligations, as a means to interpret or complement other rules of international law, as a tool to reinforce legal reasoning, or more generally as a means to inform the international legal system and its systemic nature.[88] The present chapter deals in more detail with the question of gap-filling, which, as will be explained, can be regarded as the essential function of general principles of law and defines their basic role in the international legal system. In chapter III below are further addressed some other specific functions of general principles of law which, while not unique to this source of international law, have been referred to throughout the debates and may benefit from some clarification.

40. As noted above, Commission members and delegations in the Sixth Committee are generally of the view that the main function of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice is to fill gaps in conventional and customary international law, and to prevent situations of *non liquet* before international courts of tribunals. This view is also widely held in the international law literature.[89]

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[87] A/CN.4/732, para. 25.

[88] *Ibid*., para. 26.

[89] See, for example, I. Saunders, *General Principles as a Source of International Law: Art 38(1)(c) of the Statute of the International Court of Justice* (Oxford, Hart Publishing, 2020), pp. 48, 89, 173; P. Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (Oxford, Oxford University Press, 2020), pp. 22–23 and 50; G. Gaja, "General principles of law", in *Max Planck Encyclopedias of International Law* (2020, available at opil.ouplaw.com), para. 21; A. Pellet and D. Müller, "Article 38", in A. Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford, Oxford University Press, 2019), pp. 819 *ff*, at pp. 922–923, 929, 934–935, 941; H. Thirlway, *The Sources of International Law* (Oxford, Oxford University Press, 2019), p. 106; G. Distefano, *Fundamentals of International Law: A Sketch of the International Legal Order* (Leiden, Brill, 2019), pp. 559–560; M. Andenas and L. Chiussi, "Cohesion, convergence and coherence of international law", in M. Andenas *et al.* (eds.), *General Principles and the Coherence of International Law* (Leiden, Brill, 2019), pp. 9–34, at p. 14; D. Costelloe, "The role of domestic law in the identification of general principles of law under Article 38(1)(c) of the Statute of the International Court of Justice", in Andenas *et al*. (eds.), *General Principles and the Coherence of International Law*, pp. 177–194, at p. 177; R. Kolb, *Theory of International Law* (Oxford, Hart Publishing, 2016), p. 138; E. Bjorge, "Public law sources and analogies of international law", in *Victoria University of Wellington Law Review*, vol. 49 (2018), pp. 533–560, at p. 535; C. Redgwell, "General principles of international law", in S. Vogenauer and S. Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Oxford, Hart Publishing, 2017), pp. 5–19, at p. 7; M. Fitzmaurice, "The history of Article 38 of the Statute of the International Court of Justice: the journey from the past to the present", in S. Besson and J. d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford, Oxford University Press, 2017), pp. 179–200, at p. 192; C. Kotuby and L. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford, Oxford University Press, 2017), pp. 30–31; B.I. Bonafé and P. Palchetti, "Relying on general principles of law", in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham, Edgar Publishing, 2016), pp. 160–176, at pp. 167 and 172–174; E. Carpanelli, "General principles of international law: struggling with a slippery concept", in L. Pineschi (ed.), *General Principles of Law – The Role of the Judiciary* (New York, Springer, 2015), pp. 125–144, at p. 141; E. Voyiakis, "Do general principles fill 'gaps' in international law?", *Austrian Review of International and European Law*, vol. 14 (2013), pp. 239–256; S.W. Schill, "Enhancing international investment law's legitimacy: conceptual and methodological foundations of a new public law approach", *Virginia Journal of International Law*, vol. 52 (2011), pp. 57–102, at

41. This supplementary function, which was discussed at the time of the drafting of the Statute of the Permanent Court of International Justice,[90] essentially means that a general principle of law may be resorted to when a legal issue is not regulated, or not sufficiently regulated, in treaties or custom.[91] In practice, this translates into a use of general principles of law in situations where there are no applicable conventional or customary rules that address a legal issue, or where a treaty or custom governs a certain subject matter, but does not provide a solution for a specific legal issue or certain aspect of a dispute.

42. The International Court of Justice has given some guidance on the gap-filling role of general principles of law on a few occasions. First, in the *Right of Passage* case, the Court considered that it was not necessary to resort to the general principles invoked by Portugal in support of its claims as it had already determined that the issue at hand was regulated by a bilateral custom applicable between Portugal and India. The Court noted:

> Portugal also invokes general international custom, as well as the general principles of law recognized by civilized nations, in support of its claim of a right of passage as formulated by it. Having arrived at the conclusion that the course

pp. 90–91; S. Besson, "General principles in international law – Whose principles?", in S. Besson and P. Pichonnaz (eds.), *Les principes en droit européen – Principles in European Law* (Geneva, Schulthess, 2011), pp. 19–64, at p. 42; Wolfrum, "General international law (principles, rules, and standards)", p. 353, para. 58; F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden, Martinus Nijhoff, 2008), pp. 42–44; V.D. Degan, "On the sources of international criminal law", *Chinese Journal of International Law*, vol. 4 (2005), pp. 45–84, at p. 52; J.A. Barberis, "Los Principios Generales de Derecho como Fuente del Derecho Internacional", *Revista IIDH*, vol. 14 (1991), pp. 11–41, at pp. 38–39; P. Benvenuti, "Principi generali del diritto, giurisdizioni internazionali e mutamenti sociali nella vita di relazione internazionale", in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (Editoriale Scientifica, 2004), pp. 301–312, at p. 303; C. Bassiouni, "A functional approach to 'general principles of international law'", *Michigan Journal of International Law*, vol. 11 (1990), pp. 768–818, at pp. 778–779; M. Bogdan, "General principles of law and the problem of lacunae in the law of nations", *Nordic Journal of International Law*, vol. 46 (1977), pp. 37–53, at p. 38; M. Akehurst, "Equity and general principles of law", *International and Comparative Law Quarterly*, vol. 25 (1976), pp. 801–825, at p. 817; M. Bos, "The recognized manifestations of international law", *German Yearbook of International Law*, vol. 20 (1977), pp. 9–76, at p. 34; P. de Visscher, "Cours général de droit international public", *Collected Courses of the Hague Academy of International Law,* vol. 136 (1972), pp. 1–202, at pp. 113 and 116; R. Quadri, "Cours général de droit international public", *ibid.*, vol. 113 (1964), pp. 237–483, at p. 343; F.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 pp. 1057–1060; G. Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law", *Collected Courses of the Hague Academy of International Law*, vol. 92 (1957), pp. 1–227, at p. 55; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, Cambridge University Press, 1953/2006), p. 390; A. Verdross, "Les principes généraux du droit dans la jurisprudence international", *Collected Courses of the Hague Academy of International Law*, vol. 52 (1935), pp. 191–251, at pp. 224–227; J. Spyropoulos, *Die allgemeinen Rechtsgrundsätze im Völkerrecht: Eine Auslegung von Art. 38(3) des Statuts des Ständigen Internationalen Gerichtshof* (Kiel, Institut für internationales Recht an der Universität Kiel, 1928), pp. IX, 1, 16–18, 70; H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London, Longman, 1927), p. 69.

[90] See A/CN.4/732, paras. 90–109.

[91] See, for instance, Pellet and Müller, "Article 38", pp. 934–935; Lauterpacht, *Private Law Sources and Analogies of International Law*, p. 85; Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, pp. 42–43; Bogdan, "General principles of law and the problem of lacunae in the law of nations", pp. 37–41; S. Yee, "Article 38 of the ICJ Statute and applicable law: selected issues in recent cases", *Journal of International Dispute Settlement*, vol. 7 (2016), pp. 472–498, at p. 487; Bonafé and Palchetti, "Relying on general principles of law", p. 172; T. Gazzini, "General principles of law in the field of foreign investment", in *Journal of World Investment and Trade*, vol. 10 (2009), pp. 103–120, at p. 105.

> of dealings between the British and Indian authorities on the one hand and the Portuguese on the other established a practice, well understood between the Parties, by virtue of which Portugal had acquired a right of passage in respect of private persons, civil officials and goods in general, the Court does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result.
>
> As regards armed forces, armed police and arms and ammunition, the finding of the Court that the practice established between the Parties required for passage in respect of these categories the permission of the British or Indian authorities, renders it unnecessary for the Court to determine whether or not, in the absence of the practice that actually prevailed, general international custom or the general principles of law recognized by civilized nations could have been relied upon by Portugal in support of its claim to a right of passage in respect of these categories.
>
> The Court is here dealing with a concrete case having special features. Historically the case goes back to a period when, and relates to a region in which, the relations between neighbouring States were not regulated by precisely formulated rules but were governed largely by practice. Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.[92]

43. In the *Barcelona Traction* case, in contrast, the Court considered that applying general principles of law was appropriate since the law on diplomatic protection did not address the specific issue of the relationship between companies and shareholders, noting in particular that "international law ha[d] not established its own rules" on the matter. The Court stated:

> In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law …
>
> In turning now to the international legal aspects of the case, the Court must … start from the fact that the present case essentially involves factors derived from municipal law – the distinction and the community between the company and the shareholder – which the Parties, however widely their interpretations may differ, each take as the point of departure of their reasoning. If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company

[92] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at pp. 43–44.

> whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers.[93]

44. Similarly, in the *Corfu Chanel* case, in the absence of applicable treaty provisions or customary rules, the Court identified an obligation incumbent on Albania to warn ships approaching its territorial waters of the imminent danger caused by the existence of minefields based on "certain general and well-recognized principles". The Court indicated that:

> Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[94]

45. The gap-filling role of general principles of law has also been expressly referred to, albeit using varying terminology, in inter-State arbitration. In the *Walfish Bay Boundary* case between Germany and Great Britain, for example, the arbitrator considered that general principles of law apply where other rules of international law "fail":

> both questions [concerning the precise location of the boundary at Walfish Bay] must be solved in conformity with the principles and positive rules of public international law, and, where they fail, in conformity with the general principles of law, since neither the said Agreement of 1890 [nor] the supplementary Declaration of Berlin of the 30th January, 1909, in any way authorize the arbitrator to base his decision on other rules, and it is notorious, according to constant theory and practice, that such authority cannot be presumed.[95]

46. In the *Russian Indemnity* case between Russia and Turkey, the arbitral tribunal found that "the general principle of the responsibility of States implies a special responsibility in the matter of delay in the payment of a monetary debt, unless the existence of contrary international custom is established".[96] Similarly, in *Eastern Extension, Australian and China Telegraph Co.*, the British-United States Claims Tribunal considered that it could resort to general principles of law "in default of any specific provisions of law":

> International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by

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[93] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970,* p. 3, paras. 38 and 50. See also Separate Opinion of Judge Fitzmaurice, at p. 78, para. 25 ("International law must in consequence be regarded as deficient and underdeveloped in this field because, while retaining the rule of the 'hegemony' of the company and its government, it fails to provide those safeguards and alternatives which private law has instituted for preventing the hegemony of the company's management leading to abuse").

[94] *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949,* p. 4, at p. 22.

[95] *The Walfish Bay Boundary Case (Germany, Great Britain)*, Award of 23 May 1911, *United Nations Reports of International Arbitral Awards* (UNRIAA), vol. XI, pp. 263–308, at p. 294. The tribunal also noted, in addressing the interpretation of the relevant treaty, that "it is necessary to determine the interpretation which should be placed on those words, utilizing the general principles of law, which are the same as the principles of international law, and according to which it is necessary to consider, in order to determine the intention which inspires an arrangement or act, the grammatical value of the terms used, the consequences which result from understanding them in one sense or the other, and the facts or antecedent circumstances which contribute to explain them" (*ibid.*).

[96] *Affaire de l'indemnité russe (Russie, Turquie),* Award of 11 November 1912, UNRIAA, vol. XI, pp. 421–447, at p. 441.

> applying, in default of any specific provisions of law, the corollaries of general principles, and so to find … the solution [to] the problem.[97]

47. In the *Beagle Channel* case between Argentina and Chile, the arbitral tribunal stated, using language similar to that of the *Russian Indemnity* award, that:

> the Court considers it as amounting to an overriding general principle of law that, in the absence of express provision to the contrary, an attribution of territory must *ipso facto* carry with it the waters appurtenant to the territory attributed.[98]

48. In the *Proceedings concerning the OSPAR Convention*, the arbitral tribunal noted, in determining the law applicable to the dispute, that:

> It should go without saying that the first duty of the Tribunal is to apply the OSPAR Convention [Convention for the Protection of the Marine Environment of the North-East Atlantic]. An international tribunal, such as this Tribunal, will also apply customary international law and general principles unless and to the extent that the Parties have created a *lex specialis*.[99]

49. International criminal tribunals have also referred to the gap-filling function of general principles of law on a number of occasions. In the *Erdmović* case, for example, in addressing the question of duress as a defence, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia resorted to general principles of law after finding that "no rule may be found in customary international law" in that regard.[100] Referring to the view expressed by Baron Descamps at the Advisory Committee of Jurists, the Appeals Chamber observed that "one purpose of [Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice] is to avoid a situation of *non liquet*, that is, where an international tribunal is stranded by an absence of applicable legal rules".[101]

50. Also in the *Erdmović* case, a Trial Chamber of the Tribunal noted that the question of the length of imprisonment for crimes against humanity was not regulated by the Statute or the Rules of the Tribunal, and considered that resort to general principles of law was appropriate in such circumstances:

> Except for the reference to the general practice regarding prison sentences in the courts of the former Yugoslavia, which will be discussed below, and to the penalty of life imprisonment, the Trial Chamber notes that the Statute and the Rules provide no further indication as to the length of imprisonment to which the perpetrators of crimes falling within the International Tribunal's jurisdiction, including crimes against humanity, might be sentenced. In order to review the scale of penalties applicable for crimes against humanity, the Trial Chamber will identify the features which characterise such crimes and the penalties associated with them under international law and national laws, which are expressions of general principles of law recognised by all nations.[102]

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

[98] *Dispute between Argentina and Chile concerning the Beagle Channel*, Decision of 18 February 1977, UNRIAA, vol. XXI, pp. 53–264, at p. 145.

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

[100] *Prosecutor* v. *Dražen Erdemović*, No. IT-96-22-A, Judgment, 7 October 1997, para. 19, referring to the Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras. 55–56.

[101] *Ibid*., para. 57.

[102] *Prosecutor v. Erdemović*, No. IT-96-22-T, Sentencing Judgment, 29 November 1996, para. 26.

51. In the *Furundžija* case, a Trial Chamber of the Tribunal, in seeking for a definition of rape, similarly found that:

> no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity … it is necessary to look for principles of criminal law common to the major legal systems of the world.[103]

52. In *Kunarac*, also regarding the definition of rape, another Trial Chamber considered that:

> the identification of the relevant international law on the nature of the circumstances in which the defined acts of sexual penetration will constitute rape is assisted, in the absence of customary or conventional international law on the subject, by reference to the general principles of law common to the major national legal systems of the world.[104]

53. In *Kupreškić*, a Trial Chamber of the Tribunal further observed that:

> it is now clear that to fill possible gaps in international customary and treaty law, international and national criminal courts may draw upon general principles of criminal law as they derive from the convergence of the principal penal systems of the world. Where necessary, the Trial Chamber shall use such principles to fill any *lacunae* in the Statute of the International Tribunal and in customary law.[105]

54. In *Situation in the Democratic Republic of the Congo* before the Appeals Chamber of the International Criminal Court, the Prosecutor maintained that "the absence of mechanism for review of negative decisions under consideration cannot be regarded as anything other than a lacuna in the law. As such, it must be remedied by the general principles of law finding application in such a situation provided for in the instant case by article 21 (1) (c) of the Statute".[106] The Appeals Chamber did not disagree with this reasoning, but considered that the general principle of law invoked by the Prosecutor could not be identified.[107]

55. In the *Katanga* case, a Trial Chamber of the International Criminal Court found that:

> article 21 of the Statute establishes a hierarchy of the sources of applicable law and that, in all its decisions, it must "in the first place" apply the relevant provisions of the Statute. In the light of the established hierarchy, the Chamber shall therefore apply the subsidiary sources of law under article 21(1)(b) and 21(1)(c) of the Statute only where it identifies a lacuna in the provisions of the Statute, the Elements of Crimes and the Rules.[108]

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[103] *Prosecutor v. Anto Furundžija*, No. IT-95-17/1-T, Judgment, 10 December 1998, para. 177.

[104] *Prosecutor v. Dragoljub Kunarac, Radomir Kunac and Zoran Vuković*, Nos. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, para. 439.

[105] *Prosecutor v. Zoran Kupreškić et al.*, No. IT-95-16-T, Judgment, 14 January 2000, para. 677. See also para. 539.

[106] *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. 22.

[107] *Ibid*., para. 32.

[108] *Prosecutor v. Germain Katanga*, No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 39.

56. In the *Situation in the Republic of Kenya*, a Pre-Trial Chamber of the Court similarly noted, in relation to an alleged general principle of law that there can be judicial review when there is a failure to investigate or prosecute, the following:

> The Chamber recalls that the purpose of article 21 of the Statute is to regulate the sources of law the Court and establishes a hierarchy within those sources of law. Article 21(1)(a) of the Statute explicitly refers to the Statute as the first source of law. Recourse to the subsidiary sources of law referred to in article 21(1)(b) and (c) of the Statute is only possible when, as established by the Appeals Chamber, there is a lacuna in the Statute or the Rules.
>
> … The Chamber observes that the Statute, in article 53, regulates in detail the Pre-Trial Chamber's competence to review the Prosecutor's exercise of her powers with respect to investigation and prosecution, as well as the boundaries of the exercise of any such competence. Therefore, the Chamber does not consider that there exists a lacuna in this respect which would need to be filled by reference to subsidiary sources of law referred to in article 21(1)(b) and (c) of the Statute or through constructive interpretation of other provisions of the Statute (such as the combined reading of article 21 and 68(1) of the Statute proposed by the Victims).[109]

57. Furthermore, in the *Lubanga* case, the Appeals Chamber of the Court stated that:

> it is noteworthy that the legal instruments of the ICTY do not contain a provision similar to Regulation 55. For that reason, in the *Kupreškić* Trial Judgment, the judges considered whether this gap in the legal framework of the ICTY could be closed by reference to a general principle of law and concluded that there exists "no general principle of criminal law common to all major legal systems of the world" regarding a change in the legal characterisation of facts. At this Court, the situation is different. The judges of the Court adopted Regulation 55 as part of the Regulations of the Court. Thus, there is no need to rely on general principles of law to determine whether or not legal re-characterisation is permissible.
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> … The Appeals Chamber is therefore not persuaded by Mr. Lubanga Dyilo's argument that Regulation 55 should not be applied because of a purported inconsistency with general principles of international law.[110]

58. The gap-filling function of general principles is also exemplified in investment arbitration. For instance, in *Inceysa v. El Salvador*, the tribunal indicated that general

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[109] *Situation in the Republic of Kenya*, No. ICC-01/09, Decision on the "Victims' Request for Review of Prosecution's decision to cease active investigation", 5 November 2015, paras. 17–18.

[110] *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06 OA 16, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, paras. 80–81. See also *Prosecutor v. Francis Kirimi Muthaura* et al., No. ICC-01/09-02/11 OA 4, Decision on the "Request to make oral submissions on jurisdiction under Rule 156(3)", 1 May 2012, para. 11; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, No. ICC-01/09-01/11 OA 7 OA 8, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the Decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's application for witness summonses and resulting request for State party cooperation", 9 October 2014, para. 105; *Prosecutor v. Germain Katanga*, No. ICC-01/04-01/07 A3 A4 A5, Judgment on the appeals against the Order of Trial Chamber II of 24 March 2017 entitled "Order for reparations pursuant to article 75 of the Statute", 8 March 2018, para. 148; *Prosecutor v. Jean-Pierre Bemba Gombo* et al., No. ICC-01/05-01/13 A6 A7 A8 A9, Judgment on the appeals of the Prosecutor, Mr. Jean-Pierre Bemba Gombo, Mr. Fidèle Babala Wandu and Mr. Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 March 2018, para. 76.

principles of law play a "complementary mission to the legal system, either national or international".[111]

59. Arbitral tribunals have also applied general principles of law to interpret investment treaty standards that are unclear or ambiguous. For example, the standard of fair and equitable treatment has sometimes been deemed "elusive" in its content.[112] In this context, arbitral tribunals have resorted to the principles of good faith and legitimate expectations to interpret the relevant provisions in bilateral investment treaties.[113] For instance, in *Sempra Energy International v. Argentina*, the tribunal observed that:

> [F]air and equitable treatment is a standard that is none too clear and precise. This is because international law is itself not too clear or precise as concerns the treatment due to foreign citizens, traders and investors. This is the case because the pertinent standards have gradually evolved over the centuries. Customary international law, treaties of friendship, commerce and navigation, and more recently bilateral investment treaties, have all contributed to this development. Not even in the case of rules which appear to have coalesced, such as denial of justice, is there today much certainty.[114]

60. The tribunal thereafter considered that "[t]he principle of good faith is … relied on as the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes".[115]

61. This supplementary gap-filling role of general principles of law also features in some pleadings of States before international courts and tribunals. In the *North Sea Continental Shelf* cases, for example, Denmark and the Netherlands rejected the applicability of the general principle of law invoked by Germany (just and equitable share) as follows:

> An equally fundamental objection to the Federal Republic's invocation of Article 38 (1) *(c)* is that there is no question here of the absence of any relevant principle of international law by which to determine the issues in the cases before the Court. In the view of the two Governments, the relevant principles and rules of international law are those expressed in Article 6 of the Continental Shelf Convention; and the application of the special circumstances exception has to be determined by reference to the indications contained in the work of the International Law Commission, the Geneva Conference and in the practice of States. These indications … provide definite enough criteria for determining

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[111] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, International Centre for Settlement of Investment Disputes, para. 228, citing C. Arellano García, *Derecho Internacional Privado*, 4th ed. (Mexico City, Editorial Porrúa, 1980), p. 87.

[112] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, International Centre for Settlement of Investment Disputes, para. 539; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, United Nations Commission on International Trade Law (UNCITRAL), Partial Award, 17 March 2006, para. 297; *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, International Centre for Settlement of Investment Disputes, para. 504.

[113] See, for example, International Centre for Settlement of Investment Disputes: *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, paras. 153-154; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on liability, 27 December 2010, para. 128; *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, para. 166; *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (see previous footnote), para. 546.

[114] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, International Centre for Settlement of Investment Disputes, para. 296.

[115] *Ibid.*, para. 298.

> the existence or otherwise in the present cases of any "special circumstance justifying another boundary line".
>
> … It is further the view of the two Governments that, even if the principles and rules of international law are not considered by the Court to be applicable as between the Parties, there is no possible question of a *non liquet* in the present cases. They contend that, in that event, the Court's clear course will be to determine the applicable principles and rules of international law by reference to the language in which and the conditions under which the exclusive rights of the coastal State over the adjacent continental shelf have been recognized in Article 1 and 2 of the Continental Shelf Convention … These principles, in the view of the two Governments, in themselves furnish a perfectly adequate objective rule for determining the delimitation of the continental shelf boundaries.[116]

62. Some treaties also shed light on the gap-filling function of general principles of law. Although article 21 of the Statute of the International Criminal Court may be said to be unique to international criminal law and that its terminology is different from that of Article 38, paragraph 1, of the Statute of the International Court of Justice, it is broadly consistent with the gap-filling role of general principles of law:

> 1. The Court shall apply:
>
> (a) *In the first place*, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) *In the second place*, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) *Failing that*, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.[117]

63. Finally, the gap-filling function of general principles of law has also been mentioned in individual opinions of judges. For instance, in *Interpretation of Judgments Nos. 7 and 8 (the Chorzów factory)*, in addressing a question relating to the principle of *res judicata*, Judge Anzilotti noted that:

> if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to "the general principles of law recognized by civilized nations", mentioned in No. 3 of Article 38 of the Statute, that case is assuredly the present one.[118]

64. In the *Fisheries* case, Judge Alvarez similarly observed that:

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[116] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, Common Rejoinder of Denmark and the Netherlands, paras. 118–119.

[117] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3. See also article 61 of the African Charter on Human and People's Rights (Nairobi, 27 June 1981; United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217) ("The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine"). See further the memorandum by the Secretariat (A/CN.4/742), paras. 48–58 and 85.

[118] *Interpretation of Judgments Nos. 7 and 8 (the Chorzów Factory)*, Judgment of 16 December 1927, PCIJ Series A, No. 13, Dissenting Opinion of Judge Anzilotti, p. 27.

> In accordance with uniformly accepted doctrine, international judicial tribunals must, in the absence of principles provided by conventions, or of customary principles on a given question, apply the *general principles of law*. This doctrine is expressly confirmed in Article 38 of the Statute of the Court.[119]

65. In *Certain Norwegian Loans*, addressing the interpretation of the declaration by France of acceptance of compulsory jurisdiction of the International Court of Justice, Judge Lauterpacht observed that:

> International practice on the subject is not sufficiently abundant to permit a confident attempt at generalization and some help may justifiably be sought in applicable general principles of law as developed in municipal law. That general principle of law is that it is legitimate – and perhaps obligatory – to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that having regard to the intention of the parties and the nature of the instrument the condition in question does not constitute an essential part of the instrument.[120]

66. In *North Sea Continental Shelf*, Judge Ammoun, after considering that the parties to the dispute were not bound by the rule set out in article 6 of the Convention on the Continental Shelf[121] (as a treaty or customary rule), noted that "[t]hus it is necessary in the last analysis to have regard to the general principles of law recognized by nations".[122] In particular, he stated that:

> [T]here is a lacuna in international law when delimitation is not provided for either by an applicable general convention (Article 38, paragraph 1 (*a*)), or by a general or regional custom (Article 38, paragraph 1 (*b*)). There remains sub-paragraph (*c*), which appears to be of assistance in filling the gap.[123]

67. General principles of law have also been used to fill gaps in the sense of interpreting new concepts that do not have an established meaning in international law. In *International Status of South West Africa*, in order to clarify the legal nature of the mandates system and the concept of "sacred trust of civilization" in Article 22 of the Covenant of the League of Nations, Judge McNair resorted to general principles of law:

> What is the duty of an international tribunal when confronted with a new legal institution the object and terminology of which are reminiscent of the rules and institutions of private law? To what extent is it useful or necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38 (1) (*c*) of the Statute of the Court bears witness that this process is still active, and it will be noted that this article authorizes the Court to "apply .... (*c*) the general principles of law recognized by civilized nations".[124]

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[119] *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, Individual Opinion of Judge Alvarez, at p. 147.

[120] *Case of Certain Norwegian Loans, Judgment of July 6th, 1957: I.C.J. Reports 1957*, p. 9, Separate Opinion of Judge Lauterpacht, at pp. 56–57.

[121] Convention on the Continental Shelf (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 499, No. 7302, p. 311.

[122] *North Sea Continental Shelf, Judgment,* International Court of Justice, *I.C.J. Reports 1969*, p. 3, Separate Opinion of Judge Ammoun, at pp. 131–132, para. 32.

[123] *Ibid*. See also *South West Africa, Second Phase, Judgment*, International Court of Justice, *I.C.J. Reports 1966*, p. 6, Dissenting Opinion of Judge Tanaka, p. 299 ("an important role which can be played by Article 38, paragraph 1 (*c*), in filling in gaps in the positive sources in order to avoid *non liquet* decisions, can only be derived from the natural law character of this provision").

[124] *International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*, p. 128, Separate Opinion of Judge McNair, at p. 148.

68. It should be noted that the examples given above are cases where the gap-filling function of general principles of law was mentioned in a more or less express manner. There are other examples, already referred to in the first and second reports, where this supplementary function was not specifically pointed out. However, that the same approach was followed is clear from the context of the cases, in particular the fact that general principles of law were invoked or applied when there was no applicable treaty or custom, or when existing rules of conventional and customary international law failed to resolve a specific legal issue or certain aspects of a dispute.

69. Some observations can be set forth, taking into consideration the practice set out above. First, the gap-filling role of general principles of law appears to be well established. Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice does not refer to this function, and it may be recalled that, at the time of the drafting of the Statute of the Permanent Court of International Justice, earlier versions of Article 38 containing references to the sequence in which the three sources of international law ought to be applied were not retained.[125] Indeed, article 35 of the draft scheme proposed by the Advisory Committee of Jurists contained the phrase "in the order following" in its *chapeau*. During the debates of the Committee it was noted that "[t]he formula adopted … simply represented the logical order in which these sources would occur to the mind of the judge".[126] Eventually, the phrase "in the order following" was deleted by States in the Council and the Assembly of the League.[127] However, the way in which the provision has been interpreted and applied in practice, and understood in the literature, seems to evidence a general consensus: general principles of law are generally resorted to in the absence of a treaty or custom, or when rules of conventional and customary international law govern a certain subject matter but do not provide a solution to a specific legal issue.[128] The existence of such lacunae is nothing but natural: the conditions

[125] See A/CN.4/732, paras. 90–109. At the same time, it may be recalled that the view was expressed that the three sources of international law were in any event to be applied simultaneously. See Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920* (The Hague, Van Langenhuysen Bros., 1920), pp. 332 and 336 (Ricci-Busatti stating that judges "should consider the various sources of law simultaneously in relation to one another", and Descamps that "the different sources of law should be made use of simultaneously. That might be done in given cases. Nevertheless a classified graduation of sources is necessary").

[126] *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920* (see previous footnote), p. 333 (Lord Phillimore).

[127] *Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption of the Assembly of the Statute of the Permanent Court* (1921), p. 145.

[128] Some authors have explained that the order of the sources listed in Article 38, paragraph 1, of the Statute may be explained on the basis of: (i) their decreasing order of ease of proof; (ii) their decreasing order of specialty; and (iii) the consuensalist degree of each source. See Pellet and Müller, "Article 38", p. 932, referring to P.-M. Dupuy, "La pratique de l'article 38 du Statut de la Cour internationale de Justice dans le cadre des plaidoiries écrites et orales", in *Collection of Essays by Legal Advisers of States, Legal Advisers to International Organizations and Practitioners in the Field of International Law* (United Nations, New York, 1999), pp. 381 and 388. At the same time, Pellet and Müller note that the fact that a rule may be (more directly) based on State consent does not mean that such rule has pre-eminence over other norms (*ibid*., p. 933). They referred in this regard to Ago, who noted that: "Le droit de formation spontanée n'est ni moins réellement existant, ni moins certain, ni moins valable, ni moins observé, ni moins efficacement garanti que celui qui est créé par des faits normatifs spécifiques; au contraire, justement la spontanéité de son origine est plutôt la cause d'une observation plus spontanée et, par conséquent, plus réelle" ["Law of spontaneous formation is not less truly existing, nor less certain, nor less valid, nor less observed, nor less effectively guaranteed than that created by specific normative facts; on the contrary, the spontaneity of its origin is in fact rather the cause of a more spontaneous and, therefore, more real observation"]. See R. Ago, "Droit positif et droit international", *Annuaire français de droit international*, vol. 3 (1957), pp. 14–62, at p. 62.

of society are ever-changing and it is difficult, if not impossible, to foresee all scenarios in which a rule of law will apply.

70. The Special Rapporteur wishes to emphasize that gap-filling is a function that may also be carried out by other sources of international law. Indeed, it may very well be that, in some cases, a treaty rule or a customary rule may fill a lacuna existing in certain areas of the law.[129] In the context of general principles of law, however, gap-filling and the avoidance of *non liquet* was clearly in the minds of the drafters of the Statute of the Permanent Court of International Justice[130] and general principles have been generally resorted to in that sense in practice. Gap-filling therefore appears to be something that is inherent in this source of international law. Addressing gaps in the international legal system may be regarded, in other words, as the essential role or function of general principles in the sense of Article 38, paragraph 1 (*c*), of the Statute.

71. Second, it is important to highlight that general principles of law perform a gap-filling role only to the extent that they exist and can be identified. There are examples, already set out in the second report,[131] of cases where a general principle of law was not identified, be it because the existence of a principle common to the various legal systems could not be established or because the principle in question was not considered transposable to the international legal system. Therefore, not all lacunae in the law can necessarily be remedied by a general principle of law.[132] It has to be noted, in this regard, that general principles of law can be derived from national legal systems as well as from the international legal system.

72. A third observation relates to the concept of *non liquet* (from the Latin, "it is not clear"), which refers to a situation where a court or tribunal cannot decide on a case due to a lacuna in the law. In the view of the Special Rapporteur, it is clear from the analysis so far that the gap-filling role of general principles of law is aimed, at least in part, at preventing such situations. However, two points need to be made. First, as the Special Rapporteur noted in his first report, general principles of law should not be regarded in a court-centric manner.[133] There is no reason why, for instance, two States should not have resort to a general principle of law to arrive to a solution to a legal problem when dealing with a dispute in a bilateral manner, if they consider it relevant. Therefore, the gap-filling role of general principles of law should be understood in a broad sense, covering the filling of lacunae not only in the context of international adjudication but also in other contexts. The concept of *non liquet* being limited to the former, it may be seen as only partly explaining the role of general principles of law in the international legal system.[134]

73. Second, the Special Rapporteur does not consider it necessary for the Commission to enter into the discussion of whether there is general prohibition of

[129] It may be recalled that, in conclusion 15 of the conclusions of the work of the Study Group on the fragmentation of international law, gap-filling was identified as one of the roles of "general law" in special regimes: "The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply". See *Yearbook of the International Law Commission 2006*, vol. II (Part Two), p. 177, para. 251, at p. 179.

[130] See *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920* (see footnote 126 above), pp. 307, 318–319, 323.

[131] A/CN.4/741 and Corr.1, paras. 47–49 and 76–81.

[132] In the words of a member of the Commission, general principles of law are not "mandatory" gap-fillers. See the statement of Mr. Hmoud (A/CN.4/SR.3489, p. 15).

[133] A/CN.4/732, para. 126.

[134] As noted by one author, "[s]ince a *non liquet* is a corollary and an expression of a gap, or lacuna, in the law, the theories of lacunae in international law and of *non liquet* are two sides of the same coin". See P. Weil, "'The court cannot conclude definitively …' *Non liquet* revisited", *Columbia Journal of Transnational Law*, vol. 36 (1998), pp. 109–119, at p. 110.

non liquet in international law. This issue has long occupied scholars[135] and diverging views exist on complex issues such as the completeness of the international legal system. For purposes of the present topic, it suffices for the Commission to note that general principles of law perform a gap-filling function and are therefore a tool available in international law to prevent the disposal of a case on grounds of *non liquet*, regardless of whether or not the latter is prohibited.

II. The relationship between general principles of law and the other sources of international law

74. Having addressed the gap-filling role of general principles of law, the Special Rapporteur now turns to analyse a related and crucial aspect of the present topic: the relationship between general principles of law and other sources of international law, in particular treaties and custom.

75. The interaction between different sources of international law is a complex matter that may encompass a wide variety of issues. In the view of the Special Rapporteur, for purposes of the present topic, three main issues require particular attention: (*a*) the absence of hierarchy between the three sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice; (*b*) the possibility of parallel existence of general principles of law and conventional and customary rules; and (*c*) the operation of the principle of *lex specialis* in the context of general principles of law. Each of these is addressed in turn below.

A. The absence of hierarchy between treaties, customary international law and general principles of law

76. It is generally accepted that no hierarchy exists between the three sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice.[136] During the debates on the present topic, a number of Commission

[135] See, for example, Weil, "'The court cannot conclude definitively …' *Non liquet* revisited"; U. Fastenrath, *Lücken im Völkerrecht: Zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts* (Berlin, Duncker & Humblot, 1991); G. Fitzmaurice, "The Problem of *Non Liquet*: Prolegomena to a Restatement", in C. Rousseau (ed.), *Mélanges offerts à Charles Rousseau: La communauté internationale* (Paris, Pedone, 1974), pp. 89–112; W.M. Reisman, "International *non liquet*: recrudescence and transformation", *International Lawyer*, vol. 3 (1969), pp. 770–786; H. Lauterpacht, "Some observations on the prohibition of '*non liquet*' and the Completeness of the Law", in F.M. van Asbeck (ed.), *Symbolae Verzijl: Présentées au Prof. J. H. W. Verzijl à l'occasion de son LXX-ième anniversaire* (The Hague, Martinus Nijhoff, 1958), pp. 196–221; L. Siorat, *Le problème des lacunes en droit international: Contribution à l'étude des sources du droit et de la fonction judiciaire* (Paris, Librairie générale de droit et de jurisprudence, 1958); H. Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon, 1933).

[136] See, for example, Pellet and Müller, "Article 38", p. 935; P. Palchetti, "The role of general principles in promoting the development of customary international rules", in Andenas *et al*. (eds.), *General Principles and the Coherence of International Law*, pp. 47–59, at p. 49; Bassiouni, "A functional approach to 'general principles of international law'", pp. 781–783; Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, pp. 20–22; Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, p. 20; V.D. Degan, *Sources of International Law* (The Hague, Martinus Nijhoff, 1997), p. 5; Gazzini, "General principles of law in the field of foreign investment", p. 108.

members and States in the Sixth Committee expressed their views in this sense.[137] Indeed, nothing in that provision or in its preparatory work indicates that such a hierarchy might exist.[138] While the Special Rapporteur finds this proposition uncontroversial, he considers that a few issues may benefit from additional clarification in the context of general principles of law.

77. It may be recalled that, in the Conclusions of the Study Group on the Fragmentation of International Law, it was noted that:

> The main sources of international law (treaties, custom and general principles of law as laid out in Article 38 of the Statute of the International Court of Justice) are not in a hierarchical relationship *inter se*. Drawing analogies from the hierarchical nature of domestic legal systems is not generally appropriate owing to the differences between the two systems. Nevertheless, some rules of international law are more important than others and for this reason enjoy a superior position or special status in the international legal system. This is sometimes expressed by the designation of some norms as "fundamental" or as expressive of "elementary considerations of humanity" or "intransgressible principles of international customary law". What effect such designations may have is usually determined by the relevant context or instrument in which that designation appears.[139]

78. In explaining the types of hierarchical relations that may exist in international law, the Study Group referred in particular to *jus cogens* norms, on the one hand, and Article 103 of the Charter of the United Nations, on the other.[140]

79. The position adopted by the Study Group is, in the view of the Special Rapporteur, generally accepted. Besides *jus cogens* norms and treaties that may establish their priority of application over other rules of international law (such as the

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[137] See, for example, the 2019 statements by Australia (A/C.6/74/SR.31, para. 90); India (A/C.6/74/SR.32, para. 94); Micronesia (Federated States of) (A/C.6/74/SR.32, para. 54); Portugal (A/C.6/74/SR.32, para 84). See also the 2021 statements by El Salvador (A/C.6/76/SR.23, para. 128); India (A/C.6/76/SR.24, para. 30); Portugal (A/C.6/76/SR.23, para. 81). See further A/CN.4/746, para. 64 ("While some delegations considered that establishing a hierarchy between the sources of international law should be avoided, others took the view that general principles of law should be used only where no treaty rule or customary international law applied to a given situation").

[138] It may be recalled that, in the Advisory Committee of Jurists, when discussing the words "in the order following" in the *chapeau* of Article 38, Phillimore noted the order in which the treaties, customary international law and general principles of law appear "simply represented the logical order in which these sources would occur to the mind of the judge". Furthermore, Ricci-Busatti expressed the concern that the order "might also suggest … that the judge was not authorised to draw upon a certain source, for instance point 3, before having applied conventions and customs mentioned in points 1 and 2. That would be a misinterpretation of the Committee 's intentions". See *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920* (see footnote 126 above), pp. 333 and 337, respectively. See also Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, pp. 22–23 ("The order in which these component parts of international law are enumerated is not ... intended to represent a juridical hierarchy, but merely to indicate the order in which they would normally present themselves to the mind of an international judge when called upon to decide a dispute in accordance with international law. There is nothing to prevent these three categories of rules or principles of international law from being simultaneously present in the mind of the judge").

[139] *Yearbook of the International Law Commission 2006*, vol. II (Part Two), p. 177, para. 251, at p. 182, conclusion 31.

[140] *Ibid*., pp. 182–184, conclusions 32–42. See also draft conclusion 3 of the draft conclusions on peremptory norms of general international law (*jus cogens*), currently under consideration by the Commission, A/74/10, para. 56 ("Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable").

Charter of the United Nations), no hierarchy exists between the different sources of international law in Article 38, paragraph 1, of the Statute of the International Court of Justice. From this point of view, treaties, customary international law and general principles of law can be said to normally coexist on an equal footing.

80. The question may be raised, however, whether some other form of hierarchy may nonetheless exist between general principles of law and the two other sources in the light of two issues: (*a*) the compatibility test for purposes of determining the transposability of principles common to the various systems of the world to the international legal system and (*b*) the gap-filling role of general principles of law. In the view of the Special Rapporteur, a hierarchy cannot be deemed to exist for the following reasons.

81. First, as regards the compatibility test for purposes of transposition, it is important to keep in mind that the test is not aimed at placing general principles of law in a position of subordination or hierarchical inferiority with respect to treaties and custom, but rather at demonstrating that the requirement of recognition in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice is met. As explained in Part One, recognition takes place on two levels: at the national level, through the acceptance of a principle in the various legal systems of the world; and at the international level, through the implicit recognition by the community of nations that the principle is capable of being applied or suitable for applying within the international legal order. That implicit recognition is to be found in the framework of rules and principles of international law accepted by States, framework within which a general principle of law is to apply and fill possible lacunae.

82. Second, with respect to the gap-filling role of general principles of law, the Special Rapporteur does not consider that this function creates a hierarchical relationship between general principles of law and treaties and custom either. The fact that a rule or principle may be used to fill a lacuna in the law does not mean that there exists subordination. As will be explained in chapter III, section C, the gap-filling role of general principles of law can be better understood from the point of view of the *lex specialis* principle.

B. The possibility of parallel existence of general principles of law and conventional and customary rules

83. Another issue that merits clarification is whether general principles of law can exist in parallel with identical or similar rules of conventional and customary international law. The view has at times been expressed that general principles of law are a transitory source in the sense that, if they are codified into a treaty or, where the conditions of State practice and *opinio juris* are met, they give rise to the emergence of a rule of customary international law, they become obsolete or cease to exist. This proposition, however, appears to be inaccurate.

84. At the outset, it may be recalled that the International Court of Justice has already dealt with the question of parallel existence of rules deriving from different sources, in particular treaties and custom, in the past. In *Military and Paramilitary Activities in and against Nicaragua*, the Court indicated that:

> The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content.

But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective.

As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" … of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.

… But as observed above …, even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the *North Sea Continental Shelf* cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallize", or because it had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was debarred as a matter of principle … More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own.

…

> It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content.[141]

85. In the view of the Special Rapporteur, taking into account that, as explained in the previous chapter, no hierarchy exists between treaties, custom and general principles of law, there is no reason to depart from the Court's reasoning insofar as it concerns the possibility of parallel existence of general principles of law and rules of international law originating from the other two sources. Following this approach, it can be stated that when a general principle of law has an identical or analogous content to that of a conventional or customary rule: (*a*) the conventional or customary rule in question does not necessarily supervene the general principle of law; and (*b*) the general principle continues to have a separate, distinct applicability.[142]

86. There appear to be no cases in practice where these issues were addressed in an express manner. However, there are various examples of the application or invocation of general principles of law the content of which was identical or analogous to that of conventional or customary rules. A clear example in this regard is the principle of *res judicata*, which has been referred to on various occasions by the International Court of Justice as a principle that is at the same time a general principle of law and a rule provided for in its Statute. In *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia*, for instance, the Court determined that:

> the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that

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[141] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, I.C.J. Reports 1986*, p. 14, paras. 175–177, 179. See also para. 178 ("There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability. In a legal dispute affecting two States, one of them may argue that the applicability of a treaty rule to its own conduct depends on the other State's conduct in respect of the application of other rules, on other subjects, also included in the same treaty. For example, if a State exercises its right to terminate or suspend the operation of a treaty on the ground of the violation by the other party of a 'provision essential to the accomplishment of the object or purpose of the treaty' (in the words of Art. 60, para. 3 (b), of the Vienna Convention on the Law of Treaties), it is exempted, vis-à-vis the other State, from a rule of treaty-law because of the breach by that other State of a different rule of treaty-law. But if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State in declining to apply the other rule. Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application. A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are customary rules or treaty rules. The present dispute illustrates this point").

[142] Granted, if a general principle of law is codified in a treaty or gives rise to the emergence of a rule of customary international law, in practice it may often suffice to rely on the treaty or customary rule in question for purposes of solving a dispute. This does not mean, however, that the general principle of law in question ceases to exist or that it becomes irrelevant. In some cases, the general principle of law may, for example, provide important interpretative guidance or serve to reinforce legal reasoning. On this matter, see also I. Skomerska-Muchowska, "Some remarks on the role of general principles in the interpretation and application of international customary and treaty law", *Polish Yearbook of International Law*, vol. 37 (2017), pp. 255–274, at pp. 256–257.

> is final and without appeal … This principle establishes the finality of the decision adopted in a particular case.[143]

87. Another instance where the Court appears to have noted the parallel existence of a rule laid down in its Statute and a general principle of law is the *Nottebohm* case. Referring to the principle *compétence-compétence*, the Court noted:

> Article 36, paragraph 6 [of the Statute], suffices to invest the Court with power to adjudicate on its jurisdiction in the present case. But even if this were not the case, the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it" (Article 38, paragraph 1, of the Statute), should follow in this connection what is laid down by general international law. The judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case.[144]

88. Other tribunals have also noted the existence of certain general principles of law that found a parallel in treaty or customary law. In *Questech, Inc. v. Iran*, for example, the Iran-United States Claims Tribunal noted, with respect to the principle *rebuc sic stantibus*, that:

> This 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.[145]

89. States have on occasion also referred to general principles of law that, in their view, existed in parallel with treaty or customary rules. In *Avena and Other Mexican Nationals*, for instance, Mexico argued that the principle of exclusion of illegally obtained evidence, in addition to being generally recognized in national legal systems, had also been included in instruments governing international criminal tribunals, article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment[146] and article 8, paragraph 3, of the American Convention on Human Rights.[147,148] Similarly, in *Certain Property*, Liechtenstein, after showing that unjust enrichment was a principle that is common to national legal systems and transposable to the international legal system, 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.[149]

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[143] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 100, at p. 125, para 58. See also *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 p. 166, para. 68, and the other previous cases referred to therein.

[144] *Nottebohm case (Preliminary Objection), Judgment of November 18th, 1953: I.C.J. Reports 1953*, p. 111, at p. 120.

[145] *Questech, Inc.* v. *Iran*, Case No. 59, Award No. 191-59-1, 25 September 1985, *Iran-U.S. Claims Tribunal Reports*, vol. 9 (1985), p. 122.

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

[147] 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.

[148] *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12, Memorial of Mexico, paras. 377–379.

[149] *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6, Memorial of Liechtenstein, paras. 6.23–6.25.

90. In *Right of Passage*, Portugal based its alleged right of passage over Indian territory on general principles of law, together with treaties and customary rules.[150] In *South West Africa*, Liberia and Ethiopia claimed that the obligation of non-discrimination was both a customary rule and a general principle of law, and that, accordingly, the policy and practice of apartheid was a violation of international law in terms of both sources.[151] In his Dissenting Opinion in that case, Judge Tanaka observed that:

> the alleged norm of non-discrimination and non-separation, being based on the United Nations Charter, particularly Articles 55 (*c*), 56, and on numerous resolutions and declarations of the General Assembly and other organs of the United Nations, and owing to its nature as a general principle, can be regarded as a source of international law according to the provisions of Article 38, paragraph 1 (*a*)–(*c*). In this case three kinds of sources are cumulatively functioning to defend the above-mentioned norm: (1) international convention, (2) international custom and (3) the general principles of law.[152]

91. In *Land, Island and Maritime Frontier Dispute*, regarding the principle of *uti possidetis*, El Salvador maintained that the latter was a customary rule as well as a general principle of law applicable to boundary delimitation.[153] Furthermore, in the advisory opinion on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Judge Evensen maintained that the privileges and immunities under the Convention extended to the family of the individual in question.[154] In doing so, he noted that:

> The integrity of a person's family and family life is a basic human right protected by prevailing principles of international law which derive not only from conventional international law or customary international law but from "general principles of law recognized by civilized nations".[155]

92. Another example of a well-established general principle of law that has been incorporated in treaties and which may be considered to also form part of customary international law is the principle of good faith.[156] The principle has been codified, for instance, in the Vienna Convention on the Law of Treaties[157] (*e.g.*, articles 26 and 31) and the Friendly Relations Declaration.[158]

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[150] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, Memorial of Portugal, para. 58.

[151] *South West Africa, Second Phase* (see footnote 124 above), Reply of Ethiopia and Liberia, pp. 518–519.

[152] *Ibid*., Dissenting Opinion of Judge Tanaka, at p. 300.

[153] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Memorial of El Salvador, para. 3.4.

[154] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177, Separate Opinion of Judge Evensen, at pp. 210–211.

[155] *Ibid*.

[156] Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p. 105. In the Advisory Committee of Jurists, Phillimore mentioned the principle of good faith as one of the examples of general principles of law originating *in foro domestico* (see *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920* (footnote 126 above), p. 335). Similarly, in the *Lighthouses* case, Judge Séféradès noted that "Contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law" (see *Lighthouses Case between France and Greece*, Judgment, Permanent Court of International Justice, 17 March 1934, Series A/B, No. 62, Separate Opinion of Judge Séféradès, p. 47).

[157] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 443.

[158] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

93. In the light of the above, it can be concluded that general principles of law can exist in parallel with rules of conventional and customary international law with an identical or analogous content. Situations like this may arise, for example, when a general principle of law is codified, fully or in part, in a conventional instrument. Similarly, a general principle of law may give rise to the formation of a rule of customary international law.[159] In either case, the general principle of law maintains its distinct existence and applicability.

94. In practice, a general principle of law with a similar or analogous content to that of a treaty or customary rule may serve to interpret or complement the latter, or it may be used as a means to reinforce legal reasoning. These issues will be addressed in some more detail in chapter III below.[160]

C. The operation of the *lex specialis* principle

95. The absence of hierarchy between the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, as well as the possibility of parallel existence of general principles of law and other rules of international law, having been established, the present section addresses the relationship between general principles of law and other rules of international law when they apply to the same subject matter. As will be explained in further detail below, this matter is governed by the principle of *lex specialis*.

96. The Commission has already addressed in some detail the principle of *lex specialis* under the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", and the Special Rapporteur considers that this previous work can provide useful guidance to understand how the principle operates in the context of general principles of law. The Study Group for that topic arrived at a number of conclusions relevant to the present topic, some of which are worth reproducing in full:

> (5) *General principle*. The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. The principle may be applicable in several contexts: between provisions within a single treaty, between provisions within two or more treaties, and between a treaty and a non-treaty standard, as well as between two non-treaty standards. The source of the norm (whether treaty, custom or general principle of law) is not decisive for the determination of the more specific standard. However, in

[159] On this matter, see also H. Waldock, "General course on public international law", *Collected Courses of The Hague Academy of International Law*, vol. 106 (1962), pp. 54–69, at p. 62 ("A general principle of law may be invoked in State practice or applied by arbitral tribunals with such consistency that it becomes possible to see in it a customary rule of international law as well as a principle derived from national systems. Indeed, there will always be a tendency for a general principle of national law recognised in international law to crystallise into customary law"). See also Palchetti, "The role of general principles in promoting the development of customary international rules", pp. 47–48 ("It is a frequent observation that in the development of general international law, principles tend to precede custom. Usually, the argument goes as follows: general principles are gap-fillers; by filling gaps, they contribute to the development of the law; in particular, the use of general principles to identify the rule of conduct applicable in certain circumstances may set a process in motion that, in the long run, through the accumulation of practice, may lead to the emergence of a customary rule").

[160] The Special Rapporteur also recalls that, in the second report, it was noted that when a principle common to the various legal systems of the world is reflected at the international level, for example in a widely accepted treaty, this may serve as evidence confirming that the principle is transposable to the international legal system. See A/CN.4/741 and Corr.1, paras. 97–106.

practice treaties often act as *lex specialis* by reference to the relevant customary law and general principles.

…

(7) *Rationale of the principle*. That special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.

(8) *Functions of* lex specialis. Most of international law is dispositive. This means that special law may be used to apply, clarify, update or modify, as well as set aside, general law.

(9) *The effect of* lex specialis *on general law*. The application of the special law does not normally extinguish the relevant general law. That general law will remain valid and applicable and will, in accordance with the principle of harmonization …, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.[161]

97. In the light of these conclusions, three issues appear to be of particular relevance for purposes of the present topic: first, the circumstances in which the *lex specialis* principle may be applicable in the context of general principles of law; second, whether general principles of law ought to be considered as "general law" and/or "special law"; and third, the legal effect of the application of the *lex specialis* principle on the relationship between general principles of law and norms of the other two sources.

98. As regards the first issue, the answer is relatively straightforward. As indicated in the conclusions on fragmentation of international law, the *lex specialis* principle applies "whenever two or more norms deal with the same subject matter".[162] This situation arises when one rule applies, clarifies, updates, modifies, or sets aside another rule.[163]

99. Indeed, it appears that the Advisory Committee of Jurists had the understanding that the principle of *lex specialis* would apply in the relationship between general principles of law and conventional and customary rules. As mentioned earlier in the present report, the draft article proposed by the Committee contained the phrase "in the order following" in the *chapeau*, which was ultimately deleted. Ricci-Busatti considered that the phrase was superfluous in light of the "fundamental principle of law that a special rule goes before general law". Phillimore observed that "all the members were agreed upon the principle, and form only could be criticized".[164]

100. The second issue is how to determine whether a general principle of law is, in the words of the conclusions of the Study Group, the "special law" or the "general law" for purposes of the application of the principle of *lex specialis*.

101. A norm can be deemed to be "general" or "special" in terms of its subject matter or in terms of the number of actors whose behaviour is regulated by it.[165] The latter case is straightforward. Since general principles of law are usually norms of general or universal application,[166] it can be said that they will always be more "general" in relation to a treaty with a limited membership or a regional or bilateral custom. An example

[161] *Yearbook of the International Law Commission 2006*, vol. II (Part Two), p. 177, para. 251, at p. 178.
[162] *Ibid*., conclusion 5.
[163] *Ibid*., conclusion 8.
[164] See *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920* (see footnote 126 above), pp. 337–338.
[165] *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, para. 112.
[166] A/CN.4/732, paras. 159–161.

sometimes cited in this respect is the *Right of Passage* case, where the International Court of Justice, having found the existence of a bilateral custom applicable between the parties to the dispute, considered it unnecessary "to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result".[167]

102. Determining whether general principles of law are "general" or "special" in terms of subject matter deserves more attention. In this connection, it is relevant to return to a more general question that has at times been raised during the debates in the Commission, namely whether there is a difference between the terms "rules" and "principles", and whether this may have an effect on the functions of general principles of law or their relationship with other sources of international law. The Special Rapporteur addressed this issue in some detail in his first report.[168] There it was noted that, while some authors have attempted to draw a distinction between the two terms, others simply view them as synonymous; that neither the *travaux* nor the text of Article 38 of the Statute of the International Court of Justice allow a clear distinction to be drawn between them; that the case law is also not determinative in this regard; and that, while general principles of law may be regarded as "fundamental" and "general" in character, practice shows that the possibility of the existence of general principles with a more specific formulation or content cannot be excluded.[169]

103. The Special Rapporteur continues to be of this view. Indeed, taking into account all the practice that has been analysed in his reports to date, it is difficult to draw a strict distinction between the terms "rules" and "principles", which often appear to have been used interchangeably in practice. The fact that, as will be explained in chapter III, section B, below, the term "rules of international law" in article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties includes general principles of law further attests to this. Additionally, as noted above, conclusion 5 of the conclusions of the work of the Study Group on fragmentation indicates that the source of a norm is not decisive for determining the more specific standard (although in practice treaties will *usually* act as *lex specialis* in relation to customary international law and general principles of law). In the light of all this, it is not necessary, in the opinion of the Special Rapporteur, for the Commission to be overly prescriptive and to determine, *a priori*, that general principles of law may only have a certain character or content, which may in any event be difficult to explain in clear and objective terms.

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[167] *Right of Passage* (see footnote 93 above), pp. 41 and 43. See also *Yearbook ... 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, para. 84 (noting that the Court was employing a judicial technique of "setting aside any examination of the content of the general law, once the special custom had been found, in a way that leaves open the questions of whether the special rules was an elaboration or an exception to that general law or whether there was any general law in the matter in the first place").

[168] A/CN.4/732, paras. 146–154.

[169] In this regard, see also the statement of Mr. Nolte (A/CN.4/SR.3492, p. 17) ("the question of the delimitation between different sources of international law was less difficult than was sometimes assumed. For example, like Mr. Reinisch, he thought that the distinction between a rule of customary international law and a general principle of law depended not so much on the generality of their content, but rather on the way in which a particular principle had come about, or, as Sir Michael Wood had said, on the distinct rules of recognition. Rules of customary international law might be quite general, and general principles of law may acquire the character of a rule of customary international law – if such principles could be shown to be followed in the practice of States and were generally accepted by States in the form of *opinio juris*. It was somewhat akin to rules of customary international law that might simultaneously be treaty rules. Thus, general principles of law and rules from other sources of international law were not necessarily distinguishable by their formulation or character. They were, rather, distinguished by the way in which they came into existence and by the conditions they must otherwise fulfil").

104. Although, based on the above considerations, general principles of law would be capable of having a specific content or formulation, the Special Rapporteur nevertheless considers that the manner in which they come into existence is relevant to the application of the *lex specialis* principle. As noted above, the Study Group on fragmentation justified the priority of "special law" over "general law" based on "the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law", and considering that the application of special law "may also often create a more equitable result and it may often better reflect the intent of the legal subjects".[170]

105. This has an impact on how general principles of law should be understood when applying the *lex specialis* principle. A general principle of law derived from national legal systems is identified by ascertaining its existence in various legal systems of the world and its transposition to the international legal system. As discussed in Part One, since principles *in foro domestico* are originally not intended to apply to matters governed by international law, but to regulate legal relations at the national level, the recognition of their transposability to the international level is necessary, and that recognition takes place in an implicit manner.[171] Similarly, as regards general principles of law formed within the international legal system, the methodology for their identification is both inductive and deductive.[172] Because of the degree of deduction (after the application of the inductive analysis) inherent in the methodology for the identification of general principles of both categories, when a general principle of law and a treaty or customary rule apply to the same subject matter, it can be said that the latter usually "better reflect[s] the intent of the legal subjects", and "take[] a better account of the particular features of the context".[173] In other words, as a matter of principle, general principles of law may be regarded as less specific in reflecting the intent of States when compared with a treaty provision or a rule of customary international law. Therefore, the Special Rapporteur considers that general principles of law would normally be the "general law" in relation to treaty or customary rules applicable to the same subject-matter.

106. A final issue to address is the effect of the application of the principle of *lex specialis*. The conclusions of the work of the Study Group on fragmentation are clear in this regard:

> The application of the special law does not normally extinguish the relevant general law. That general law will remain valid and applicable and will, in accordance with the principle of harmonization …, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.[174]

107. Thus, even if a general principle of law is *lex generalis* and other rules of international law take precedence, depending on the particular circumstances of the case, the former may not be completely set aside by the latter and the general principle may continue to play an interpretative or complementary role with regard to the

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[170] *Yearbook of the International Law Commission 2006*, vol. II (Part Two), p. 177, para. 251, at p. 178, conclusion 7.

[171] See para. 14 above.

[172] See para. 31 above.

[173] See paras. 96 and 104 above. On this matter, see also J. G. Lammers, "General principles of law recognized by civilized nations", in F. Kalshoven, P.J. Kuyper and J.G. Lammers (eds.), *Essays on the Development of the International Legal Order in Memory of Haro F. van Panhuys* (Alphen aa den Rijn, Sijthoff and Noordhoff, 1980), pp. 53–75, at p. 66; X. Shao, "What we talk about when we talk about general principles of law", *Chinese Journal of International Law*, vol. 20 (2021), pp. 219–255, at pp. 246–249.

[174] *Yearbook of the International Law Commission 2006*, vol. II (Part Two), p. 177, para. 251, at p. 178, conclusion 9.

"special" treaty or customary rule, especially in situations not fully regulated by the latter. As concluded by the Study Group:

> It is a generally accepted principle that when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.[175]

This matter is further discussed in chapter III, section B, below.

III. Certain specific functions of general principles of law

108. Having dealt with the question of gap-filling, which, as explained in chapter I, may be regarded as the essential function of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court Justice, as well as the relationship between general principles and other sources of international law, this last chapter addresses certain specific functions of general principles of law that have been referred to during the debates on the topic in the Commission and the Sixth Committee. More specifically, the sections below address: (*a*) whether general principles of law may be an independent basis of rights and obligations; (*b*) the interpretative function of general principles of law; and (*c*) the systemic function of general principles.

109. It should be noted at the outset that, in the view of the Special Rapporteur, these specific functions are not unique to general principles of law, but pertain in principle to all sources of international law. In the case of general principles, however, they should be understood in the light of their gap-filling role.

A. General principles of law as an independent basis for rights and obligations

110. That general principles of law may fill gaps in the international legal system by establishing procedural rules, interpretative rules or secondary rules appears to be a proposition that is widely accepted.[176] The question has at times been raised, however, whether general principles of law can also constitute an independent basis of primary rights and obligations. As will be shown below, State practice and jurisprudence, as well as the previous work of the Commission, suggest that general principles may, in

[175] *Ibid*., conclusion 4.

[176] Examples of the invocation or application of such general principles of law have been referred to in the three reports of the Special Rapporteur to date, including: the principle of *res judicata*; *compétence-compétence*; *iura novit curia*; excess of jurisdiction; *actio popularis*; the principle that no one can be judge in its own suit; burden of proof; admission of indirect evidence; admissibility of evidence in the form of admissions; nullity of arbitral awards; connection between counter-claims and main claims; division of costs and expenses; a right to appeal in criminal proceedings; the power of a court to subpoena witnesses; trial *in absentia* in criminal proceedings; the principle of good faith; principles of treaty interpretation; abuse of rights; the obligation to make reparation for breaches of international law; calculation of damages; consequential damages and loss of profit as damages; the principle *rebuc sic stantibus*; the *exceptio non adimpleti contractus*; the principle *fraus omnia corrumpti*; error as a defect of consent; the principle of separation between a limited company and its shareholders; the "clean hands" doctrine; and principles on succession of individuals to determine reparation.

some cases, establish such rights and obligations. This position has also been referred to in the literature.[177]

111. As noted in the first report, the Commission has already addressed this question to some extent.[178] Article 12 (Existence of a breach of an international obligation) of the 2001 articles on responsibility of States for internationally wrongful acts provides that: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin". In explaining the meaning of the term "regardless of its origin", the commentary noted that "[i]nternational obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order".[179] It thus follows that, in the Commission's understanding, general principles of law may establish obligations binding upon States (as well as corresponding rights), and that a breach of such obligations may engage the international responsibility of the State concerned.

112. Substantive rights or obligations based on general principles of law have sometimes been invoked or applied in practice, in the absence of rules of conventional or customary international law regulating a specific legal issue. Examples of States invoking such general principles of law may be found, for instance, in the *North Atlantic Coast Fisheries* case, where the United States sought to demonstrate the existence of a right granting it an international servitude in Great Britain's waters.[180] Similarly, in *Right of Passage*, Portugal considered that a general principle of law conferred it a right of passage over Indian territory so as to access its enclaves existing at the time.[181] Furthermore, an obligation by States to exclude statements and confessions obtained prior to notification to a foreign national of his/her right to consular assistance was invoked by Mexico in *Avena and Other Mexican Nationals* relying on general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.[182]

113. In *Certain Property*, Liechtenstein invoked the principle of unjust enrichment,[183] noting that it was "underpinned by the fundamental principle of good faith", and that it served "to grant remedies in cases of unjustified wealth transactions under international law".[184] In *Questions relating to the Seizure and Detention of Certain Documents and Data*, Timor-Leste argued that Australia had violated, *inter alia*, a general principle of law protecting the right of confidentiality and non-interference in communications with

[177] See, for example, Pellet and Müller, "Article 38" p. 941; Yee, "Article 38 of the ICJ Statute and applicable law: selected issues in recent cases", p. 488; Schill, "Enhancing international investment law's legitimacy: conceptual and methodological foundations of a new public law approach", pp. 90–91; Skomerska-Muchowska, "Some remarks on the role of general principles in the interpretation and application of international customary and treaty law", p. 256; W. 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. 290–299.

[178] A/CN.4/732, para. 68.

[179] *Yearbook of the International Law Commission 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at pp. 54–55, para. (3) of the commentary to art. 12. See also *Yearbook of the International Law Commission 1976*, vol. II (Part Two), pp. 80–87.

[180] *The North Atlantic Coast Fisheries Case (Great Britain, United States)*, Award of 7 September 1910, UNRIAA, vol. XI, pp. 167–226. See also the *Chamizal* case, where the United States appears to have invoked a general principle of law relating to prescription as a title to territory (*The Chamizal Case, (Mexico, United States)*, Award of 15 June 1911, UNRIAA, vol. XI, pp. 309–347, at pp. 328–329).

[181] *Right of Passage* (see footnote 93 above), p. 43.

[182] *Avena*, Memorial of Mexico (see footnote 149 above), paras. 374–380.

[183] *Certain Property (Liechtenstein* v. *Germany)*, Memorial of Lichtenstein (see footnote 150 above), paras. 6.50–6.52.

[184] *Ibid*., paras. 6.1 and 6.4.

legal advisers.[185] Furthermore, in *Obligation to Negotiate Access to the Pacific Ocean*, the Plurinational State of Bolivia invoked estoppel and legitimate expectations on the basis of general principles of law as substantive obligations.[186] In a case before the German Federal Constitutional Court, Argentina sought to demonstrate the existence of a right, arising under general principles of law, to refuse debt service on bonds held by private creditors under certain conditions.[187]

114. It should be noted that, while the other parties to the abovementioned disputes contested, or the tribunals concerned rejected, the arguments relating to general principles of law (*e.g.* because they considered that no principle common to the various legal systems of the world existed, or that the principle *in foro domestico* was not transposable to the international legal system), the possibility that a general principle of law may constitute an independent basis of rights and obligations was not questioned.

115. Some case law referring to or applying general principles of law establishing independent rights and obligations further sheds light on this issue. One example is the principle of estoppel, which has been applied by different courts and tribunals. In the *Temple of Preah Vihear* case, for example, the International Court of Justice stated that "[i]t is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error".[188] In *Argentine-Chile Frontier*, although the arbitral tribunal found that the claim of estoppel was unfounded in the circumstances of the case,[189] it recognized that the principle of estoppel "can operate with decisive

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[185] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, International Court of Justice, Memorial of Timor-Leste, 28 April 2014, para. 6.2. In its order in indication of provisional measures, the International Court of Justice did not rely on the alleged general principle of law invoked by Timor-Leste to determine the plausibility of the invoked rights of Timor-Leste, but on the principle of sovereign equality of States reflected in Article 2, paragraph 3, of the Charter of the United Nations (see *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014*, International Court of Justice, *I.C.J. Reports 2014*, p. 147, at p. 153, para. 27). See also the Dissenting Opinion of Judge Greenwood, at p. 199, para. 12 ("I am not sure that those rights may be derived from Articles 2 (1) and 2 (3) of the United Nations Charter, as opposed to a general principle of law concerning the confidentiality of communications with legal advisers, but that is a matter for the merits").

[186] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, International Court of Justice, Reply of the Plurinational State of Bolivia, 21 March 2017, vol. I, paras. 320 ff; Rejoinder of Chile, 15 September 2017, vol. I, paras. 2.28 ff). See also the International Tribunal for the Law of the Sea, *M/V "Norstar" Case (Panama v. Italy)*, where Italy argued that estoppel (together with acquiescence and extinctive prescription), was a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice (Written Observations and Submissions of the Italian Republic, paras. 169–170). See also *M/V "Norstar" Case (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at pp. 108–111, paras. 300–314.

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

[188] *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962*, p. 6, at p. 26. See also the Separate Opinion of Vice-President Alfaro, pp. 39–43 ("a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation … I have no hesitation in asserting that this principle, known to the world since the days of the Romans, is one of the 'general principles of law recognized by civilized nations'"), and the Dissenting Opinion of Judge Spender, pp. 143–144 ("the principle [of estoppel] operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself").

[189] *Argentine-Chile Frontier Case*, Award of 9 December 1966, UNRIAA, vol. XVI, pp. 109–182, at p. 166.

effect in international litigation, and especially in a boundary dispute".[190] In the *Chagos Marine Protected Area* arbitration, the tribunal also relied on the principle of estoppel as a general principle of law,[191] and considered that the undertakings and practice of the United Kingdom suggested "a legally binding commitment".[192]

116. Reference may also be made to the advisory opinion on *Reservations to the Convention on Genocide*, where the International Court of Justice referred to the principles underlying the Genocide Convention as "principles which are recognized by civilized nations as binding on States, even without any conventional obligation".[193] Furthermore, in the *Frontier Dispute* (Burkina Faso/Mali) case, the Chamber of the Court decided on the merits by applying the principle of *uti possidetis*,[194] which, as noted in the second report, may be considered as a general principle of law formed within the international legal system.[195] In the *Corfu Channel* case, the Court found that Albania was obliged to warn ships passing through its territorial waters of the existence of minefields based on the existence of certain general principles, including elementary considerations of humanity.[196]

117. As another example, the Iran-US Claims Tribunal in *Sea-Land Service, Inc. v. Iran* applied the principle of unjust enrichment, noting that the latter:

> involves a duty to compensate which is entirely reconcilable with the absence of any inherent unlawfulness of the acts in question. Thus the principle finds an obvious field of application in cases where a foreign investor has sustained a loss whereby another party has been enriched, but which does not arise out of an internationally unlawful act which would found a claim for damages.[197]

118. Similarly, in *Saluka v. Czech Republic*, an investment arbitral tribunal observed that:

> The concept of unjust enrichment is recognised as a general principle of international law. It gives one party a right of restitution of anything of value that has been taken or received by the other party without a legal justification.[198]

119. National courts have also relied on general principles of law to identify substantive rights and obligations. For instance, in a judgment dated 8 March 2016, the Supreme Court of the Philippines considered that foundlings had, under general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, a right to be presumed to have been born of nationals of the country in which they are found.[199]

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[190] *Ibid*., p. 164.

[191] *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, UNRIAA, vol. XXXI, pp. 359–606, at p. 542, para. 435.

[192] *Ibid*., paras. 439–447.

[193] *Reservations to the Convention on Genocide*, *Advisory Opinion: I.C.J. Reports 1951*, p. 15, at p. 23.

[194] *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, paras. 20–21.

[195] A/CN.4/741 and Corr.1, paras. 150–152.

[196] *Corfu Channel* (see footnote 95 above), p. 22; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, Declaration of Judge Herczegh, at p. 275 ("In the fields where certain acts are not totally and universally prohibited 'as such', the application of the general principles of law makes it possible to regulate the behaviour of subjects of the international legal order, obliging them or authorizing them, as the case may be, to act or refrain from acting in one way or another").

[197] *Sea-Land Service, Inc.* v. *Iran*, Award No. 135-33-1, 20 June 1984, *Iran-U.S. Claims Tribunal Reports*, vol. 6, p. 169.

[198] *Saluka Investments BV v. The Czech Republic* (see footnote 113 above), para. 449.

[199] Philippines, Supreme Court of the Philippines, *Mary Grace Natividad S. Poe-Llamanzares v. Commission. on Elections and Estrella C. Elampar*, Decision of 8 March 2016 (G.R. No. 221697; GR Nos. 221698-700), p. 21.

120. Finally, article 15, paragraph 2, of the International Covenant on Civil and Political Rights[200] is worth mentioning. The provision provides that: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations". The article clearly leaves the possibility open, when the conditions are met, for the criminalization of certain acts under international law on the basis of general principles of law. Therefore, a general principle of law may impose a direct obligation on individuals not to commit a given crime, and he or she may be tried and punished for its commission.

121. In the light of the above, it is possible to conclude that general principles of law may serve as an independent basis for the establishment of substantive rights and obligations under international law. In the view of the Special Rapporteur, the possibility to create such rights and obligations, authorizing or prohibiting a given conduct by States or other actors, is in fact inherent in any of the sources listed in Article 38, paragraph 1, of the Statute of the International Court of Justice. That being said, the Special Rapporteur considers it relevant to observe that cases in which primary rights and obligations have been based on general principles of law are relatively fewer than cases where general principles of law served as a basis for procedural or secondary rules.

B. General principles of law as a means to interpret and complement other rules of international law

122. It is often mentioned in the literature that general principles of law may serve, in fulfilment of their gap-filling function, to interpret and complement treaty and customary rules.[201] The present section addresses some aspects of this issue, taking into account the debates within the Commission and the Sixth Committee to date.

123. The consideration of the possible role of general principles of law in treaty interpretation must start by reference to article 31, paragraph 3 (*c*), of the Vienna Convention on the Law of Treaties, which provides that:

> 3. There shall be taken into account, together with the context:
>
> …

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

[201] See, for example, Dumberry, *A Guide to General Principles of Law in International Investment Arbitration*, pp. 60–61; Skomerska-Muchowska, "Some remarks on the role of general principles in the interpretation and application of international customary and treaty law", pp. 255–274; Kotuby and Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, pp. 30–31; Besson, "General principles of international law – Whose principles?", p. 30; Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, p. 7; Bassiouni, "A functional approach to 'general principles of international law'", pp. 775–776 and 800–801; Lammers, "General principles of law recognized by civilized nations", pp. 64–65; M. Akehurst, "The hierarchy of the sources of international law", *British Yearbook of International Law*, vol. 47 (1975), pp. 273–285, at p. 279; Freeman, "The quest for the general principles of law recognized by civilized nations – A study", p. 1064; Friedmann, "The uses of 'general principles' in the development of international law", pp 287–290; Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p. 390; Verdross, "Les principes généraux du droit dans la jurisprudence internationale", p. 227. See also Barberis, "Los Principios Generales de Derecho como Fuente del Derecho Internacional", p. 39 (noting that, when a general principle of law is applied to interpret other rules of international law, this is done in a supplementary manner in the absence of other rules of interpretation).

(*c*) any relevant rules of international law applicable in the relations between the parties.

124. There seems to be little doubt that the term "rules of international law" includes general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.[202] The clearest indication in this regard was provided by the European Court of Human Rights in *Golder v. United Kingdom*, where it was noted that:

> Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of "any relevant rules of international law applicable in the relations between the parties". Among those rules are general principles of law and especially "general principles of law recognized by civilized nations" (Article 38 para. 1 (c) of the Statute of the International Court of Justice). Incidentally, the Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court must necessarily apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention.[203]

125. The same position was adopted by the Appellate Body of the World Trade Organization. In *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, it noted that:

> the reference to "rules of international law" [in Article 31 of the Vienna Convention on the Law of Treaties] corresponds to the sources of international law in Article 38(1) of the Statute of the International Court of Justice and thus includes customary rules of international law as well as general principles of law … We observe that Articles 4, 5 and 8 of the ILC Articles [on State responsibility] are not binding *by virtue of* being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties.[204]

126. There are various examples in practice of the use of general principles of law to interpret treaties. In *Golder v. United Kingdom*, for instance, the European Court of Human Rights had to decide whether article 6 (Right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)[205] included a right of access to a court or tribunal. The Court noted the absence of express language in article 6 providing such a right and,

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[202] This position has been referred to in the literature. See, for example, A. Pellet, "Canons of interpretation under the Vienna Convention", in J. Klingler, Y. Parkhomenko and C. Salonidis (eds.), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International, 2018), p. 8; O. Dörr, "Article 31: General rule of interpretation", in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, 2nd ed. (Berlin, Springer, 2018), pp. 559–616, at p. 608; R.K. Gardiner, *Treaty Interpretation*, 2nd ed. (Oxford, Oxford University Press, 2015), pp. 300 and 308; J.-M. Sorel and V. Boré Eveno, "Article 31", in O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press, 2011), vol. I, pp. 804–837, at pp. 828–829; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Martinus Nijhoff, 2009), p. 433.

[203] *Golder v. the United Kingdom*, Judgment of 21 February 1975, Series A, No. 18, para. 35.

[204] *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Appellate Body Report, 25 March 2011 (WT/DS379/AB/R), para. 308.

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

after interpreting the provision in the light of its text and context, and the object and purpose of the Convention, turned to general principles of law:

> Article 6 para. 1 (art. 6-1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.
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> …
>
> The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles.
>
> Were Article 6 para. 1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook ...
>
> It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.
>
> … Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty…, and to general principles of law.[206]

127. The Appellate Body of the World Trade Organization has also taken into account general principles of law in treaty interpretation. An example is the reference to the principle of good faith in the interpretation of the *chapeau* of article XX of the 1947 General Agreement on Tariffs and Trade.[207] In *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body observed that:

> The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by States. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and

[206] *Golder v. the United Kingdom* (see footnote 204 above), paras. 28 and 35–36. See also *Enea v. Italy* [Grand Chamber], No. 74912/01, Judgment, 17 September 2009, ECHR 2009, para. 104; *Demir and Baykara v. Turkey* [Grand Chamber], No. 34503/97, Judgment, 12 November 2008, ECHR 2008, para. 71.

[207] General Agreement on Tariffs and Trade (Geneva, 30 October 1947), United Nations, *Treaty Series*, vol. 55, No. 814, p. 187.

> enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.[208]

128. In another case, the Appellate Body relied on a "widely accepted common element" in national legal systems 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:[209]

> Although these instruments do not define "foreign-source income" uniformly, it appears to us that certain widely recognized principles of taxation emerge from them. In seeking to give meaning to the term "foreign-source income" in footnote 59 to the *SCM Agreement*, which is a tax-related provision in an international trade treaty, we believe that it is appropriate for us to derive assistance from these widely recognized principles which many States generally apply in the field of taxation. In identifying these principles, we bear in mind that the measure at issue seeks to address foreign-source income of United States citizens and residents – that is, income earned by these taxpayers in "foreign" States where the taxpayers are not resident
>
> …the 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.[210]

129. Relevant examples may also be found in the field of international criminal law. In the *Lubanga* case, for example, a Pre-Trial Chamber of the International Criminal Court referred to the role of general principles of law in the interpretation of article 17, paragraph 1 (*d*), of its Statute:

> Considering that the Statute is an international treaty by nature, the Chamber will use the interpretative criteria provided in articles 31 and 32 of the Vienna Convention on the Law of Treaties (in particular the literal, the contextual and the teleological criteria) in order to determine the content of the gravity threshold set out in article 17 (1) (d) of the Statute. As provided for in article 21 (1) (b) and (1) (c) of the Statute, the Chamber will also use, if necessary, the "applicable treaties and the principles and rules of international law" and "general principles of law derived by the Court from national laws of legal systems of the world".[211]

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[208] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, 6 November 1998 (WT/DS58/AB/R), *Dispute Settlement Reports* 1998, vol. VII, p. 2755, at para. 158.

[209] 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.

[210] *United States – Tax Treatment for "Foreign Sales Corporations"*, Appellate Body Report, 29 January 2002 (WT/DS108/AB/RW), *Dispute Settlement Reports* 2002, vol. I, p. 55, at paras. 142–143.

[211] *Situation in the Democratic Republic of the Congo in the case of* Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 10 February 2006, para. 42.

130. In *Kupreškić*, a Trial Chamber of the International Tribunal for the Former Yugoslavia considered that general principles of law may aid in the interpretation of the notion of "persecution" as follows:

> The Trial Chamber is thus called upon to examine what acts not covered by Article 5 of the Statute of the International Tribunal may be included in the notion of persecution. Plainly, the Trial Chamber must set out a clear-cut notion of persecution, in order to decide whether the crimes charged in this case fall within its ambit. In addition, this notion must be consistent with general principles of criminal law such as the principles of legality and specificity. First, the Trial Chamber will examine what types of acts, aside from the other categories of crimes against humanity have been deemed to constitute persecution. Secondly, it will examine whether there are elements underlying these acts which assist in defining persecution.[212]

131. Furthermore, in *Furundžija*, a Trial Chamber relied on the definition of "rape" common to national legal systems,[213] as well as the principle of human dignity,[214] to interpret and broaden the definition of rape in the Statute and Rules of the Tribunal. The Trial Chamber in the *Kunarac* case adopted a similar approach.[215] In the *Čelebići* case, the Appeals Chamber of the Tribunal referred to general principles of law as an interpretative tool as follows:

> The Appeals Chamber recalls that reference to principles applied in national jurisdictions can be of assistance to both Trial Chambers and the Appeals Chamber in interpreting provisions of the Statute and the Rules. However, Rule 89(A) of the Rules expressly provides that the Chambers "shall not be bound by national rules of evidence". What is of primary importance is that a Trial Chamber "apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law." The Appeals Chamber notes that the Trial Chamber found that implicit in this principle was "the application of national rules of evidence by the Trial Chamber." On the contrary, the Appeals Chamber confirms that rules of evidence as expressly provided in the Rules should be primarily applied, with the assistance of national principles only if necessary for guidance in the interpretation of these Rules.[216]

132. In investment arbitration, general principles of law have also been relied on for purposes of interpreting broadly formulated treaty standards such as fair and equitable treatment. For instance, in *Total v. Argentina*, the arbitral tribunal considered that the fair and equitable treatment standard contained in the Argentina-France bilateral investment treaty was not equivalent to the minimum standard of treatment of aliens under customary international law.[217] In that context, the tribunal interpreted the treaty provision in light of the principle of legitimate expectations, which it considered as "based on the requirement of good faith, one of the general principles referred to in Article 38(1)(c) of the Statute of the International Court of Justice as a source of international law".[218]

133. Another arbitral tribunal, in the case *Cairn v. India*, relied on general principles of law by reference to article 31, paragraph 3 (*c*) of the Vienna Convention on the

[212] *Kupreškić* (see footnote 106 above), para. 609.
[213] *Furundžija* (see footnote 104 above), para. 180.
[214] *Ibid*., para. 184.
[215] *Kunarac* (see footnote 105 above), paras. 437–460.
[216] *Prosecutor* v. *Zejnil Delalić et al.* [*Čelebići* case], No. IT-96-21-A, Judgment, 20 February 2001, para. 538.
[217] *Total S.A. v. Argentine Republic* (see footnote 114 above), para. 125.
[218] *Ibid*., paras. 126–128.

Law of Treaties in order to interpret the fair and equitable provision of the bilateral investment treaty in question:

> Tribunals and commentators have understood the reference to the "relevant rules of international law" as a reference to sources of international law as set out in Article 38 of the ICJ Statute. These sources include treaties establishing rules expressly recognised by the contesting States, customary international law, and "the general principles of law recognized by civilized nations" …
>
> In the case of the FET standard and of investment protection standards in general, the most useful guidance can often be found in general principles of law. Other sources of international law, such as treaties and customary international law, traditionally regulate State-to-State affairs and offer limited guidance as to the particularities of the relationship between an individual and the State. General principles of law, in turn, have emerged mostly in the context of municipal laws and contain various principles of individual-to-State relations that are usually at stake in the context of investment protection. This includes core principles such as the rule of law, legal certainty, transparency and predictability, non-arbitrariness and non-discrimination. For instance, the principle of protection of legitimate expectations, which is commonly employed by investment treaty tribunals, may be understood to have found its way into the core of the FET standard precisely as a general principle of law common to many municipal laws, at least as to a general proposition, the exact contours of which are far less clear. Indeed, some commentators have argued that the FET standard reflects general principles of law, while others argue that the FET standard "should properly be understood as an embodiment of the concept of the rule of law (or *Rechtsstaat* in the German, *état de droit* in the French tradition)".
>
> …
>
> Resorting to general principles of law to establish the content of the FET standard is, in the Tribunal's view, an appropriate methodology to establish its normative content. Not only is it consistent with the mandate of Article 31 of the VCLT to consider sources of international law when interpreting Article 3(2) of the BIT; it also provides objective guidelines that restrain the Tribunal from applying its own subjective interpretation of the terms "fair" and "equitable". One caveat must be borne in mind: the analysis should remain at the level of general principles and avoid focusing on idiosyncratic regulations that particular jurisdictions may have come up with in order to address specific needs.[219]

134. In *El Paso v. Argentina*, the arbitral tribunal similarly referred to general principles of law in order to interpret article XI of the Argentina-United States bilateral investment treaty. The tribunal noted, in particular, that:

> It follows from the above that: (i) there is a rule of general international law which provides that necessity may not be invoked as a ground for precluding wrongfulness if the State concerned has significantly contributed to creating that necessity; (ii) there also seems to be a general principle of law recognised by civilised nations that necessity cannot be recognised if a Party to a contract has contributed to it. This means that the rule or principle in question may be used, under Article 31 (3) of the Vienna Convention, to ascertain the meaning of Article XI of the Argentina-US BIT. Accordingly, that Article may be taken to

[219] *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-7, Award, Permanent Court of Arbitration, 21 December 2020, paras. 1713, 1715 and 1717.

> mean that necessity cannot be invoked by a Party having itself created such necessity or having substantially contributed to it.[220]

135. The interpretative role of general principles of law has also been noted by some judges in their individual opinions. For example, in *Sovereignty over Pulau Ligitan and Pulau Sipadan*, on the question of intervention under Article 62 of the Statute of the International Court of Justice, Judge Weeramantry considered that "[i]n the context of the paucity of international legal decisions on the subject, any search for governing principles must draw heavily upon comparisons and contrasts with intervention principles in domestic legal systems".[221] He then observed that:

> It is an interesting question whether the principles relating to intervention, *mutatis mutandis*, are part of the general principles imported into the corpus of international law by Article 38 (i) (*c*) of the Statute. If so, those general principles can be invoked for clarifying the terms of Article 62, which by common agreement is neither a comprehensive nor a clearly formulated provision.[222]

136. Similarly, in the *Right of Passage* case, Judge Fernandes was of the view that:

> The priority given by Article 38 of the Statute of the Court to conventions and to custom in relation to the general principles of law in no way excludes a *simultaneous* application of those principles and of the first two sources of law. It frequently happens that a decision given on the basis of a particular or general convention or of a custom requires recourse to the general principles of law … A court will have recourse to those principles to fill gaps in the conventional rules, or to *interpret* them.[223]

137. Cases where general principles of law were clearly relied upon to interpret or complement rules of customary international law seem to be less common. A relevant example in this regard might be *LIAMCO v. Libya*, where the arbitral tribunal appears to have relied on general principles of law to complement customary rules on compensation for lawful expropriation. The tribunal first found that most States recognized the existence of a liability to compensate in case of nationalization and that the compensation should include as a minimum the *damnum emergens*.[224] The tribunal further considered, however, that it was controversial whether this included an obligation to compensate loss of profits (*lucrum cessans*).[225] The tribunal indicated that international law in this respect was in a "confused state",[226] and considered it "necessary to refer therefore to the general principles of law as may have been applied by international tribunals", one of which was, in in its view, the principle of equity.[227] Another example is a 1917 judgment of the Central American Court of Justice, where the latter, in determining whether Nicaragua had violated the rights of El Salvador in the Gulf of Fonseca by concluding the Bryan-Chamorro Treaty with the United States, appears to have relied on general principles of law in order to interpret and clarify the

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[220] *El Paso Energy International Company* v. *The Argentine Republic*, ICSID Case No. ARB/03/15, Award, International Centre for Settlement of Investment Disputes, 31 October 2011, para. 624.

[221] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 575, Separate opinion of Judge *ad hoc* Weeramantry, at p. 634, paras. 13.

[222] *Ibid*., at p. 636, para. 18.

[223] *Right of Passage* (see footnote 93 above), Dissenting Opinion of Judges Fernandes, p. 140 (citing De Visscher, in Revue de droit international et de législation comparée, 1933, p. 413).

[224] *Libyan American Oil Company (LIAMCO)* v. *Libya*, Award, 12 April 1977, paras. 283–287.

[225] *Ibid*., paras. 293–318.

[226] *Ibid*., para. 324.

[227] *Ibid*., paras. 324–326, 328.

rules of international law relating historic bays and the General Treaty of Peace and Amity between El Salvador and Nicaragua.[228]

138. In the light of the above, the Special Rapporteur considers that the interpretative role of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice is well-established. While general principles of law have been mostly used as an aid in the interpretation of treaties, it cannot be excluded that they may also serve to clarify certain aspects of customary international law in fulfilment of their supplementary gap-filling function.

C. General principles of law as a means to ensure the coherence of the international legal system

139. The view that general principles of law may fulfil a broader function of ensuring the coherence of the international legal system has been referred to during the debates on the topic.[229] Commission members have noted, for example, that general principles of law could "function as interstitial norms that operated between other rules of international law to ensure their coherence and consistency",[230] "provide coherence and unity for the interpretation of the specific rules derived from them",[231] serve as "instruments for ensuring the systematicity of international law",[232] or contribute to the "systematizations of legal norms".[233] While in practice there have been scant references to this systemic function of general principles, the Special Rapporteur is of the view that the latter is a natural consequence of the fact that this source of international law is essentially aimed at filling gaps in the international legal system.

140. It may be recalled that, in his statement to the Sixth Committee in 2019, the President of the International Court of Justice referred to general principles of law and the question of systemic coherence in the following way:

> The question of coherence in international law is an existential one. The lack of a centralized legislator at the international level has often triggered fears about the possible effect of contradictions between international legal norms. It has also raised questions about possible lacunae in international law, and its corollary, the potential declaration by the Court of a *non liquet*. General

[228] *El Salvador v. Nicaragua*, Central American Court of Justice, Judgment of 9 March 1917, available at *American Journal of International Law*, vol. 11 (1917), pp. 674–730, at p. 728 ("The Government of Nicaragua, being bound by solemn agreements to the Government of El Salvador to maintain unchanged the constitutional order and the full exercise of the perfect rights that have been mutually recognized in the General Treaty of Peace and Amity, the ceding Government could not, without the authorization and consent of El Salvador grant a naval base in the Gulf of Fonseca, impressed as it is with common ownership pertaining to three co-sovereigns, since none of them could properly dispose of its rights independently without affecting those of the other sovereigns, in view of the status of community in which the Gulf has been and is held, thanks to the universal principle handed down by Roman law and faithfully observed in modern law, that coparceners may not perform any act disposing of a thing possessed in common except jointly or with the consent of all").

[229] For instance, Slovenia observed that "any principles identified as general principles of law should not lose their most basic character: they should enable the law to function as such even at the international level [i.e. the principle of sovereign equality]" (A/C.6/76/SR.24, para. 40). Sierra Leone described general principles of law as "ways of promoting greater coherence and upholding stability in the international legal order" (A/C.6/74/SR.31, para. 105).

[230] See the statement of Mr. Tladi (A/CN.4/SR.3489, p. 4).

[231] See the statement of Ms. Lehto (A/CN.4/SR.3541, p. 6, and A/CN.4/SR.3492, p. 16).

[232] See the statement of Ms. Galvão Teles (A/CN.4/SR.3539, pp. 15–16).

[233] See the statement of Ms. Oral (A/CN.4/SR.3492, p. 6).

> principles have proved effective in helping the Court to address both structural problems of law-making in international society and to promote coherence.[234]

141. Similarly, Judge Cançado Trindade has referred to the role of general principles of law as follows:

> It is the principles (derived etymologically from the Latin *principium*) that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (*prima principia*) which confer to the legal order (both national and international) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves.[235]

142. In *Jurisdictional Immunities of the State*, Judge Bennouna considered that general principles of law could be a means to establish a link between different rules of international law:

> It is by taking account of all those elements [pertaining to the law of immunities and the law of State responsibility], and their mutually complementary nature, that the Court can help to ensure the unity of international law in the service of international justice. That primordial function cannot be confined within a narrow, formalistic approach, which considers immunity alone, *stricto sensu*, without concern for the victims of international crimes seeking justice. It could be considered that an "interstitial norm" … would enable the establishment of a link between the law of immunities and the law of State responsibility. This could be done by invoking general principles of law, as the Court did in the *Corfu Channel* case, where it referred to "elementary considerations of humanity" as a link between human rights and international humanitarian law.[236]

143. The systemic function of general principles of law has also been referred in the literature. For instance, it has been observed that "[t]he principles contemplated by [Article 38, paragraph 1 (*c*) of the Statute of the International Court of Justice] are, or at all events include, those principles without which no legal system can function at all, that are part and parcel of legal reasoning".[237] Other authors describe that function as threefold:

> First, principles of law represent a central cohesive force, revealing and reinforcing the systemic nature of the system. Second, they operate as a tool for intra-systemic convergence in the constellation of international courts and tribunals, avoiding or reducing fragmentation in the approaches adopted in different sub-fields of international law by ensuring that they remain part of general international law.

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[234] Statement of H.E. Mr. Abdulqawi Ahmed Yusuf, President of the International Court of Justice before the Sixth Committee of the General Assembly, New York, 1 November 2019, para. 37. See also A.A. Yusuf, "Concluding remarks", in Andenas *et al.* (eds.), *General Principles and the Coherence of International Law*, pp. 448–457, at p. 456.

[235] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, Separate Opinion of Judge Cançado Trindade, at p. 210, para. 201.

[236] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, Separate Opinion of Judge Bennouna, para. 28.

[237] Thirlway, *The Sources of International Law*, p. 113. See also Kolb, *Theory of International Law*, p. 136 ("From the logical point of view, there are some general principles that must be supposed to conceive a legal order. Without these principles, the construction of the sources would fall into a vicious circle."); Gazzini, "General principles of law in the field of foreign investment", p. 106 (General principles of law "lie at the very foundation of the [international] legal system and are indispensable to its operation" (citing Cheng, *General Principles of Law as Applied by International Courts and Tribunals*)).

> Third, principles of law promote inter-systemic coherence by bridging the gap between international law and domestic legal systems.[238]

144. Some scholars have similarly observed that general principles of law play an important role in "in ensuring the systematic coherence of the international legal order and its progressive development" to the extent that, "within the international legal system, it is appropriate not only to find legal responses suited to the emergence of new issues, but also to find appropriate mechanisms to reconcile the discipline of different sectors within this legal system, which can increasingly lead to regulatory conflicts".[239]

145. In the view of the Special Rapporteur, while all general principles of law, as well other rules of international law, could be regarded as ensuring in some way the coherence of the international legal system, certain general principles appear to be aimed at performing this function in a more direct manner. Examples of such general principles of law include *pacta sunt servanda*, good faith,[240] the principles of *lex specialis* and *lex posterior*,[241] respect for human dignity and elementary considerations of humanity.

146. It thus appears accurate to state that general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice may serve to ensure coherence in the international legal system. They may do this in the light of their essential gap-filling function, and regardless of whether that function is carried out by establishing substantive rights and obligations, secondary rules, procedural rules or interpretative rules.

147. In the light of the explanations provided in this part of the report, the Special Rapporteur proposes the following draft conclusions:

Draft conclusion 10
Absence of hierarchy between the sources of international law

General principles of law are not in a hierarchical relationship with treaties and customary international law.

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[238] Andenas and Chiussi, "Cohesion, convergence and coherence of international law", p. 10.

[239] R. Pisillo Mazzeschi and A. Viviani, "General principles of international law: from rules to values?", in R. Pisillo Mazzeschi and P. de Sena (eds.), *Global Justice, Human Rights and the Modernization of International Law* (Springer, 2018), pp. 113–162, at p. 126. See also C. Eggett, "The role of principles and general principles in the 'constitutional processes' of international law", in *Netherlands International Law Review*, vol. 66 (2019), pp. 197–217; Skomerska-Muchowska, "Some remarks on the role of general principles in the interpretation and application of international customary and treaty law", pp. 257 and 260; M. Koskenniemi, "General principles: reflexions on constructivist thinking in international law", in M. Koskenniemi (ed.), *Sources of International Law* (London, Routledge, 2017), pp. 359–402, at pp. 381–382; Besson, "General principles of international law – Whose principles?", p. 48.

[240] Which has been described as "necessary for the functioning of the legal system". See Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p. 118.

[241] See *Yearbook… 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, para. 26 ("Conflicts between rules are a phenomenon in every legal order. Every legal order is also familiar with ways to deal with them. Maxims such as *lex specialis* or *lex posterior* are known to most legal systems, and … to international law. Domestic legal orders also have robust hierarchical relations between rules and rule systems (in addition to hierarchical institutions to decide rule conflicts). In international law, however …, there are far fewer and much less robust hierarchies, and there are many types of interpretative principles that purport to help out in conflict resolution").

Draft conclusion 11
Parallel existence

General principles of law may exist in parallel with treaty and customary rules with identical or analogous content.

Draft conclusion 12
Lex specialis *principle*

The relationship of general principles of law with rules of the other sources of international law addressing the same subject matter is governed by the *lex specialis* principle.

Draft conclusion 13
Gap-filling

The essential function of general principles of law is to fill gaps that may exist in treaties and customary international law.

Draft conclusion 14
Specific functions of general principles of law

General principles of law may serve, *inter alia*:

(a) as an independent basis for rights and obligations;

(b) to interpret and complement other rules of international law;

(c) to ensure the coherence of the international legal system.

Part Four. Future programme of work

148. As indicated in the introduction, this third report seeks to complete the set of draft conclusions proposed by the Special Rapporteur.[242] The future programme of work will therefore depend on the progress made by the Commission at its session in 2022 before the end of the present quinquennium. If the Commission is able to adopt provisionally a set of draft conclusions with commentaries, then the Special Rapporteur would suggest, in his fourth report, changes that might be made to them in light of the debate in the Sixth Committee in 2022 and of any written observations received from States and others. The aim of the Special Rapporteur is to conclude work on the present topic, if possible, at the Commission's 2024 session, following a detailed and thorough review and revision at that session of the text of the draft conclusions and commentaries as adopted in 2022.

149. The Special Rapporteur also intends to circulate a bibliography related to the topic for the consideration of Commission's members.

[242] See para. 6 above.