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A FUNCTIONAL APPROACH TO "GENERAL PRINCIPLES OF INTERNATIONAL LAW"

M. Cherif Bassiouni *

INTRODUCTION

"General Principles of International Law" are among the sources of national and international law¹ which have long been recognized and applied in disputes between States.² They were embodied in the Statute of the Permanent Court of International Justice ["PCIJ"], article 38 (I)(3), and in the Statute of the International Court of Justice ["ICJ"], article 38 (1)(c), under the terms "general principles of law recognized by civilized nations."³ As discussed below, both the PCIJ and ICJ have relied on this source.

The terms used to describe this source of international law appear to posit two separate requirements: one, "General Principles," and two, recognition by "civilized nations." With regard to the latter, it would appear, at least in the post-United Nations Charter era, that a presumption exists that all Member-States of the United Nations are "civilized."⁴ The use of the term "General Principles" presents more difficulty.

The writings of scholars and opinions of international and national tribunals have invariably confirmed that "General Principles" are, first, expressions of national legal systems, and, second, expressions of other unperfected sources of international law enumerated in the statutes of the PCIJ and ICJ; namely, conventions, customs, writings of scholars, and decisions of the PCIJ and ICJ. It is obvious that if these legal sources are perfected, they are ipso facto creative of international legal obligations. When they are not perfected, however, such as when a custom is not evidenced by sufficient or consistent practice, or when States express opinio juris without any supportive practice, these man-

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1. See 1 L. OPPENHEIM, INTERNATIONAL LAW 29-30 (H. Lauterpacht 8th ed. 1955).

2. See *infra* Section V.

3. STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE art. 38(I)(3); STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1)(c).

4. This requirement has utility where a given nation, because of peculiar historical circumstances, no longer follows its previously "civilized" system of law, or that of the other "civilized nations."

ifestations, singularly or cumulatively with others, may possibly be considered to be expressions of a given principle.

In the post-United Nations Charter era, principles may also emerge from manifestations of international consensus expressed in General Assembly and Security Council Resolutions.⁵

The decisions of international and national tribunals are, along with the writings of the "most noted publicists," the most useful sources for ascertaining the existence and application of a given legal principle.⁶ The effect of "General Principles," *inter alia*, is that, "when a solution is approved by universal public opinion, the judge is justified in applying it."⁷

As the world's interdependence increases, there will doubtless be greater reliance on international law as a means to resolve a variety of issues which neither conventional nor customary international law is ready to meet. The fast pace of human rights will also bring to the forefront of international, regional, and national adjudication issues which heretofore may have only been viewed as theoretical. The four most pressing issues that will advance to the forefront in the 1990s are: human rights, the environment, economic development, and international and transnational criminality. Even the casual observer will note that in these four areas, conventional and customary international law have not developed the framework, norms, or rules necessary to regulate these issues, nor is it likely that these two sources of law will catch up with the needs of the time. Thus, it is quite likely that "General Principles" will become the most important and influential source of international law in this decade. Existing needs and conflicts will necessarily require some legal basis for their satisfaction and resolution. In this case, the definition, identification, and functional use of "General Principles" will require more rigorous attention than has thus far been given to these questions. For the same reasons, greater rigor will be demanded of the rather loose manner in which *jus cogens* has been defined, identified, and applied by various writers.

5. See Bleicher, *The Legal Significance of Re-citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444 (1969).

6. For decisions of tribunals see Section V and for the writings of scholars see Part I. For examples of "noted publicists," see, e.g. B. CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1953); H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* (1927); H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (rev. ed. 1958) [hereinafter *THE DEVELOPMENT OF INTERNATIONAL LAW*]; I. G. SCHWARZENBERGER, *INTERNATIONAL LAW* (3d ed. 1957); Maki, *General Principles of Human Rights Law Recognized by All Nations: Freedom from Arbitrary Arrest and Detention*, 10 CAL. W. INT'L L.J. 272 (1980).

7. M. BOS, *A METHODOLOGY OF INTERNATIONAL LAW* 70 (1984) (quoting PERMANENT COURT OF INTERNATIONAL JUSTICE ADVISORY COMMITTEE OF JURISTS, *Procès-Verbaux* of the Proceedings of the Committee, June 16 - July 24, 1920, at 318 (1920)).

As "General Principles" become decisively more important as a source of international law, more specific rules will be needed for the identification, appraisal, and application of a given principle to a given factual situation and a clearer understanding of the functional uses of such principles.

I. SCHOLARLY DEFINITIONS OF "GENERAL PRINCIPLES"

The scholarly debate does not center so much on dogmatic or doctrinal conceptions, but more pragmatically on what evidences the existence of "General Principles." This orientation reflects the pragmatic empiricism of the Common Law tradition more than the doctrinal or dogmatic approach of the Romanist-Civilist-Germanic legal tradition.⁸ Nevertheless, scholarly definitions of "General Principles" abound, even though they are frequently so general and self-evident that they add little to the plain meaning of the very words they intend to define. A review of these definitional approaches is, thus, more revealing than instructive.

Professor Hersch Lauterpacht defines "General Principles" as: [T]hose principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character . . . a comparison, generalization and synthesis of rules of law in its various branches—private and public, constitutional, administrative, and procedural—common to various systems of national law.⁹

To Bin Cheng, one of the most authoritative scholars on the subject, "General Principles" are "cardinal principles of the legal system, in the light of which international . . . law is to be interpreted and applied."¹⁰

Professor Schlesinger refers to "General Principles" as "a core of legal ideas which are common to all civilized legal systems."¹¹ An-

8. The exception, however, is in the area of *jus cogens*, discussed in Part VI, *infra*, which is at the other end of the spectrum on this question of theoretical formulation.

9. 1 INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 69, 74 (E. Lauterpacht ed. 1970) [hereinafter COLLECTED PAPERS]. However, in *Barcelona Traction* (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5), the International Court of Justice stated:

In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law.

Id. at 33.

10. Discussion of Bin Cheng, in *The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice*, 38 GROTIUS SOCIETY TRANSACTIONS FOR THE YEAR 1952 125, 132 (1953).

11. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734, 739 (1957).

other distinguished scholar, Verzijl, states that they are "principles which are so fundamental to every well-ordered society that no reasonable form of co-existence is possible without their being generally recognized as valid."¹² Lammers, citing Favre, defines "General Principles" in much the same way. He states that they are ". . . norms underlying national legal orders . . . [T]hey are the manifestation of the universal legal conscience certified by the law of civilized States."¹³ Professor Wolfgang Friedmann seems to be more relativistic when he states that they are intended to embody the "maximum measure of agreement on the principles relevant to the case at hand."¹⁴ Conversely, Gutteridge tends more toward absoluteness when he states that "an international judge before taking over a principle from private law must satisfy himself that it is recognized in substance by all the main systems of law and that in applying it, he will not be doing violence to the fundamental concepts of any of those systems."¹⁵ Jalet is more conceptual in her universalist formulation when she describes "General Principles" as "principles that constitute that unformulated reservoir of basic legal concepts universal in application, which exist independently of the institutions of any particular country and form the irreducible essence of all legal systems."¹⁶

Except for the literature on *jus cogens* discussed below, the consensus of scholarly definitions stresses the objective character of the term "principles" and recognizes the existence of a common core of objectively identifiable legal principles. The consensus among the most noted publicists is that "General Principles" are found in the underlying or posited principles or postulates of national legal systems or of international law. The definitions that leave room for further elaboration and more specificity, including some of those noted above as well as others not reported here, have the great merit of recognizing that the very generality of the concept is needed to preserve the evolutionary character of international law. The inevitable consequences of this approach are divergent interpretations of the sources, scope, content, functions, and evidence of "General Principles" with respect to their

12. I J.H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 59 (1968) (referring to VON DER HEYDTE, *Glossen zu einer Theorie der allgemeinen Rechtsgrundsätze*, in *DIE FRIEDENSWARTE* 289 (1933)).

13. Lammers, *General Principles of Law Recognized by Civilized Nations*, in *ESSAYS IN THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 53, 57 (F. Kalshoven, P.J. Kuyper & J.G. Lammers eds. 1980) (citing A. FAVRE, *PRINCIPES DU DROIT DES GENS* 273-90 (1974)).

14. Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 *AM. J. INT'L L.* 279, 284 (1963).

15. H.C. GUTTERIDGE, *COMPARATIVE LAW* 65 (2d ed. 1949).

16. See Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations*, 10 *U.C.L.A. L. REV.* 1041, 1044 (1963).

identification, appraisal, and application in international law, as is discussed hereinafter.

II. SOURCES OF "GENERAL PRINCIPLES"

The majority of scholars believe that article 38 (I)(3) of the Statute of the PCIJ and article 38 (1)(c) of the ICJ Statute envision or imply that "General Principles" can be identified from two different legal sources — national and international.¹⁷ Of course, principles deemed basic to international law can emerge in the international legal context without having a specific counterpart in national legal systems because of the differences that characterize these two legal systems. Indeed, it would be incongruous to think that the framers of articles 38 of the PCIJ and ICJ Statutes intended, for example, to exclude from "General Principles of International Law" those principles which emerge from the customary practice of States or from treaties. The writings of scholars not only range from the more positivist objective view of "General Principles" to that of the naturalist subjective one, but also from the broadest possible generalization to that of the narrowest specific norm. Thus, we can find principles with general content, such as justice, fairness, equality, and good faith. Others of a more specific nature are, for example, territorial criminal jurisdiction and treaty and contract interpretation based first upon the plain meaning of the words.

Some authors view "General Principles" as an international common law growing out of the composite concepts, norms, and rules of State legal systems.¹⁸ Other scholars conclude that the fundamental principles of justice which have been accepted by "civilized nations" are part and parcel of the corpus of international law. The appropriate answer depends on the nature or subject of the principle in question. However, whether a fundamental principle of justice rises to the level of a "General Principle of International Law" can best, though not exclusively, be determined by its existence in the national laws of "civilized nations."¹⁹ A common conception of both law and justice, though not necessarily of its contents, exists among all States. The international legal system is a reflection of this fact, as are the norms,

17. There are, however, some scholars who believe that "General Principles" consist only of those principles explicitly recognized in national legal systems. See Lammers, *supra* note 13, at 56-57, citing several authorities.

18. See, e.g., Gutteridge, *The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice*, 38 GROTIIUS TRANSACTIONS FOR THE YEAR 1952 125 (1953); C. RHYNE, *INTERNATIONAL LAW: THE SUBSTANCE, PROCESSES, PROCEDURES, AND INSTITUTIONS FOR WORLD PEACE WITH JUSTICE* 54-69 (1971).

19. I D.P. O'CONNELL, *INTERNATIONAL LAW* 10 (1965); see also Maki, *supra* note 6.

rules, and customs that regulate international relations.²⁰

Baron Descamps, President of the Advisory Committee which drafted the Statute of the PCIJ, expressed such a view when he observed that "the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations [exists in every legal system]."²¹ This view is representative of the notion that a common denominator exists between all legal systems. Professor Gordon Christenson refers to "General Principles" as "foundational ordering norms in a global, interdependent community."²² Thus, if a principle exists in most national laws, it is likewise inherently part of the structure of international law, which can best regulate the conduct of States by applying those principles which are recognized by these States. Professor Gutteridge acknowledges this linkage of principles between national and international law. As he states:

[i]f any real meaning is to be given to the words "general" or "universal" and the like, the correct test would seem to be that an international judge before taking over a principle from private law must satisfy himself that it is recognised in substance by all the main systems of law, and that in applying it he will not be doing violence to the fundamental concepts of any of those systems.²³

Comparative legal technique furnishes the judge seeking to identify and apply "General Principles" with an objective test by which to measure breadth and depth of the recognition and applicability of a given principle in national legal systems. One such comparative legal technique is the inductive process, which uses empirical data based on the comparative legal method of analysis. This process is intended to eliminate approximations of what a principle may be and avoids speculation over its reliability or applicability. A methodology for such an inductive process has not yet been agreed upon. This writer would suggest that this is simply due to the fact that comparative legal research has not defined a formula and that its techniques change with time. It is valid to leave the method and the techniques to the evolving science of comparative legal research.

The difference between those who argue that "General Principles" are found only in national legal systems and those who advance the proposition that they are also found in the international legal system is

20. Cheng, *supra* note 10, at 130.

21. M. BOS, *supra* note 7, at 70 (quoting Baron Descamps).

22. See Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 587 (1988).

23. H.C. GUTTERIDGE, *supra* note 15, at 65.

the dual unarticulated desire for specificity and certainty. Principles embedded in national law will usually have undergone the test of time and experience and are more easily ascertainable. Consequently, they are believed to be worthy of great deference. By contrast, principles in the international legal system may prove to be more tentative and thus less specific and more difficult to ascertain. Both of these positions are, however, generalizations, and thus not always correct. There is some interaction between principles found in national legal systems, which are applicable in international law, and principles arising from other sources of international law and practice, which may qualify as "General Principles." As Professor Brierly points out, "[i]nternational law . . . does not borrow from this source [national law] by importing private law institutions lock, stock, and barrel with a ready-made set of particular rules; it rather looks to them for an indication of a legal policy or principle."²⁴ Thus, Brierly affirms that international tribunals should find and apply rules of international law, which are generally recognized by the legal systems of civilized states and which involve principles of law and equity.

Such "General Principles" may fill the gaps in conventional and customary international law and provide a more objective basis than the value-laden natural law philosophy espoused by some Continental and American scholars.²⁵ Professor Lauterpacht argues that the ICJ Statute "emphasizes their [i.e., "General Principles"] pragmatic and inductive character inasmuch as they are derived from systems of law actually in operation as distinguished from the speculative and philosophical aspects of the classical law of nature."²⁶ This view, though more congruent to the Common Law's jurisprudential outlook, has not, however, prevailed in its entirety. Indeed, there is reason to believe that the framers of the PCIJ's article 38 (I)(3) and the ICJ's article 38 (1)(c) may have accepted the notion that natural law may be separate from the naturalists' understanding of that term, and that it may arise from concrete applications and common practices existing in and among "civilized nations."²⁷ Such a composite conception may be viewed as a compromise between positivism and naturalism, if that is at all possible, and as a blending of Common Law pragmatism and the more conceptual approach of the Romanist Civilist system. But then, is not all international law a process of blending legal concepts in a way that fits the exigencies of the international legal order? One

24. J.L. BRIERLY, *THE LAW OF NATIONS* 63 (6th ed. 1963).

25. See Lammers, *supra* note 13, at 60.

26. COLLECTED PAPERS, *supra* note 9, at 77.

27. See Lammers, *supra* note 13, at 61.

author seemed to take such an approach when he observed: "General Principles of International Law" are the "expression of the legal conviction of states . . . directly related to inter-State relations."²⁸

III. THE FUNCTIONS OF "GENERAL PRINCIPLES"

As objective or pragmatic as one might desire a rule-finding process to be, it is nevertheless always predicated on certain values, just as much as such a process seeks or aims to achieve a value-oriented goal.²⁹ Indeed, no principle is value-free, nor is it free of a value-oriented goal or outcome. Yet, to define "General Principles," one should first turn to their functions as they are perceived by theorists and applied in practice, whether by international judicial adjudication or as they emerge from customary practices in inter-state relations and international interaction.

Some scholars regard "General Principles" merely as a means of assistance in the interpretation and application of conventional and customary law, while others consider them a primary source embodying an equal or even a higher order of norms.³⁰ Precisely because that doctrinal debate continues and its outcome is unlikely to be settled, it may prove more useful to look at "General Principles" from the perspective of their functional uses and applications. The most avid proponent of this approach is probably Bin Cheng, who postulates three general functions that "General Principles" may serve. First, they are the source of various rules which are merely an expression of these principles. Second, they constitute the guidelines or framework for the judiciary with respect to the interpretative and applicative functions of positive rules of law. Third, they may be applied as norms whenever there are no formulated norms governing a given question.³¹

To this writer, there are at least four functions that "General Principles" fulfill as a source of international law that are also complementary to the other sources of international law. "General Principles" serve as:

- (1) A source of interpretation for conventional and customary international law;
- (2) A means for developing new norms of conventional and customary international law;

28. *Id.* at 67.

29. See LAW AND PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION (M. MacDougal & F. Feliciano eds. 1961).

30. See C. RHYNE, *supra* note 18.

31. B. CHENG, *supra* note 6, at 390.

- (3) A supplemental source to conventional and customary international law; and,
- (4) A modifier of conventional and customary international rules.

This classification is neither exhaustive nor necessarily certain enough to delineate with specificity the parameters of each one of the four identified functions. The reason simply lies in the very nature of "General Principles," which cannot be so extremely specific and precise as to afford certainty of the law and at the same time be broad and general enough to allow for the growth and evolution of international law.

A. *A source of interpretation for conventional and customary international law*

"General Principles" have been primarily used to clarify and interpret international law. For example, as Schlesinger notes, "General Principles" must be considered in determining the meaning of treaty terms.³² Lauterpacht points out that recourse by the ICJ to "General Principles" has constituted "no more than interpretation of existing conventional and customary law by reference to common sense and the canons of good faith."³³ This interpretive function is the most widely recognized and applied function of "General Principles" and the one that is evidently the most needed and useful, in contrast to the use of "General Principles" as a method to supplant or remedy deficiencies in conventional and customary international law.³⁴

"General Principles" can be utilized to interpret ambiguous or uncertain language in conventional or customary international law, but, foremost, they can be relied upon to determine the rights and duties of States in the contextual, conventional, or customary law. This is particularly the case, for example, with respect to such principles as "good faith" and "equitable performance."

The extent to which one can resort to "General Principles" for interpretative purposes has never been established. Consequently, "General Principles" can logically extend to fill gaps in conventional and customary international law and serve as a supplementary source thereto. From that basis, "General Principles" can be interpreted as a source of law that overreaches other positive sources of international law, and eventually supersedes it.

32. "[Treaty] terms acquire concrete meaning only by reading into them the general standards of decency which civilized nations recognize in their municipal legal systems . . ." Schlesinger, *supra* note 11, at 736.

33. See THE DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 6, at 166-67.

34. See S. CARLSTON, LAW AND ORGANIZATION IN WORLD SOCIETY 216 (1962).

This interpretative approach can be applied *in extenso*. "General Principles" thus become not only a source of new norms, but also a source of higher law, i.e., *jus cogens* [as discussed below].

B. *A means for developing new norms of conventional and customary international law*

The second function of "General Principles" is known as the growth function. Brierly states, "[i]t is an authoritative recognition of a dynamic element in international law and of the creative function of the courts which administer it."³⁵ Many other writers, including Verzijl,³⁶ Whiteman,³⁷ and Gross,³⁸ recognize this underlying role of "General Principles" as necessary to the development of international law. Thus, it is probably safe to assume that the framers of both the PCIJ and ICJ Statutes anticipated the prospective need for evolution and change in the development of international law—as evidenced by article 38 (I)(3) and article 38 (1)(c).

Professor O'Connell articulated the need for growth in international law:

If international law is seen as an organic growth reflecting more the life of the international community than the conscious operation of the government will, then the creative role of the judiciary is important, and its pronouncements upon the emanations from basic principles significant.³⁹

Indeed, it would be stifling not to inject into the sources of any legal system the capability of growth and development. Every national legal system includes such a process, either through the jurisprudence of its courts or through doctrine as developed by scholars. Thus, it can be said that legal principles evolve and that a legal mechanism or process for the recognition and application of this evolutive aspect of law must exist in international law.

Such an approach injects a dynamic element into international law. This prevents the static application of archaic norms and procedures to what is admittedly an evolving legal process designed to frame or regulate the dynamic exigencies and needs of a community of nations with changing interests and mutable goals and objectives. To state that international law has faced and is likely to face increasing new challenges, if for no other reason than to meet the fast-growing and

35. See J.L. BRIERLY, *supra* note 24, at 63.

36. See J.H.W. VERZIJL, *supra* note 12, at 57.

37. See 1 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 90 (1963).

38. See 1 L. GROSS, *ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* 145 (1984); M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW AND ORGANIZATION* 145 *passim* (1984).

39. See D.P. O'CONNELL, *supra* note 19, at 12.

changing technological advances, is a truism. Thus, the demands on international law must be accommodated through an expanded usage of "General Principles."⁴⁰ However, as will be discussed below, it has not necessarily been the generalized experience of the jurisprudence of the PCIJ and ICJ that "General Principles" have, in fact, appreciably influenced the growth of new rules.⁴¹ The development of new norms of conventional and customary law required the existence of "General Principles." As one author states: "From its legislative inception until the final determination, law is a 'continuing process.'"⁴²

C. *A supplemental source to conventional and customary international law*

"General Principles" may provide a norm or standard when a custom or treaty is inapplicable or nonexistent. Some say this is precisely one of the functions which the framers of article 38 had in mind when they included "General Principles" among the sources of international law.⁴³ Indeed, the members of the Advisory Committee drafting the PCIJ statute were eager to avoid the danger of having to declare a *non liquet* for lack of a positive rule. One committee member, Hangerup of Norway, pointed out that "[a] rule must be established to meet this eventuality to avoid the possibility of the court declaring itself incompetent through lack of an applicable rule."⁴⁴

Jalet recognizes that the rejection of the admissibility of *non liquet* implies the necessity of creative activity on the part of the judges.⁴⁵ Allowing the judge to search through the unbounded fields of legal experience precludes the possibility that, in a given case, an applicable rule of law may be absent.⁴⁶ As one commentator observed:

Another favorite legalistic argument . . . is the doctrine of *Nulla Poena Sine Lege* (No Penalty Without Law). 'But it doesn't follow from this that in the absence of domestic legislation an international court cannot justifiably punish acts well known by all concerned to be contrary to the laws of nations.'⁴⁷

40. See COLLECTED PAPERS, *supra* note 9, at 71.

41. See M. SORENSEN, *MANUAL OF PUBLIC INTERNATIONAL LAW* 145 (1968).

42. See M. BOS, *supra* note 7, at 74.

43. See Lammers, *supra* note 13, at 64.

44. See C. RHYNE, *supra* note 18, at 60.

45. See Jalet, *supra* note 16, at 1060.

46. See COLLECTED PAPERS, *supra* note 9, at 243.

47. See Comment, *International War Criminal Trials and the Common Law of War*, 20 ST. JOHN'S L. REV. 18, 23 (1945), (quoting Glueck, *By What Tribunal Shall War Offenders Be Tried*, 56 HARV. L. REV. 1059, 1081 (1943)); see also Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle*, 29 ARIZ. L. REV. 385 (1987).

If this approach were not taken, we would be left with the notion that "General Principles" are meant to prevent an international court from redressing a denial of justice in a case where neither a treaty nor a customary rule could be identified with specifically applicable provisions. Similarly, how could one redress an *abus de droit* without resort to "General Principles"? A pragmatic approach to this function of "General Principles" is that the judge, in the absence of an applicable rule of international law, in order to fill a legal gap, may rely on a principle derived from the national legal systems which represent the major systems of jurisprudence in the world, or from those systems whose legal traditions more particularly apply to the specific case at hand.⁴⁸

Opposition to this function can be advanced on the premise that filling gaps in conventional and customary international law by resorting to "General Principles" creates new law and thus transforms the judicial process into a legislative one. This concern explains the reluctance of international judges to make use of this legal reservoir as a source of principles that can be turned into operative norms. This is particularly a concern where the parties to whom such principles are applied may have never known of these principles or contemplated either their existence or their applicability to the parties' conduct. In this respect, "General Principles" must conform to what is known in criminal law doctrine as the "principles of legality," which prevent judicial lawmaking. The dilemma with respect to this function of "General Principles" is no different from that of national legal systems in which the judiciary is always seeking the proper balance between strict and progressive legal interpretation.⁴⁹

D. *A modifier of conventional and customary international law*

The final function of "General Principles" is described as the corrective function. "General Principles," in this context, would be used to set aside or modify provisions of conventional or customary law in favor of a greater good or higher cause. This is the most controversial of the four functions. This function embodies that of *jus cogens* [discussed below]. The argument that "General Principles" should, in certain circumstances, be utilized to modify conventional or customary law is at the heart of the *jus cogens* doctrine.

Professor Gordon Christenson explains the virtue of using "General Principles" to fulfill this function:

48. See COLLECTED PAPERS, *supra* note 9, at 71.

49. See Jalet, *supra* note 16, at 1060-62.

[S]ome principles of general international law are or ought to be so compelling that they might be recognized by the international community for the purpose of invalidating or forcing revision in ordinary norms of treaty or custom in conflict with them.⁵⁰

This statement brings to the surface another important concept: the notion that *jus cogens* is premised on the existence of a hierarchy of "General Principles." Scholars supporting this view argue that only those principles which are "peremptory" may modify or overturn customary or conventional law, holding a State to a higher obligation. For example, as Professor Christenson states, "[the concept of *jus cogens*] invalidates ordinary state-made rules of international law in conflict with powerful norms expressing fundamental exceptions vitally important to overriding community interests."⁵¹

Simply stated, in cases where protection of a fundamental interest is needed, peremptory norms shall prevail over positive law. Peremptory norms are those which are said to occupy the highest place in the hierarchy of principles, and which must be accepted as overriding by the international community. With this status, they have the power to force revision "in certain conventional and customary prescriptions to maintain the minimum coherence and content demanded of an international public order system."⁵²

Theoretically speaking, peremptory norms are said to be an indispensable component of the law of nations because they are the framework of the international legal order.⁵³ Yet it remains unclear whether such peremptory norms are in a category of their own or if they are merely a semantic variation of "General Principles." In other words, if a "General Principle" has attained a higher level of consensus or even unanimity, it becomes a *jus cogens* peremptory norm. No matter what the outcome of this distinction may be, there exists a separate category or level of norms whose standing is on a higher plane than other principles, norms and rules. The problems of ascertaining the existence of such a peremptory norm and identifying its contents for the purposes of applying it to a factual situation are, however, the same as with respect to other principles, irrespective of whether the source of the peremptory norm or principle arises under international or national law.

Lauterpacht questions this function:

[I]n practice the situation is not that of simple absence or simple pres-

50. See Christenson, *supra* note 22, at 586 (footnote omitted).

51. *Id.* at 589 (footnote omitted).

52. *Id.* at 645.

53. See *id.* at 592.

ence of rules of customary or conventional international law; that in practice these rules are often obscure or controversial; that, as the result, the question is not one of displacing them but of interpreting them against the background or in the light of general principles of law; and that the difference between disregarding a rule of international law in deference to a general principle of law and interpreting it (possibly out of existence) in the light of a general principle of law may be but a play on words.⁵⁴

Corbett, however, sees it as a form of rhetoric:

No one has ever improved much on Aristotle's instructions, in *The Art of Rhetoric*, to the advocate who, finding the precedents or code heavily against him, tries to persuade the court to "interpret" or ignore the enacted or judge-made law in favor of a higher justice.⁵⁵

Jurisprudential theories abound in the international and national legal literature as to whether higher principles of law can or should override positive law, and the debate surely will continue as long as there are legal systems evolving to meet societal needs and interests, especially when legislative processes are unable, or unwilling, to respond in a timely fashion to new societal needs and interests.

IV. "GENERAL PRINCIPLES": A SUBSIDIARY OR CO-EQUAL SOURCE OF INTERNATIONAL LAW?

To determine whether "General Principles" are a subsidiary source of international law presupposes a hierarchy of these sources and their ranking of principles. Such suppositions raise, inter alia, the following issues, which are particularly relevant to this functional approach of "General Principles." They are:

- 1) The place of "General Principles" in the hierarchy of sources of international law;
- 2) Hierarchical judicial reliance on "General Principles" as latent rules of law;
- 3) Functional differences between legal norms and principles; and
- 4) The binding nature of "General Principles."

A doctrinal approach to these questions would have probably required that the last of these four issues precede the others, but because the approach followed herein is empirical, the issue as to the binding nature of "General Principles" is deemed conclusory.

A. *The place of "General Principles" in the hierarchy of international law sources*

Some consider "General Principles" to be a secondary source of

54. THE DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 6, at 165-66.

55. Corbett, *The Search for General Principles of Law*, 47 VA. L. REV. 811 (1961).

international law, following conventional and customary international law, only because that is the order in which these sources are listed in articles 38 of the PCIJ and ICJ Statutes. This notion of a hierarchy based on the place of "General Principles" in the listing of international law sources should be rejected. As Cheng states:

The order in which these components of international law are enumerated is not, however, intended to represent a judicial hierarchy, but merely to indicate the order in which they would normally present themselves in the mind of an international judge There is nothing to prevent these three categories of rules or principles of international law from being simultaneously present in the mind of the judge. His task consists precisely in declaring which are the relevant rules applicable to the case, in accordance with international law as a whole.⁵⁶

When one examines this issue in the context of legislative intent, it becomes evident that the drafters of article 38 of the PCIJ Statute never intended to create a hierarchy of sources. In fact, the Advisory Committee notes reject the idea of a hierarchy. Descamps said that "[t]he various sources of law should be examined successively."⁵⁷ To maintain that the sources should be examined successively requires a judge not to draw upon a given source before first applying the preceding one. This would contravene the drafting committee's intentions, since, in the drafting process, the committee deleted the words "in the order following" (*en ordre successif*), thus eliminating any requirement in order of choice.⁵⁸

Judicial decisions and the teachings of publicists have emphasized a more primary role for "General Principles." These two subsidiary sources do not enunciate rules, but rather serve as a means of determining how rules may properly be considered. They thus have "law-determining agencies."⁵⁹

The view that "General Principles" have the same standing as conventional and customary laws also finds support in Western scholarly writings, but it has been rejected by the socialist legal system⁶⁰ and by some Third-World countries. One source of concern for socialist scholars is that the principles of Western capitalism are so different from those of Marxism-Leninism, which inspire their systems. Similarly, Muslim scholars would only accept those principles which are

56. B. CHENG, *supra* note 6, at 22-23 (footnote omitted).

57. C. RHYNE, *supra* note 18, at 61 (footnote omitted).

58. *Id.* at 62.

59. B. CHENG, *supra* note 6, at 23 (footnote omitted).

60. *See, e.g.*, K. GRZYBOWSKI, *SOVIET INTERNATIONAL LAW AND THE WORLD ECONOMIC ORDER* (1987); G.I. TUNKIN, *THEORY OF INTERNATIONAL LAW* (1974); *see also* Rubanov, *The Development of Generally Recognized Rules of International Law*, in *INTERNATIONAL LAW AND INTERNATIONAL SYSTEMS* (Butler ed. 1987).

compatible with Islam.⁶¹ Other Third-World scholars reject the *a priori* application of principles because they are a product of Western systems that have long dominated many Third-World nations through colonialism.⁶² These rejectionist positions are gradually changing, first because conflict between the East and the West — socialism and capitalism — is abating, and second because the very concept of "General Principles" is broad enough to encompass all world legal systems. Indeed, so long as the emphasis is not on those principles emanating solely from Western legal systems, the viability of "General Principles" as one of the co-equal primary sources of international law will prevail. In time, with increased reliance upon them in both national systems and in the international system, and also in the interaction between these systems, "General Principles" are bound to gain greater acceptance and applicability in various functional aspects.

B. *Hierarchical judicial reliance on "General Principles" as utilization of latent rules of law*

Past decisions of the international courts demonstrate that concerns by scholars over eventual arbitrary or subjective application of "General Principles" are unwarranted.⁶³

The composition of the ICJ serves as an initial safeguard against arbitrariness and subjectivity. As Professor Sorensen points out:

[T]he formula [that identifies general principles] suggests a notion of common consent comparable to that requisite for the creation of customary law, but, in this context, to be found in a coincidence of municipal rules of law. In practice, however, the International Court proceeds in a more pragmatic fashion, and is satisfied with a coincidence of opinion amongst its own judges. Such a method affords sufficient safeguards, the judges having been elected so as to ensure 'the representation of the main forms of civilisation and the principal legal systems of the world' (article 9 of the Statute)."⁶⁴

Interestingly enough, the words "recognized by civilized nations," which at one time were regarded with suspicion because they were thought to place Western legal principles above those of socialist and Third-World nations, are now a guarantee of the universality of sources of principles. Indeed, all Member-States of the United Na-

61. See M. KHADDURI, *THE ISLAMIC LAW OF NATIONS* (1966); Mahmassani, *The Principles of International Law in Light of Islamic Doctrine*, 117 *RECUEIL DES COURS* 205 (1966); S. RAMADAN, *ISLAMIC LAW, ITS SCOPE AND EQUITY* (1961); H. HAMIDULLAH, *MUSLIM CONDUCT OF STATE* (1961); Bassiouni, *Islam: Law Concept and World Habeas Corpus*, 1 *RUT.-CAM. L.J.* 163 (1969).

62. See C. RHYNE, *supra* note 18.

63. See Section V(B), *infra*, specifically footnotes 95-97 and accompanying text.

64. See M. SORENSEN, *supra* note 41, at 146.

tions are presumed to be "civilized nations."⁶⁵ Thus, the basis for ascertaining the existence of a given principle has so broadened that it ensures against the limited basis that was once the reason for criticism of that source.

The Advisory Committee for the ICJ's statute was in agreement that a judge did not legislate by using "General Principles," because although "applying them, [brought] *latent* rules of law to light, [it] did not *create* new rules."⁶⁶ As previously mentioned, comparative legal analysis provides a broad empirical basis for objectively ascertaining the "General Principles" found in national legal systems, and that ensures a broader measure of consensus as to what constitutes a given "General Principle." Thus, judicial application of "General Principles" is not a form of judicial legislation if a correct empirical approach is followed in the ascertainment of a given principle and if its judicial application is in accordance with similarly ascertained "principles" of judicial practice.

In the final analysis, it is not the theoretical function of "General Principles" that is outcome-determinative, but rather the manner in which "General Principles" are judicially identified and applied. Assessing judicial application can best be done experientially. As illustrated below, the jurisprudence of both the PCIJ and the ICJ has remained well within the boundaries of judicious identification and application of "General Principles" in cases brought before the courts. That jurisprudence, however, does not necessarily identify the methods of inquiry or the rationale in applying "General Principles," even though the outcome would withstand the tests of empirical methodology in comparative legal research.

C. *Functional differences between legal norms and principles*

Some scholars believe that the word "principle" implies the need for a philosophical content, and that "principles" thus should not be considered on the same level as positive rules of law, which are said to embody concrete and definite elements established by those making the rules. Under this theory, using "General Principles" as a basis of judicial decision-making and as a substitute for positive legal norms would inject certain subjective elements, such as morality and justice, into positive international law.⁶⁷

Certainly, the major difficulty encountered in accepting "General

65. See B. CHENG, *supra* note 6, at 25.

66. See *id.* at 19 (emphasis in the original).

67. See J.L. BRIERLY, *supra* note 24.

Principles" of morality and justice as a source of international law is the fact that morality and justice are variable concepts in the different legal systems of the world.⁶⁸ Lauterpacht finds that "paragraph 3 of article 38 must be regarded as declaratory because 'general principles of law' expresses that vast residuum of social necessity . . . that social and legal necessity without which law, international and other, is inconceivable."⁶⁹

It is misleading, however, to reject "General Principles" of morality and justice as purely subjective because every legal system, no matter how different, has some principle of morality and justice. Conceptual differences can be taken into account in the inductive process of ascertaining the meaning and content of morality and justice. These differences can then be objectivized in their application to specific factual situations. Thus, for example, the principle of access to justice can be objectively demonstrated and thereafter specific localization of the principle can also be objectively applied. Such a technique is used in conflict of laws. Consequently, the various approaches to concepts of justice and fairness do not place their existence in legal doubt, nor do they render their identification and application so impossible or uncertain as to nullify the functional validity of such a principle, even when it is used to supersede positive law.⁷⁰ Lastly, it should be remembered that "General Principles" "guide and give life to the [positive] law"⁷¹ and are thus indispensable to its viable application.⁷² With this understanding, semantic differences can be overcome and "General Principles" can remain a co-equal primary source, standing with conventions and customs.

D. *The binding nature of "General Principles"*

With regard to the binding nature of "General Principles," a basic question arises under a strict positivist approach, which would see "General Principles" as an undefined and uncertain source of law which would have the capacity of binding States to that to which they have not specifically consented. For example, Hudson believes that "General Principles" could be used in a way that would bind States beyond that to which they have agreed to be bound. He states, "[Arti-

68. See G. VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 24-25 (4th ed. 1981).

69. See *COLLECTED PAPERS*, *supra* note 9, at 242.

70. M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942* 611 (1943), *cited in* M. WHITEMAN, *supra* note 37, at 91.

71. Jalet, *supra* note 16, at 1047.

72. M. HUDSON, *supra* note 70, at 611, *cited in* M. WHITEMAN, *supra* note 37, at 91.

cle 38 of the PCIJ Statute] empowers the Court to go outside the field in which States have expressed their will to accept certain principles of law as governing their relations *inter se*, and to draw upon principles common to various systems of . . . law”⁷³

The possibility that “General Principles” will be used as a basis to modify conventional and customary law, and thus become a primary source of international law, challenges the view that presumptive freedom of any obligation exists where positive law is silent. Two ideas are at the heart of this question: first, the distinction between express and tacit agreement of States, and second, the fact that international law is a permissive rather than a restrictive body of law.

It can be argued that “General Principles” create obligations which have the implicit consent of States.⁷⁴ This argument can be construed from the fact that “General Principles” are an accepted source of international law and that they are derived from the States’ own principles, as ascertained through the inductive approach. Even if express consent were required, it would be satisfied by empirical evidence that principles existing in the national legal system are applicable in international law.⁷⁵

On a pragmatic level, invalidating the ability of “General Principles” to bind without the express consent of States can produce three possible consequences:

- (1) denial of justice;
- (2) a static body of international law; and
- (3) a judicial system unable to resolve contentious issues on which there is no positive law, or about which the positive law is insufficient, unclear, or ambiguous.

With regard to the permissive character of international law, one commentator stated that: “international law confines the jurisdiction of sovereignties and those rights which are not specifically ruled out accrue to the nations of the world as a residue of power.”⁷⁶ This presumption of freedom of obligation cannot, however, be limitless. If “General Principles” are considered to be rules from which States may in no case depart, then they are a valid exception to the doctrine of freedom of obligation beyond accepted normative positive law because they too derive from positive law.

The best evidence that international law has not only accepted but

73. M. HUDSON, *supra* note 70, at 610-12, cited in M. WHITEMAN, *supra* note 37, at 91.

74. *Id.*

75. See COLLECTED PAPERS, *supra* note 9, at 71.

76. See Comment, *supra* note 47, at 24 (citing S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 23 (Sept. 7)).

relied on "General Principles" is the Vienna Convention on the Law of Treaties, which contains a number of such "principles" in its rules of treaty interpretation.⁷⁷ Although that Convention codifies customary rules of international law, it nonetheless incorporates such principles as good faith and others as part of customary international law, even though their origin is found in "General Principles."

The choice of which functions "General Principles" should assume is clearly predicated on whether "General Principles" are deemed a subsidiary or primary source of international law. If they are a primary source, "General Principles" may have a binding legal effect superior to that of positive normative rules of international law. Those who feel the subsidiary role of "General Principles" is more appropriate justify their position by arguing that treaty provisions and customary international law are, by nature, a more direct emanation of the will of States and are also often more specifically related to the subject matter envisaged by treaty provisions and customary rules than are "General Principles." Thus, they contend that a priority of conventional and customary international law should be maintained over "General Principles." Under this view, "General Principles" are only appropriately resorted to for the purposes of explaining inadequacies in the positive normative law and can also occasionally fill gaps in these two primary sources.

In contrast, viewing "General Principles" as a co-equal primary source of law would mean that a court could apply them for the purpose of modifying and superseding conventional and customary rules. While critics have voiced some apprehension about applying "General Principles" in this manner, the jurisprudence of international courts and tribunals has not borne out these concerns. Thus, the question of whether "General Principles" are a binding source of international law is well established and its hierarchical ranking has simply been left to the functional need for their application in specific cases. The exception, as discussed below, remains in the area of *ius cogens*, where confusion seems to thrive.

V. "GENERAL PRINCIPLES" AS APPLIED BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND THE INTERNATIONAL COURT OF JUSTICE

The PCIJ and now the ICJ, under article 38 (I)(3) and article 38 (1)(c) respectively, have the authority to apply the "General Principles

77. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 239/27; see T.O. ELIAS, *THE MODERN LAW OF TREATIES* 71-87 (1974); F. MALEKIAN, *THE SYSTEM OF INTERNATIONAL LAW: FORMATION, TREATIES, RESPONSIBILITY* 110-16 (1987).

of Law Recognized by Civilized Nations.” These “General Principles” include “the norms common to the different legislation of the world, united by the identity of the legal reason therefor, or the *ratio legis*, transposed from the internal legal system to the international legal system.”⁷⁸ Despite this grant of authority, the two courts have, for the most part, been cautious in applying “General Principles” and, as a result, the exact scope of article 38(1)(c) has remained, at least from a doctrinal perspective, somewhat undefined and uncertain. This assertion becomes evident when one examines the decisions of the Permanent Court of International Justice and those of the International Court of Justice, even though both have relied upon and applied “General Principles” in cases before them.

A. *Identifying the Elements of “General Principles”*

Even though the PCIJ and ICJ have usually taken a cautious approach toward “General Principles,” decisions of the two courts provide some guidelines as to how to identify the elements of a “General Principle.” For a rule to be recognized as a “General Principle” under article 38(I)(3) and 38(1)(c), it now appears that the rule must exist in a number of States, but the rule does not have to meet the test of “universal acceptance,” and no quantitative or numerical test for States having such a “principle” has ever been established.

In the *Lotus* case, the PCIJ suggested that article 38(I)(3) requires a rule to be of universal acceptance when it stated that a “General Principle” “is applied between all nations belonging to the community of States.”⁷⁹ An examination of the facts of this case, however, reveals that the court’s finding can be explained by reason of the very principle which was found to be universal. That principle, territoriality of criminal jurisdiction, is indeed universal in its recognition and application. Had the facts of the case been different, the court likely would not have suggested a requirement of universality. This writer’s conclusion is that the court did not intend to posit a test of universality for “General Principles,” but merely ascertained it in this instance.

The ICJ rejected the test of “universal acceptance” in the *South*

78. See *North Sea Continental Shelf* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 101, 134 (Feb. 20) (Sep. Op. Ammoun); see also *Right of Passage over Indian Territory* (Port. v. India), 1960 I.C.J. 123, 149 (Apr. 21) (Fernandes, J., dissenting) (citing VERDROSS, *DERECHO INTERNACIONAL PÚBLICO* 205-06 (1955)). Judge Fernandes suggested that “The general principles of law are at the basis of custom and of conventional law. The latter are usually no more than the crystallization of those principles.” For the jurisprudence of the PCIJ, see M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* (1934); *THE DEVELOPMENT OF INTERNATIONAL LAW*, *supra* note 6.

79. See S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 16 (Sept. 7).

West Africa Cases (1966), where Judge Tanaka, in his dissenting opinion, explained that, "[t]he recognition of a principle by civilized nations . . . does not mean recognition by all civilized nations . . ." ⁸⁰ That test was also rejected by the ICJ in the *North Sea Continental Shelf* case, where Judge Lachs, in his dissenting opinion, explained that "[t]he evidence should be sought in the behavior of a great number of States, possibly the majority of States, in any case the great majority of the interested States."⁸¹ Furthermore, none of the other cases in which "General Principles" were relied upon required "universality of acceptance."

Decisions of the ICJ further suggest that the term "civilized nations" in article 38(1)(c) is not intended to be an added legal element to evidence "General Principles." If that were the case, such a term would be discriminatory and incompatible with the United Nations Charter,⁸² which recognizes the equality of all Member-States. Judge Ammoun of the ICJ suggested that article 9 of the ICJ Statute also requires the court to recognize "as a whole the representation of the main forms of civilization and of the principal legal systems of the world."⁸³ The import of that statement is consonant with comparative legal research technique, which would look to representative States among the world's major legal systems. Such an inquiry would not seek to identify norms, but rather the sameness of precepts upon which norms are predicated.

In evidencing a "General Principle," the PCIJ and ICJ have also looked for expressions of principles in the international context. "General Principles" have been identified by examining State conduct, policies, practices, and pronouncements at the international level, which may be different from domestic legal principles. Thus, States' foreign policies, bilateral and multilateral treaties, international pronouncements, collective declarations, writings of scholars, international case law, and international customs, even when unperfected, are valid areas of inquiry from which to determine the existence of "principles" within the international context.

In the *Asylum Case*, the ICJ was required to determine if a State had the competence to unilaterally qualify an offense for the purpose of granting asylum to a citizen of another State charged with organiz-

80. See *South West Africa Cases* (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 4, 299 (July 18) (Tanaka, J., dissenting).

81. See *North Sea Continental Shelf* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 101, 229 (Feb. 20) (Lachs, J., dissenting).

82. *North Sea Continental Shelf* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 101, 133 (Feb. 20) (Ammoun, J., separate opinion).

83. *Id.*

ing a military rebellion in Peru. The court used "General Principles" in order to determine the policies underlying diplomatic asylum and examined United States and Latin American international legal practice, including certain international instruments of a regional and bilateral nature.⁸⁴ Judge Castilla noted, "[a]t the Montevideo Conference of 1933, the [asylum] *principle* was accepted by the United States of America following the development of the policy of President Franklin Roosevelt; and pursuant to the confirmation of juridical equality of American States."⁸⁵

Similarly, in the *South West Africa Cases* (1962), Judge Jessup found that the "principle of separation" is evidenced in the practice of states as found in such publications as "Tobin, *Termination of Multi-partite Treaties* (1933); Stephens, *Revisions of the Treaty of Versailles* (1939); [and] Hoyt, *The Unanimity Rule in the Revision of Treaties: A Reexamination* (1959)."⁸⁶

The two courts have also looked at prior court decisions, and applied them by close analogy to cases at bar.⁸⁷ However, the jurisprudence of the PCIJ and the ICJ cannot be considered as having precedential authority unless it is in harmony with the international law or "General Principles" "common to all nations."⁸⁸

The judges have been known to look for evidence of a principle at the national level by examining all the branches of national law, whether public, constitutional, administrative, private, commercial, or procedural. For example, in the *International Status of South West Africa* case, Judge McNair, in his separate opinion, examined the American and English laws on trusts in order to define the policies and principles underlying the League of Nations Mandate System, which was a newly established institution in the international sphere.⁸⁹ As stated above, however, national legal principles do not automatically become part of the international 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 . . . [T]he 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 pri-

84. See *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 359, 369 (Mar. 3) (Castilla, J., dissenting).

85. *Id.* at 378-79 (emphasis added).

86. See *South West Africa Cases* (Ethiopia v. S. Afr., Liberia v. S. Afr.), 1962 I.C.J. 319, 408 (Dec. 21) (Jessup, J., separate opinion).

87. See S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 16 (Sept. 7).

88. *Id.*

89. See *International Status of South West Africa*, 1950 I.C.J. 146, 148-49 (July 11) (McNair, J., separate opinion).

vate law as an indication of policy and principles rather than as directly importing these rules and institutions.⁹⁰

The courts have sometimes looked to the origins of a given legal system, such as Roman Law, for the Romanist-Civilist systems. In some cases, resort to such origins leads to the examination of natural law.⁹¹ In the words of Judge Tanaka, "[I]nternational protection of human rights . . . is not the application by analogy of a principle or norm of private law to a matter of international character . . . only one and the same law exists and this is valid through all kinds of human societies in relationships of hierarchy and co-ordination."⁹²

It should be noted that in applying "General Principles," the courts have not always been clear on where the demarcation line should be drawn between customary law and "General Principles." In some instances, "General Principles" are barely distinguishable from customary international law.⁹³ In other cases, "General Principles" and customary law are clearly set apart. However, it does appear that some principles that are not encompassed in customary law may be implicated by the term "General Principles." As Lammers suggested, certain principles cannot be evidenced in customary law because they are fairly broad in scope and have not yet been applied in State practice, or have been applied only in a limited form.⁹⁴

B. *Reliance on "General Principles" by the International Courts*

In the view of Judge Hudson, "principles" in judicial practice have loomed "less large" than in the literature which they have inspired.⁹⁵ Judge Hudson's opinion holds true for the jurisprudence of both PCIJ and the ICJ. An examination of the two courts' decisions reveals that the judges have only sparingly employed "General Principles" in their opinions. In the words of Lauterpacht, "[e]xperience has shown that the main function of 'general principles of law' has been that of a

90. *Id.* at 148.

91. For a discussion of the relationship between natural law and positive law, see *North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.)*, 1969 I.C.J. 101, 193-95 (Feb. 20) (Tanaka, J., dissenting).

92. See *South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.)*, 1966 I.C.J. 4, 296 (July 18) (Tanaka, J., dissenting).

93. In the *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 369 (Mar. 3) (Castilla, J., dissenting), M. Castilla indicated, "These principles of international law cannot be other than those which have been stated in the various treaties on asylum Acceptance of the application of the principles of international law entails recognition of principles which may be derived from international custom."

94. See Lammers, *supra* note 13, at 72. Such principles include the principle of freedom and the principle of the high seas. For a discussion of these principles, see S.S. "Lotus" (*Fr. v. Turk.*), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

95. See M. HUDSON, *supra* note 70, at 610-12, cited in M. WHITEMAN, *supra* note 37, at 91.

safety-valve to be kept in reserve rather than a source of law of frequent application."⁹⁶ That may explain why on some occasions, when "General Principles" are resorted to, the judges do not refer to them *eo nomine* or by express reference to article 38. Thus, those who feared that "General Principles" would lead to the demise of positivism are proven wrong.⁹⁷

Positivists espouse the view that no gaps or ambiguities exist in international customs and conventions because the only international law that exists is that which has been stated in positive terms. That which has not been established in positive terms is outside the scope of the law. Consequently, there is no need for "General Principles." To take this position, however, is to deny reality and the needs of the international legal system. That which is not covered by positive international law exists and does give rise to conflicting and contentious situations in need of judicial or legally based resolutions. Thus, there is a need for "General Principles" to fill the gaps of positive law. That is why this source of law was included in article 38 of both the PCIJ and the ICJ Statutes.⁹⁸

The real unarticulated fear of positivists is that "General Principles" can be abused and can become a source of judge-made law. The record of the PCIJ and the ICJ belies that fear.

1. "General Principles" as relied upon by the Permanent Court of International Justice

As stated above, the Statute of the PCIJ authorized that court to apply "General Principles of Law Recognized by Civilized Nations" to cases before it.⁹⁹ In a number of cases, the court did resort to and apply, "General Principles."¹⁰⁰ As will be illustrated below, the extent of the PCIJ's reliance on "General Principles" and the degree of specificity with which the court utilized them varied from case to case.

One of the earliest references to "General Principles" by the PCIJ is found in the *Mavrommatis Palestine Concessions* case.¹⁰¹ In his dissenting opinion, Judge John Bassett Moore asserted that the require-

96. See THE DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 6, at 166.

97. See generally M. BOS, *supra* note 7, for a discussion of general principles of law and legal positivism.

98. See *supra* notes 43-44 and accompanying text.

99. STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE art. 38(I)(3).

100. See generally B. CHENG, *supra* note 6.

101. *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30).

ment that a court have jurisdiction before it can act is one of the principles common to all legal systems. As he stated:

There are certain elementary conceptions common to all systems of jurisprudence, and one of these is the principle that a court of justice is never justified in hearing and adjudging the merits of a cause of which it has not jurisdiction The requirement of jurisdiction, which is universally recognised in the national sphere, is not less fundamental and peremptory in the international.¹⁰²

In several early cases, the PCIJ based its rulings on "General Principles," but did not articulate the basis of its specific reliance on the principle in question. The PCIJ, in its Advisory Opinion on the *Exchange of Greek and Turkish Populations*, declared that there is a "self-evident" principle, "according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken."¹⁰³ Similarly, in the case of *Certain German Interests in Polish Upper Silesia*,¹⁰⁴ the court indicated that its laws of procedure contain not only the "Statute or Rules which govern the Court's activities" but also "general principles of law."¹⁰⁵ Again failing to specify the basis of its reliance on a given principle, the court, in its Advisory Opinion in *The Frontier Between Iraq and Turkey* case, simply acknowledged that the "well-known rule that no one can be judge in his own suit holds good."¹⁰⁶ Finally, in its advisory opinion in *Greco-Turkish Agreement of December 1, 1926*, the court simply asserted "the principle that, as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction"¹⁰⁷

In the *Chorzów Factory (Judgment)* case,¹⁰⁸ the court continued to rely on "General Principles," but unlike some of the previous cases, it noted the basis of the principle — *nullus commodum capere potest de injuria sua propria* — upon which it relied. The court held that:

It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party can-

102. *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 57-59 (Aug. 30) (Moore, J., dissenting).

103. *Exchange of Greek and Turkish Populations* (Greece v. Turk.), 1925 P.C.I.J. (ser. B) No. 10, at 20 (Feb. 21).

104. *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25).

105. *Id.* at 19.

106. Article 3, Paragraph 2 of the Treaty of Leusenne (Frontiers Between Turkey and Iraq), 1925 P.C.I.J. (ser. B) No. 12, at 32 (Nov. 21).

107. *Interpretation of the Greco-Turkish Agreement of Dec. 1, 1926*, 1928 P.C.I.J. (ser. B) No. 16, at 20 (Aug. 28).

108. *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26).

not avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.¹⁰⁹

The S.S. "*Lotus*" case¹¹⁰ is perhaps the most widely cited decision of the PCIJ. Among other reasons, the case is important because it instructs one on how to ascertain if a "General Principle" exists. The court stated that the issue in the case was "whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons."¹¹¹ The court went on to explain that:

[I]n the fulfilment of its task of itself ascertaining what the international law is [the court] has *included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law . . .* The result of these researches has not been to establish the existence of any such principle.¹¹²

In its *Chorzów Factory (Claim for Indemnity)* decision,¹¹³ which involved the German government seeking damages for harm sustained by two of its companies caused by the express acts of the Polish government, the PCIJ again articulated the basis of the "General Principle" upon which it relied. The court stated that:

The essential principle contained in the actual notion of an illegal act — *a principle which seems to be established by international practice and in particular by decisions of arbitral tribunals* — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability, have existed if that act had not been committed.¹¹⁴

The court thus affirmed that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."¹¹⁵

The *Lighthouses* case¹¹⁶ serves as another example of the court stating where the "General Principle" in question is found: "Contracting Parties are always assumed to be acting honestly and in good

109. *Id.* at 31 (emphasis added).

110. S.S. "*Lotus*" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

111. *Id.* at 21. More specifically, the issue was whether Turkey acted in conflict with principles of international law when it assumed jurisdiction over an officer of a French ship which had collided with a Turkish ship on the high seas.

112. *Id.* at 31 (emphasis added).

113. *Chorzów Factory* (Ger. v. Pol.) 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

114. *Id.* at 47 (emphasis added).

115. *Id.* at 29.

116. *Lighthouses* (Fr. v. Greece), 1934 P.C.I.J. (ser. A/B) No. 62 (Mar. 17).

faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law."¹¹⁷

In the *Serbian Loans* case¹¹⁸, the court referred to a couple of proposed "General Principles of Law." The court found that the requirements of one principle, however, were not met: "[w]hen the requirements of the principle of estoppel to establish a loss of eight are considered, it is quite clear that no sufficient basis has been shown for applying the principle in this case. There has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied . . ."¹¹⁹ The court went on to reject the "principle" of impossibility of performance, stating: "It cannot be maintained that war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders."¹²⁰ In the companion case to *Serbian Loans*, *Brazilian Loans*, the court did accept and apply the principle of interpretation *contra proferentum*, asserting it as a "familiar rule for the construction of instruments."¹²¹

In the Advisory Opinion concerning the *Greco-Bulgarian "Communities,"* an issue arose as to which of two conflicting provisions — a convention or a municipal law — should be preferred.¹²² The PCIJ held that "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."¹²³ In another of its Advisory Opinions, the case of *Treatment of Polish Nationals in Danzig*, the court again referred to "General Principles of Law," declaring:

It should . . . be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.¹²⁴

The PCIJ continued its use of "General Principles" — though

117. *Id.* at 47 (Séfériadès, J., separate opinion).

118. *Serbian Loans* (Fr. v. Serb.-Croat.-Slovans), 1929 P.C.I.J. (ser. A) Nos. 20, 21, at 5 (July 12).

119. *Id.* at 39.

120. *Id.* at 39-40.

121. *Brazilian Loans* (Fr. v. Braz.), 1929 P.C.I.J. (ser. A) Nos. 20, 21 (July 12).

122. *Greco-Bulgarian Communities*, 1930 P.C.I.J. (ser. B) No. 17, at 32 (July 31).

123. *Id.* at 32.

124. *Treatment of Polish Nationals in Danzig*, 1932 P.C.I.J. (ser. A/B) No. 44, at 24 (Feb. 4).

without specific reference to them — in the *Legal Status of Eastern Greenland* case, in which Norway was “estopped” from occupying certain territories in eastern Greenland.¹²⁵ The court held:

In accepting these bilateral and multilateral agreements [the Treaty of 1826 and the Danish-Norwegian Agreements] as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland, and, in consequence, from proceeding to occupy any part of it.¹²⁶

Finally, in the case of *Electricity Company of Sofia and Bulgaria (Interim Protection)*, the PCIJ considered as a “principle universally accepted by international tribunals” that “parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.”¹²⁷

2. “General Principles” as relied upon by the International Court of Justice.

The International Court of Justice continued the PCIJ’s tradition of utilizing “General Principles.” Like its predecessor, the ICJ frequently failed to articulate the method or process by which to identify the existence of a “General Principle” under article 38(1)(c). Moreover, it has given no real guidance regarding how to employ a “General Principle” in a legal dispute between States. The following is an examination of some ICJ cases which resorted to “General Principles of Law.”¹²⁸

The *Temple of Preah Vihear* case is indicative of the ICJ’s reluctance to use “General Principles” and its failure to articulate what the contents of “General Principles” are. The court failed to refer to the “principle” of “preclusion” *eo nomine* and instead merely stated: “*qui tacet consentire videtur si loqui debuisset ac potuisset*” (he who is silent appears to consent if he should, and could, have spoken).¹²⁹ Judge Percy Spender’s dissenting opinion, however, articulated the principle of “preclusion” by referring to it *eo nomine* and explaining how the

125. *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J.(ser. A/B) No. 53 (Apr. 5).

126. *Id.* at 68-69.

127. *Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.)*, 1939 P.C.I.J. (ser. A/B) No. 79, at 199 (Dec. 5).

128. See *supra* notes 78, 80-86, 89-93, and accompanying text.

129. *Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6, 23 (June 15). In the *Temple of Preah Vihear* case, the court merely referred to the principle of plea of error as an “established rule of law.”

principle operates to prevent a State from challenging a position previously taken expressly or impliedly which one party has relied upon. He then criticized the judgment for treating the principle as a "formless . . . maxim," instead of an instrument of substantive international law.¹³⁰

One principle that the ICJ has specifically applied is that of good faith.¹³¹ In the *Nuclear Test* case, which involved a dispute between Australia and France concerning the atmospheric testing of nuclear weapons in the Pacific Ocean, the court recognized that the principle of good faith governs the creation and performance of an international legal obligation: "Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."¹³²

In its advisory opinion in the *Western Sahara* case, the ICJ examined the question of self-determination and considered it a fundamental principle.¹³³ Obviously, the court relied upon the existence of such a principle as arising under international law.¹³⁴ In determining the basis for such a principle, the court examined the United Nations Charter, various General Assembly resolutions and its own prior decisions.¹³⁵

It should be noted that, in the *Right of Passage* case, the court applied a "regional custom," which had only been developed between India and Portugal and which reflected the will of the two States, and by-passed "General Principles." In that case, the court was asked to determine if Portugal had a right of passage between the enclaves of Dadra and Nagar-Avril, and the coastal district of Daman, and to determine if India's refusal to allow passage of a proposed delegation of Portuguese nationals in time of war violated Portugal's rights. The court concluded:

130. *Id.* at 143. That approach was consonant with the common law of equity, which the civilist and socialist systems do not recognize.

131. For a discussion of the good faith principle, see B. CHENG, *GENERAL PRINCIPLES OF LAW AS A SUBJECT FOR INTERNATIONAL CODIFICATION* 35; Schwarzenberger, *Trends in the Practice of the World Court*, 4 *CURRENT LEGAL PROBS.* (M. Keeton & G. Schwarzenberger eds. 1951).

132. *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 268 (Dec. 20).

133. *Western Sahara*, 1975 I.C.J. 1, 30-33 (Jan. 3). With specific regard to U.N. General Assembly practices, the court stated: "The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting inhabitants of a given territory." *Id.* at 33.

134. As the court notes, "It [the court] is necessarily called upon to take into account existing rules of international law which are directly connected with the terms of the request" *Id.* at 30.

135. *Id.* at 31-35.

Portugal also invokes . . . the general principles of law recognized by civilized nations, in support of its claim of a right of passage as formulated by it. Having arrived at the conclusion that the course of dealings between the British and Indian authorities on the one hand and the Portuguese on the other established a practice, well understood between the Parties . . . the Court does not consider it necessary to examine . . . the general principles of law recognized by civilized nations¹³⁶

“General Principles” have been used to provide a legal solution in cases where the conventional and customary law does not address a particular legal question; they have thus served a “gap filling function.” In the *South West Africa Cases* (1962), for example, Judge Jessup’s separate opinion employed “General Principles” to fill a gap in an existing treaty. In that case, the Republic of South Africa had argued that the court lacked compulsory jurisdiction because no dispute existed as envisioned under article 7 of the League of Nations Mandate (which triggered the court’s compulsory jurisdiction).¹³⁷ By recognizing the principle whereby a party may seek adjudication if that party has a “legal interest” at stake, Jessup rejected South Africa’s argument on the grounds that the parties have a “legal interest” in that the outcome of the case directly affected their financial and economic interests. He could also have argued that the meaning of “legal interests” extends beyond economic interests and applies also to humanitarian interests.¹³⁸

In the *International Status of South West Africa* case, Judge Arnold McNair’s separate opinion employed “General Principles” in order to interpret the then-existing League of Nations Mandate system. In so doing, he relied on Common Law principles applicable to the law of trusts and he found that an analogy to the mandate system was appropriate.¹³⁹

“General Principles” were also used for “interpretative purposes” when the conventional or customary international law was obscure or unclear, and on rare occasions, they have been used to influence the development of conventional and customary law. In the *Right of Passage* case, Judge Wellington Koo used “General Principles” to deter-

136. *Right of Passage Over Indian Territory* (Port. v. India), 1960 I.C.J. 43 (Apr. 12).

137. *South West Africa Cases* (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1962 I.C.J. 319 (Dec. 21). Article 7 reads:

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

Id. at 401.

138. *Id.* at 425.

139. *International Status of South West Africa*, 1950 I.C.J. 127, 148-49 (July 11).

mine if Portugal had a right of access to the Dadra enclaves. Here, two conflicting rights existed because Portugal had a sovereign claim over the enclaves while India claimed the right to passage. Based on the elementary principle of justice founded on logic and reason which is evidenced in international customary law, Judge Koo concluded that a principle dictates that States, as a necessity, have a right of passage in surrounding territories and suggested Portuguese sovereignty over the enclaves is subject to the control and regulation by India.¹⁴⁰ Likewise, in the *Asylum* case, Judge Castilla's dissenting opinion resorted to principles of international law in order to determine if the doctrine of asylum as evidenced in various conventions enabled Colombia to unilaterally qualify an offense for the purpose of granting asylum to a Peruvian citizen charged with organizing a military rebellion in Peru.¹⁴¹

There are a number of "General Principles" arising out of the international law of treaty interpretation and also out of the law of contracts in national legal systems, and the court frequently resorts to them when dealing with problems that arise when it is adjudicating claims arising out of treaties and international contracts. For example, in the *South West Africa Cases* (1962), Judge Jessup employed one of these principles — that of "separateness" of treaty provisions — which may be resorted to when a treaty provision has become inoperative.¹⁴² In that case, the question arose by reason of the fact that the League of Nations was no longer in existence.¹⁴³ By using the principle of "separateness," Jessup determined that the life of the League was not necessary to the operation of a treaty provision (article 7).¹⁴⁴

Lastly, some cases hold that "General Principles" can also be derived from the natural law. As stated above, in the *South West Africa Cases* (1966), Judge Tanaka suggested that article 38(1)(c) incorporates natural law into international law. Thus, in his dissenting opinion, he indicated that the natural law recognizes the principle of protection of human rights and that such rights are recognized and deserving of protection everywhere because they pertain to individuals.¹⁴⁵

140. Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 66-68 (Apr. 12).

141. See *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 359 (Mar. 3).

142. See *South West Africa Cases* (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1962 I.C.J. 319, 408 (Dec. 21).

143. *Id.*

144. *Id.* at 414.

145. See *South West Africa Cases* (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 4, 276 (July 18).

C. *The Function of "General Principles" As Revealed by The Jurisprudence of International Courts*

As has been shown, both the PCIJ and the ICJ have made use of "General Principles" in their decisions. However, when the two courts have drawn upon "General Principles," their articulations thereof have been vague. In practice, both the PCIJ and ICJ have been cautious and have often restricted "General Principles" to a limited role that some would see as a subsidiary function, though nothing in the drafting history of the two courts' Statutes warrants that interpretation. However, one cannot rely on the caution of the courts as evidence that they intended to place "General Principles" in a subsidiary position to other sources of international law.

As demonstrated above, scholars have attempted to articulate the meaning and functions of "General Principles" in international law, but there has been some disagreement in their positions. Some Soviet writers suggest that "General Principles" can never play a normative role in international law because of the divergence between Soviet law and the national law of other States.¹⁴⁶ That position may not be valid for long, given changing international and national perspectives. According to Lammers, however, this early Soviet position is untenable. The first sentence of article 38(1)(c) explicitly requires that "the sources of law . . . must be considered as sources of *international law*, i.e., legal norms regulating the relations between States as subjects of international law,"¹⁴⁷ and the USSR is bound by the Statute.

"General Principles" have been used by the two courts in order to fill gaps or *lacunae* in conventional and customary international law.¹⁴⁸ These gaps or *lacunae* arise where conventions and customs (whether general, particular, or regional) fail to address particular legal issues in dispute.

"General Principles" have also been employed as a means of interpreting conventions. They are useful for interpreting words not susceptible to an ordinary or common meaning interpretation, or as a means for ascertaining the intent of the parties (presumably objec-

146. See Lammers, *supra* note 13, at 54; see also G.I. TUNKIN, *supra* note 60.

147. Lammers, *supra* note 13, at 56.

148. Judge Fernandes advocated this position in the *Right of Passage* case: The priority given by Article 38 of the Statute of the Court to conventions and to custom in relation to the general principles of law in no way excludes a *simultaneous* application of those principles and of the first two sources of law. It frequently happens that a decision given on the basis of a particular or general convention or of a custom requires recourse to the general principles A court will have recourse to those principles to fill gaps in the conventional rules, or to *interpret* them. *Right of Passage Over Indian Territory* (Port. v. India), 1960 I.C.J. 123, 140 (Apr. 12) (Fernandes, J., dissenting) (emphasis in original).

tively). In that respect, "General Principles" may merge with the customary law of treaty interpretation.

"General Principles" are also embodied in customary law if for no other reason than the fact that customary practice may emerge from or be based on pre-existing "principles." *Mutatis mutandi*, customs, when consistently practiced, become "principles." Furthermore, unperfected custom and *opinio juris* not followed by practice may evidence a given "principle." Thus, there is an intertwining relationship between customs and treaties where the latter evidence or are a source of custom.

In general, the two courts have adhered to an apparently more positivistic approach by according conventional and customary law a presumptive priority in application, except where these conflict with a *jus cogens* "principle." But whenever "General Principles" are embodied in conventions and customs, it is difficult to conceive how they can be of a lesser standing. Nevertheless, these two sources are presumably given priority standing because they are a more objectively ascertainable reflection of the will of the States.

The two courts have, however, occasionally strayed from this caution and allowed "General Principles" to serve a "normative function" in the regulation of State conduct whenever "[the State's] infraction cannot be looked upon as a mere incident of the proceedings."¹⁴⁹ In that sense, the two courts have overridden the presumption of freedom of action of States.

VI. "GENERAL PRINCIPLES" AND *JUS COGENS*

The very words "*jus cogens*" mean "the compelling law" and, as such, a *jus cogens* principle holds the highest position in the hierarchy of all other norms, rules, and principles. It is because of that standing that *jus cogens* principles have come to be known as "peremptory norms." However, scholars are in disagreement as to what constitutes a peremptory norm and how a given rule, norm, or principle rises to that level. The basic reason for this is that the underlying philosophical premises of the scholarly protagonist view are different. These philosophical differences are also aggravated by methodological disagreements.

Scholars differ as to *jus cogens* substance, sources, content (the positive or norm-creating elements), evidentiary elements (such as universality or less), and value-oriented goals (for example, preservation of world order and safeguarding of fundamental human rights). Further-

149. Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6, 41-42 (June 15).

more, there is no scholarly consensus on the methods by which to ascertain the existence of such a norm, nor to assess its significance, determine its contents, identify its elements, determine its priority over other competing or conflicting rules, norms, or principles, assess the significance and outcomes of prior application, and gauge its future applicability in light of the value-oriented goals sought to be achieved.¹⁵⁰ Perhaps we cannot expect much progress in this and other multi-disciplinary approaches in an era where the legal generalist has become a downgraded rarity and the highly narrow specialist the upgraded generality. What is needed is a multi-disciplinary approach that can bring together specialists in public and private international law, jurisprudence, philosophy of law and legal methods, and empiricists of various backgrounds. Without such an approach, we will continue to be faced with confusion in this important area of law.

Some scholars see *jus cogens* and customary international law as the same,¹⁵¹ others properly distinguish between custom and peremptory norms,¹⁵² while still others question whether *jus cogens* is simply not another semantical way of describing certain "General Principles," which for a variety of reasons rise above other "General Principles."¹⁵³ No matter how it is described, this appears to be a problem of hierarchy of applicable law. Arguments regarding the justification for this hierarchy continue to feed the flow of legal literature on the subject, albeit too frequently shrouded in such metaphysics that the ordinary legal practitioner has difficulty following, let alone applying, these doctrines to actual cases and controversies. While doctrinal debate is the grist of scholarship, it is in this case all too frequently ambiguous, and, at times, confusing. To that extent, it is the bane of practitioners, whether judges or advocates. Worse yet, it renders no

150. See generally Christenson, *supra* note 22; Parker & Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411 (1989); Tunkin, *The Contemporary Theory of Soviet International Law*, 31 CURRENT LEGAL PROBS. 177 (1978); Rubanov, *supra* note 60; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512-15 (3d ed. 1979); G. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 5 (1971); 1 H. LAUTERPACHT, INTERNATIONAL LAW 113 (E. Lauterpacht ed. 1970); see also Onuf & Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 DENVER J. INT'L L. & POL'Y 187 (1974), which states:

Peremptory norms of international law (*jus cogens*) have been the subject of much recent interest. In light of their extensive and quite unprecedented treatment by the International Law Commission and the Vienna Conference on the Law of Treaties, it may be surprising that attention has not been greater. At the same time, inquiry into the relationship between peremptory norms and the sources and functions of international law have been virtually non-existent. This is indeed surprising, given the recent substantial interest in these areas as part of a larger "theoretical explosion" in international legal studies.

Id. at 187.

151. A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 132 (1971).

152. See Christenson, *supra* note 22.

153. Janis, *Jus Cogens: An Artful Not a Scientific Reality*, 3 CONN. J. INT'L L. 370 (1988).

service to what this writer deems an exigent necessity of law: namely, certainty.¹⁵⁴

To be sure, certainty exists in some instances. For example, the Vienna Convention on the Law of Treaties¹⁵⁵ uses the term "peremptory norm,"¹⁵⁶ but its context is more justified by the reasons advanced by Professor D'Amato as being the common identity of customary rules¹⁵⁷ than it is by an unidentified higher law.¹⁵⁸ The Law of Treaties indeed embodies customary rules which have emerged from international and national legal experience, as well as national legal principles of the law of contracts.¹⁵⁹ However, adding certain value-laden adjectives to what may be either a custom derived from a principle, or a custom embodying a principle, or a principle reflecting a custom, does not add much to the improved understanding of the concept. Furthermore, the frequent references to *jus cogens*, or its other appellation, "peremptory norm," or the undisciplined use of such terms as "compelling," "inherent," "inalienable," "essential," "fundamental" and "overriding," does not contribute greater clarity to the concept. Perhaps it is as Verdross stated: "no definition is necessary because the idea of *jus cogens* is clear in itself."¹⁶⁰ This facile way out of a difficult conundrum is reminiscent of Justice Stewart's statement regarding the definition of obscenity: ". . . perhaps I could never succeed in intelligibly doing so. But I know it when I see it."¹⁶¹

A naturalist would hardly have any difficulty identifying higher principles of positive law based on the values and norms of that philosophy.¹⁶² Conversely, positivists, both from the Common Law and Romanist-Civilist-Germanic traditions, question the sources of such a value-laden approach. Others simply reject subjective sources of law because they contravene the certainty of the law.¹⁶³ Thus, by implica-

154. See, e.g., F. LOPEZ DE OÑATE, *LA CERTEZZA DEL DIRITTO* (1968).

155. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27.

156. *Id.* art. 53; see, e.g., C. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* (1976).

157. See A. D'AMATO, *supra* note 151.

158. See Janis, *The Nature of Jus Cogens*, 3 *CONN. J. INT'L L.* 359, 360 (1988).

159. This position is affirmed by the *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)* § 102 (Tent. Draft No. 6, 1985).

160. 1 *Y.B. INT'L L. COMM.* 63, 66-67 (1963); Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 *AM. J. INT'L L.* 55, 57 (1966).

161. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

162. For a survey, see R. POUND AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) (discussing Beccaria, Grotius, and de Vattel). For a naturalist perspective, see J. MARITAIN, *LES DROITS DE L'HOMME ET LA LOI NATURELLE* (1942).

163. See H.L.A. HART, *THE CONCEPT OF LAW* (1961); Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958). *Contra* D'Amato, *The Moral Dilemma of Positivism*, 20 *VAL. U.L. REV.* 43 (1985) (wherein he states initially: "Not only do positivists

tion, some positivists seek a value-neutral law, though of course there can be no law which is value-neutral.¹⁶⁴ Most positivists acknowledge that law embodies values, and seek no more than to have positive law elaborated to avoid resorting to the subjectivity of a higher law whose determination and application is left to the changing values of those entrusted with its identification and application.

Admittedly, the generality of "General Principles" must be preserved as a means to advance international law. Thus, it appears inevitable that the flexibility needed for the growth of international law must be supplied by a greater degree of flexibility in identifying "General Principles," among them those that rise to the level of *jus cogens*.

The International Court of Justice, in its opinion in *Nicaragua v. United States: Military and Paramilitary Activities in and Against Nicaragua*,¹⁶⁵ relied on *jus cogens* as a fundamental principle of international law. However, that case also demonstrates the tenuous

insist upon separating law from morality, but they also appear to be unable to deal with moral questions raised by law once the two are separated. This inability stems, I believe, from their simultaneous attempt to assert and to prove that law and morality are separate; the argument reduces to a vicious circle."); D'Amato, *The Relation of the Individual to the State in the Era of Human Rights*, 24 TEX. INT'L L.J. 1 (1989); P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1968); J. BENTHAM, *A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (W. Harrison ed. 1948); Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940); see also Onuf & Birney, *supra* note 150, who state:

The concept of peremptory norms originated in the thinking of Western publicists. Their faith in Western culture and institutions shaken by the convulsions of recent decades, these individuals were prompted by a desire to strengthen the international legal order as a vehicle for justice and order. Yet the concept was embodied in the Vienna Convention at the insistence of Asian, African, and Latin American states for altogether different purposes—purposes which looked to the future rather than the past. Specifically, these states saw the concept of peremptory norms as both an immediate symbol and eventual instrumentality for restructuring the international legal order.

It would be instructive at this point to view peremptory norms as a subset of "general principles" of international law, which is something they would seem to be almost as a matter of definition. Non-Western states have demonstrated an active concern for establishing the importance and defining the content of these general principles. The latter task has proven exceedingly difficult and where successful has been undertaken at a level of considerable generality. Inasmuch as general principles are inefficient for identifying individual instances of deviant behavior, we might conclude that their function is not specifically constraint-oriented. The major alternative is that they perform a symbolic function. Concretely, this could mean that such principles stand as generally understood and accepted characterizations of the abiding concerns of the international community. Apparently, general principles perform a service comparable to myth in any culture. A substantial change in the thematic content of such symbols signals the emergence of new concerns in the community including particularly the concern of its newer, more restless members.

Id. at 195-96.

164. See Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition—A Proposed Juridical Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217 (1969); see also Frank & Senecal, *Porfiry's Proposition: Legitimacy and Terrorism*, 20 VAND. J. TRANSNAT'L. L. 195 (1987); Blakesley, *Terrorism, Law and Our Constitutional Order*, 60 COLUM. L. REV. 471, 479-87 (1989).

165. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14. See generally *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77 (1987).

relativity of the use of principles in the resolution of cases involving ideological or political issues.

This writer's understanding of *jus cogens* is that it is essentially a label placed on a principle whose perceived importance, based on certain values and interests, rises to a level which is acknowledged to be superior, and thus capable of overriding another norm, rule, or principle in a given instance. However, this definition leaves open the differences of values, philosophies, goals and strategies of those who claim the existence of the norm in a given situation and its applicability to a given case or controversy.

Admittedly, almost all the operative terms used in describing *jus cogens* are value-laden and susceptible of multiple definitions based on differing concepts. They are thus capable of producing several outcomes, some contradictory.¹⁶⁶ Assuming, however, the validity of the issues raised, one must ask the next logical question: in what way are these issues different from those concerning "General Principles?" Surely, it is obvious that these are fundamental legal issues which every legal system has been forced to confront, and for which no definitive answer can, by the nature of the question, ever be found. One must also wonder whether the debate is not really more of a methodological rather than a substantive one. Positivists would probably find a way to reason, for example, that positive law must be obeyed, but that the absence of substantive or formal legitimacy for positive law invalidates its legitimacy. In this case, most positivists would deem such a law null and void; and argue that it need not be followed. The best example of such a situation arises with respect to the non-applicability of the "defence of obedience to superior orders" to a patently illegal order.¹⁶⁷

The problem of technical positivism becomes more acute when one seeks to fill a void in positive law in the face of an obvious and palpable injustice, such as with respect to "Crimes Against Humanity," as articulated in the London Charter of August 8, 1945.¹⁶⁸ After all, the specific crimes, as enunciated in article 6(c) of the Charter, did not exist in positive international criminal law until the Charter's promul-

166. See, e.g., McDougal, Laswell & Reisman, *The World Constitutive Process of Authoritative Decision Making*, in 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 73 (R. Falk & C. Black eds. 1969).

167. See Y. DINSTEIN, *THE DEFENCE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW* (1965); L. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* (1976).

168. The London Charter (accompanying the London Agreement), Aug. 8, 1945, 82 U.N.T.S. 279.

gation thereof.¹⁶⁹ In that respect, a conflict exists between the theories a *jus cogens* advocate would advance about the higher legal value to be observed by prosecuting such offenders, and another principle whose values and goals are, at least in principle, of that same dignity, namely the "principle of legality"—*nullum crimen sine lege*.¹⁷⁰ This articulation of a value-neutral theory is indeed difficult, if not to say impossible, when conflicting values are at stake. For example, can the principle of punishing known offenders, for which there is no specific law, override the principle of *nullum crimen sine lege*?

Genocide¹⁷¹ is now deemed a *jus cogens* violation because its prohibition imposes on states certain duties and obligations *erga omnes*. Yet the very definition of genocide in article II excludes mass killings when unaccompanied "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . ."¹⁷² On the basis of the *erga omnes* rationale for genocide, "Crimes Against Humanity" should also rise to that standard. Such a theory has not yet been fully accepted, even though the notion certainly merits that equal status.¹⁷³ The moral outrage of the world community in the years 1945-46 has subsided and has regrettably even dwindled over the ensuing years.¹⁷⁴

The *erga omnes* and *jus cogens* doctrines are often presented as two sides of the same coin. The term *erga omnes* means "flowing to all," and thus obligations deriving from *jus cogens* are presumably *erga omnes*.¹⁷⁵ Indeed, legal logic supports the proposition that what is "compelling law" must necessarily engender obligation "flowing to all."

169. Bassiouni, *International Law and the Holocaust*, 9 CALIF. W. INT'L L.J. 201, 208-14 (1979).

170. See Allen, *supra* note 47; Ancel, *La Règle Nulla Poena Sine Lege dans les Legislations Modernes*, ANNALES DE L'INSTITUT DE DROIT COMPARÉ 245 (1936); G. VASSALLI, *Nullum Crimen Sine Lege* (1939); Nuvolone, *Le Principe de la Legalité et les Principes de la Défense Sociale*, 1956 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 231.

171. G.A. Res. 96, 1 U.N. GAOR (55th plen. mtg.) at 188, U.N. Doc. A/64 (1946); Convention on Prevention of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; see Advisory Opinion of the International Court of Justice on Reservations to the Genocide Convention, 1951 I.C.J. 1, 15 (May 28).

172. Convention on Prevention of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280; see Bassiouni, *Introduction to the Genocide Convention*, in 1 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW 281 (1986); Berés, *Genocide and Genocide-like Crimes*, in *id.* at 271.

173. Bassiouni, *Crimes Against Humanity*, in 3 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 51, 65-70 (1987). This position was prevalent in the Nuremberg and Tokyo Charters, Indictments, and Judgments. It was also prevalent in the writings of scholars who dealt with these prosecutions, see, e.g., Schwelb, *Crimes Against Humanity*, 21 BRIT. Y.B. INT'L L. 1 (1944), and others, see, e.g., Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937).

174. Bassiouni, *Nuremberg: Forty Years After*, PROC. AM. SOC'Y INT'L L. 59 (1986).

175. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 829-30 (1988).

The problem with such a simplistic formulation is that it is circular. What "flows to all" is "compelling," and if what is "compelling" "flows to all" it is difficult to distinguish between what constitutes a "General Principle" creating an obligation so self-evident as to be "compelling" and so "compelling" as to be "flowing to all," that is, binding on all States.¹⁷⁶

In the *Barcelona Traction* case, the ICJ stated:

... [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.¹⁷⁷

Thus, the first criterion of an obligation rising to the level of *erga omnes* is, in the words of the ICJ, "the obligation(s) of a State towards the international Community as a whole."¹⁷⁸ The ICJ goes on in paragraph 34 to give examples,¹⁷⁹ but it does not define or list precisely what it means by "obligations of a state towards the international community as a whole."¹⁸⁰

Both the PCIJ and ICJ, particularly through the separate and dissenting opinions of their judges, have tried to bring these norms to the level of a higher law.¹⁸¹ Despite this recognition, the relationship be-

176. In an important study bearing on the *erga omnes* and *jus cogens* relationship, Professor Randall notes that, "traditionally international law functionally has distinguished the *erga omnes* and *jus cogens* doctrines . . ." Randall, *supra* note 175, at 830. However, he, too, seems to accept the *sine qua non* relatively.

"*Jus cogens* means compelling law." The *jus cogens* concept refers to "peremptory principles or norms from which no derogatory is permitted, and which may therefore operate to invalidate a treaty or agreement between States to the extent of the inconsistency with any such principles or norms."

While authoritative lists of obligations *erga omnes* and *jus cogens* norms do not exist, any such list likely would include the norms against hijacking, hostage taking, crimes against internationally protected persons, apartheid, and torture. Traditionally, international law functionally has distinguished the *erga omnes* and *jus cogens* doctrines, which addresses violations of individual responsibility. These doctrines nevertheless, may subsidiarily support the right of all states to exercise universal jurisdiction over the individual offenders. One might argue that "when committed by individuals," violations of *erga omnes* obligations and peremptory norms "may be punishable by any State under the universality principle."

177. *Barcelona Traction* (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

178. *Id.*

179. *Id.* The court further stated in the ensuing paragraph:

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23*); others are conferred by international instruments of a universal or quasi-universal character.

180. *Id.* at 32.

181. Judge Fernandes explained,

tween *jus cogens* and "General Principles" is not clearly articulated. The jurisprudence of both courts also has failed to explicitly articulate how a given norm becomes *jus cogens* and when and why it becomes *erga omnes*. Arguably, a *jus cogens* norm rises to that level when the principle it embodies has been universally accepted by the States. Thus, the principle of territorial sovereignty has risen to the level of a "peremptory norm" because all States have consented to the right of States to exercise exclusive territorial jurisdiction.¹⁸²

Where to draw the line between *jus cogens* peremptory norms deriving from a higher order, which Professor Schwelb refers to as the equivalent of an international *ordre public*,¹⁸³ and *jus dispositivum*¹⁸⁴ is fertile ground for legal scholarship,¹⁸⁵ as is the relationship between *jus cogens* and *erga omnes*. The more significant issues regarding *jus cogens* are:

- (1) How do "principles" develop and rise to the level whereby they override pre-existing positive international law?
- (2) By what legal technique can a "principle" override that which certain basic values would deem to be an unjust positive law?
- (3) In what way can a "principle" fill the gap of positive international law to avoid injustice, or denial of justice, or to do justice?
- (4) When is a *jus cogens* "principle" superseded by another one, or when does it fall in *désuétude*?

None of these issues, among others, has yet been sufficiently addressed by scholarly research. We are left with our imagination to analogize *jus cogens* to a shooting star in the firmament of higher values, without much knowledge of how it got there or why. We do not know how to distinguish between the various trajectories taken by these shooting stars, nor do we know how to compare their relative brilliance. Finally, we have no understanding of how or why such

It is true that in principle special rules will prevail over general rules, but to take it as established that in the present case the particular rule is different from the general rule is to beg the question. Moreover, there are exceptions to this principle. Several rules *cogestes* prevail over any special rules. And the general principles to which I shall refer later constitute true rule of *jus cogens* over which no special practice can prevail.

Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 123, 135 (Apr. 12) (Fernandes, J., dissenting); see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 66 (Ammoun, J., dissenting).

182. See S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

183. Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 949 (1967).

184. Verdross, *supra* note 160.

185. See Janis, *supra* note 153; Turpel & Sans, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 369 (1988); see also Christenson, *supra* note 22; D'Amato, *The Moral Dilemma of Positivism*, *supra* note 163.

stars dip, lose their brilliance, or disappear from our firmament of higher values. The legal literature abounds with competing descriptions whose many qualities, however, elude those of reliable methodology and intellectual legal rigor which can provide us with predictable and consistent outcomes.

VII. AN APPRAISAL OF THE PCIJ AND ICJ OPINIONS WITH RESPECT TO DEFINING "GENERAL PRINCIPLES" AND ESTABLISHING A METHODOLOGY FOR THEIR IDENTIFICATION

As we have seen, the opinions of the ICJ, like its predecessor, the PCIJ, make use of "General Principles." These cases have not, however, explained the courts' technique or methodology for identifying "General Principles." In those cases where the courts relied on international law manifestations and expressions of States' policies and practices, as evidenced by multilateral treaties, custom, and United Nations resolutions, they did not indicate how they were doing so. In short, the courts have not identified the process or the methodology for identification and appraisal of the evidentiary sources of "General Principles."

In the few cases where the courts relied upon the inductive method of ascertaining "General Principles" as deriving from the national legal systems, there was also no indication of the methodology employed. This may be due to the fact that the courts implicitly relied upon techniques of comparative legal research, and were unwilling to take a position on a question of methods, which may be best left to scholarly and doctrinal works.

To identify "General Principles" of international law which arise from the various national legal systems, the inductive method of research is employed. By that method, one identifies the existence of a legal principle in the world's major legal systems. More specifically, however, how one searches for an identity or commonality that exists with respect to a given principle — under the domestic laws of different countries which represent the world's major legal systems — needs more particularity. Obviously, such an inductive method is both the most logical and simplest approach to comparative research methodology, but it will have to be particularized with respect to each subject, or specific inquiry, for which the research is to be undertaken. Thus, if the principle which is being researched is one of great generality, it will more likely be easier to identify in the various major legal systems, and in specific domestic legal systems representing the world's major legal systems. If, however, the principle inquired of is narrow or spe-

cific, then the focus of the research will have to be on the more relevant or particularized sources of law within the various domestic legal systems representing the major legal systems of the world.¹⁸⁶

Professor Akehurst confirms in his research on customs that this methodology has been recognized and relied upon by international and national courts, and by policy-makers in different countries.¹⁸⁷ Among the countries he specifically cites are Great Britain and the United States.¹⁸⁸ As early as 1877, the British Foreign Office recognized the validity of this approach, particularly with respect to criminal matters, and so instructed the British Minister in Rio de Janeiro as follows: " 'Her Majesty's Government . . . would not be justified' in protesting against a law extending the jurisdiction of Brazilian criminal courts because the law was similar to the laws of several other countries."¹⁸⁹

The United States of America has also followed this position since the late 1800s.¹⁹⁰ The *Cutting* case involving the United States and Mexico is a landmark ruling on this point.¹⁹¹ Both the United States and Mexico relied on the laws of different countries to establish the existence of a principle or custom or both, but of particular relevance in this case was the emphasis on the representativeness of the countries referred to and the sufficiency of their number.¹⁹² The United States has also relied on this approach in its national courts¹⁹³ as has, for example, Italy.¹⁹⁴

The ICJ, like its predecessor, the PCIJ, also examined national legal systems to derive from them the existence of a custom or "General Principle." Both courts used the same methodology of empirical research, though obviously the relevance of the laws discovered and their widespread similarity made for their inclusion in these two sources of international law. The PCIJ used the methodology of em-

186. It should be noted that this empirical methodology is also relied upon in the identification of customary rules of international law. See, e.g., A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971); Akehurst, *Custom As a Source of International Law*, 47 *BRIT. Y.B. INT'L L.* 1, 16-18 (1977).

187. See Akehurst, *supra* note 186, at 8-11.

188. *Id.* at 8-9.

189. *Id.*

190. See 1887 *FOREIGN RELATIONS OF THE UNITED STATES* 859-67 (1888).

191. *Id.* at 751.

192. *Id.* at 754-55, 781-817.

193. See *The Scotia*, 81 U.S. (14 Wall.) 170, 186-87 (1871); *The Paquete Habana*, 175 U.S. 677, 688-700 (1900).

194. *Lagos v. Baggianini*, 22 *INT'L L. REP.* 533 (1953). To decide a question of diplomatic immunity, the court looked to the custom and practice of states to determine " 'the generally accepted rule.' " *Id.* at 534.

pirical research in the *Lotus* case.¹⁹⁵ In the *Nottebohm* case¹⁹⁶ the ICJ comparatively examined national legal provisions on nationality law, and in the *North Sea Continental Shelf's*¹⁹⁷ case, the court looked for relevant national laws on exploration of continental shelves.¹⁹⁸

Akehurst concludes: "Obviously a law which is frequently applied carries greater weight than a law which is never or seldom applied; any kind of State practice carries greater weight if it involves an element of repetition."¹⁹⁹ Thus, the more a given national or international principle is reiterated in national and international sources, the more it deserves deference.²⁰⁰

It should be noted that the empirical methodology used for demonstrating the existence of "General Principles" is substantially similar to the one used to demonstrate the existence of a customary rule of international law.²⁰¹ While this same method can serve as a valid technique for identifying a custom and a principle, the appraisal of the research will be different with respect to establishing the existence of a custom as compared to the identification of a given principle.²⁰² The connection between customs and principles does not, however, end there, as customs draw on principles and principles may derive from customs. Interestingly, however, neither PCIJ nor the ICJ identified these methods nor indicated any views on their application, or for that matter even commented on the difference between research methods relevant to principles and customs.

Some initial, important methodological questions that may arise concern the selection of legal systems, the relevant sources within each system and within each State which is part of a system, and whether or how to quantify the data deriving from the comparative research.

195. See S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 21 (Sept. 7).

196. *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4, 22 (Apr. 16).

197. See *North Sea Continental Shelf* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 101 (Feb. 20).

198. *Id.* at 129, 175, 228-29, containing the views of Ammoun, Tanaka, and Lachs.

199. Akehurst, *supra* note 186, at 9.

200. Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444 (1969).

201. See *supra* notes 186-99.

202. The difference will depend on the nature of the custom and the principle, which in some cases could be the same. This is indeed an overlap between sources of international law. Professor D'Amato, *supra* note 186, looks at treaties as evidence of custom and practice. Akehurst, *supra* note 186, and both the PCIJ and ICJ, *supra* notes 196 and 197, use national laws as evidence of practice. Many of the PCIJ and ICJ cases, such as those cited in Part V, use national laws as evidence of "General Principles."

A. *The Major Legal Systems of the World*

Scholars in comparative legal studies recognize the major legal systems of the world as:²⁰³

- (1) The Romanist-Civilist-Germanic Family of Legal Systems
- (2) The Common Law Family of Legal Systems
- (3) The Marxist-Socialist Family of Legal Systems
- (4) The Islamic Family of Legal Systems
- (5) The Asian Family of Legal Systems

There is no significant dispute as to this step in the methodology, but there is no recognized yardstick to determine the representative quality of choice of states within a given system.

For example, the Common Law family of legal systems includes, *inter alia*: the United States, the United Kingdom, Canada, Australia, Ghana, India, Nigeria, and Malaysia. However, various aspects of United States law are entirely different from the laws of the other countries in terms of purpose, scope, and substance. Thus, it would not be appropriate to consider the United States as the only representative country for the Common Law.

B. *Identifying Legal Principles*

The opinions of the courts do not draw a distinction between broad and narrow legal principles. For example, a broad principle may be whether a right to life exists in the world's major legal systems. A narrow principle may be whether the taking of the life of one person by another without legal justification constitutes a crime or, even more specifically, what crime it constitutes. The type of inquiry will determine the appropriateness of the choice of legal sources. Where broad principles are involved, these sources can be as general as religious laws or national constitutions.

In the instance of comparative research and analysis, a question arises as to whether constitutions can be compared without regard to whether their provisions are general or specific, and what weight should be given to the terminology employed in the various texts. Also, questions arise as to whether comparative evaluation should be validated by research of other national laws and eventually research inquiring into the application of the "principle," and whether there should be, whenever relevant, a comparison between principles or

203. René David, who is recognized as the world's leading authority on comparative law, states that the major world systems are: 1. The Romanist-Germanic; 2. The Socialist; 3. The Common Law; 4. Islamic Law; 5. Asian Legal Systems. He refers to them as "famille" or families of law. R. DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAIRES* 22-32 (5th ed. 1973).

rights enunciated in multilateral conventions and provisions in national constitutions. In the cases that give rise to these concerns, the inquiry is whether there is a numerical or quantitative standard for correlating or comparing that data.²⁰⁴

C. *Correlation Between the Sources of Law to be Consulted and the Principle Sought to be Identified*

Both courts have failed to address this question except with broad generalities. Presumably, the sources of law to be consulted with respect to narrow or specific legal principles are the relevant statutes, laws, and other normative sources. Thus, inquiring whether the killing of one person by another without legal justification constitutes murder would necessarily entail an examination of the criminal laws of the countries representing the world's major legal systems with appropriate geo-political representativeness.

However, the number of national legal systems that need to be consulted within the world's major legal systems will depend upon the type of inquiry and the degree of identity or similarity of findings that may emerge from the research. Thus, the more obvious the similarity in the different legal systems, the more likely it is that adding more countries with the same general legal basis may not significantly add to the outcome of the research. However, if there is only general similarity, which is only vaguely equivalent but not of such sufficient comparative equivalence to ensure a broad consensus, then it would appear that a larger number of national legal systems would have to be consulted.

It is obvious that no two legal systems are alike, and certainly the legal provisions or normative formulations of different countries are not likely to be identical. The question, therefore, is whether, by the notion of sameness, one comprehends: (i) identical normative formulations; (ii) identical legal elements; or (iii) substantial similarity, irre-

204. For a study of the basic rights in criminal processes protected under six international instruments, which correlates them to more than one hundred national constitutions, see *The Protection of Human Rights in the Criminal Process Under International Instruments and National Constitutions*, in 4 NOUVELLES ÉTUDES PÉNALES 6-31 (1981); see also Maki, *supra* note 6; C. STRONG, A HISTORY OF MODERN CONSTITUTIONS: AN INTRODUCTION TO COMPARATIVE STUDY OF THEIR HISTORY AND EXISTING FORMS (1964); K. AZIZ, COMPARATIVE CONSTITUTIONAL AND ADMINISTRATIVE LAW (1979). For a research project on ACCESS TO JUSTICE which compared various legal system's constitutional and normative approaches in several volumes, see also A WORLD SURVEY (M. Cappelletti & B. Garth eds. 1978); PROMISING INSTITUTIONS (M. Cappelletti & J. Weisner eds., vol. 1, 1978, vol. 2, 1979); EMERGING ISSUES AND PERSPECTIVES (M. Cappelletti & B. Garth eds. 1979); and ANTHROPOLOGICAL PERSPECTIVE (K.F. Koch ed. 1979). Unfortunately, this comprehensive study has no described methodology. For what is probably the best study on methodology, see J. HALL, COMPARATIVE LAW AND SOCIAL THEORY (1963).

spective of identical normative formulation or required elements. In short, the question is whether or not one must seek sameness of normative provisions or comparative equivalence of normative provisions. The answer to that question will depend on whether the inquiry involves a broad "General Principle" or not. By its very nature, a broad "General Principle" does not require sameness in terms of its specific normative formulation, but a narrower or specific principle will require greater similarity.

Comparative criminal law research involving the determination of what constitutes a crime in different national legal systems reveals a substantial historical basis and national practice which provide a foundation for such an inquiry. This foundation is embodied in the law of international extradition, which has been in existence for a substantial period of history and has been relied upon by almost all of the countries in the world. In the comparative criminal law research process, the search for comparative criminal legal provisions is referred to as the "Principle of Double Criminality" or as the "Principle of Dual Criminality."²⁰⁵

Under this principle, the requested State in an extradition process examines the crime charged by the requesting state and seeks to determine whether that crime also constitutes a crime under the domestic criminal laws of the requested State. Two methods may be applied in the course of that inquiry: *in concreto* and *in abstracto*.²⁰⁶ Under the *in concreto* approach, the use of which has been gradually abandoned since the late 1800s, the focus is on whether or not the elements of the

205. See A. LAFOREST, INTERNATIONAL EXTRADITION TO AND FROM CANADA 52-56 (1961). The author notes that

... [A]n exact correspondence between offenses in two countries cannot be expected. It is, therefore, not necessary that the crime concerned bears the same name in both countries. It is sufficient if the acts constituting the offence in the demanding state also amount to a crime in the country from which the fugitive is sought to be extradited even though it may be called by a different name. As already mentioned it is the essence of the offence that is important.

Id. at 54-55; see also LEGAL ASPECTS OF EXTRADITION AMONG EUROPEAN STATES (Council of Europe, European Committee on Crime Prevention 1970); T. VOGLER, AUSLIEFERUNGSRECHT UND GRUNDGESETZ (1970); I. SHEARER, EXTRADITION IN INTERNATIONAL LAW (1971); Vieira, *L'Evolution Recente de l'Extradition dans le Continent Americain*, 185 RECUEIL DES COURS 155 (1978); V.E.H. BOOTH, BRITISH EXTRADITION LAW AND PROCEDURE (1980); B.P. BORGOÑÓN, ASPECTOS PROCESALES DE LA EXTRADICION EN DERECHO ESPAÑOL (1984); H.A. BOUKHRIS, LA COOPERATION PENALE INTERNATIONALE PAR VOI D'EXTRADITION AU MOROC (1986); O. LAGODNY, DIE RECHTSSTELLUNG DES AUSZULIEFERNDEN IN DER BUNDESREPUBLIK DEUTSCHLAND (1987); M.C. BASSIOUNI, INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE 319-80 (2d rev. ed. 1987); M.T. LUPACCHINI, L'ESTRADIZIONE DALL'ESTERO PER L'ITALIA (1989).

206. See 39 REVUE INTERNATIONALE DE DROIT PENALE (1968) dedicated to national reports on extradition from: Austria, Belgium, Brazil, Chile, Czechoslovakia, Finland, France, Federal Republic of Germany, Greece, Hungary, Italy, Japan, Poland, Sweden, Switzerland, United States and Yugoslavia.

crime in the laws of the requested State are the same as the elements of the crime in the laws of the requesting State — in other words, greater specificity and sameness of incentive provisions. Under the *in abstracto* approach, which is now used by almost all States, the focus is on whether or not the crime in the requested State is generally comparable to the crime in the requesting State. The modern trend is to examine the underlying facts of the criminal charge to determine whether or not the same facts that would give rise to a charge in the requested State would give rise to the same or to a comparable charge in the requesting State.²⁰⁷

Therefore, a person who is charged with the killing of another person without legal justification may be charged in different legal countries under different types of statutes involving criminal homicides. These homicide laws may have different labels, require different levels of intent, and have different elements. Still, all of these laws would have the same general elements in common: the material element of one person engaging in conduct which produced the death of another; the mental element of intention (however described); and causation (between conduct and resulting death). If, as a result of the above, the fact that a person would be charged in one country with a crime called murder whereas in another he would be charged with a crime called intentional killing or voluntary manslaughter would not be legally relevant to a finding that "dual criminality" exists. The reason is that the underlying fact, would give rise to a similar, though not necessarily identical, charge in the requested State.

The inquiry, then, focuses on the general characteristics of the crime charged in comparative analysis, and not on the sameness or identity of the label of the crime, or the legal elements needed to prove

207. This position is required in all modalities of international cooperation in penal matters. See E. MULLER-RAPPARD & M.C. BASSIOUNI, *EUROPEAN INTER-STATE COOPÉRATION IN CRIMINAL MATTERS, LA COOPÉRATION INTER-ÉTATIQUE EUROPÉENNE MATIÈRE PÉNALE* (3 vols. 1987). For different modalities of international cooperation in penal matters, see Muller-Rappard, Schutte, Epp, Poncet, Zagaris, *et al.*, in 2 M.C. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: PROCEDURE* (1986); Grutzner, *International Judicial Assistance and Cooperation in Criminal Matters*, in *A TREATISE ON INTERNATIONAL LAW* 189 (M.C. Bassiouni & V.P. Nanda eds. 1973). For a survey of recent Mutual Legal Assistance Treaties between the United States and other countries, see Nadelman, *Negotiations in Criminal Law Assistance Treaties*, 33 *AM. J. COMP. L.* 467 (1985); Zagaris & Simonetti, *Judicial Assistance under U.S. Bilateral Treaties*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM* 219 (M.C. Bassiouni ed. 1989). For a Socialist perspective, see Krapac, *An Outline of the Recent Development of the Yugoslav Law of International Judicial Assistance and Cooperation in Criminal Matters*, 34 *NETHERLANDS INT'L L. REV.* 324 (1987); Gardocki, *The Socialist System of Judicial Assistance and Mutual Cooperation in Penal Matters*, in 2 M.C. Bassiouni, *INTERNATIONAL CRIMINAL LAW: PROCEDURE* 133 (1986); Shupilov, *Legal Assistance in Criminal Cases and Some Important Questions of Extradition [in the USSR]*, 15 *CASE W. RES. J. INT'L L.* 127 (1983).

it.²⁰⁸ The same technique and approach is valid in other areas of comparative legal research.

As stated above, with respect to other issues of comparative research, the two courts have not provided much guidance. The same can be said with respect to international law sources of "General Principles." Should there be a quantified technique to assess principles embodied in United Nations resolutions, treaties, or, customary practices of States? If so, can common practices of States, because of their recurrence, rise to the level of principles?

One of the reasons for the courts' lack of guidance on these issues may be the fact that they may not have wished to establish precedents that may impact on future cases. The courts, through the history of their jurisprudence, seem to have avoided including the types of formulations in their opinions that may lead to the notion that their opinions could be deemed the basis for future jurisprudential development. Unlike the jurisprudence of the Common Law courts, which relies on precedents and adheres to *stare decisis*, the PCIJ and the ICJ have carefully avoided having their opinions couched in formulations that can lead to such a jurisprudential development. This is why one can only find a more detailed explanation of what constitutes "General Principles" and how they are applied in the separate and dissenting opinions of the two courts; especially in those of the ICJ. However, these difficulties are more prevalent in the area of *jus cogens*, as discussed above.

CONCLUSION

"General Principles" are recognized as a source of international law in the Statutes of the Permanent Court of International Justice and International Court of Justice, but their identification, appraisal, content, ranking, enforceability, and applicability are the subject of different scholarly and judicial perceptions.

There is a well established consensus that "General Principles" are to be derived from national legal systems. Thus, "General Principles" are a common denominator of certain basic principles embodied in

208. It would be of no consequence to the requested State if the charge by the requesting State is murder, intentionally killing, voluntary manslaughter, or, for that matter, involuntary manslaughter, as long as the crime charged, irrespective of the specificity of its elements, generally corresponds to an equivalent counterpart crime in the requested State. The issue will not turn on what type of mental element is required, for example, for the offense of murder, first degree murder, voluntary manslaughter, or involuntary manslaughter. Rather, the inquiry will be whether the facts allegedly committed by the individual sought are such that they constitute the material element of the killing of one person by another accompanied by some type of mental state and that a resulting death ensued. If these basic facts would constitute a homicidal offense in both the requested and requesting States, then extradition shall be granted.

national legal systems which, because of their commonality, rise to an internationally enforceable level. However, the process and methodology of identification and appraisal of these national legal principles remains open for further elaboration. There is no simple method that can be applied, but surely an agreed methodology could be recognized. In its absence, protagonists for different philosophical propositions will rely on what they consider to be "General Principles" for self-serving support. This practice does not aid in making the law more certain.

In the meantime, there is little consensus about the processes and methods of identifying, appraising, and applying "General Principles" evidenced through various sources of international law. Scholarly writings on this question are few, and what writings exist are unclear. Opinions of international and national tribunals on this subject are also vague and permit many inferences to be drawn from reliance, for example, on United Nations resolutions.

Recent jurisprudential scholarly debates on *jus cogens* have overshadowed earlier, more legalistic, debates on "General Principles." In the process, and before resolving the pending issues concerning "General Principles" discussed above, *jus cogens* became, at least for some scholars, a higher source of peremptory norms, superceding all other sources of positive international law. By no means does this writer purport to presume to know better or more, but only to know enough to wage a critical re-examination.

In less than two decades, *jus cogens* emerged out of "General Principles" and, for its ardent proponents, immediately moved up to become a separate and higher ranking source of law, though technically the positive legal recognition of *jus cogens* only comes under the label of "General Principles."

The jurisprudence of the PCIJ and the ICJ has not yet been affected by the jurisprudential, and, I suspect, ideological debate concerning *jus cogens*. In fact, the position of the two courts has been, in the aggregate of its opinions, reserved in its reliance on "General Principles" as a source of international law. Whenever the two courts did rely on "General Principles," they were mainly using principles as a means to interpret positive international law and only rarely to supersede it. Only a few cases give us a glimpse of how the courts applied *jus cogens*. The tension between proponents of *jus dispositivium* and *jus naturales* as well as between advocates of the *lex lata* and those arguing for a *lexe desiderata* has become particularly evident in the legal literature of the last decade. But the passion of their advocacy is

not necessarily matched by the intellectual and legal technical rigors which such important legal issues deserve.

Regardless, these legal traditions are evolving and have achieved in contemporary times a significant rapprochement. Similarly, differences in legal philosophies are being compromised by greater concessions to pragmatism. Modern positivists have lessened their historical rigidity; some have even conceded that legitimacy may be found elsewhere than in positive texts. Thus, differences between modern positivism and the new socio-ethical foundation of modern naturalism are gradually being narrowed.

The gray areas that have developed as a result of the reduction of these dual contrasting lines of legal and philosophical analysis have, however, added to the lack of clarity of the entire subject. What is needed, perhaps, is a convention to codify "General Principles of International Law," much as the Vienna Convention on the Law of Treaties codified customary international law and those "General Principles" relating to treaty law.