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Customary International Law and the General Principles of Law Recognized by Civilized Nations

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Abstract

This article looks beyond customary international law and asks whether the source of international law listed in Article 38, paragraph 1(*c*) of the ICJ Statute ('the general principles of law recognized by civilized nations') might join the dance. Is there a risk that general principles of law may be too easily invoked where no applicable treaty or rule of customary international law can be identified? In emphasizing the distinction between customary international law and general principles of law, the article first recalls relevant recent work of the International Law Commission. It then addresses the term 'general international law' and certain problems related to it, and raises questions concerning the relationship between customary international law and general principles of law. Before drawing some conclusions, reference is also made to the place of general principles of law within the international legal system.

Keywords

customary international law – general principles of law – International Law Commission – Statute of the International Court of Justice – sources of international law

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0 Introduction

In his 2014 *EJIL: Talk!* blog entry entitled 'Customary International Law as a Dance Floor',[1] Jean d'Aspremont referred, among other things, to the "argumentative freedom" sought by certain international lawyers and scholars when identifying the rules of customary international law. He described such freedom as "a dance floor where (almost) anything goes" and where all kinds of ambitions can be served. The present contribution looks beyond customary international law and points to a further challenge to the stability of the international legal system: the possibility that the source of international law listed in Article 38, paragraph 1(*c*) of the Statute of the International Court of Justice ('the general principles of law recognized by civilized nations', hereafter also 'general principles of law') might join the dance.[2] In particular, there is a risk that the general principles of law may be all too easily invoked where no applicable rule of customary international law can be identified. This risk may be increased by the recent inclusion in the International Law Commission's current programme of work of the topic entitled *General principles of law*, which will inevitably shed a spotlight upon this rather neglected source of international law.[3] For this reason (among others), care will be needed when approaching the new topic.

1 J. d'Aspremont, "Customary International Law as a Dance Floor", Parts I and II, *EJIL: Talk!* (2014).

2 *Alice's Adventures in Wonderland* and *Through the Looking-glass* seem to have a special place at the International Court of Justice – contrary to the opinion of Mr. Harish Salve who, ignoring precedent, in *Jadhav* claimed that "Humpty Dumpty has no place in this Court" (*Jadhav case* (*India* v. *Pakistan*), *CR 2019/3, 20 February 2019*, p. 9, para. 8). It is therefore appropriate to recall in this article the *Mock Turtle's Song* (*The Lobster Quadrille*), and in particular its refrain –

> *Will you, won't you, will you, won't you, will you join the dance?*
> *Will you, won't you, will you, won't you, won't you join the dance?*

3 Writings on the general principles of law within the meaning of Article 38, paragraph 1(*c*) of the ICJ Statute are, however, voluminous and varied. They include B. Cheng, *General Principles of Law* (Stevens and Sons, 1953); H. Waldock, "General Course on Public International Law", in *Recueil des cours*, vol. 106 (1962), ch. 4; G. Gaja, "General Principles of Law", in *Max Planck Encyclopedia of Public International Law* (2013); H. Thirlway, *The Sources of International Law*, 2nd Edition (OUP, 2019), ch. IV; V.D. Degan, *The Sources of International Law* (Martinus Nijhoff, 1996); M. Andenas, M. Fitzmaurice, A. Tanzi, J. Wouters (eds.), *General Principles and the Coherence of International Law* (Brill, Nijhoff, 2019) (hereafter, 'Andenas *et al.*'); A. Pellet, *Recherche sur les principes généraux de droit en droit international* (Université de droit, d'économie et de sciences sociales, 1974); A. Pellet and D. Müller, "Article 38", in A. Zimmermann, C.J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (OUP, 2019). For other references, see the writings referred to in First report on general

The present contribution is necessarily preliminary in nature; it does not seek to reach firm answers, or even to refer to all the questions that may arise with respect to general principles of law. Instead, it first recalls the recent work of the International Law Commission touching on the relationship between customary international law and general principles of law (**1**). It then addresses the term 'general international law' and some problems related to it (**2**). The next two sections raise a number of questions concerning the relationship between customary international law and general principles of law, as well as the place of the latter within the international legal system (**3** and **4**). Finally, some tentative conclusions are provided.

1 Recent Work of the Commission

It is convenient to begin by briefly recalling some recent work of the International Law Commission relevant to the present contribution.[4] While that work has not gone into the question in any depth, it does show that the relationship between the sources of international law listed in paragraphs 1(*b*) and 1(*c*) of the Article 38 of the Statute of the International Court of Justice has not passed unnoticed, and that a continuing interest exists.

The Commission's work on the topic *Identification of customary international law*[5] touched only lightly on the relationship between customary international law and the general principles of law recognized by civilized nations.[6] In his first report, the Special Rapporteur noted, among other things, that the distinction between customary international law and general principles of law

principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur (A/CN.4/732) (hereafter "First report on general principles of law").

4 A summary of the work of the Commission related to general principles of law can be found in Part Two of the First report on general principles of law.

5 The Commission completed its work on *Identification of customary international law* in August 2018 with the adoption, on second reading, of 16 draft conclusions, with commentaries (Annual Report of the International Law Commission to the General Assembly on the work of its seventieth session, A/73/10, pp. 119–156). On 20 December 2018, the UN General Assembly, after noting that the subject "is of major importance in international relations", took note of the Commission's conclusions, the text of which was annexed to the resolution, with the commentaries thereto; brought the conclusions and commentaries to the attention of States and all who may be called upon to identify rules of customary international law; and encouraged their widest possible dissemination: A/RES/73/203.

6 On the background to, and possible ways for dealing with, the term 'civilized nations' as employed in Article 38, paragraph 1(c) of the ICJ Statute, see the First report on general principles of law, paras. 176–187.

"is … important, but not always clear in the case law or the literature", and that "[w]hile it may be difficult to distinguish between [the two] in the abstract, whatever the scope of general principles it remains important to identify those rules which, by their nature, need to be grounded in the actual practice of States".[7]

It is also worth recalling that, in 2013, the UN Secretariat prepared a thorough Memorandum on *Formation and evidence of customary international law: Elements in the previous work of the International Law Commission that could be particularly relevant to the topic*, which dealt with various aspects of the relationship between custom and general principles of law in its Observations 29, 30, and 31, under the heading *Relationship of customary international law with "general international law"*.[8]

During an early plenary debate, members of the Commission spoke on the issue and expressed some preliminary and thought-provoking views. Professor Nolte, for example, noted that "[an] important interaction was the one that took place between customary international law and the general principles of law, the latter often being used in conjunction with or in place of the traditional criteria of customary law. It was thus conceivable for a customary rule to be interpreted in the light of a recognized general principle. The role of such principles was closely linked to the formation and evidence of customary international law … The Commission must be careful, however, not to exclude the possibility of identifying a general principle as a source of international law, whether as a stand-alone rule or as a complement to other rules from other sources".[9] Professor Caflisch suggested that "when general principles of law applicable under national law were transposed frequently enough into

7 First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur (A/CN.4/663), para. 36.

8 See Observation 29 ("In certain instances, the Commission has employed the phrase 'general international law' to refer, in a generic manner, to rules of international law other than treaty rules. Also, on some occasions, the Commission appears to have used 'general international law' and 'customary international law' interchangeably. The phrase 'general international law' has also been used by the Commission as an umbrella term that includes both customary international law and general principles"); Observation 30 ("On some occasions, the Commission has referred to general principles of law – possibly within the meaning of Article 38, para. (1) (c) of the Statute of the International Court of Justice – or to so-called general principles of international law. The Commission has also indicated that such general principles may inform the international regulation of particular subjects or even the international legal system as a whole"); Observation 31 ("Furthermore, in the work of the Commission, the phrase 'general international law' was also used to refer to general rules of international law as opposed to rules pertaining to specific fields which include, inter alia, human rights law, environmental law, the law of the sea, etc.") (footnotes omitted).

9 *Yearbook of the International Law Commission 2013*, vol. I, p. 92, para. 14.

international law, they became customary rules of international law. The process by which that occurred was a mode of formation that the Commission could not afford to overlook".[10] Professor Murphy noted that the distinction between customary international law and general principles of law was not always very clear in the case law and the literature, and referred to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* as an example, "inasmuch as the Court had based its conclusions on an analysis of customary international law, international humanitarian law and general international law, without however clarifying the relationship between those different sources".[11] Mr Gevorgian raised the question whether *pacta sunt servanda* was a general principle of law, a rule of customary international law, or a treaty rule, and suggested that "[t]he criterion might be the presence or the absence of actual State practice".[12] Mr Vázquez-Bermúdez stated that "it was important to make a distinction between customary international law and 'the general principles of law recognized by civilized nations'. As could be seen from the *travaux préparatoires* for the Statute of the International Court of Justice, those principles had been added to Article 38 to fill any gaps in the international legal order and avoid *non liquet*. Those principles of law, which were common to all national legal systems, differed from principles of international law".[13]

The Commission's annual report for 2012 had recorded that "[w]hile recognizing the need, in considering the topic, to address the distinction between customary international law and general principles of law, it was suggested that definitive pronouncements on the latter should be avoided, as general principles possessed their own complexities and uncertainties".[14] This accorded with the Commission's decision to focus on the identification of customary international law, not on its formation, and to refrain from entering into matters relating to other sources of international law, except insofar as that might be relevant for the practical purposes of the topic. As the commentaries to the draft conclusions explain, "no attempt [was] made to explain the relationship

10 *Ibid.*, p. 89, para. 39.

11 *Ibid.*, p. 91, para. 5.

12 *Ibid.*, p. 97, para. 21.

13 *Ibid.*, p. 103, para. 11. In Spanish (at p. 112, para. 11): "es importante establecer una distinción entre el derecho internacional consuetudinario y « los principios generales de derecho reconocidos por las naciones civilizadas ». De los trabajos preparatorios del Estatuto de la Corte Internacional de Justicia se desprende que esos principios se incluyeron en el Artículo 38 para llenar posibles lagunas del ordenamiento jurídico internacional y evitar el *non liquet*. Esos principios *de* derecho, que corresponden a principios comunes a los sistemas jurídicos nacionales, se distinguen de los principios *del* derecho internacional".

14 *Yearbook of the International Law Commission 2012*, Vol. II, Part Two, p. 70, para. 175.

between customary international law and other sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice".[15]

Under the current topic *Peremptory norms of general international law* (*jus cogens*), the Special Rapporteur, Professor Tladi, proposed, albeit in the absence of any actual practice, that general principles of law form part of general international law and may therefore serve as the basis for *jus cogens* norms within the meaning of article 53 of the Vienna Convention on the Law of Treaties.[16] This position has been adopted by the Commission on first reading. Draft conclusion 5(2), adopted by the Commission on 29 May 2019, reads:

> Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).[17]

A new topic, entitled *General principles of law*, was placed on the International Law Commission's long-term programme of work in 2017 on the basis of a syllabus presented by Mr Vázquez-Bermúdez.[18] In 2018, it was moved to the current programme of work, and Mr Vázquez-Bermúdez was appointed Special Rapporteur.[19] The Special Rapporteur presented his first report at the 2019 session of the Commission. The debate on the first report is expected to take place in July 2019.

The Special Rapporteur's first report does not enter into matters concerning the relationship between the general principles of law and customary international law in depth. It does indicate, however, that that relationship "deserves particular attention", and makes the important preliminary remark that "the fact that a rule of customary international law requires there to be a 'general practice accepted as law' (accompanied by *opinio juris*), while a general principle of law needs to be 'recognized by civilized nations', should not be overlooked. This suggests that these two sources are distinct and should not be confused".[20] The aim of the Special Rapporteur is to address the relationship between the two sources in his second report.

15 A/73/10, p. 124, para. (6).
16 Second report on *jus cogens* by Dire Tladi, Special Rapporteur (A/CN.4/706), paras. 48–52, and p. 46.
17 A/CN.4/936 (29 March 2019).
18 A/72/10, annex A.
19 A/73/10, para. 363.
20 First report on general principles of law, para. 28.

2 'General International Law'

It is also worth looking briefly at what may seem to be no more than a terminological question, but which has important implications for the subject of this contribution. The term 'general international law' is often to be found in judicial decisions and in writings, as well as in Articles 53, 64 and 71 of the Vienna Convention on the Law of Treaties. The meaning of the term is often not clear and may cause confusion, not least in connection with the relationship between customary international law and general principles of law.[21] This introduces real uncertainty or – some might say – a useful element of flexibility.

Professor Gaja, for example, suggests that, while the terms 'general international law' and 'customary international law' are sometimes used interchangeably, one can identify in the jurisprudence of the International Court of Justice two different categories of sources that come under the definition of 'general international law', one under Article 38, paragraph 1(*b*) and the other under Article 38, paragraph 1(*c*) of the Statute.[22] After saying that general principles of law do not "necessarily concern only the importation into international law of principles that have taken root in municipal laws", but may also include "principles of international law that have been 'recognized' by States",[23] Gaja states that:

> The relatively frequent reference by the Court to this type of principle may be explained, at least in part, by the narrow definition of customary international law in Article 38, paragraph 1(*b*), of the Statute. Given the limited availability of practice, several principles of law which are not applicable on the basis of a treaty would not fit the definition of custom.[24]

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21 The commentary to the ILC's conclusions on 'Identification of customary international law' suggests that "'general international law' is used in various ways (not always clearly specified) including to refer to rules of international law of general application, whether treaty law or customary international law or general principles of law"; it is added that "[f]or a judicial discussion of the term 'general international law' see *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*) and *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v. Costa Rica*), *Judgment, I.C.J. Reports 2015*, p. 665, at p. 782 (separate opinion of Judge Donoghue, para. 2) and pp. 846–849 (separate opinion of Judge *ad hoc* Dugard, paras. 12–17)" (A/73/10, fn 667).

22 G. Gaja, "The Protection of General Interests in the International Community", in *Recueil des cours*, vol. 364 (2013) p. 34.

23 *Ibid.*, p. 35.

24 *Ibid.*

After proposing a few examples,[25] Gaja announces that "[i]t is noteworthy that in these and other decisions the Court did not specify on which basis it arrived at the conclusion that a certain principle exists".[26] And then, after examining in some detail examples of how the Court has ascertained the existence of a rule of customary international law, he says that "[i]n this and in other instances, the existence of customary rules is stated by the Court, rather than demonstrated".[27] He continues:

> When this occurs, the method that the Court follows when assessing the existence and content of customary rules does not substantially differ from the method that the Court adopts when it asserts the existence of general principles.[28]

Writing some years later, Gaja acknowledged the difficulties of this approach, saying:

> To avoid the impression of a discretionary finding of a source of international law, it would be preferable for the Court to state more precisely what it considers to be necessary for the existence of a principle which does not have its origin in municipal laws and is not part of customary law.[29]

However, once again, Gaja's conclusion suggests that in his view clear distinctions may not always be essential:

> It may not be necessary to make a sharp distinction between principles that are not based on a convergence of municipal laws, on the one hand, and customary law, on the other. The Court does not always give weight to this distinction. For example, in the judgment in the *Pulp Mills on the River Uruguay case* the Court asserted the existence of a principle or rule

25 *Ibid*., pp. 35–36.

26 *Ibid*., p. 36.

27 *Ibid*., p. 42. Gaja cites Mendelson, who has noted that the Court often does not identify "whether the rule derives from custom, 'general principles of law recognized by civilized nations', some other source, or a combination of sources". See M. Mendelson, "The International Court of Justice and the Sources of International Law", in V. Lowe, M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP, 1996), p. 64.

28 *Ibid*.

29 G. Gaja, "General Principles in the Jurisprudence of the ICJ", in: Andenas *et al*., p. 42.

> of general international law imposing an obligation to undertake an environmental impact assessment without giving any demonstration that the elements required for a customary norm were present and did not clarify whether this obligation found its source in a customary norm. What seems necessary is that, whether they are principles or customary rules, they reflect the actual attitude of States.[30]

Mr Abdulqawi Yusuf, currently the President of the International Court of Justice, but writing in his private capacity, has also addressed recently general principles of law.[31] He did so in a very wide sense, perhaps detached from the specific source of international law listed in Article 38, paragraph 1(*c*) of the Statute of the Court.[32] He concludes with an appeal for the "articulation of fundamental values":

> What is clear is that general principles will only increase in significance in the future, especially as courts encounter new challenges on which specific legal rules may not yet exist or which call for the articulation of fundamental values recognised by the international community as a whole in the form of legal rules or principles to be applied in specific circumstances in the relations among States.[33]

Some may find Gaja's account in his Hague Academy lectures, as in his later essay, and that of Yusuf, somewhat disturbing. If they accurately reflect what happens in practice, such a conflation of the general principles of law and rules of customary international law could harm the structure of the international legal system, even taking into account the important point with which Gaja concludes The Hague Academy lectures, namely that "States preserve a decisive role in determining whether a rule of international law has come into existence and whether certain interests will be protected and in what way".[34]

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30 *Ibid.*, p. 44 (footnote omitted).

31 A.A. Yusuf, "Concluding remarks", in Andenas *et al.*, pp. 448–457.

32 Yusuf covers "the different formulations of general principles as found in the Court's jurisprudence, such as: general principles as derived from municipal systems of law; general principles as enshrined in treaties and customary international law; general principles as gap-fillers; and general principles in specific subfields of international law" (*ibid.*, at p. 448).

33 *Ibid.*, p. 457.

34 G. Gaja, "The Protection of General Interests in the International Community", in *Recueil des cours*, vol. 364 (2013), p. 45.

It is suggested that, if the term 'general international law' is employed, to avoid confusion it should be made clear whenever possible to which source of international law reference is being made, individually or collectively.

3 The Relationship between Customary International Law and the General Principles of Law

To assess the relationship between customary international law and general principles of law, it is crucial to understand the meaning and scope of each of these sources of international law. While customary international law is generally well understood, the same cannot be said, today, about the third source of international law listed in Article 38, paragraph 1, of the ICJ Statute. What exactly are "the general principles of law recognized by civilized nations"? What precisely does Article 38, paragraph (1)(*c*) cover?

The negotiating history of Article 38, paragraph 1(*c*) of the Statute is well-known.[35] Within the Advisory Committee of Jurists, in particular, only this subparagraph of Article 38(1) gave rise to strongly diverging views, but agreement was eventually reached on certain points. The ILC Special Rapporteur's first report on *General principles of law* summarised the debate in the following terms:

> The drafting history of Article 38(1)(c) of the ICJ Statute and its predecessor shows the following. First, as some authors have noted, it appears that the drafters did not believe that, by including "general principles of law recognized by civilized nations" in the Statute, they were creating a new source of international law, but rather codifying an already existing one. Second, the inclusion of this third source seems to have been partly driven by a concern that the Court may decline to exercise its jurisdiction and find a *non liquet*, but it was also generally agreed that the Court should not have a power to create the law.
>
> Third, the drafting history provides some important clarifications as regards the origins of general principles of law. On the one hand, there was general agreement among members of the Committee that general

35 See M. Fitzmaurice, "The History of Article 38 of the Statute of the International Court of Justice", in: S. Besson, J. d'Aspremont (eds.), *The Oxford Handbook on the Sources of International Law* (2017), pp. 179–199; O. Spiermann, "'Who attempts too much does nothing well': the 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice", in *British Yearbook of International Law*, vol. 73 (2002), pp. 187–260.

> principles of law may derive from principles found *in foro domestico*. On the other hand, the Committee did not exclude the possibility that general principles of law may find their origins elsewhere as well. Finally, the *travaux* also show that general principles of law form part of international law, that there is no formal hierarchy between the different sources of international law listed in the provision, and that general principles of law are clearly distinguishable from *ex aequo et bono*.[36]

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. The Special Rapporteur's first report on general principles of law shows this rather clearly, with the caveat that the exact method for the identification of such principles will be studied in greater depth in a future report.[37] It appears to be clear, however, that the identification of a general principle of law requires a demonstration that such principle has been 'recognized by civilized nations'; recognition being, as the Special Rapporteur suggests, "the essential condition for the existence of a general principle of law as a source of international law".[38] This may require, in broad terms, a comparative study of domestic legal systems in order to identify a legal principle that is common to a large majority of them, and analysis of whether the transposition of that principle to the international legal system is appropriate. This method of identification obviously differs from the method for the identification of rules of customary international law; the latter requires evidence of two constituent elements (a general practice, and acceptance of that practice as law) while the former requires recognition by States of a general principle of law.[39]

Provided that general principles of law are considered to be those derived from domestic legal systems, and accepting that the method for their identification is different from the method for determining the existence of rules of customary international law, there appears to be little room for confusion between the two sources. No doubt, there may be some overlap between these methodologies, since even in the case of customary international law State practice may be reflected in what States do at the domestic legal order (for instance through laws and judicial decisions). A crucial point, however, is that

36 First report on general principles of law, paras. 108–109.

37 *Ibid.*, para. 163.

38 *Ibid.*, para. 166.

39 P. Palchetti, "The role of general principles in promoting the development of customary international rules", in Andenas *et al.*, p. 47.

such practice must be accompanied by *opinio juris*, that is, the belief that the State is acting in accordance with an international right or obligation. As regards general principles of law derived from domestic legal systems, such an *opinio juris* is not required; what one must look at is how States regulate legal relationships that occur at the domestic level.

Another key question, however, is whether Article 38, paragraph 1(*c*) of the Statute covers anything beyond general principles of law derived from domestic legal systems. Some international lawyers and scholars seem to be of the view that this is the case and refer to other possible "categories" of general principles of law that they see as falling within that provision of the Statute.[40] The ILC Special Rapporteur does not address all those proposed categories in his first report (and does not appear to intend to do so in the future), but does point in particular to one that he considers to be "supported by practice and widely accepted by scholars":[41] what he terms "general principles of law formed within the international legal system", or "general principles of international law".[42]

It is perhaps here where the confusion between general principles of law and customary international law comes to the fore.

A first, obvious (but not infrequently overlooked) point is that the general principles of law within the meaning of Article 38, paragraph 1(*c*), must be distinguished from 'general principles of international law' (if such a category has any meaning). As Waldock stated:

> (…) a word of warning must be said as to **the necessity to keep clear the distinction between the 'general principles of law recognised by civilised nations' discussed in the present lecture and 'general principles of international law'**. The latter phrase is sometimes used to denote what are considered to be particularly important and deep-rooted principles of international law; and it is, of course, true that international law does have a number of fundamental, constitutional principles, such as those surrounding the independence and equality of States (…)
>
> The use of the phrase 'general principles of international law' is perfectly natural and not open to objection, so long as it does not give the impression that in some way these principles have a different legal basis from other principles of international law and are on that account wholly sacrosanct and untouchable. This is certainly not the case. Indeed, the

40 See First report on general principles of law, para. 23.

41 *Ibid.*, para. 189.

42 *Ibid.*, p. 67.

> future progress of international law largely depends on further inroads being made on some of the principles surrounding State sovereignty. The most that it can mean when a principle is characterised as a general principle of international law is that it is well-settled and fundamental; a Court will take judicial notice of it without requiring argument; a treaty will not be held to depart from it unless the intention to do so is clear. No doubt, conclusions such as these may be drawn from the evidently fundamental character of a particular rule. But **the formal source of the principle is customary or treaty law, and its legal status is simply that of a customary rule or a general multilateral treaty**.[43]

But it is also true, as the opening words of Article 38 make clear,[44] that the general principles of law referred to in Article 38, paragraph 1(*c*) are (form part of) international law. In that sense, reference to them as general principles of international law may seem understandable.

Be that as it may, the term 'general principles of international law', like the term 'general international law' discussed above, is vague and ambiguous, and is best avoided. If used at all, it is best reserved for those principles of international law that are especially general in nature (whether derived from treaty, customary international law or even general principles of law). Such principles may include the freedom of the high seas, *pacta sunt servanda*, and the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, as set forth in the Friendly Relations Declaration.[45]

As a chamber of the International Court explained in *Gulf of Maine*,[46] 'principles' and 'rules' do not designate different things, though the use of 'principles' may be justified because of their more general and more fundamental character. This being so, the word 'general' in the term 'general principles of

43 H. Waldock, "General Course on Public International Law", in *Recueil des cours*, vol. 106 (1962), pp. 68–6.

44 Article 38.1 begins with the words: "The Court, whose function is to decide *in accordance with international law* such disputes as are submitted to it, shall apply" (emphasis added).

45 UN General Assembly resolution 2526.

46 *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 288–290, para. 79 ("the association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context [of defining the applicable international law] 'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character").

international law' does not appear to add anything.[47] It would be highly confusing to refer to a possible category of 'general principles of law' within the meaning of Article 38, paragraph 1(*c*) as 'general principles of international law', since that term, if it has a meaning, denotes a wider class of rules of international law.

Assuming, therefore, that we avoid a category termed 'general principles of international law', is it still nevertheless possible to consider one or more other categories of 'general principles of law', beyond those derived from domestic legal systems? As noted above, the first report on general principles of law takes a somewhat cautious approach, without adopting a definitive position for the time being. As the report states:

> Among the categories of general principles of law that may fall under Article 38(1)(c) of the ICJ Statute, two appear to stand out: (1) general principles of law derived from national legal systems; and (2) general principles of law formed within the international legal system.[48]

After some analysis, the report proposes a draft conclusion 3 (Categories of general principles of law) to this effect, which would read as follows:

> General principles of law comprise those:
> A. derived from national legal systems;
> B. formed within the international legal system.

The terminology employed by the Special Rapporteur may be questioned (especially 'formed' and 'within the international legal system'). But, importantly, the report addresses the crucial question of whether the scope of Article 38, paragraph (1)(*c*) of the Statute extends beyond principles *in foro domestico*. Such a claim, if accepted by the Commission, will inevitably affect the way in which the Commission approaches the topic generally, including the issue of the relationship between customary international law and general principles of law. The Special Rapporteur's first report does not provide definitive evidence that a further category of general principles of law is covered by Article 38, paragraph 1(*c*); whether or not such category exists will require further careful study and research.

47 By contrast, the word 'general' in 'the general principles of law recognized by civilized nations' does have meaning: it refers to the fact that at least originally a principle of law within the meaning of Article 38, paragraph 1(*c*) must be one that exists generally in domestic legal systems.

48 First report on general principles of law, para. 22.

One major problem with this "second category" of general principles of law is that it is very difficult to explain, based on existing practice, how such principles come into being and are to be identified. As the first report on general principles of law makes clear, one would still need to demonstrate that the principle has been 'recognized by civilized nations'. But how? Which materials are relevant? What is the relevance of treaties in this regard?[49] Is, for example, a declaration by States within the UN General Assembly sufficient? Some authors maintain that it is.[50] In any event, it is evident that such an approach might make it all too easy for a general principle of law to be invoked, which would affect the credibility of this source of international law. Such an approach would also risk undermining customary international law, since some may wish to argue that whenever there is insufficient State practice or *opinio juris*, there is nonetheless 'recognition' in the sense of Article 38, paragraph 1(*c*) of the Statute. General principles of law would thus become, as Klabbers has put it, some sort of 'custom lite'.[51]

4 The Place of General Principles of Law within the International Legal System

General principles of law appear as a separate source of international law in Article 38, paragraph 1, of the Statute of the International Court of Justice. As such, and as the drafting history of Article 38 confirms, they are to be regarded as an autonomous source capable of creating rights and obligations on their own, that is, distinct from treaties and customary international law.

At the same time, it is important to note that general principles of law are also commonly understood to play a supplementary role.[52] In practice, international lawyers usually have recourse to general principles of law in exceptional circumstances, when there is no treaty rule or rule of customary

49 During the Vienna Conference on the Law of Treaties, in 1968, the observation was made by Mr Yasseen, the delegate of Iraq (and endorsed by Waldock, as Expert Consultant to the Conference) that "A general principle [within the meaning of Article 38.1(*c*)] could undoubtedly be conceived as being established on the basis of a [treaty] rule, but that was hardly likely in practice. A general principle flowed from a legal order, from a whole set of rules. It could not be established on the basis of an article in a treaty without passing through the stage of custom": *Official Records of the United Nations Conference on the Law of Treaties, First Session* (*Summary records of the plenary meetings and of the meetings of the Committee of the Whole*), p. 200, para. 39 and p. 201, para. 43.

50 See First report on general principles of law, para. 173.

51 J. Klabbers, *International Law* (CUP, 2017), p. 38.

52 First report on general principles of law, para. 25. See also F. Berman, "Authority in International Law", in *KFG Working Paper Series*, No. 22 (2018).

international law addressing a specific situation, or when a general principle of law is needed to supplement or clarify existing rules found in treaties and customary international law. This seems to have been what the members of the Advisory Committee of Jurists had in mind in 1920.

Based on this, it is widely understood that the role of the general principles of law recognized by civilized nations is that of "filling gaps" or avoiding findings of *non liquet*. As the Special Rapporteur's first report explains, however, this raises several difficult questions.[53] It is indeed not obvious what a "gap" is in international law, or, more specifically, whether and how a "gap" should be distinguished from States' intention not to regulate a specific situation through international law. The nature and implications of what is often referred to as the *Lotus* principle[54] within the system of contemporary international law remain hotly contested. It is also not entirely clear that there exists a general prohibition of *non liquet* in international law. These are all questions that may need to be addressed by the International Law Commission if it decides to embark on a study of the functions of general principles of law.

In his 1962 Hague Academy lectures, Waldock described the position with characteristic clarity:

> Truth to tell, there is a certain overlap between custom and general principles of national law as sources of rules of international law. A general principle of law may be invoked in State practice or applied by arbitral tribunals with such consistency that it becomes possible to see in it a customary rule of international law as well as a principle derived from national systems. Indeed, there will always be a tendency for a general principle of national law recognised in international law to crystallise into customary law.[55]

Pellet and Müller suggest, in a similar manner, that general principles of law are "transitory" in nature, in the sense that their repeated use eventually transforms them into rules of customary international law.[56] And according to Palchetti:

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53 First report on general principles of law, para. 25.

54 *The Case of the S.S. "Lotus"*, Judgment of 7 September 1927, Series A – No. 10 (suggesting that sovereign States may act in any way they wish so long as they do not contravene an explicit international legal prohibition).

55 H. Waldock, "General Course on Public International Law", in *Recueil des cours*, vol. 106 (1962), p. 62.

56 A. Pellet and D. Müller, "Article 38", in A. Zimmermann, C.J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (OUP, 2019), p. 943.

> The second point of agreement concerns the legal dynamics between principles and customs. It is a frequent observation that in the development of general international law, principles tend to precede custom. Usually, the argument goes as follows: general principles are gap-fillers; by filling gaps, they contribute to the development of the law; in particular, the use of general principles to identify the rule of conduct applicable in a certain circumstance may set a process in motion that, in the long run, through the accumulation of practice, may lead to the emergence of a customary rule. In this sense, principles precede practice and may promote the formation of a new customary rule.[57]

This, of course, brings us once again to the question of the relationship between customary international law and the general principles of law.

5 Conclusions

Article 38, paragraph 1, of the Statute of the International Court of Justice is widely accepted as a statement of the sources of international law in general, not just the law to be applied by the International Court.[58] The paragraph lists three sources of international law: treaties, customary international law, and the general principles of law recognized by civilized nations. It also lists two 'subsidiary means for the determination of rules of law': judicial decisions and teachings. These various elements, the sources enumerated at (*a*), (*b*) and (*c*) of paragraph 1 and the 'subsidiary means' mentioned at paragraph (*d*), are distinct, even if at times there may be a certain interrelationship between them. Each to be applied carefully and rigorously, if the dangers of Jean d'Aspremont's dancefloor are to be avoided and the credibility of international law maintained.

The fact that general principles of law are supplementary does not mean that every time that a relevant treaty provision or rule of customary international law cannot be identified, there will necessarily be an applicable general principle of law. One must look for evidence of the existence of such a general

57 P. Palchetti, "The role of general principles in promoting the development of customary international rules", in Andenas *et al.*, pp. 47–48.

58 This is not the place to join the debate about whether Article 38, paragraph 1, is a complete statement of the sources of international law. On this, the present author agrees with Thirlway's pragmatic approach: H. Thirlway, *The Sources of International Law*, 2nd Edition (OUP, 2019), pp. 24–30.

principle of law. If that evidence cannot be ascertained, then it may well be that there is simply no rule that applies.

The test for identifying general principles of law has to be a stringent one, with the necessary degree of flexibility. In any event, one should not easily assume that a general principle of law exists. This is made clear in the first report on general principles of law when addressing the requirement of 'recognition':

> In the view of the Special Rapporteur, recognition is similarly the essential condition for the existence of a general principle of law as a source of international law. Therefore, to identify a general principle of law a careful examination of available evidence showing that it has been recognized is required.[59]

It is to be hoped that in its ongoing work on *General principles of law* the International Law Commission will not only explain the limits of the general principles of law recognized by civilized nations, but also clearly state the distinction between that source of international law and customary international law. They are indeed two distinct sources of international law, with distinct 'rules of recognition'. Where it is not possible to identify an applicable rule of customary international law, because of the absence of one or both of the two constituent elements, it cannot be the case that one can lightly turn to general principles of law to find the desired rule.

59 First report on general principles of law, para. 165.