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GENERAL PRINCIPLES OF LAW FORMED WITHIN THE INTERNATIONAL LEGAL SYSTEM

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Abstract In the work of the International Law Commission (ILC) on 'the general principles of law' in Article 38(1)(c) of the Statute of the International Court of Justice, one question has given rise to an inordinate amount of controversy: does this category of principles include principles formed within the international legal system or does it embrace only principles derived from national legal systems? In the draft conclusions adopted on first reading in 2023, the ILC accepts the existence of general principles of law formed within the international legal system, but only in a very narrow manner. Prominent commentators have argued that such a narrow approach is correct. It has been contended, furthermore, that the category of general principles of law formed within the international legal system is an innovation of the ILC's, and one that lacks any real support in State practice. These views are based on assumptions to the effect that the traditional view concerning the meaning of Article 38(1)(c) was that it referred only to general principles of law derived from national legal systems. The present article takes issue with these assumptions. It seeks to prove, by an analysis of the position in 1920 when the Statute was drafted, of the practice of States, both before and after 1920, and the writings of leading commentators, that general principles of law formed within the international legal system are no less part of 'general principles of law' than general principles of law derived from national legal systems.

Keywords: general principles of law, International Law Commission, general international law, general principles of law formed within the international legal system, State practice.

I. INTRODUCTION

The International Law Commission decided in 2018 to move the topic of 'general principles of law' onto its current programme of work and appointed

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as special rapporteur Marcelo Vázquez-Bermúdez (Ecuador). The Commission's work in this regard relates to the source of law enumerated in Article 38(1)(c) of the Statute of the International Court of Justice (ICJ): 'the general principles of law recognized by civilized nations'.[1] One question has given rise to an inordinate amount of controversy in the Commission: does this category of principle include principles formed within the international legal system or does it embrace only (or for the most part) principles derived from national legal systems?[2]

The prevailing thinking within the Commission at this stage of its work on the topic is apparent from Draft conclusions 3, 5, and especially 7, provisionally adopted by the Commission on first reading in 2023.[3] Draft conclusion 3 seems to recognize the existence of both types of general principle of law and to put the two on a largely equal footing:

> General principles of law comprise those:
> (a) that are derived from national legal systems;
> (b) that may be formed within the international legal system.

In Draft conclusion 5, which concerns the first category, the Commission accepts general principles derived from national legal systems, with the requirement that their existence can be determined on the basis of a comparative analysis of national legal systems that is 'wide and representative, including the different regions of the world'. That is consonant with the provision in Article 38(1)(c) to the effect that the principles in question must be 'recognized' to a requisite degree by States.

Draft conclusion 7, however, which concerns the second category, is in the following, more restrictive, terms:

> (1) To determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to the international legal system.

[1] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355, art 38(1)(c) (ICJ Statute).

[2] See SD Murphy, 'Peremptory Norms of General International Law (*Jus Cogens*) (Revisited) and Other Topics: The Seventy-Third Session of the International Law Commission' (2023) 117 AJIL 92, 106–7.

[3] See International Law Commission, seventy-fourth session, 'Report of the International Law Commission' (advance version of 14 August 2023) UN Doc A/78/10; see also Statement of the Chair of the Drafting Committee, 29 July 2022, International Law Commission, Seventy-third session. The draft conclusions were provisionally adopted, in the form given in the main body of the text here, by the Drafting Committee at the Seventy-fourth session on first reading: International Law Commission, 'General Principles of Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee on First Reading' (12 May 2023) UN Doc A/CN.4/L.982.

(2) Paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system.

As regards the first paragraph, the words 'may be formed', which were substituted for the original 'general principle of law formed', were inserted in order to 'introduce a degree of flexibility to the provision, acknowledging that there is a debate as to whether a second category of principles of law exists'.[4] The word 'intrinsic' was taken to mean that the principle in question was 'specific to the international legal system and reflects and regulates its basic features'.[5]

As regards the second paragraph, the purpose of that peculiar provision was to leave open the question of the possible existence of general principles of law formed within the international legal system, other than those provided for in the first paragraph.[6]

Despite the valuable efforts of the special rapporteur in his first and second reports, a number of Commission members had expressed hostility to the inclusion of general principles of law derived from the international legal system itself. The views of three of the members of the Commission, the members from the United States, France and the United Kingdom, were representative in this regard.

Mr Murphy (United States) expressed the view that general principles could emanate from within the international legal system; but 'that category … was a relatively narrow one, and the Commission should be very cautious in indicating the circumstances in which such principles arose'. He added that the existence of such a second category had been 'denied by a number of scholars'.[7] Furthermore, he warned against

> the risk of encouraging decision-makers to identify miscellaneous principles as general principles of law that overwhelmed the other sources of international law, as well as the risk of dissipating the requirement for State consent to international obligations—perhaps even at the risk of unravelling the system of international law.[8]

For these reasons, he asseverated, the text should be crafted 'narrowly': general principles formed within the international legal system could be ascertained only to the extent that they fulfilled a requirement of being 'inherent in that system'.[9]

[4] International Law Commission, UN Doc A/78/10, ibid, 15, para 1. [5] ibid 23, para 4.
[6] ibid 24, para 11. It is peculiar because what is the point of the Commission studying the topic of general principles of law if, even by its own admission, the Commission is unable to deal with the matter more or less exhaustively?
[7] International Law Commission, seventy-third session (second part), 'Provisional Summary Record of the 3587th Meeting, 4 July 2022' (5 August 2022) UN Doc A/CN.4/SR.3587, 7 (Murphy). [8] ibid. [9] ibid.

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Mr Forteau (France) expressed similarly critical views. He contended that modern scholarship had concluded that 'the category of general principles of law formed within the international legal system was in fact an "innovation" of the International Law Commission'.[10] He considered that there seemed not to be 'any real practice in support of such a category'.[11]

Sir Michael Wood (United Kingdom) summarized the debate within the Commission by saying that the central issue 'was the existence, or not, of a category of general principles of law other than those derived from national legal systems', a question on which Commission members continued to hold a range of views. He suggested, therefore, that the Commission's challenge was 'whether there could be such a second category' and whether the Commission could come up with a credible way of describing it.[12] Sir Michael has also written on the topic,[13] concluding that 'the traditional and still widely held view with respect to the meaning and scope of Article 38, paragraph (1)(c) is that it refers to general principles of law derived from domestic legal systems'[14] and, it could fairly be inferred, only that. As the Commentary puts it, some members had considered that Article 38, paragraph (1)(c) 'does not encompass a second category of general principles of law, or at least remain sceptical of its existence as an autonomous source of international law'.[15] These members raised the concern that no sufficient State practice, jurisprudence or teachings were available fully to support the existence of the second category; in their view, this made it difficult to determine clearly the methodology for their identification.[16]

Few would agree with the views put forward by these three Commission members (two of whom, Mr Murphy and Sir Michael Wood, it should be said, have since joined the ranks of former Commission members). Nevertheless, such views having been forcibly put in the Commission debates seems to have meant that the Commission has adopted an approach to the topic that is unduly restrictive and retrograde.[17] The bluntness of the views put forward by the Commission members in question invites bluntness in reply: the views set out above do not withstand scrutiny. They lead, moreover, to an unsatisfactory approach to the understanding of Article 38(1)(c), for essentially three reasons, which will be dealt with in turn:

[10] ibid 12 (Forteau). [11] ibid. [12] ibid 15.
[13] M Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (2019) 21(3–4) ICLR 307. [14] ibid 317.
[15] International Law Commission, UN Doc A/78/10, 16, para 3. [16] ibid 25, para 12.
[17] Not least as compared with the special rapporteur's more balanced reports: International Law Commission, 'Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (9 April 2020) UN Doc A/CN.4/741, paras 113–171; International Law Commission, 'Third Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (18 April 2022) UN Doc A/CN.4/753, paras 18–33.

(1) They are based on the erroneous assumption that the category 'general principles of law', as drafted in 1920, was meant to embrace only principles derived from national legal systems and not ones formed within the international legal system itself;
(2) They are predicated on the erroneous assumption that States in their practice have given expression to the view that the category 'general principles of law' was meant to embrace only principles derived from national law and not ones formed within the international legal system; and
(3) They are, finally, predicated on the erroneous assumption that the balance of views of leading writers, 'the most highly qualified publicists of the various nations',[18] is that 'general principles of law' embrace only principles derived from national legal systems and not principles formed within the international legal system.

II. NO DENIGRATION OF GENERAL PRINCIPLES OF INTERNATIONAL LAW INTENDED

It was indicative of general thinking in international law at the beginning of the twentieth century when the tribunal in *Walfisch Bay* observed in 1911 that it would rely on 'the general principles of law', which, continued the tribunal, were 'the same as the principles of international law'.[19] There were, however, differing views on this within the Advisory Committee of Jurists that the League of Nations had tasked in 1920 with the drafting of Article 38 of the Statute. That may have been, at least in part, because some of the members were better versed in municipal (and Roman) law than they were in international law.

The British member, Lord Phillimore, a domestic Court of Appeal judge prominent in the field of ecclesiastical and admiralty law, was of the view that, '[g]enerally speaking, all the principles of common law are applicable to international affairs'.[20] He later observed that the principles referred to by the term general principles of law 'were those which were accepted by all nations *in foro domestico*'.[21] The President of the Committee, the Belgian Baron Descamps, a professor of international law in the University of Louvain, was of the (rather broader) view that the Court should in this context be able 'to take into consideration the legal conscience of civilised nations'.[22] On this basis Descamps had suggested the following formulation of what would become Article 38(1)(c): 'the rules of international law as recognised by the legal conscience of civilised nations'.[23] The Brazilian

[18] ICJ Statute (n 1) art 38(1)(d).
[19] *Walfisch Bay Boundary (Germany/Great Britain)* (1911) 11 RIAA 263, 294.
[20] *Procès-Verbaux of the Proceedings of the Committee*, 16 June–24 July 1920, with Annexes (Van Langenhuysen 1920) 316. [21] ibid 335. [22] ibid 323. [23] ibid 306.

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member, Fernandez, observed that it might be possible to bridge the opposing views of Phillimore on the one side and Descamps on the other if the Court were to be given the power to base its decisions, in the absence of any conventional or customary law, on certain 'principles of international law'.[24] De Lapradelle, the French member, a prominent professor of international law in the University of Paris, considered that it would be preferable not to specify in the text whether the general principles in question were general principles of domestic or international law, but simply 'the general principles of law', without indicating exactly the sources from which the principles should be derived.[25] That became the solution in the final text, which de Lapradelle duly presented, on the Committee's behalf, to the Council of the League of Nations on 23 June 1920.[26]

It is surprising that there is even a debate today as to whether general principles of law formed within the international legal system are part of Article 38(1)(c). Considering the matter in the 1920s, Anzilotti, a Judge of the Permanent Court of International Justice, and who had acted as the Committee's Secretary-General,[27] wrote that not only were general principles of law formed within the international legal system part of the category of Article 38(1)(c), but that the rubric referred *first and foremost* to such principles, giving only second place to principles recognized in domestic legal systems.[28]

There is also the authority of Politis, Professor of international law in the University of Paris and Greece's representative in the League of Nations, for the same proposition.[29] One had to admit, Politis observed, that Article 38(1)(c) referred not *only* to general principles of international law, but also to those

[24] ibid 346.

[25] ibid 335–6.

[26] Report on the Draft Scheme for the Establishment of the Permanent Court of International Justice, Albert de Lapradelle, 23 July 1920. The report does not touch on the question of general principles of law in any detail, other than to state that: 'The Hague Convention relative to the creation of an International Prize Court (18 October 1907), explicitly laid down in Article 7 that: "In the absence of such provisions, the Court shall apply the rules of International Law. If no generally recognised rule exists, the Court shall give judgment in accordance with the general principles of justice and equity." There can be no question of giving such an unrestricted filed to the decisions of the Court. The wording adopted, which is based on Article 7 of the Hague Convention and lays down an order in which the rules of law are applied, states that the Court is to apply, firstly, the rules embodied in conventions; secondly, in the absence of general or special conventions, international custom in so for as its continuity proves a common usage; thirdly, the general principles of law recognized by civilised nations; fourthly, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means of determining the rules of law.' ibid 729.

[27] See *Procès-Verbaux of the Proceedings of the Committee* (n 20) 1.

[28] D Anzilotti, *Cours de droit international* (G Gidel trans, Sirey 1929) 117 ('bien que les principes auxquels cette disposition se rapporte directement soient les principes acceptés par les ordre internes des Etats civilisés, on doit bien considérer que les principes généraux de l'ordre international, c'est-à-dire les principes pouvant être tirés, au moyen de généralisations successives, des normes internationales positives, y sont aussi rappelés et qu'ils devront même prévaloir sur les premiers').

[29] N Politis, 'Méthodes d'interprétation du droit international conventionnel' in *Recueil d'études sur les sources du droit en l'honneur de François Gény, tome III* (Sirey 1934) 375, 378.

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which had generally been admitted in the legislation of domestic legal systems.[30]

Hudson, the American Judge of the Permanent Court, observed in 1943 that the phrase 'general principles of law recognized by civilized nations' might well be thought to 'refer primarily to the general principles of international law'.[31] It is correct that the wording of Article 38(1)(c) refers *not*, for example, to general principles of law 'common to' or 'recognized in' the States' concerned. Instead, the focus in the wording chosen is on the recognition given *by* States to these general principles of law: the ordinary meaning to be given to the wording lends itself equally well to recognition that States give to general principles in the domestic context of their internal law and in the international context of their inter-State relations. Hudson went on to explain that, given that Article 38(1)(c) followed the provisions in Article 38 relating to international conventions and customary international law, it appeared from the context that the content was 'larger' than one referring primarily to the general principles of international law: it also empowered the Court to draw upon principles common to systems of domestic law.[32]

The same understanding is apparent from the contemporaneous work of the Institut de Droit International. In Article I of its 1925 resolution on extinctive prescription in international law—ie the bar of international claims by lapse of time[33]—it observed that:

> practical considerations of order, stability, and peace, long-recognized in the decisions of arbitral tribunals, put acquisitive prescription of obligations of States among the general principles of law recognized by civilized nations, which international tribunals must apply.[34]

It is apparent from the description in Article I that this is an instance of a general principle formed within the international legal system, which is considered to be amongst the general principles of law referred to in Article 38(1)(c). As a more recent authority has put it, with reference to the resolution of the Institut, the operation of extinctive prescription in international law has been 'recognized

[30] ibid 378 ('Bien qu'on soit loin d'être d'accord sur l'exacte portée de cette disposition, on peut admettre qu'elle vise non seulement les principes généraux de l'ordre juridique international, mais encore ceux qui sont généralement admis dans les legislations des peuples civilisés.').

[31] MO Hudson, *The Permanent Court of International Justice 1920–1942: A Treatise* (Macmillan 1943) 611.

[32] ibid.

[33] R Jennings and A Watts, *Oppenheim's International Law*, vol 1 (9th edn, Longmans 1992) 526.

[34] Institut de Droit International, 'Règles générales en matière de prescription libératoire dans les rapports internationaux' (1925) 32 AnnIDI 559 ('Des considérations pratiques d'ordre, de stabilité et de paix, depuis longtemps retenues par la jurisprudence arbitrale, doivent faire ranger la prescription libératoire des obligations entre États parmi les principes généraux de droit reconnus par les nations civilisées, dont les tribunaux internationaux sont appelés à faire application.'). See also the Institut report on the topic: N Politis and C de Visscher, 'Rapport' (1925) 32 AnnIDI 1, 1–23; and, for a review of State and international arbitral practice, N Politis, 'La prescription libératoire en droit international' (1925) 3 RDI 3.

as a general principle of law in the meaning of Article 38(1)(c) of the ICJ Statute'.[35]

The views of Anzilotti, Politis, Hudson and the Institut are eloquent of the traditional understanding of general principles of law as this category was codified in Article 38(1)(c). It was self-evident that principles formed within international law were a part of Article 38(1)(c). The only question open for debate was whether those principles of law formed within national legal systems, too, had a right of abode within the category.

Against this background, the Commission's special rapporteur on general principles of law is correct today to 'focus on the text of Article 38(1)(c), which did not refer to the possible origins of general principles'.[36] Adopting definitions of the sources of law set out in Article 38 that hew closely to the language of the Statute has the great advantage of maintaining its key concepts, which are the basis not only of the ICJ, but also of other courts and tribunals and of States.[37] There is every reason, therefore, to take Article 38(1)(c) at its word and, as Mr Jalloh (Sierra Leone) observed during the Commission debates, there is 'nothing in Article 38 (1) *(c)* to indicate that general principles of law were limited to principles derived from national legal systems'.[38]

III. INTERNATIONAL PRACTICE IS TO THE EFFECT THAT 'GENERAL PRINCIPLES OF LAW' EMBRACE GENERAL PRINCIPLES OF INTERNATIONAL LAW

It is apparent from international practice, both in the period before and after 1920, that general principles of international law—or principles formed within the international legal system—are part of general principles of law in the sense of Article 38(1)(c).

From its international practice, it appears that France considers that general principles of law, as enumerated in Article 38(1)(c), embrace general principles formed within the international legal system. When France gave its *de jure* recognition of the government of the Soviet Union, it reserved 'expressly the rights held by French citizens on the basis of contractual obligations of Russia or its nationals under previous régimes, obligations the respect of which is guaranteed by the general principles of law'.[39] The principle in question, the respect for acquired rights of aliens, is

[35] JE Viñuales, 'Defence Arguments in Investment Arbitration' (2020) 18 ICSIDRep 9, 40.

[36] International Law Commission, 'Provisional Summary Record of the 3592nd Meeting' (5 August 2022) UN Doc A/CN.4/SR.3592, 6 (Vázquez-Bermúdez).

[37] International Law Commission, 'Second Report on Identification of Customary International Law, by Michael Wood, Special Rapporteur' (22 May 2014) UN Doc A/CN.4/672, 6, para 17.

[38] International Law Commission, 'Provisional Summary Record of the 3589th Meeting' (5 August 2022) UN Doc A/CN.4/SR.3589, 10 (Jalloh).

[39] Letter of Mr Herriot, President of the Council, to Mr Rykof, President of the Council of Commissaires of the People of the Soviet Union, 28 October 1924 in *Répertoire de la pratique française en matière de droit international public, tome I* (Centre national de la recherche scientifique 1962) 605 ('les droits que les citoyens français tiennent des obligations contractées

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not one which could have been derived from national legal systems. It is a principle that must, at least in part, have been formed within the international legal system. As tribunals have recognized, the principle of acquired rights 'constitutes undoubtedly one of the general principles recognized by international law'.[40] Similarly, the representative of France in the Sixth Committee of the General Assembly stated in 1950 that '[t]he principles of international law, as defined in Article 38 of the Statute of the International Court of Justice, were those recognized by civilized nations or embodied in international custom'.[41] That means that, of the two kinds of principle of international law identified by the French representative, one kind fell within the rubric international custom in Article 38(1)(b), and the other within those principles recognized by civilized nations, under Article 38(1)(c); these latter principles did not overlap with customary international law.

It emerges from international arbitral practice that general principles of international law may be something other than principles embodied in customary international law, as well as something other than principled restatements of what is already embodied in general treaties. In *Biens britanniques au Maroc espagnol* the sole arbitrator, Max Huber, a judge of the Permanent Court,[42] observed that, no treaty in force between the parties being capable of governing the questions before the tribunal, it must base its decision on 'the rules of customary law and on the general principles of international law'.[43] The two were, in other words, different from one another.

The same is apparent from State practice. An example is the position taken by Egypt when, in reaction to Israel's occupation of Om-Rachrach, later known as Eilat, the Egyptian military occupied the islands of Tiran and Sanafer, which gave Egypt control over the entry into the Gulf of Aqaba. The Egyptian Minister of Foreign Affairs stated, in a note to the United Kingdom of 28 January 1950 and to the United States two days later, that:

par la Russie ou ses ressortissants sous les régimes antérieurs, obligations dont le respect est garanti par les principes généraux du droit'). See also, in Italy's State practice, Letter from Ricci-Busatti to Tittoni, Paris, 13 August 1919, in *La prassi italiana di diritto internazionale: terza serie (1919–1925), vol III* (Consiglio nazionale delle ricerche 1995) 3893, where the prohibition of recruiting as soldiers the population of an occupied territory, which cannot be a principle *in foro domestico*, is referred to as a 'general principle of law' ('principio generale di diritto').

[40] *Goldenberg* (1928) 4 ILR 542, 545; see also Case No. 11 (1934) 4 ZaöRV 152, 153.

[41] *Répertoire de la pratique française en matière de droit international public, tome I* (Centre national de la recheche scientifique 1962) 605; United Nations General Assembly, Fifth Session, 232nd meeting (2 November 1950) UN Doc A/1316, 141, para 60.

[42] Judge (and later President) Huber was sitting as arbitrator in this matter not because he was a Judge of the Permanent Court of International Justice, but by reason of having been elected by Great Britain and Spain to do so: *Biens britanniques au Maroc espagnol (Spain v Great Britain)* (1925) 2 RIAA 615, 617.

[43] ibid 639 ('Il faut donc se baser sur des règles de droit coutumier et sur les principes généraux du droit international.').

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> Given that this occupation in no way has been inspired by a wish to prevent in any manner the innocent maritime passage between the two aforementioned islands and the coast of Egyptian Sinai, that passage, the only one practically navigable, will remain as it has been in the past open to navigation, in conformity with international custom and recognized principles of international law.[44]

Furthermore, the United States seems to have expressed a similar opinion when it reacted in 1973 to Libya's declaration of a 'restricted area', a special zone covering the air space within a radius of 100 nautical miles from Tripoli; the United States' position was that Libya's actions were inconsistent with 'generally recognized principles of international law'.[45]

A telling instance in treaty practice of States referring to general principles of law formed within the international legal system can be found in the Declaration Concerning the Laws of Naval War of 26 February 1909.[46] In the preamble, the States Parties set out their agreement that 'the rules contained in the following Chapters correspond in substance with the generally recognized principles of international law'.[47] According to the General Report on the Declaration presented to the Conference on behalf of its Drafting Committee,[48] this category went beyond customary international law: it would serve, 'where needful, to complete what might be considered as customary law'.[49] In fact, 'there were so many points on which it was necessary to "complete" the law', that there was a considerable amount of clear blue water between the two rubrics generally recognized: principles of international law, on the one hand, and customary international law, on the other.[50] States continued to refer to the principles of the Declaration of London as 'generally recognized principles of international law', rather than by using other terms, such as customary international law or international custom.[51] Other examples from more recent treaty practice could be mentioned, too, where the States Parties

[44] H Sultan, *Le problème du Golfe d'Akaba, l'un des problèmes découlant de la question palestinienne* (Institut de recherches et études arabologiques 1967) 11 ('Attendu que cette occupation n'a nullement été inspire par le désir d'entraver d'une manière quelconque le passage maritime innocent entre les deux îles précitées et le littoral du Sinaï égyptien, ce passage, le seul navigable pratiquement, demeurera comme par le passé ouvert à la navigation, conformément à la coutume internationale et aux principes établis du droit international.').

[45] United Nations Security Council, 'Letter Dated 18 June 1973, from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council' (20 June 1973) UN Doc S/10956, 2.

[46] CHS Kriege et al, 'The London Naval Conference: Signed at London, February 26, 1909' (1909) 3(S3) AJIL 179.

[47] ibid 190.

[48] 'General Report on the Declaration Concerning the Laws of Naval Warfare Presented to the London Naval Conference on Behalf of Its Drafting Committee' (1914) 8 AJIL Supp 88.

[49] ibid 93.

[50] JL Brierly, 'The Codification of International Law' (1948) 47(1) MichLRev 2, 7.

[51] See eg 'Memorandum from the British Embassy, Washington, 4 February 1916' (1916) 10 AJIL Spec Supp 388; 'Japan's Note to the United Kingdom, 10 January 1940' (1968) 10 BDIL 780, 780–1; see also the State practice reported in C Rousseau, *Principes généraux du droit international public, tome I: introduction, sources* (Sirey 1944) 915–16.

have used the rubric 'the generally recognized principles of international law' to refer to general principles in the sense of Article 38(1)(c).[52]

There is, furthermore, valuable recent treaty practice regarding the term 'the general principles of international law' in bilateral investment treaties,[53] on which investment tribunals have had occasion to rule. A prominent example is the decision by the Annulment Committee in *Mobil v Venezuela*, to the effect that a reference in the 1991 Venezuela–Netherlands bilateral investment treaty[54] to 'the general principles of international law' referred to (and only to) Article 38(1)(c); the tribunal in the underlying case had been wrong to suggest that the rubric (also) referred to customary international law.[55] The tribunal in *Infinito v Costa Rica* similarly held that the term 'principles of international law', without the qualifier 'general', in the 1998 Canada–Costa Rica bilateral investment treaty, was to be understood 'as a reference to the general principles of law cited in Article 38(1)(c)'.[56]

International courts and tribunals in inter-State proceedings have also taken the approach that general principles of international law are part of 'general principles of law' in the sense of Article 38(1)(c).[57] They have done so in a manner that gives useful guidance concerning how the requisite recognition by the community of States is to be ascertained. In *Reservations to the Genocide Convention*, the ICJ set out the special characteristics of the Genocide Convention,[58] including its origins and character. It stated that it had been the intention of the United Nations to condemn and punish genocide as a crime under international law, a crime contrary to moral law and to the spirit and aims of the United Nations. According to the Court, 'the

[52] See eg, Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Certain Fishery Problems on the High Seas in the Western Areas of the Middle Atlantic Ocean (adopted 25 November 1967, entered into force 25 November 1967) 701 UNTS 162, preamble (see also Agreement Extending and Modifying the Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Certain Fishery Problems on the High Seas in the Western Areas of the Middle Atlantic Ocean (adopted 13 December 1968, entered into force 1 January 1969) 715 UNTS 392, preamble); Consular Convention between the People's Republic of Bulgaria and the Syrian Arab Republic (adopted 12 June 1981, entered into force 27 May 1982) 1399 UNTS 186, preamble; Treaty on Friendship and Cooperation between the Republic of Belarus and the Republic of Armenia (adopted 26 May 2001, entered into force 14 March 2002) 2181 UNTS 558, art 6.

[53] See eg China–Denmark Agreement Concerning the Encouragement and Reciprocal Protection of Investments (29 April 1985) 1443 UNTS 84; Spain–China Agreement on Reciprocal Encouragement and Protection of Investment (6 February 1992) 1746 UNTS 186.

[54] Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Venezuela and the Kingdom of the Netherlands (22 October 1991) 1788 UNTS 70.

[55] *Venezuela Holdings, BV, et al (case formerly known as Mobil Corporation, Venezuela Holdings, BV, et al) v Venezuela, Decision on Annulment*, ICSID Case No ARB/07/27 (9 March 2017) paras 154–9.

[56] *Infinito Gold Ltd v Republic of Costa Rica*, ICSID Case No ARB/14/5 (3 June 2021) para 332.

[57] See *Biens britanniques au Maroc espagnol* (n 42).

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

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principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.[59] As Giorgio Gaja has explained, what the Court was doing was to ascertain:

> the basis for the existence of a principle in the *recognition* by States, noting that such recognition was expressed in resolution 96(I) of the General Assembly, which marked 'the intention of the United Nations to condemn and punish genocide as a crime under international law'. This approach is in line with an interpretation of Article 38, paragraph 1, (c), which considers that the existence of a principle may rest on its 'recognition' by States and does not necessarily consist in the presence of parallel principles in municipal laws.[60]

More recently, the tribunal in *Abyei* held that it was a 'general principle of law' that 'the transfer of sovereignty in the context of boundary delimitation should not be construed to extinguish traditional rights to the use of land (or maritime resources)'.[61] This is also a general principle of law that by definition cannot have been derived from national legal systems. Like the ICJ in *Reservations to the Genocide Convention*, the tribunal in *Abyei* looked for recognition, at the international level, of the general principle of international law in question. The tribunal found that the principle had been 'recognized in a multitude of international agreements',[62] and that this also followed from the decisions of international courts and tribunals;[63] it was therefore a 'general principle of law'.

As is apparent from the foregoing, general principles of international law are considered in the practice of States, and of international courts and tribunals, to be included in the category general principles of law in Article 38(1)(c). In keeping with this general position, there are certain fields of international law where States have made particularly recurrent reference either to 'general principles of international law' or 'generally recognized principles of international law' in describing the basis for rights and obligations. The practice suggests that they have, in those particular contexts, preferred these categories over 'customary international law',[64] because the questions arising

[59] *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

[60] G Gaja, 'General Principles in the Jurisprudence of the ICJ', in M Andenas et al (eds), *General Principles and the Coherence of International Law* (Brill 2019) 35, 40 (emphasis in original); see also A Verdross and B Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd edn, Duncker & Humblot 1984) 386–7, who point especially to General Assembly Resolutions as a means by which States might give their recognition to general principles of law formed within the international legal system.

[61] *Abyei (Sudan v Sudan People's Liberation Movement/Army)* (2009) 30 RIAA 145, 408, para 753.

[62] ibid paras 761–765.

[63] ibid paras 754–760. In addition to the judicial decisions to which the tribunal refers, it also finds support in the judgment of the ICJ in the *Anglo–Norwegian Fisheries Case* (Judgment) [1951] ICJ Rep 116, 142, which in the context of delimitation referred to 'the vital needs of the population' and the need to take that factor into account.

[64] Or 'international custom', to use the traditional term in art 38(1)(b).

in these fields have been of a nature that, for reasons which are their own, States have not considered it to be opportune to address them through customary international law, but instead to do so through the other constituent part of general international law: the general principles of law. The main reason is to emphasize the fundamental importance of a norm as compared to the many rules of customary international law which are of lesser moment.

The contexts in question are, first, the independence and territorial integrity of States; secondly, naval and aerial warfare; thirdly, the relationship between provisions of municipal law and those of international treaties; and, fourthly and finally, the procedure of international courts and tribunals. They will be addressed in turn below.

A. Independence and Territorial Integrity of States

The following five examples from State practice make it apparent that, in the context of independence and territorial integrity, States have, at least in the pre-World War II period, preferred to conceive of the questions arising in this field as governed in the first instance by general principles of law. First, Mr Paul Bastid, a professor in the University of Paris and a deputy in the French Chamber of Deputies, presented in 1929 a report to the Chamber of Deputies in which he explained on behalf of the Commission on Foreign Affairs that:

> Article 38 of the Statute of the Permanent Court of International Justice lays down that it must apply, in addition to international conventions and international custom, the general principles of law recognized by civilized nations. Now, the independence of States within the field of their political and economic organization is, without a shadow of doubt, among those general principles, even though it is not part of customary international law. Our liberty would, it seems, therefore be safeguarded.[65]

This principle is, by its nature, not a principle that could have been derived from national legal systems.

Secondly, in 1931 the Tribunal de commerce de Luxembourg held in *Dortven v Deckers* that it was

> a general principle of international law, recognized through obligations set out in general conventions of the international community of modern States, such as

[65] Journal official, documents parlementaires, Chambre (1929) 1143; A-C Kiss (ed), *Répertoire de la pratique française en matière de droit international public, tome I* (Centre national de la recherche scientifique 1962) 605 ('L'article 38 du statut de la Cour Permanente de Justice Internationale lui prescrit d'appliquer, aussi bien que les conventions internationales et la coutume internationale, les principes généraux de droit reconnus par les peuples civilisés. Or, l'indépendance des États dans le domaine de leur organisation politique et économique est, à coup sûr, au nombre de ces principes généraux, si même elle ne renter dans la coutume internationale. Notre liberté paraît donc être sauvegardée.'). See also the US Note of 30 April 1934, to the Government of Japan, reported in Rousseau (n 51) 916.

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> Article 10 of the Pact of the League of Nations, that States must mutually respect one another's political independence and territorial integrity.[66]

Thirdly, in 1939, following Germany's invasion of Czechoslovakia, the deposed Czech President Edouard Beneš had addressed a telegram to the Secretary-General of the League, which was presented by the Soviet Union to the Assembly and League Members.[67] The telegram referred to breaches by Germany of 'the fundamental articles of the Pact of the League of Nations as well as the recognized general principles of international law'.[68]

Fourthly, Iraq sent a letter to the President of the Security Council on 29 April 1969, in which it accused Iran of acts which, in Iraq's contention, constituted a violation of 'one of the basic and generally recognized principles of international law which prohibits States from interfering in the exclusive territorial jurisdiction of another State, or to carry out any executive action on the territory of another State'.[69]

Fifthly, in the Bulgaria–Syria Consular Convention the two States Parties expressed in 1981 their desire to continue to develop and intensify their friendly relations 'on the basis of the generally recognized principles of international law and, in particular, on the basis of the principles of sovereign equality of States, territorial integrity and non-interference in internal affairs'.[70] As is apparent from these examples, States have in the context of the independence and territorial integrity of States given recognition to a general principle of law, which by its nature cannot be derived from national legal systems, rather than to seek to claim that the same position follows from customary international law.

[66] *Dortven v Deckers* (1931) 58 JDroitIntl 230, 230–1 ('il est un principe générale du droit des gens, reconnu avec ses obligations déterminées par les conventions générales de la communauté internationale des Etats modernes, tel l'article 10 du pacte de la Société des nations, que les Etats se doivent mutuellement de respecter leur indépendance politique et leur intégrité territoriale'). Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 195, art 10: 'The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.'

[67] Communication du Gouvernement de l'Union des Républiques socialistes soviétiques, Communiqué à l'Assemblée au Conseil et aux Membres de la Société (9 June 1939) LoN Doc A.15.1939.VII.

[68] ibid 2 ('les articles fondamentaux du Pacte de la Société des Nations ainsi que les principes généraux du droit international reconnus').

[69] Letter dated 29 April 1969, from the Acting Permanent Representative of Iraq Addressed to the President of the Security Council, UN Document S/9185 of 29 April 1969, in 'Iran–Iraq: Documents on Abrogation of 1937 Treaty Concerning Shatt-Al-Arab Waterway' (1969) 8(3) ILM 478, 487.

[70] Consular Convention between the People's Republic of Bulgaria and the Syrian Arab Republic (n 52) preamble.

B. Naval and Aerial Warfare

Naval and aerial warfare has been a particularly productive field for the development by States of general principles of international law.[71] It was in the field of naval warfare that the tribunal in *Eastern Extension, Australasia, and China Telegraph Co* made its often quoted observations concerning the need to have resort to general principles of law.[72] Those observations were well described by Cassese, who explained that the tribunal set out that the need to resort to general principles of international law was conspicuous in this context because:

> treaty law tends to regulate only the specific matters of concern to the relevant contracting parties, and customary rules normally come into being slowly and by definition cannot address all the interests and concerns of States. In this community, general principles constitute both the backbone of the body of law governing international dealings and the potent cement that binds together the various and often disparate cogs and wheels of the normative framework.[73]

Mention has already been made above of the reference in the preamble of the London Declaration Concerning the Laws of Naval War of 1909 to 'the generally recognized principles of international law', a category that was taken, where necessary, to complement what might follow from customary international law. Another instance of treaty practice relating to naval warfare is the Declaration between Denmark, Finland, Iceland, Norway and Sweden for the Purpose of Establishing Similar Rules of Neutrality of 27 May 1938.[74] This Declaration provided, in five essentially identical instruments, that each of the States would, for the purposes of safeguarding in wartime the sovereign rights and maintaining the neutrality of the Kingdom or Republic in question, prohibit access to its ports and other stated zones of territorial waters, 'while at the same time observing the general principles of international law' applicable in the field.[75]

As regards State practice in the form of diplomatic exchanges, examples can be given from World Wars I and II. Germany stated, in a Note of 7 January 1916, from its Ambassador in Washington to the United States Government, that its U-boats in the Mediterranean had, from the beginning of World War I, 'received orders not to conduct warfare against enemy commercial vessels other than in conformity with the general principles of international law'.[76]

[71] Rousseau (n 51) 922.

[72] *Eastern Extension, Australasia, and China Telegraph Company, Limited (Claim No. 36)* (1924) 18 AJIL 835, 837–8.

[73] P Gaeta, JE Viñuales and S Zappalà, *Cassese's International Law* (3rd edn, OUP 2020) 192.

[74] Declaration between Denmark, Finland, Iceland, Norway and Sweden for the Purpose of Establishing Similar Rules of Neutrality (27 May 1938) 188 LNTS 295.

[75] ibid, art 2(1) (the text quoted refers to Denmark); see also art 8(1): 'Belligerent aircraft, with the exception of air ambulances and aircraft carried on board warships shall not be admitted to Danish territory, save in so far as may be otherwise provided in regulations applied, or to be applies, in accordance with the general principles of international law in regard to certain spaces.'

[76] 'Note of the German Ambassador in Washington to the United States Government, 7 January 1916' (1917) RGDIP (Documents) 62, 62 ('Des sous-marins allemands dans la Méditerranée ont,

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A British Note of 10 February 1914, dealing in part with the same topic, referred to criticism by the United States that a British Order in Council was in breach of 'the generally recognized principles of international law' applicable in this context.[77] A German Note of 4 May 1916, relating to the torpedoing of *The Sussex*, similarly referred to 'the general principles of visit and search and destruction of merchant vessels as recognized by international law'.[78] At the beginning of World War II, the German Foreign Office had been asked by the Naval High Command whether Germany could engage in 'unrestricted submarine warfare against England'.[79] The Legal Department of the Foreign Office advised that 'such warfare cannot be justified on the basis of the principles of international law generally recognized'.[80]

In a Note of the Soviet Union to the United Kingdom dated 25 October 1939, the Soviet Union stated that '[t]he generally recognized principles of international law as is well known do not permit the noncombatant population, women, children or the aged to be subjugated to bombardment from the air'.[81] The United Kingdom, using the same language, answered in a Note of 26 October 1939 that 'the generally recognized principles of international law' did not permit the aerial bombardment of civil populations.[82]

Against this backdrop, the ICJ could be confident in *Corfu Channel* that the general principle of law in question was sufficiently recognized by States, when it observed that 'elementary considerations of humanity, even more exacting in peace than in war' amounted to a 'general and well-recognized principle'.[83] The Court did so reproducing almost textually

dès le début, reçu des ordres de ne conduire une guerre de croiseurs contre des navires de commerce ennemis qu'en conformité avec les principes généraux du droit international. En particulier, des mesures de représailles, telles que celles appliquées dans la zone de guerre aux environs des Iles Britanniques, ont été écartées.').

[77] 'New Response of the British Government, 10 February 1914, Addressed to the American Ambassador in London, on the Subject of American Commerce with Neutrals' (1916) RGDIP (Documents) 49 ('Les règles que le gouvernement de Sa Majesté a publiées dans un ordre en Conseil du 20 août 1914 ont été critiquées par le gouvernement des États-Unis comme étant contraires aux principes généralement reconnus du droit international.'). See also, 'From the Imperial German Embassy, Washington, DC, 4 April 1916' (1915) 9 AJIL Spec Supp 125 ('The various British Orders in Council have one-sidedly modified the generally recognized principles of international law in a way which arbitrarily stops the commerce of neutral nations with Germany.').

[78] 'Response of the German Government, 4 May 1916, to the Note of the United States, Received 20 April 1916, Relating to German Submarine Warfare' (1910) 10 AJIL Spec Supp 195, 196; (1919) RGDIP (Documents) 146, 146 ('selon les principes généraux, reconnus par le droit international, qui s'appliquent à la visite et à la recherche ainsi qu'à la destruction des navires de commerce').

[79] 'Memorandum by the Deputy Director of the Legal Department (Albrecht), submitted to the State Secretary (Weizäcker), 3 September 1939' in *Documents on German Foreign Policy 1918–1945*, Series D, vol VII (U.S. Government Printing Office 1956) 546, 547; MM Whiteman, *Digest of International Law*, vol 10 (U.S. Government Printing Office 1968) 652.

[80] ibid 652–3.

[81] ibid 798.

[82] Reported in Rousseau (n 51) 916 ('Les principes généralement reconnus du droit international ne permettent pas de soumettre aux bombardements aériens la population civile.').

[83] *Corfu Channel* (Judgment) [1949] ICJ Rep 4, 22.

the formula of Article 38(1)(c): the ICJ was, in common with the State practice of the first half of the twentieth century, relying on general principles of law formed within the international legal system in the application of 'general principles of law recognized by civilized nations'.[84] As Rolf Einar Fife has observed, the elementary considerations of humanity to which the Court referred, later relied on by the International Tribunal for the Law of the Sea,[85] are an example of 'a general principle of international law, and therefore a source of law in its own right'; '[t]hese considerations thus supplement those which are already reflected in customary law and treaty obligations'.[86]

C. *Provisions of Municipal Law Cannot Prevail Over Those of the Treaty*

Another context in which States have expressed preference, in their practice, for general principles of international law is the relationship between international law and municipal law, more specifically the question of whether provisions of municipal law can prevail over those contained in international treaties. Fitzmaurice referred to this principle as 'one of the great principles of international law, informing the whole system and applying to every branch of it'.[87]

It is striking how States have in this context couched their practice in terms of either 'generally recognized principles of international law' or 'general principles of law', to the exclusion of references to customary international law.

Numerous examples could be given; the following four are representative. First, Greece objected to the United States' reservations to the Genocide Convention on the basis that 'the Government of the Hellenic Republic considers that, in accordance with the generally recognized principles of international law, a party to an international convention may not invoke its domestic legislation as a reason to avoid honouring its obligations under that Convention'.[88]

Secondly, Hungary and Australia considered that Pakistan's reservations to the Torture Convention[89] were subject to 'the general principle' according to

[84] S Bastid, 'La jurisprudence de la Cour international de justice' (1951) 78 RCADI 575, 630.

[85] *M/V 'SAIGA' (No 2) (Saint Vincent and the Grenadines v Guinea), ITLOS Reports 1999*, 10, 62, para 155; *M/V 'Virginia G' (Panama/Guinea-Bissau), ITLOS Reports 2014*, 4, 101, para 359; *The 'Enrica Lexie' (Italy v India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, 182, 204, para 133.

[86] RE Fife, 'The Duty to Render Assistance at Sea: Some Reflections after *Tampa*' in J Petman and J Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Brill 2003) 470, 482.

[87] G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 RCADI 1, 85.

[88] Objection by Greece Concerning Reservations Made by the United States of America upon Ratification (26 January 1990) 1557 UNTS 334.

[89] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

which 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[90]

Thirdly, the Czech Republic and Australia considered that the Maldives' reservation to the International Covenant on Civil and Political Rights[91] was in contradiction with 'the general principle' according to which 'a State Party to a treaty may not invoke the provisions of its internal law as justification for failure to perform according to the obligations set out by the treaty'.[92]

Fourthly, in connection with Uruguay's interpretative declaration to the Rome Statute,[93] Finland recalled 'the general principle relating to internal law and observance of treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[94]

It is correct therefore, as the ICJ has observed, that 'it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty',[95] and as a United Nations Commission on International Trade Law (UNCITRAL) ad hoc tribunal held more recently, that '[i]t is a general principle of international law that a State cannot rely on its own laws to avoid its international obligations'.[96] As the State practice in the field makes apparent, this principle is one recognized by the community of States: it is a general principle of law in the sense of Article 38(1)(c).

D. The Procedure of International Courts and Tribunals

Although the context of the procedure of international courts and tribunals is, of course, one which might reasonably draw on the rich experience of tribunals *in foro domestico*, there are important differences between international tribunals, on the one hand, and domestic tribunals, on the other, which have meant that procedural principles at the international level have had to rely on general

[90] Objection to the Reservations Made by Pakistan upon Ratification: Hungary (28 June 2011) 2762 UNTS 84; Objection to the Reservations Made by Pakistan upon Ratification: Australia (28 June 2011) 2762 UNTS 173.

[91] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[92] Objection to the Reservations Made by Maldives upon Accession: Czech Republic (12 September 2007) 2472 UNTS 113; Objection to the Reservations Made by Maldives upon Accession: Australia (18 September 2007) 2472 UNTS 132.

[93] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

[94] Objection to the Interpretative Declaration Made by Uruguay upon Ratification: Finland (8 July 2003) 2220 UNTS 403.

[95] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 12, 35, citing *Greco-Bulgarian Communities*, PCIJ, 1930, Series B, No 17, 32.

[96] *Petrobart Limited v The Kyrgyz Republic* (Award), UNCITRAL (13 February 2003) para 4.1.4.3.

principles of law formed in the international legal system.[97] In domestic law, the default position is that there is a judicial forum before which to bring a claim, whereas 'the default position under public international law is the absence of a forum before which to present claims'.[98] This means that, in spite of the similarities that exist, there is a vital difference as regards the very fundamentals of the functioning of international courts and tribunals on the one hand and domestic courts on the other.[99] In *Nottebohm* the ICJ dealt with the principle of *Kompetenz-Kompetenz*—the principle that, in the event of a dispute as to whether an international tribunal has jurisdiction, the matter shall be settled by the decision of the tribunal itself. The Court stated that Article 36(6) of the Court's Statute, which codifies the principle:

> merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.[100]

It seems that this was a principle formed within the international legal system, which was already well established by the eighteenth century in international arbitration.[101]

Similarly, the tribunal in *Waste Management No 2* observed that the principle of *res judicata* was a principle of international law and that it belonged under the rubric 'general principle of law within the meaning of Article 38(1)(c)'.[102] Whilst of course it exists in national legal systems, *res judicata* is as a matter of international law a principle formed within international law rather than in domestic law. This is because the principle of *res judicata* at the international level has features which domestic versions of the principle lacks, although there are of course similarities. This is related to structural differences between the contexts in which domestic and international tribunals operate. One such difference in context, highlighted by McNair, is that in relation to the definition of the jurisdiction of the Permanent Court, and later the ICJ, it was 'worthwhile recalling the general principle of

[97] See AP Sereni, *Principî generali di diritto e processo internazionale* (Giuffrè 1955) 7–13; G Morelli, 'La théorie générale du procès international' (1937) 61 RCADI 253, 344–5.

[98] *ICS v Argentina*, PCA Case No 2010–09, Award on Jurisdiction (10 February 2012) para 280.

[99] J Basdevant, G Jèze and N Politis, 'Les principes juridiques sur la compétence des juridictions internationales' (1927) 45 RDP 45, 46.

[100] *Nottebohm Case (Preliminary Objection)* (Judgment) [1953] ICJ Rep 111, 119; the reference is to *Alabama Claims Arbitration (UK v US)* (1872) 1 Moore International Arbitrations, 653.

[101] See C Santulli, *Droit du contentieux international* (2nd edn, LGDJ 2015) 154; *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, para 79 (Lord Collins); *Soufraki v The United Arab Emirates*, ICSID Case No ARB/02/7, Decision on Annulment (5 June 2007) para 50.

[102] *Waste Management v Mexico (No 2)* (Preliminary Objections) (2002) 132 ILR 145, 171, para 39.

international law that no State can be compelled to litigate against its will'.[103] For example, questions relating to the principle of *res judicata* such as those which arose in *Von Tiedemann*—what happens under the principle of *res judicata* when a tribunal has, in a preliminary decision, upheld jurisdiction and then, subsequently, but prior to its decision on the merits, finds that in fact it lacks jurisdiction—do not have analogues in domestic law.[104] The general principles of international law of *Kompetenz–Kompetenz* and *res judicata* are, within the context of the procedure of international courts and tribunals, instances of general principles of law within the meaning of Article 38(1)(c).

There is every reason, however, for international courts and tribunals, not least in the dynamic field of investment arbitration, to heed the call by commentators, such as Martins Paparinskis, not to invoke too readily what are considered to be general principles of law, whether of international or national law origin, as a substitute for rigorous applicable law analysis.[105] There is evidence that tribunals are increasingly aware of this, as is evidenced by the award in *Yukos Capital v Russia*, where the tribunal rejected a claim based on the clean hands doctrine in favour of the application of the test under the applicable municipal law.[106]

IV. THE BALANCE OF VIEWS OF LEADING WRITERS IS THAT 'GENERAL PRINCIPLES OF LAW' EMBRACE GENERAL PRINCIPLES OF INTERNATIONAL LAW

Basdevant, later judge and President of the ICJ, wrote in 1936 that the contribution to the international legal order of Article 38(1)(c) was not limited to principles formed in national legal systems.[107] If it was legitimate to transform into the international legal order principles formed *in foro domestico*, then it was surely no less legitimate to introduce, through the same conduit, into international law general principles recognized by States in their international practice.[108] De Visscher, a judge of both the Permanent

[103] AD McNair, *Oppenheim's International Law*, vol 2 (4th edn, Longman 1928) 50–1.

[104] *Von Tiedemann & Others v Poland* (1923) 2 Recueil Trib Arb Mixtes 999, 1001; see also DW Bowett, '*Res Judicata* and the Limits of Rectification of Decisions by International Tribunals' (1996) 8 AfrJIntl&CompL 577, 577.

[105] See M Paparinskis, 'Conclusions: General Principles and the Other Sources of International Law' in Andenas et al (eds) (n 60) 117.

[106] *Yukos Capital Limited (formerly Yukos Capital SÀRL) v The Russian Federation*, PCA Case No 2013–31 (Award) (18 January 2017) paras 511 et seq, esp 526. A similar approach has been preferred in treaty practice: see eg art 13, relating to 'Law Applicable', which provides that the Joint Court, a criminal jurisdiction for the Hebrides, was to 'decide according to substantial justice and the general principles of law, except in cases where the code of native law … may be applicable', of the British–French Protocol Respecting the New Hebrides (6 August 1914) 10 LNTS 335.

[107] J Basdevant, 'Règles générales du droit de la paix' (1936) 58 RCADI 471, 503.

[108] ibid ('A cela, d'ailleurs, ne doit pas se limiter l'apport à l'ordre juridique international des principes généraux de droit reconnus par les nations civilisées. S'il est légitime … de transporter dans l'ordre international des principes reconnus in *foro domestico*, c'est-à-dire des principes élaborés et reconnus dans l'ordre interne, il est, pour le moins, tout aussi légitime d'introduire

Court and its successor, shared this view: the Court must apply general principles of law, he explained, 'to the extent that they have received general adhesion, whether in international practice itself or in the internal law of civilized nations'.[109] Morelli, a judge of the ICJ, was of the view that, if Article 38(1)(c) referred to principles accepted within national legal systems, general principles formed within the international legal system were also part of the category and must, if anything, take precedence over those formed within domestic legal systems.[110] Rousseau similarly wrote that the principle of general principles of law in Article 38(1)(c) was not limited to principles derived from national legal systems: it also covered the general principles of international law, which did not have to be recruited from any other system than international law itself.[111] In summary, Alain Pellet was right when he wrote in 1974 that the view according to which the general principles of law embrace both the category of principles derived from national law and that of principles of international law was extremely widespread.[112]

The correct view is, as a great number of leading writers have concluded, that general principles of law formed within the international legal system are a part of Article 38(1)(c) on a perfectly equal footing with general principles of law derived from national legal systems.[113]

dans le droit international commun des principes généraux de droit reconnus par les nations civilisées sous forme de droit international national ou de droit international particulier.'). The term Basdevant used, '*droit international particulier*', is used in the same sense as 'particular' is used in art 38(1)(a) of the ICJ Statute (n 1), that is, 'bilateral'. The English translation of the term 'droit international particulier', in the jurisprudence of the ICJ, is 'special international law'—special as opposed to general: *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Judgment) [1984] ICJ Rep 246, 300, 303.

[109] C de Visscher, 'Contribution à l'étude des sources du droit international' in *Recueil d'études sur les sources du droit en l'honneur de François Gény, tome III* (Sirey 1934) 389, 396 ('Il est bien vrai que ces principes ne s'imposent à la Cour qu'autant qu'ils ont déjà reçu une adhésion générale, soit dans la pratique internationale elle-même, soit dans le droit interne des nations civilisées.').

[110] Morelli (n 97) 344–5 ('Quant aux principes généraux de droit, dont parle le no 3 de l'article 38, ce sont avant tout les principes généraux de l'ordre juridique international, et, en second lieu, les principes universellement admis dans les législations des peuples civilisés.').

[111] Rousseau (n 51) 891.

[112] A Pellet, *Recherche sur les principes généraux de droit en droit international* (Université de Paris 1974) 349.

[113] Other than the writers already discussed, the list of leading writers who support the position that principles formed within the international legal system are part 'general principles of law' in the sense of art 38(1)(c) includes: F Castberg, 'La méthodologie du droit international' (1933) 43 RCADI 309, 370; M Sørensen, *Les Sources du Droit International* (Munksgaard 1946) 113; A Ræstad, *La philosophie du droit international public* (Jacob Dybwad 1949) 71–5; J Basdevant (ed), *Dictionnaire de la terminologie du droit international* (Sirey 1960) 474–5; P Reuter, 'Principes de droit international public' (1961) 103 RCADI 425, 466–7; JHW Verzijl, *International Law in Historical Perspective*, vol I (Sijthoff 1968) 62–3, 88; DP O'Connell, *International Law*, vol I (2nd edn, Stevens & Sons 1970) 9–14; H Mosler, 'Völkerrecht als Rechtsordnung' (1976) 36 ZaoRV 6, 43; JG Lammers, 'General Principles of Law Recognized by Civilized Nations' in F Kalshoven, PJ Kuyper and JG Lammers (eds), *Essays on the Development of the International Legal Order: in Memory of Haro F. Van Panhuys* (Sijthoff & Noordhoff 1980) 53; R Kolb, *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit* (Presses Universitaires de France 2000) 56–7; BI Bonafé and P

V. CONCLUSION

General principles of law, like other instances of international law, are not only a product of principles derived from national legal systems. This body of law is instead, and to a very real extent, 'its own creation'.[114] In various contexts of international life, States have relied, and continue to rely, on diplomatic exchanges and on treaty practice, on general principles of law formed within the international legal system. In this manner, they have given and give their recognition to a certain number of general principles of international law as being 'general principles of law' in the sense of Article 38(1)(c). Such instances of recognition in the practice of States have, since the early twentieth century, been reflected in judicial decisions of international courts and tribunals and in the writings of the most qualified publicists.

The International Law Commission is right to have adopted on first reading the approach to general principles derived from national legal systems that follows from Draft conclusion 5. The requirement that the recognition by States is 'wide and representative, including the different regions of the world' is in keeping with Article 38(1)(c). It is worth remembering that there is State practice to suggest that a more restrictive test would need to be met: at the League of Nations Codification Conference of 1930, for example, 17 States (then a large number) were of the view that it was only when general principles were '*indisputably* admitted by the international community' that there was sufficient recognition.[115] The Commission is right *not* to have adopted such an approach to general principles of law derived from national legal systems. The question is why the Commission, without any support in the text of Article 38(1)(c) and without State practice to buttress its conclusion, considers that it can adopt a restrictive approach to the recognition of general principles of law formed within the international legal system. It would be unsatisfactory for the International Law Commission, whose prime object is 'the promotion of the progressive development of international law and its codification',[116] to adopt a regressive instrument in which the character of general principles of law formed within the international legal system is so at odds with the realities of international life.

Palchetti, 'Relying on General Principles in International Law' in C Brölmann and Y Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Elgar 2016) 160; AA Yusuf, 'Concluding Remarks' in Andenas et al (eds) (n 60) 448, 457; University of Cambridge Faculty of Law, 'Campbell McLachlan Delivers Goodhart Lecture on "The Legal Science of the International"' (8 February 2023) <https://www.law.cam.ac.uk/press/news/2023/02/campbell-mclachlan-delivers-goodhart-lecture-legal-science-international>.

[114] J Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 32.

[115] EM Borchard, 'Responsibility of States at the Hague Codification Conference' (1930) 24 AJIL 517, 521; EM Borchard, 'The Theory and Sources of International Law' in *Recueil d'études sur les sources du droit* (n 29) 328, 354 (emphasis in original).

[116] Statute of the International Law Commission, United Nations General Assembly Resolution 174 (II) (21 November 1947) UN Doc A/RES/174(II), art 1(1).

In order for the Commission to fulfil its mandate of codification of international law, the work of the Commission in this field needs to reflect more clearly that general principles of law formed within the international legal system are no less part of 'general principles of law' than general principles of law derived from national legal systems.