Chapter 15

General Principles of Law and International Law-Making

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Introduction

General principles of law are frequently ranked among the most controversial categories of international law. Nearly each and every important parameter of these principles has induced prolonged and intense academic debates ever since the advisory committee of distinguished jurists entrusted with the preparation of a report on the Statute of the Permanent Court of International Justice decided nine decades ago to include 'the general principles of law recognized by civilized nations' in the catalogue of sources that would be applied by the future judicial organ.[1] In the spirit of expediency and positive experiences, a quarter-century later the drafters of the Statute of the International Court of Justice took over from the preceding document the provision on applicable sources in an identical shape, save for a minor specifying addendum.[2] Nevertheless, it remains a matter of debate whether general principles of law form part of positive law or natural law, originate from domestic law or international law, carry a distinctively private law or public law content, possess a subsidiary or supreme character, qualify as an independent source of international law, and occupy a separate, if any, position in the international legal order. Finally, the methods and conditions of their international applicability likewise yield much disagreement in the scholarly community.[3]

This chapter merely seeks to examine whether general principles of law constitute a source of international law, and by what legislative means they might achieve that status. The following investigation is based on the assumption that general principles – this complex set of private and public, substantive and procedural rules, such as the principle of equity, the prohibition of abuse of rights, the prohibition of unjust enrichment, the protection of acquired rights, the principle of reparation, *res iudicata*, *audiatur et altera pars* or *pacta sunt servanda* – belong to the domain of positive law and originate from domestic law. Hence these rules should not be deemed equivalent to the so-called 'principles of international law',

1 Statute of the Permanent Court of International Justice, Article 38, paragraph 3.
2 Statute of the International Court of Justice, Article 38, paragraph 1, sub-paragraph c).
3 B. Cheng, *General Principles of Law, as Applied by International Courts and Tribunals*. Reprint (Cambridge: Cambridge University Press, 1994), 2–5.

such as the sovereign equality of states, the prohibition of threat or use of force, the prohibition of intervention, the peaceful settlement of international disputes and the right to self-determination of peoples. Nor should they be seen as totally synonymous with the 'general principles of international law', 'principles of international organizations', 'principles of transnational law' and 'principles of supranational law'. Though these latter categories may occasionally overlap with general principles of law, it is but a terminological anomaly that does not have any significance here.[4]

International lawyers have been divided over the questions in the focus of our investigation from the outset. The negative position typically holds that general principles originating from domestic law cannot be categorized as a source of international law, as they were not created by the concurrent wills of two or more states to govern their international relations. Their international application is based on a special rule of customary law that authorizes international judicial organs, with a view to avoid *non liquet*, to resort, by way of analogy, to principles borrowed from the technically more advanced national legal systems in the settlement of disputes, where gaps in the system of international law would otherwise render a decision impossible. That rule of authorization was codified in Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice and Article 38, paragraph 1, sub-paragraph c) of the Statute of the International Court of Justice.[5]

Incontestably, the abstract and general principles at issue spring from the legislative will of a single state, derive from a multitude of specific interconnected legal norms, permeate the entirety or segments of the legal system, and are meant to regulate domestic social relations, and to provide guidelines for national law-making and law enforcement. These features obviously do not match those of the sources of international law. However, it would lead to premature and tenuous results, if we ceased our investigation here, relying on a brief and superficial analysis of the problem. In order to answer the question concerning their nature as a source of international law, we must disregard the peculiar formation and characteristics of general principles. Instead, it should be thoroughly examined whether there has been any legislative act in the international level after the domestic consolidation of these principles, which made them an independent source of international law.

4 For more details, see, G. Sulyok, 'General Principles of Law as a Source of International Law', in *International Law – A Quiet Strength (Miscellanea in memoriam Géza Herczegh)*, ed. P. Kovács (Budapest: Pázmány Press, 2011), 166–68.

5 G. Herczegh, *General Principles of Law and the International Legal Order* (Budapest: Akadémiai Kiadó, 1969), 97–100. See also, H. Bokor-Szegő, 'Les principes généraux du droit', in *Droit international: bilan et perspectives*, vol. 1, ed. M. Bedjaoui (Paris: A. Pedone – UNESCO, 1991), 228–29; H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems, with Supplement* (London: Stevens & Sons Ltd, 1951), 533.

Reception of General Principles of Law

Erstwhile literature suggests that the necessity to apply domestic legal rules, as a separate source of law, to the international conduct of states had already surfaced in the period of traditional international law. In the nineteenth century these rules had been supplied by internationally relevant municipal laws and regulations of selected states,[6] but at the beginning of the twentieth century their place was taken over, for various theoretical and practical reasons, by 'the general principles of law recognized by civilized nations'.[7] Thus the development of international law has and does not terminate the need for assistance by the technically more advanced national legal systems. The explanation lies in the paradoxical effects of progress: while the growth of conventional and customary law decreases the number of gaps and the value of domestic legal solutions, the expansion of legal regulation to new fields generates new gaps, and maintains the demand for provisions originating from domestic law.

If the picture canvassed by scholars of traditional international law broadly corresponds to past realities, the elevation of certain rules of national legal systems, including general principles of law, to the international level primarily served to more comprehensively govern the international conduct of states in fields inadequately regulated by other sources of law rather than to facilitate the settlement of disputes submitted to international judicial organs by the prevention of

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6 See, for example, J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (Nördlingen: C.H. Beck'schen, 1868), 58–59; C. Calvo, *Le droit international théorique et pratique, précédé d'un exposé historique des progrès de la science du droit des gens*, 4th edn, vol. 1 (Paris – Berlin: Guillaumin et Cie – Puttkammer et Mühlbrecht, 1887), 161–62; P. Fiore, *Nouveau droit international public, suivant les besoins de la civilisation moderne*, 2nd edn, vol. 1 (Paris: G. Pedone-Lauriel, 1885), 158–59; F. von Holzendorff and A. Rivier, *Introduction au droit des gens: recherches philosophiques, historiques et bibliographiques* (Hamburg: Verlagsanstalt und Druckerei AG, 1889), 83; T.J. Lawrence, *The Principles of International Law* (Boston: D.C. Heath and Co, 1895), 105–06; F.F. Martens, *Traité de droit international* (Paris: A. Chevalier-Marescq, 1883), 252–53; P.L.E. Pradier-Fodéré, *Traité de droit international public européen & américain, suivant les progrès de la science et de la pratique contemporaines*, vol. 1 (Paris: G. Pedone-Lauriel, 1885), 88–89; H. Wheaton, *Elements of International Law, with a Sketch of the History of the Science* (Philadelphia: Carey, Lea and Blanchard, 1836), 49.

7 See, for example, E.M. Borchard, 'The Theory and Sources of International Law', in *Recueil d'études sur les sources du droit en l'honneur de François Gény*, vol. 3 (Paris: Sirey, 1934), 354–56; L. Le Fur, 'La coutume et les principes généraux du droit comme sources du droit international public', *ibid.*, 366–72; A. Verdross, 'Les principes généraux du droit comme source du droit des gens', *ibid.*, 383–86; C. de Visscher, 'Contribution à l'étude des sources du droit international', *ibid.*, 395–98. See also, H. Lauterpacht, *Private Law Sources and Analogies of International Law, with Special Reference to International Arbitration* (London: Longmans, Green, and Co, 1927), 69–71; J.B. Scott, ed., *The Proceedings of the Hague Peace Conferences: The Conference of 1907*, vol. 1 (New York: Oxford University Press, 1920), 351.

non liquet.[8] That presupposes international law-making, even if its exact course and date can hardly be ascertained from the distance of approximately one and a half centuries. Its occurrence is confirmed by its results only: the disturbingly chaotic literary reflections and the vague remarks made by international judicial organs.

However, it causes little difficulty to outline the hypothesis of a law-making process culminating in the international recognition of general principles of law. This process is arguably based on an automatism, the beginning of which is marked by the emergence of a customary rule of reception. Accordingly, states accept, without exhaustive enumeration or further measures, principles originating from domestic law as an integral part and unwritten source of international law, if they are generally recognized and suitable to govern international relations. Following the emergence of the rule of reception, the incorporation of general principles takes place automatically, provided that the two conjunctive conditions are met. The fulfilment of these conditions is continuously 'verified' by the rule of reception, as it will be displayed later with regard to the question of termination. (It may be inferred by exclusion of other possibilities that the rule of reception forms part of universal customary law. Simply put, it could not have come into existence in any other way.[9])

The requirement of general recognition does not imply that a principle has to exist in the domestic law of every state in the world. Notwithstanding that the reference to 'civilized nations' in the Statute of the International Court of Justice is utterly obsolete and rightly criticized,[10] it seems sufficient, if the dominant legal systems of principal families of law accept a provision with identical or similar content.[11] Notably, this allegation may prove implausible for extreme positivists, who have been reluctant to regard general principles of law as a source of law, unless they are recognized by every state, claiming 'those are the rules of international

8 'The general principles of law, therefore, permanently rectify a more primitive law in the spirit of a more advanced and progressive law.' J. Csiky, *Az általános jogelvek, mint a nemzetközi jog forrása [General Principles of Law as a Source of International Law]* (Szeged: Szeged Városi Nyomda és Könyvkiadó, 1934), 43. (Emphasis omitted.)

9 In the past, a less-known scholar also traced back the legal nature of general principles of law to customary law, but he did not hypothesize the existence of a rule of reception. Instead, he suggested that customary law behaved as 'a source of law, which designates another source of law'. Csiky, *Az általános jogelvek, mint a nemzetközi jog forrása [General Principles of Law as a Source of International Law]*, 21–22.

10 *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark) (Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, ICJ Reports 1969, Separate Opinion of Judge Fouad Ammoun, 132–34. Cf. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, ICJ Reports 1949, Dissenting Opinion by Judge Krylov, 219.

11 Distant similarities can be revealed in this respect between general principles of law and ancient Roman *ius gentium*. Gaius, *Institutionum commentarii quattuor*, I.1; *Digest*, 1.1.9.

law only, to which states in some way consent'.[12] Yet such an interpretation of general recognition is dubious, as it looks for the intentions of states in the wrong place, and erroneously confounds their domestic and international legislative wills. The international legislative will that manifests itself in the rule of reception and elevates general principles to the international level is not an aggregate or a reflection of domestic legislative wills that originally establish the principles concerned. These wills prevail in different realms, pursue different objectives, and carry different contents. Hence the internationally relevant manifestation of legislative intention and engagement should be sought not in domestic law, but in the rule of reception, which does not demand recognition by every state for the elevation of a principle to the international level. Indications are that it is enough, if the dominant legal systems of principal families of law accept it with identical or similar content. The verification of general recognition calls for the application of the comparative method,[13] but in the procedure of the International Court of Justice, a consensus among judges representing the main forms of civilization and the principal legal systems of the world might as well suffice.[14]

The requirement of suitability to govern international relations must likewise be interpreted in a flexible manner. This condition merely implies that a domestic provision, which is to be reckoned as a general principle, must be capable of producing effects on the international plane in view of the similarities between the typical behaviour of private persons and states. Once these conditions are met, a principle is elevated to the international level, albeit its content is at this point

12 Csiky, *Az általános jogelvek, mint a nemzetközi jog forrása [General Principles of Law as a Source of International Law]*, 15. (Emphasis omitted.)

13 It has been submitted that this process consists of two operations. The vertical move involves the abstraction of legal principles from domestic rules; the horizontal move involves the verification of general recognition of principles thus obtained. F.O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden – Boston: Martinus Nijhoff, 2008), 45 *et seq.* The process has also been described as a threefold test comprising the verification of general character, recognition by civilized nations and capability of being incorporated into international law. M. Bos, *A Methodology of International Law* (Amsterdam – New York – Oxford: North-Holland, 1984), 262. See also, M.C. Bassiouni, 'A Functional Approach to "General Principles of International Law"', *Michigan Journal of International Law* 11, no. 3 (1990): 809–16; B. Conforti, *International Law and the Role of Domestic Legal Systems* (Dordrecht: Martinus Nijhoff, 1993), 64–65. It is essential to prevent imbalances caused by the dominance of world languages, especially English and French, in the course of the process. C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law', *Recueil des Cours* vol. 281 (1999): 339.

14 Statute of the International Court of Justice, Article 9. Cf. *Anglo-Iranian Oil Co. Case (United Kingdom v Iran)*, Preliminary Objection, Judgment of 22 July 1952, ICJ Reports 1952, Dissenting Opinion of Judge Levi Carneiro, 161.

still extremely abstract and raw. It is primarily the task of the judiciary to disclose, specify and elaborate on that content.[15]

Even though the process under deliberation rests on a rule of customary law, it does not yield as an outcome new customary norms, for it is not a convergence of general practice and *opinio iuris* of states that creates the domestic provisions elevated to the international level. In fact, states endeavoured by the establishment of the rule of reception to fill the gaps of conventional and customary law by generally recognized domestic principles capable of governing international relations. Consequently, on account of its gap-filling function and the differences of various law-making processes, the rule of reception incorporates general principles of law into the system of international law as an independent source of law rather than as customary law. This surely does not preclude a subsequent conventional or customary reaffirmation of certain principles,[16] but it will affect neither their nature as general principles of law nor the independence of this unique source of law. Similar intertwinements regularly occur between conventional and customary international law without any bearing on their respective self-identities.[17]

Due to the exceptionally high degree of abstraction of general principles, their effects can barely be perceived in everyday life: upon the examination of the conduct of members of the international community, we much earlier and more

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15 Cf. 'International law has recruited and continues to recruit many of its rules and institutions from private systems of law. […] The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of "the general principles of law". In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions'. *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, ICJ Reports 1950, Separate Opinion by Sir Arnold McNair, 148.

16 G. Gaja, 'General Principles of Law', in *The Max Planck Encyclopedia of Public International Law*, vol. 4, ed. R. Wolfrum (Oxford: Oxford University Press, 2012), 375. It is often regarded as a fundamental function of general principles of law to facilitate the development of international law. Cheng, *General Principles of Law, as Applied by International Courts and Tribunals*, 39; Herczegh, *General Principles of Law and the International Legal Order*, 116; P. Kovács, *A nemzetközi jog fejlesztésének lehetőségei és korlátai a nemzetközi bíróságok joggyakorlatában [The Perspectives and Obstacles of the Development of International Law in the Practice of International Courts]* (Budapest: Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar, 2010), 85–88; Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, 50. See also, M. Bartoš, 'Transformation des principes généraux en règles positives du droit international', in *Mélanges offerts à Juraj Andrassy*, ed. V. Ibler (La Haye: Martinus Nijhoff, 1968), 1–12; W. Friedmann, 'The Uses of "General Principles" in the Development of International Law', *American Journal of International Law* 57, no. 2 (1963): 279–99.

17 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, 93–96.

easily come across a relevant conventional or customary norm, than a general principle of law, as the former relates to the latter as *lex specialis* relates to *lex generalis*. Therefore, these provisions mostly surface in judicial proceedings, when judges encounter gaps in the law during the peaceful settlement of international disputes. It is no coincidence that the literature of general principles of law focuses on the practice of international judicial organs, as their existence, contents and effects are best observable in that field. Otherwise, these provisions are not a particularly effective source of international law.[18]

It should be added that the customary rule of reception is not identical to the rule of authorization, as codified in Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice and Article 38, paragraph 1, sub-paragraph c) of the Statute of the International Court of Justice, which permits international judicial organs to resort to general principles of law by way of analogy. The rule of reception precedes the rule of authorization in terms of both the time of formation and the logic of functioning. That leads to two further conclusions. First, the rule of authorization sanctions the application of international law rather than domestic law. Second, it was not the cited statutes that established the general principles of law – these documents only rendered them applicable in the procedure of the two courts.

Let us recall at this point a remark made by the Permanent Court of International Justice that portrayed municipal laws as mere facts from the standpoint of international law.[19] If we project this statement to Article 38, paragraph 3, of the Statute of that court, it becomes evident that 'the general principles of law recognized by civilized nations', considered by several prominent drafters of the document as provisions originating from national legal systems, could be important for the judicial settlement of international disputes insofar as they were applied in their international rather than domestic legal capacity. Article 38, paragraph 1, of the Statute of the International Court of Justice explicitly confirms this assessment by virtue of the sole amendment to the text of the former provision, as a result of which the sentence introducing the catalogue of applicable sources, including general principles of law, now reads as follows: 'The Court, whose function is to decide *in accordance with international law* such disputes as are submitted to it, shall apply […].'[20] (It reaffirms the disparity of the rule of reception and the rule of authorization, as well.)

The significance of the highlighted reference to international law has at times been rejected on the basis that it does not prove that general principles of law truly constitute a source of international law.[21] This approach obviously contradicts the

18 G.J.H. van Hoof, *Rethinking the Sources of International Law* (Deventer: Kluwer, 1983), 146–48.

19 *German Interests in Polish Upper Silezia (Germany v Poland)*, Judgment No. 7, 25 May 1926, PCIJ Series A, No. 7, 19.

20 Statute of the International Court of Justice, Article 38, paragraph 1. (Emphasis added.)

21 Cf. Herczegh, *General Principles of Law and the International Legal Order*, 18–19.

basic rules of treaty interpretation, and may lead to other misconceptions.[22] These misconceptions include, for example, the parallel treatment of the application of general principles and the choice of law method, claiming that both point towards a foreign legal system as seen from the perspective of the forum applying the law. This parallel has far-reaching consequences. It amounts to a denial of general principles of law as a source of law to regard their application as a special manifestation of the choice of law method, for that method does not entail the incorporation of foreign legal rules into the law of the forum.[23] However, it requires little effort to explore the fundamental differences in the respective bases, techniques and normative backgrounds of the application of general principles and foreign legal rules, and in the contents and characteristics of the provisions invoked. Therefore, no matter how appealing this parallel may appear, it can be challenged along several dimensions, and has to be deemed unsubstantiated.

Finally, we need to counter a negative position, which maintains that, in spite of the identical wording, the sub-paragraph of the Statute of the International Court of Justice concerning general principles of law has a meaning different from that of the Statute of the Permanent Court of International Justice due to the divergent historical circumstances prevailing at the time of adoption of the two documents.[24] Though historical interpretation is a universally accepted supplementary means of interpretation of international treaties,[25] the *travaux préparatoires* of the statutes do not support this allegation. Nor can a fundamental change of circumstances explain the alleged modification of the original content of the provision, because the wording, as already mentioned, was deliberately left unaltered in light of positive experiences.

Beyond the introductory sentence of Article 38, paragraph 1, of the Statute of the International Court of Justice, miscellaneous other pieces of indirect evidence too attest that general principles of law constitute an independent source of international law. These pieces of evidence include the law of the European Union, a legal order distinct from both international law and the national legal systems of member states, where the development of law and the strengthening of integration necessitated the recognition of general principles of law as a source of law. The European Court of Justice has played an instrumental role in the process. Notwithstanding that the founding treaties do not expressly authorize the application of general principles, there is widespread agreement that the legal basis of this practice can be derived from Article 19, paragraph 1, of the Treaty

22 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Article 31, paragraphs 1 and 4.

23 Cf. Herczegh, *General Principles of Law and the International Legal Order*, 99.

24 G.I. Tunkin, *A nemzetközi jog elméletének kérdései [Questions of the Theory of International Law]* (Budapest: Közgazdasági és Jogi Könyvkiadó, 1963), 154.

25 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Article 32.

on European Union, and Articles 263 and 340, paragraph 2, of the Treaty on the Functioning of the European Union.[26]

The European Court of Justice has taken into account the domestic laws of member states, the law of the European Community, and later the law of the European Union, and international law, especially the European regime of human rights protection, for the determination and application of general principles of law. Several groups of principles have so crystallized, but a consensus on their exact boundaries has not been reached yet. Nevertheless, the extensive case law of the body indicates that general principles of law that have been incorporated into the law of the European Union include, for example, the respect for fundamental rights,[27] the prohibition of discrimination,[28] the protection of legitimate expectation,[29] the requirement of effective judicial control,[30] the prohibition of retroactive effect,[31] *ne bis in idem*[32] *and pacta sunt servanda*.[33] The founding treaties, on the other hand, scarcely contain explicit references to general principles. Such references can be found in Article 6, paragraph 3, of the Treaty on European Union, concerning the protection of fundamental rights, and Article 340, paragraphs 2 and 3, of the Treaty on the Functioning of the European Union, concerning the obligation to make good any damage caused by the institutions or their servants in the performance of their duties.[34]

General principles of law undoubtedly rank among the primary sources of the law of the European Union, and possess a 'constitutional status'.[35] Knowing that the development of the law of the European Union has been greatly inspired

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26 O.J. C 326, 26.10.2012, 27, 162–63, 193.

27 C-29/69, *Erich Stauder v City of Ulm, Sozialamt* [1969] ECR 419; C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491.

28 C-20/71, *Luisa Sabbatini, née Bertoni v European Parliament* [1972] ECR 345; C-149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1978] ECR 1365.

29 C-112/77, *August Töpfer & Co. GmbH v Commission of the European Communities* [1978] ECR 1019.

30 C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

31 C-63/83, *Regina v Kent Kirk* [1984] ECR 2689.

32 C-14/68, *Walt Wilhelm and Others v Bundeskartellamt* [1969] ECR 1.

33 C-162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655.

34 O.J. C 326, 26.10.2012, 19, 193.

35 Opinion of Advocate General Trstenjak, delivered on 30 June 2009, C-101/08, *Audiolux SA e.a. v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* [2009] ECR I-9823, para. 70. See also, C-101/08, *Audiolux SA e.a. v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* [2009] ECR I-9823, para. 63. For more details, see, T. Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford – New York: Oxford University Press, 2006).

by international law, the recognition as a source of law of general principles partly derived from the national legal systems of member states should not be underestimated regardless of the particular circumstances. If this process came to pass in a short period of time in the European legal order, it could also have easily happened in the considerably older and in many ways standard-setting international law. The special features of the law of the European Union do not undermine the validity of this assumption. Thus it seems permissible to draw a parallel between international law and the law of the European Union as regards their attitude towards the general principles of law.

Elements of the practice of international organizations and institutions and states likewise indirectly prove that general principles of law constitute a source of international law. For example, the Secretary-General of the United Nations described them as one of the principal sources of law in an early memorandum on the codification of international law.[36] The World Trade Organization has adopted a similar approach, and general principles now play an important role in its dispute settlement mechanism.[37] Furthermore, selected principles originating from domestic law have gained special emphasis in international criminal law, where different international and hybrid, *ad hoc* and permanent judicial organs have resorted to them on many occasions since the end of World War II.[38] (International human rights instruments too tend to recall general principles with respect to criminal procedure.[39])

National legal systems treat general principles of law as a source of international law, as well. It is true that the diverse constitutional clauses on the relationship of international law and domestic law typically reaffirm the generally recognized principles and/or rules of international law, and omit express references to general principles of law, but they are habitually interpreted in a manner so as to embrace these principles.[40] However, the constitutional clauses on international law are not

36 Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory Work within the Purview of Article 18, Paragraph 1, of the Statute of the International Law Commission. Memorandum submitted by the Secretary-General, 10 February 1949, UN Doc. A/CN.4/1/Rev.1, 22.

37 J. Cameron and K.R. Gray, 'Principles of International Law in the WTO Dispute Settlement Body', *International and Comparative Law Quarterly* 50, no. 2 (2001): 248–98.

38 Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, 73 *et seq.* See, for example, United States of America v Wilhelm List *et al.*, Judgment of 19 February 1948, Nürnberg Military Tribunal, vol. 11, 1235.

39 See, International Covenant on Civil and Political Rights, New York, 16 December 1966, Article 15, paragraph 2; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Rome, 4 November 1950, Article 7, paragraph 2. See also, N.K. Hevener and S.A. Mosher, 'General Principles of Law and the UN Covenant on Civil and Political Rights', *International and Comparative Law Quarterly* 27, no. 3 (1978): 596–613.

40 For a European overview, see, V.S. Vereshchetin, 'New Constitutions and the Old Problem of the Relationship between International Law and National Law', *European*

the only domestic provisions that need to be taken into account. General principles of law also appear in fundamental rights catalogues of constitutions or other laws and regulations in connection with the guarantees of criminal procedure, often indicating the influence of international human rights instruments.[41]

Modification and Termination of General Principles of Law

If we accept that general principles of law constitute a source of international law, we inevitably face the questions of modification and termination. It has to be stated at the outset that modification, in this context, does not designate the indispensable process by which the inherently abstract and raw content of principles originating from domestic law is disclosed and specified by the judiciary. Nor does it amount to modification, if various judicial organs interpret the same principle, within their margin of discretion, with negligible differences. Modification here denotes any alteration of the content of a general principle, which occurs after its reception into international law, and substantially transforms its nature in line with the intentions of states.

Since general principles of law originate from domestic law, the question of modification must be examined in the realms of both international law and domestic law. We may draw a surprising conclusion at the very beginning of our investigation: general principles cannot be directly modified by international law-making, for it is incompatible with the peculiar way of their creation. These principles are automatically incorporated into international law by a customary rule of reception, if they are generally recognized and suitable to govern international relations. Apart from the establishment of the continuously functioning rule of reception, no other legislative act has taken place in the international level. Hence states could make an attempt to modify the content of a general principle by conventional or customary law-making only.[42] Still neither of these processes can

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Journal of International Law 7, no. 1 (1996): 29–41; L. Wildhaber and S. Breitenmoser, 'The Relationship between Customary International Law and Municipal Law in Western European Countries', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 48, no. 2 (1988): 163–207.

41 See, for example, Canada, Constitution Act 1982, Part I, Article 11, paragraph g); Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Article 13, paragraph 6; Hong Kong Bill of Rights Ordinance, 1991, Part II, Article 12, paragraph 2.

42 The question of modification has already been raised in the practice of the International Court of Justice. The relevant separate opinion did not rule out that an international treaty may provide further rights in addition to those that spring from a general principle of law, but the interpretation of treaty stipulations led the judge to doubt that it had actually happened in the present case. Despite that the wording leaves room for different interpretations, the structure of reasoning suggests that the granting of further rights would have taken place within the framework of the treaty, and would not have modified the principle itself: 'That general principle of law concerning the rights or status

perform the expected adjustment. They would instead produce a new conventional or customary rule with a content different from the general principle concerned that, in turn, would remain unaltered and preserve its independent existence. The explanation is simple: different law-making processes necessarily yield different sources of law.[43] Given that the general principle would retain its original content and independence regardless of the modifying conventional or customary rule, a dual regime would emerge, in which potential conflicts would have to be resolved by rules of legal logic, such as *lex specialis derogat legi generali* and *lex posterior derogat legi priori*. That is why conventional or customary rules cannot formally modify, only derogate from general principles that have become undesirable by reason of their contents.

General principles of law can be modified exclusively through the medium of domestic law. Remarkably, this process may be attributed not only to national, but also to international legal factors. However, in the latter case the conventional or customary rules of international law cannot and do not directly modify the general principles, as this possibility has just been ruled out – international law merely induces the modification of these principles through the medium of domestic law. In order to comprehend this process, we need to reach back to the relationship of international law and domestic law. It is commonly known that states incorporate the rules of international law into their national legal systems either by the monistic technique of adoption or the dualistic technique of transformation, and, at the same time, they must ensure harmony between international law and domestic law.[44] Naturally, the techniques of adoption and transformation too incorporate into domestic law the conventional or customary rules that have been created by states with a view to derogate from the content of a general principle of law. Having been incorporated into domestic law, these conventional or customary rules may induce a change in the content of the domestic legal principle from which the general principle originates, in conformity with the requirement to ensure harmony between international law and domestic law. If this process

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of shareholders, which underlies not only Italian Company law but also the company law of some other civil law countries, may not be altered by any treaty aimed at the protection of investments unless that treaty contains some express provision to that end. […] Yet there is no reason to interpret the [treaty] *as having granted* […] *any further rights in addition to those* to which the same shareholders would have been entitled under Italian law as well as under the general principles of company law.' *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)*, Judgment of 20 July 1989, ICJ Reports 1989, Separate Opinion of Judge Oda, 86, 88–89. (Insertion and emphasis added.)

43 With the establishment of the rule of reception, an automatic mechanism emerged in customary international law, the products of which – that is, the general principles of law – cannot be directly influenced or modified by other customary rules due to the differences of various law-making processes.

44 See, for example, I. Seidl-Hohenveldern, 'Transformation or Adoption of International Law into Municipal Law', *International and Comparative Law Quarterly* 12, no. 1 (1963): 88–124.

uniformly takes place throughout the dominant legal systems of principal families of law, the customary rule of reception will elevate the domestic legal principle to the international level with its new content, and overwrite the general principle of law, from which states previously strove to derogate by conventional or customary law-making. (Evidently, this process presupposes general international treaties or universal customary rules.)

Domestic legal factors may change the content of a domestic legal principle, as well. If the new content becomes generally recognized and continuously allows the international application of the provision, the content of the corresponding general principle of law will automatically and accordingly change in international law by virtue of the rule of reception.[45] Normally, this is a subtle and lengthy evolution that can be perceived from a distance of decades or centuries only. Fast and radical changes, on the other hand, may also occur, and reveal an odd phenomenon. Similarly to the conventional and customary rules of international law, general principles of law are incorporated by states into their national legal systems. These provisions travel an intriguing road: they depart from domestic law, gain reception into international law, then return to domestic law as rules of international law. Hence selected principles exist in national legal systems in two forms: as general principles of law and as principles of domestic law. In spite of expectations to the contrary, a change of the latter does not immediately modify the former. It should not be forgotten that such modification takes place only if a change becomes generally recognized in the dominant legal systems of the principal families of law. In other words, a change in the content of a domestic legal principle is followed by a change of the corresponding general principle of law with a delay. Until the general recognition of the new content of a domestic legal principle and the resulting modification of the general principle of law, the principle concerned exists in the national legal system not only in two forms, but also with two different contents. If a change is modest and tolerable, practical problems are unlikely. But in extreme cases, the requirement of harmony between international law and domestic law may slow or delay the modification of a domestic legal principle, and secure the preservation of the minimum standards of the rule of law.

The termination of general principles of law must also be examined in the realms of both international law and domestic law. Yet it would be a grave mistake to automatically adopt the conclusions drawn with regard to modification to the question of termination, and to presume that the only feasible way of termination is through the medium of domestic law. The situation is quite different. In the international level, it is equally possible to terminate the entire category of general principles of law, and to terminate individual principles. The total elimination of general principles of law as a source of law requires the termination of the customary rule of reception, or the substantial modification of its purpose and

45 Cf. Csiky, *Az általános jogelvek, mint a nemzetközi jog forrása [General Principles of Law as a Source of International Law]*, 43.

functioning. Conversely and understandably, it is impossible to directly terminate individual principles by persistent objection[46] or international law-making.[47] There is but one scenario that involves the termination of a general principle on account of circumstances in the international level: if the provision is rendered unable to govern international relations by changes in the international environment. Let there be no misunderstanding: it is not the mere fact of alteration of international relations that terminates the general principle, but the rule of reception that reacts to this alteration automatically, in absence of further measures by states. Since international applicability is an essential condition of their recognition as a source of law, objectively inapplicable general principles cannot exist in the system of international law. If a general principle is no longer able to govern international relations due to changes in the international environment, and as such, one of the features required for its elevation to the international level fades away, then it will become invisible to the rule of reception, and ultimately disappear from international law. (Theoretically speaking, nothing precludes the 'revival' of principles that have so been terminated by subsequent changes in the international environment.)

The termination of individual general principles can also be achieved through the medium of domestic law. All it takes to realize that is to breach the requirement of general recognition by removing the principle from a large number of national legal systems, or to widely modify its domestic legal content in a manner that it becomes unable to govern international relations in the future. Such a generally unrecognized principle may nevertheless continue to exist in national legal systems, but it will remain invisible to the rule of reception and ineligible for elevation to the international level, for failing to meet the required conjunctive conditions.

It should be stressed that the question of modification or termination is mainly of academic importance. The practical probability of these measures is negligible. The overwhelming majority of general principles of law came into existence several centuries ago, and have become inseparable from the normal functioning of law. Substantial alterations of any kind thus seem unnecessary and futile. Moreover, it is always far more convenient for states to derogate from an undesirable general

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46 In light that the customary rule of reception was established more than a century ago, a detailed examination of persistent objection may be dispensed with. Suffice it to note that persistent objection would have thwarted the elevation of general principles to the international level *in toto* (as such, it would have been ineffective against individual principles), and it would have had an effect on those states only that had rejected the rule of reception in the course of its formation. (On the recognition of general principles of law by newly independent states, see, S.P. Sinha, 'Perspective of the Newly Independent States on the Binding Quality of International Law', *International and Comparative Law Quarterly* 14, no. 1 (1965): 124.)

47 Since states are not at all defenceless against the flow of principles towards international law, and have numerous ways to dispose of undesirable provisions, this statement is not irreconcilable with the postulation that international law does not bind sovereign states against their will. *S.S. Lotus (France/Turkey)*, Judgment No. 9, 7 September 1927, PCIJ Series A, No. 10, 18.

principle by conventional or customary law-making. Derogation, of course, would not bring about the modification or termination of the principle, but at least it offers a chance to evade its application with the help of rules of legal logic, such as *lex specialis derogat legi generali* and *lex posterior derogat legi priori*.

Conclusion

In sum, it may be stated that general principles of law constitute an independent source of international law, created and maintained by a customary rule of reception. Due to their unwritten character, gap-filling function and insignificant influence on the everyday life of the international community, the existence, contents and effects of these principles mainly become palpable in the practice of international judicial organs. Hence they are frequently described as being subsidiary or auxiliary in nature, though it should not be taken as if they actually occupied a subordinate or inferior position in the international legal order. In absence of a hierarchy between the various sources of international law, general principles of law are of equal rank with their more 'robust' counterparts, including international treaties and customary international law. For that reason, the catalogue contained in Article 38, paragraph 1, of the Statute of the International Court of Justice reflects the logical train of thought of a judge in search of rules applicable to a particular case, not a hierarchy of sources.[48] Clearly, general principles of law may be labelled as a source of law in a formal sense only. In a material sense, the source of law is the community of states that established the customary rule of reception, or alternatively, the circumstances that necessitated this legislative act. General principles of law themselves can at best be deemed a material source of law in the context of the development of international law; even so, it is most doubtful whether rules are capable of serving as a means of laying down new rules.[49] But it is exactly how this ethereal source of law attracts the attention of generations of international lawyers: every question answered leads to even more.

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48 Cheng, *General Principles of Law, as Applied by International Courts and Tribunals*, 22; Gaja, 'General Principles of Law', 375.

49 M. Virally, 'The Sources of International Law', in *Manual of Public International Law*, ed. M. Sørensen (London – New York: Macmillan – St. Martin's, 1968), 147.

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