THE USE OF DOMESTIC LAW PRINCIPLES IN THE DEVELOPMENT OF INTERNATIONAL LAW

REPORT

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I. INTRODUCTION

I.1 Background

1. Increasingly complex and vital international relations keep international law moving into new domains and require steady development. However, in many cases (e.g. sovereign insolvency), due to the lack of corresponding rules of international law, there is a need to borrow principles from the domestic legal systems (see article 38.1.c of the Statute of the International Court of Justice).[1]

2. It is important to clarify from the start that, in accordance with its mandate, the Study Group expressly focused on general principles derived from domestic law, without discussing whether general principles could also derive from other sources. Therefore, references to 'general principles' or 'general principles of law' in this report are to general principles derived from domestic law.

3. The reference to the ICJ Statute[2] should not be misunderstood. Those general principles derived from domestic law are not to be exclusively used in the adjudication process, but also in any decision-making process when the resort to such principles is necessary. Nevertheless, when international courts and arbitral tribunals have resorted to domestic principles in their legal reasoning, they seem to have done so cautiously, indirectly, and without clarifying how those principles were identified and how are they to be correctly applied. On the other hand, when considering domestic principles in drafting hard and soft law instruments, it has not always been clear whether all main forms of civilization and of the principal legal systems of the world were considered.

4. Therefore, the objective of the Study Group was (i) to survey and understand how general principles derived from domestic principles are currently identified and applied, as well as (ii) to consider whether it could be possible to provide some general guidelines to serve as a practical reference for those involved in the adjudication or other decision-making process, as well as for those concerned with the development of international law. Those guidelines could ideally facilitate a more uniform, predictable and reviewable recourse to the general principles of law, reducing the high degree of subjectivity and potential misuse in applying this source of law.

5. Apart from holding two open working sessions (one in The Hague in 2010 and another in Sofia in 2012), the Study Group met twice, one in Cambridge (at the Lauterpacht Centre for International Law) in 2012 and another in Madrid (at the offices of Cuatrecasas, Gonçalves Pereira) in 2013. The Study Group is made up of members coming from several states in an attempt to have proportional geographic representation to the extent possible. This diversity of cultures and legal backgrounds was considered even more important in a study dealing with the general principles of law. Some members provided a substantive contribution. The other members of the Study Group were invited to comment on the drafts of the contributors. The present report takes into account their comments.

6. A Draft report was considered and commented upon by participants at the 77th ILA Biennial Conference in Johannesburg in August 2016. In the light of the comments received, the Study Group finalised the present Report.

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[1] On the use of general principles, see among others: H. Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*, 1927; H.C. Gutteridge, "Comparative Law and the Law of Nations", 21 Brit. Y.B. Intl. L. (1944) 1; B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*, CUP, 1953/2006; A. McNAIR, "The general Principles of Law Recognized by Civilised Nations", B.Y.I.L., 1957.1; H. Waldock, "The 'Common Law' of the International Community—General Principles of Law", 106 *Recueil Des Cours* (1962) 54; W. Friedman, "The Uses of 'General Principles' in the Development of International Law", 57 Am. J. Intl. L. (1963), 279; A. Verdross, "Les principes généraux de droit dans le système des sources de droit international public", in *Mélanges P. Guggenheim*, 1968, 53; M. Bogdan, "General Principles of Law and the Problem of Lacunae in the Law of Nations", 46 *Nordisk Tidsskrift Int'l Ret* (1977), 37; M. Cherif Bassiouni, "A Functional Approach to General Principles of International Law", 11 Mich. J. Intl. L. (1990), 768; G. Ripert, "Les règles du droit civil applicables aux rapports internationaux", R.C.A.D.I., 1933-II, vol. 44.565; J. Ellis, "General Principles and Comparative Law", 22 EJIL (2011), 949; G. Gaja, "General Principles of Law", Max Planck Encyclopaedia of Public International Law, 2013.

[2] A. Pellet, "Article 38" in A. Zimmerman et al. (eds), *The Statute of the International Court of Justice*, 2012. H. Thirlway, *The Sources of International Law*, OUP, 2014; S. Yee, "Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases", 7 Journal of International Dispute Settlement (2016), 472-498.

7. The Draft report of the Study Group was quoted and considered in the initial report prepared by the UN International Law Commission (ILC),[3] which in 2017 decided to include the topic of general principles of law in its long-term programme of work (also focused on terminology, relations with other sources of international law and methods of identification). The proposed work of the ILC is broader than the objective of this report since it attempts to consider also whether general principles of law could be derived from other sources (e.g. from elements in the international legal system).

I.2 Methodology

8. Instead of a theoretical exercise of trying to establish those uniform guidelines at the outset of the work, the main part of the report has been concerned with identifying, summarizing and explaining the 'current practice' in identifying and applying domestic principles, both at the adjudication phase (criminal courts, World Trade Organization, ICJ, International Administrative Tribunals, and international arbitration) and the law-making phase (International Law Commission, criminal law, global administrative law and financial/trade). The report will focus on the current practice or 'modern' use of domestic principles, rather than explaining the influence of domestic principles in the formative period of public international law. The topics covered were the result of a balance between the aspiration to address some of the main areas of potential use of domestic principles and the particular expertise of Study Group members. The result is, of necessity, selective, but it is hoped provides a broad enough sample to derive some useful conclusions.
9. One of the initial tasks of the Study Group was to limit the scope of the work. After some discussion, it was decided to focus primarily on those principles derived from domestic legal systems, including both private and public law principles. As was observed by Judge Tanaka in his dissenting opinion to the *South West Africa* judgment (second phase) of 1966, where the phrase 'general principles of law' is not qualified, the 'law' must be understood to embrace all branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc.[4] This approach allowed the Study Group to have a broader coverage (e.g. by including criminal law).

II. ANALYSIS OF CURRENT PRACTICE

II.1 ADJUDICATION

II.1.a International Court of Justice[5]

10. Up to the end of 2016, 126 contentious cases have been concluded by the International Court of Justice (ICJ) – since the report tries to focus on the 'current practice', the decisions of the Permanent Court of International Justice, PCIJ, (1922-1946) have not been taken into account. General principles of law derived from domestic law have been invoked before the ICJ and applied by the Court or its judges in a reduced number of those cases. So far, in no case has the Court expressly based an essential part or holding of a decision on general principles of law. Furthermore, references to domestic principles are generally brief, lack substantial legal citations in support, and do not clearly explain how those principles have been identified and can be applied. While the ICJ Handbook[6] contains a full chapter focused on the application by the Court of treaties and conventions, custom, judicial decisions, and even on its power to decide *ex aequo et bono*, there is no particular discussion on the use of general principles of law.

11. The present section analyses the judgments and orders published by the Court as well as all declarations, separate and dissenting opinions handed down by its judges before December 2016. Every document was scanned for references to the term 'principle' with a digital search function. Whenever such a reference appeared, its relevance was scrutinized. Most ambiguous references were excluded from the results of the research since it is difficult to confirm whether the Court was actually referring to general principles of law. As a result, the section does not include some

[3] Annex A to the ILC Report on the work of the sixty-ninth session (2017), document A/72/10.
[4] *South West Africa (Ethiopia/Liberia v. South Africa)*, Second Phase, Dissenting Opinion of Judge Tanaka, I.C.J. Rep. 1966, p. 294.
[5] Based on the analysis provided by Robert Pfeiffer (external collaborator associated with the Study Group, enrolled at the University of Postdam) and peer review from Junichi Eto and Sienho Yee. For an analysis regarding references to Islamic principles before and by the ICJ, see section 6 (prepared by A. Carballo) of the 2010 Report of the ILA Committee on Islamic Law & International Law.
[6] See 6th edition, 2016, http://www.icj-cij.org/publications/en/manuel_en.pdf

references, such as the one contained in the *Corfu Channel* case regarding the use of indirect evidence (which is 'admitted in all systems of law, and [the] use [of which] is recognized by international decisions').[7]

12. Once a reference was identified as such, it was categorised as either relying upon, merely affirming or even negating a general principle of law. 'Reliance' is self-explanatory. Mere affirmation occurs when the existence of a general principle is acknowledged even if it is not considered relevant to the specific dispute. For the purpose of this analysis, negation means that an alleged general principle is negated as such, i.e. not considered a source of law in terms of Art. 38 (1) (c) ICJ Statute.

II.1.a.i References to General Principles of Law by the Court

13. It has been suggested that the ICJ as a judicial body has remained rather cautious in its application of the general principles of law for a number of reasons: According to ICJ Judge Giorgio Gaja, when writing as a commentator, the 'difficulty of engaging […] in a comparative analysis'[8] may be a factor as well as the 'risk of transgressing into the application of equity'[9], which pursuant to Art. 38 (2) ICJ Statute requires the parties' particular consent. Moreover, he emphasized the need for decisions' predictability. An unexpected reliance upon a general principle of law intended to fill in *lacunae* in the law may decrease the parties' willingness to subject themselves to the Court's jurisdiction.[10]

14. The Court has arguably referred to alleged general principles of law only a few times, once negating, twice affirming and the others relying upon a general principle of law. Its references mainly concern issues of procedure or evidence (not as a direct source of rights and obligations).

- *South West Africa (Ethiopia/Liberia v. South Africa)*[11]

15. In its first reference to an alleged general principle of law, in the *South West Africa* case, the ICJ negated its qualification as such:

> Looked at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an "*actio popularis*", or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: *nor is the Court able to regard it as imported by the* "*general principles of law*" *referred to in Article 38, paragraph 1 (c), of its Statute*.[12] (emphasis added)

- *Barcelona Traction (Belgium v. Spain)*[13]

16. In the *Barcelona Traction* case, the Court affirmed the procedure of 'lifting the corporate veil' to be a general principle of law, originating from domestic legal systems. After referring to the 'wealth of practice accumulated on the subject in municipal law', it stated that 'in accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law, is equally admissible to play a similar role in international law.'[14] As the relevant passage lacks a reference to Art. 38 (1) (c) ICJ Statute and does not employ its wording, the reference to the municipal origin of the principle is the only indicator, which justifies the assertion that the Court may have affirmed a general principle of law. The reference is thus somewhat ambiguous:

> It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of

[7] *Corfu Channel* case, judgment of 9 April 1949, I.C.J. Reports 1949, p. 4, at p. 18.
[8] Gaja, supra note 1, para. 16.
[9] Ibid.
[10] Ibid., quoting Sir Gerald Fitzmaurice.
[11] Second Phase, Judgment, I.C.J. Rep 1966, 6.
[12] Id., 47.
[13] *Barcelona Traction (Belgium v. Spain)*, Second Phase, Judgment, I.C.J. Rep. 1970, 3.
[14] Id., paras. 56 ff.

> the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations. Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of – along others – the shareholders, but only in exceptional circumstances. *In accordance with the principle expounded above*, the process of *lifting the veil*, *being an exceptional one admitted by municipal law* in respect of an institution of its own making, *is equally admissible to play a similar role in international law*. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.[15] (emphasis added)

17. The Court also considered international instruments and judgments of international tribunals (since both parties relied on them during the proceedings) dealing with (i) the treatment of enemy and allied property, during and after the First and Second World Wars, and (ii) the treatment of foreign property consequent upon the nationalizations carried out at that time in several countries. However, the Court considered those two developments to have arisen out of special and very peculiar circumstances. Due to their character as *lex specialis*, no analogies or conclusions could be generally drawn from them in other fields of international law.[16] Similarly, the Court also concluded that the general arbitral jurisprudence cited by the parties could not be generalized since it rested upon the instruments establishing the jurisdiction of those tribunals or claim commissions and the protected rights.[17]

18. After considering potential exceptions to the above-mentioned principle, the Court declined to 'pierce the corporate veil' and to allow Belgium to defend the rights of its shareholders in a Canadian company against Spain.[18]

- *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*[19]

19. In 1982, in a case concerning maritime delimitation, the Court proclaimed 'the legal concept of equity [as] a general principle directly applicable as law.' While the Court neither cited Art. 38 (1) (c) of its Statute, nor referred to domestic legal systems, it made an effort to distinguish the application of the said legal norm from a decision *ex aequo et bono* pursuant to Art. 38 (2) of its Statute.

> *Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it*. In the course of the history of legal systems the term "equity" has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; *the legal concept of equity is a general principle* directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice. Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. The Court can take such a decision only on condition that the Parties agree (Art. 38, para. 2, of the Statute), and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement. The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.[20] (emphasis added)

20. Judge Oda criticized the Court in his Dissenting Opinion: '[…] in saying that "delimitation is to be effected in accordance with equitable principles" (para. 38), the Court cannot be regarded as suggesting principles and rules of international law, for it is simply stating a truism.'[21] Given that the Court explicitly considered itself bound to apply equitable principles as a part of international law, its dictum can hardly be understood as a deliberate application of equity *praeter legem*. Nevertheless, the Court's reference remains inconclusive with regard to the invoked source of

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[15] Ibid.
[16] Id., paras 59-62.
[17] Id., para. 63.
[18] Id., paras. 64 ff.
[19] Judgment, I.C.J. Rep. 1982, 18.
[20] Id., para. 71.
[21] Dissenting Opinion of Judge Oda, I.C.J. Rep. 1982, pp. 157, para. 155.

law. No inference can be drawn that the Court referred to equity as a general principle of law, since it may as well have intended to rely upon a specific rule of customary international law.

- *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*[22]

21. In 1985, the Court reaffirmed its previous, ambiguous reference to equity as a 'general principle directly applicable as law.'[23]

> Thus the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application. This is precisely why the courts have, from the beginning, elaborated equitable principles as being, at the same time, means to an equitable result in a particular case, yet also having a more general validity and hence expressible in general terms; for, as the Court has also said, "*the legal concept of equity is a general principle directly applicable as law*"(I.C.J. Rep. 1982, p. 60, para. 71).[24] (emphasis added)

22. However, this time, the Court stressed the need for 'a clear body of equitable principles' and thereafter specified the pertinent source of public international law, stating that it 'had thus had occasion to note the development which has occurred in the customary law of the continental shelf'.[25] The Court hence based its delimitation on equitable principles within the realm of customary international law, not upon a general principle of law.

- *Military and Paramilitary Activities (Nicaragua v. USA)*[26]

23. In its 1986 Judgment in the *Nicaragua* case, the Court relied upon 'general principles as to the judicial process,'[27] as it determined the admissibility of evidence. While the Court neither referred to Art. 38 (1) (c) ICJ Statute, nor to domestic legal systems, the wording and content of its reference suggest that it relied upon a general principle of law.

> *The Court holds that general principles as to the judicial process require that the facts on which its Judgment is based should be those occurring up to the close of the oral proceedings on the merits of the case.* While the Court is of course very well aware, from reports in the international press, of the developments in Central America since that date, it cannot, as explained below (paragraphs 62 and 63), treat such reports as evidence, nor has it had the benefit of the comments or argument of either of the Parties on such reports.[28] (emphasis added)

- *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*[29]

24. In 2002, the Court reaffirmed a finding of its 1951 Advisory Opinion,[30] namely that 'the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding upon States, even without any conventional obligation.'[31] As the term 'principles […] recognized by civilized nations' resemble the wording of Art. 38 (1) (c) ICJ Statute, a reference to general principles of law can more readily be assumed than a reference to

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[22] Judgment, I.C.J. Rep. 1985, 13.
[23] Id., para. 45.
[24] Ibid.
[25] Id., p. 55, para. 76 f.
[26] Judgment, Merits, I.C.J. Rep. 1986, 14.
[27] Id., p. 40, para. 60.
[28] Ibid.
[29] Judgment, Jurisdiction and Admissibility, I.C.J. Rep. 2002, 6.
[30] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Rep. 1951, pp. 15, 23.
[31] *Supra* note 29, paras. 41 f.

international custom in terms of Art. 38 (1) (b) of the ICJ Statute.[32] This assumption is strengthened by the broad and generic nature of the invoked principles, which the Court in its Advisory Opinion also referred to as the 'moral and humanitarian principles which are at [the Convention's] basis.'[33] Yet, the Court's ambiguous reference once again leaves room for interpretation:

> The Court will begin by reaffirming that "*the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation*" and that a consequence of that conception is "the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)" […][34] (emphasis added)

- *Sovereignty over Pedra Branca (Malaysia/Singapore)*[35]

25. In 2008, the Court unambiguously relied upon a 'general principle of law […] that a party which advances a point of fact in support of its claim must establish that fact.'[36] While the Court had referred to this procedural principle before,[37] this is the first time that it used the term 'general principle of law.'

- *Navigational and Related Rights (Costa Rica v. Nicaragua)*[38]

26. One year later, in 2009, the Court reaffirmed this 'well-established general principle'[39] concerning the burden of proof, hence invoking the same general principle of law.

> The Court notes that Costa Rica, in support of its claim of unlawful action, advances points of fact about unreasonableness by referring to the allegedly disproportionate impact of the regulations. The Court recalls that *in terms of well-established general principle it is for Costa Rica to establish those points* [...][40] (emphasis added)

- *Territorial and Maritime Dispute (Nicaragua v. Colombia)*[41]

27. In 2011, the Court (quoting its 1954 Advisory Opinion on the effect of awards of compensation made by the UN Administrative Tribunal) relied upon the 'well-established and generally recognized principle of law that a judgment rendered by a judicial body has binding force between the parties to the dispute,'[42] i.e. the principle of *res judicata*:

> *It is a well-established and generally recognized principle of law that a judgment rendered by a judicial body has binding force between the parties to the dispute* (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Rep. 1954, p. 53). The Court notes that in ascertaining the scope of res judicata of the 2007 Judgment, it must consider Honduras's request in the specific context of the case. […] In order to assess whether Honduras has an interest of a legal nature in the area south of the bisector line, the essential issue for the Court to ascertain is to what extent the 2007 Judgment has determined the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras.[43] (emphasis added)

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[32] W.A. Schabas, "Genocide Convention, Reservations (Advisory Opinion)", Max Planck Encyclopaedia of Public International Law, 2009, para. 10.
[33] *Supra* note 29, p. 24.
[34] *Supra* note 30, paras. 41 f.
[35] Judgment, I.C.J. Rep. 2008, 12.
[36] Id., paras. 44 f.
[37] E.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* I.C.J. Rep. 2007, 43, at para. 20; *Maritime Delimitation in the Black Sea (Romania v. Ukraine),* I.C.J. Rep. 2009, 61, at para. 68; *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* I.C.J. Rep. 2010, 14, at para. 162.
[38] Judgment, I.C.J. Rep. 2009, 213.
[39] Id., para. 101.
[40] Ibid.
[41] Judgment (Application by Honduras for Permission to Intervene), I.C.J. Rep. 2011, 420.
[42] Id., paras. 67-69.
[43] Ibid.

28. The Court had referred to this general principle of procedural law before,[44] but in a more ambiguous way.

- *Questions of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*[45]

29. Most recently, in March 2016, the Court reaffirmed that 'the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal.'[46] The Court was evenly split on the question of whether or not the requirements of said general principle were fulfilled. The decision not to apply the principle of *res judicata* and thus to reject Colombia's third Preliminary Objection was eventually reached by President Abraham's casting vote.

> The Court recalls that *the principle of res judicata*, as reflected in Articles 59 and 60 of its Statute, *is a general principle of law* which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), I.C.J. Reports 2007 (I), pp. 90-91, para. 116). This principle establishes the finality of the decision adopted in a particular case (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), I.C.J. Reports 2007 (I), p. 90, para. 115; Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon), Judgment, I.C.J. Reports 1999 (I), p. 36, para. 12; Corfu Channel (United Kingdom v. Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949, p. 248).[47]

II.1.a.ii References to General Principles of Law in Separate and Dissenting Opinions

30. The alleged general principles of law which were relied upon in separate and dissenting opinions predominantly concerned procedural law and the law of treaties. Occasionally, alleged general principles of law were also relied upon in relation to the law of state responsibility, human rights law, environmental law and the law of the sea.

31. The views of individual judges differed with regard to the existence of certain general principles of law. For instance, in the *Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants*, Judges Lauterpacht and Moreno Quintana, in their separate opinions, both relied upon the notion of *ordre public* as a general principle of law,[48] the existence of which was however negated by Judge Spender.[49]

32. On a more fundamental level, judges have entertained divergent views regarding the nature and origin of general principles of law as a source of international law. Some judges have been in favour of a naturalist interpretation of Art. 38(1)(c) of the ICJ Statute: e.g. Judge Tanaka stated in his dissenting opinion to the *South West Africa* judgment of 1966 that 'it is undeniable that in Article 38, paragraph 1 (c), some natural elements are inherent […] this provision does not require the consent of States as a condition of the recognition of the general principles. States which do not recognize this principle or even deny its validity are nevertheless subject to its rule. From this kind of source international law could […] assume an aspect of its supra-national and supra-positive character.'[50] In 2010, Judge Cançado Trindade went even further in his separate opinion to the decision in the *Pulp Mills* case asserting that

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[44] E.g. in *Application of the Genocide Convention* (*supra* note 39, para. 116), the Court referred to the 'principle of *res judicata*, internationally as nationally.' See also dissenting opinion of Judge Owada in the same case, which regarded the rule of res judicata as 'a general principle of law recognized by civilized nations.' (para. 14).

[45] Judgment, Preliminary Objections, I.C.J. Rep. 2016, 26.

[46] Id., para. 58.

[47] Ibid.

[48] *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment, Separate Opinions of Judges Sir Hersch Lauterpacht and Moreno Quintana, I.C.J. Rep. 1958, pp. 79, 91 f.; pp. 102, 105.

[49] Id., Separate Opinion of Judge Sir Percy Spender, I.C.J. Rep. 1958, pp. 116, 123.

[50] Id., Dissenting Opinion of Judge Tanaka, I.C.J. Rep. 1966, pp. 294-301, 313 f.

'[g]eneral principles of law emanate […] from human conscience, from the universal juridical conscience, […] the ultimate material "source" of all law.'[51]

33. More judges, however, have referred to municipal legal systems as the origin of the general principles of law which they invoked. Some judges have deemed it necessary to conduct a comparative analysis of domestic legal systems, such as Judge Ammoun, who stated that 'the general principles of law mentioned by Article 38, paragraph 1 (c), of the Statute, are nothing other than the norms common to the different legislations of the world, united by the identity of the legal reason therefor.'[52] Relying upon the general principle of equity, Judge Ammoun traced its origins to several legal systems.[53] Similarly, in his separate opinion to the 2003 *Oil Platforms* judgment, Judge Simma compared 'various common law jurisdictions as well as French, Swiss and German tort law'[54] in order to identify the principle of joint and several responsibility as a general principle of law.

34. This voluntarist-naturalist divide among judges of the ICJ may be yet another reason for its reluctance to explicitly affirm and apply general principles of law.

II.1.a.iii Interim Conclusion

35. Throughout the past seven decades, the Court has indeed been rather cautious in its explicit proclamation of general principles of law. Its unambiguous affirmative references can be counted on one hand and, almost without exception, they concern procedural law. Individual Judges, however, have been more inclined to invoke general principles of law and their understanding of the nature and origin of this source of law has varied greatly.

36. One may tentatively draw the conclusion that the Court has been more inclined to confidently enunciate rather technical and predictable general principles of procedural law than general principles of a substantive nature.

II.1.b International Criminal Courts and 'Internationalized' National Criminal Courts [55]

II.1.b.i International Criminal Courts[56]

37. The International Criminal Tribunals, in particular the International Criminal Tribunal for the former Yugoslavia (ICTY), have often invoked the concept of general principles of law to address substantive and procedural issues - mainly to bridge the gaps because international criminal law was undeveloped at the time of the establishment of these tribunals. In doing so, international criminal courts have contributed to the development of this branch of international law. However, when the courts have looked into municipal legal systems to find general principles, there are scarce mentions of the precise methodology used.

38. As an example, in the *Erdemović* case, the Trial Chamber of ICTY had sentenced the accused to ten years' imprisonment for crimes against humanity following a plea bargain. The accused appealed the decision, asking the Appeals Chamber to revise the sentence, on the grounds that the crime had been committed under duress. As treaty and custom were silent on the elements of the crime, the Appeals Chamber drew on general principles, and found that no principle existed to support duress as a complete defence to a charge of crimes against humanity.[57] However, Judges McDonald and Vohrah, after comparing thirty national legal systems (which covered civil law systems, common law

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[51] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, Separate Opinion of Judge Cançado Trindade, I.C.J. Rep. 2010, pp. 135, 156, para. 52.

[52] *North Sea Continental Shelf (Germany v. Denmark)*, Judgment, Separate Opinion of Judge Ammoun, I.C.J. Rep. 1969, pp. 101, 134, para. 33.

[53] Id., p. 139 f., para. 38.

[54] *Oil Platforms (Islamic Republic of Iran v. USA)*, Judgment (Merits), Separate Opinion of Judge Simma, I.C.J. Rep. 2003, pp. 324, 358, para. 74.

[55] For additional reference, see F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Brill/Martinus Nijhoff, 2008 (providing a comprehensive analysis of the use of general principles by international criminal tribunals, including the ICTY); N. Jain, "Comparative International Law at the ICTY: the General Principles Experiment", 109 Am. J. Intl. L. (2015), 486.

[56] Based on the analysis provided by Fabian Raimondo.

[57] ICTY, *Prosecutor v. Erdemović, Judgment,* Case No. IT-96-22-A, App. Ch., 7 October 1997, para. 19.

systems, and a hybrid category which they called 'criminal law of other states' –China, Ethiopia, Japan, Morocco and Somalia), concluded that under domestic law, duress was a mitigating factor in sentencing.[58] Judge Li was of the same opinion in that regard.[59] Since the majority of the Appeals Chamber did not consider that duress was a complete defence, but only a mitigating factor, the sentence was reduced to five years.[60] The *Erdmović* case reveals that even if general principles were subsidiary in nature, they could play an important role, at least so far as international criminal trials were concerned.

39. But international criminal courts and tribunals have not only applied general principles as gap-fillers of the law but also as value-oriented principles to interpret international rules (for example, the ICTY has used the principles of human dignity to define the crime of rape under international law). By doing so, the courts tried to avoid any charge of arbitrary interpretations. In addition, general principles have had a supplementary function of reinforcing legal reasoning. For example, in the *Blaškić* case, the Trial Chamber of the ICTY expressed the view that the accused could be held responsible under any of the heads of individual criminal responsibility in Article 7(1) of the ICTY Statute, adding that this 'was consonant with the general principles of criminal law and customary international law.'[61]

40. Regarding the issue of the identification of general principles, international criminal courts and tribunals have sometimes relied on decisions of other international courts and tribunals (for example, they have often relied on decisions of the ICJ to argue that the court or tribunal had the ability to determine its own jurisdiction). At other times, the courts and tribunals relied on scholarly writings to determine the scope (though not the existence) of particular principles. Most interestingly, some courts and tribunals, particularly the ICTY, have used comparative law to ascertain general principles by the following two sequential moves: first, the 'vertical move', which involved a process of abstracting legal rules from domestic legal systems in order to derive an underlying principle; second, the 'horizontal move', which aims at comparing domestic legal systems in order to verify that the principle identified in the 'vertical move' was recognised by the generality of nations.
41. With respect to the 'vertical move', the ICTY would sometimes identify the principle that it was looking for to begin with, noting as an example the principle that courts had an inherent power to deal with contempt of court. In the *Tadić* case, the accused argued that successive amendments to the Rules of Procedure and Evidence that expanded the types of conduct amounting to contempt infringed his rights. In response, the Appeals Chamber of the ICTY looked at the 'general principles of law common to the major legal systems of the world, as developed and refined (where applicable) in international jurisprudence'[62] and found that while the power to deal with contempt in common law legal systems is part of the inherent jurisdiction of the courts, in the civil law legal family the power comes into existence only if enacted by legislation.[63] Despite this, the Chamber proceeded to find that the ICTY did have an inherent power to deal with contempt.[64] This could lead to the conclusion that the ICTY was determined to find a solution regardless of its comparison of domestic legal systems.

42. With respect to the 'horizontal move', most courts and tribunals would proclaim that a particular principle was recognised by 'most' or 'civilised' nations without providing evidence. Sometimes, on important issues, the court or tribunal would undertake an empirical study and provide evidence of this study in the reasons for its decision. For these studies, the court and tribunals tended to refer to the same common and civil law systems. Almost half of the domestic legal systems referred to belonged to just seven jurisdictions: United States, England and Wales, Germany, Canada, Italy, France, and Belgium. All other legal systems of the world were more often than not ignored. In the 21st century, with domestic criminal laws available online, this approach could, arguably, no longer be justified on the grounds of access to law. Nevertheless, the approach was due to judges tending to refer to their own legal systems, and the fact that most judges – and most legal officers working at the courts and tribunals – were from these jurisdictions. Although a likely justification for that course of action could be that some of those legal systems have

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[58] ICTY, *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App.Ch., 7 October 1997, § 40, 55-72.
[59] ICTY, *Prosecutor v. Erdemović, Judgment, Separate and Dissenting Opinion of Judge Li*, Case No. IT-96-22-A, App.Ch., 7 October 1997, § 3.
[60] ICTY, *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T bis, T.Ch. II ter, 5 March 1998, disposition.
[61] ICTY, *Prosecutor v. Blaškić, Judgment*, Case No. IT-95-14-T, T.Ch. I, 3 March 2000, para. 264.
[62] ICTY, *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 31 January 2000, para. 15.
[63] Id., paras. 15-17.
[64] Id., para. 28.

influenced others beyond Europe via colonisation, it is worth noting that, over time, the staff of international courts and tribunals has become more geographically representative and the comparative law research more varied.

43. In the early years of the ICTY, Antonio Cassese had expressed concerns about automatic transposition of national law concepts, including general principles of law.[65] A number of persuasive reasons had been given, such as a difference between States and international society concerning legal subjects and sources of law.[66] In practice, however, international criminal courts and tribunals did not challenge the transposition of principles but adjusted them to the characteristics of the international legal system. For example, in the first case before the ICTY (the *Tadić* case), the accused challenged the legality of the ICTY's establishment on the basis that it was contrary to the general principle whereby courts must be 'established by law'. The Appeals Chamber responded that this principle could not be applied in an international setting as it was domestically, as the legislative, executive and judicial division of powers which prevails in the generality of national legal systems does not apply to the international setting.[67] Therefore, the Appeals Chamber did not reject the application of the principle but rather adjusted its meaning to the special characteristics of the international setting. Following the adjustment, the principle meant for the Appeals Chamber that an international criminal court or tribunal is 'to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments.'[68]

44. In *Boškoski & Tarčulovski*, the Tribunal did not base its decision on general principles of domestic law but rather used these principles to reinforce its decision.[69] Tarčulovski claimed that the Tribunal violated national rules of evidence when admitting into evidence certain out-of-court statements made during the national investigation of suspected war crimes. Even though the Appeals Chamber pointed out that pursuant to its Statute, the Tribunal is not bound by national rules of evidence, and hence evidence inadmissible by national rules of law is not necessarily inadmissible under international rules of law,[70] it added that Tarčulovski failed to identify a specific 'general principle of law' to support his argument. In other common law and civil law jurisdictions, out-of-court statements are admissible. The Tribunal also referred to the principle of *lex mitior* (the principle by which a person is to benefit from the lighter penalty set by a law posterior to the incriminated act). It relied on this principle as it was enshrined in the law of the Former Yugoslav Republic of Macedonia, to which the ICTY was invited to revert to when sentencing.[71]

45. In *Haradinaj*, the Appeals Chamber stated that the prosecution was not entitled to a right of appeal in many domestic jurisdictions –without mentioning which ones - for it was seen as a breach of the principle of *non bis in idem*. Arguably, in light of the gravity of the crimes prosecuted at the Tribunal and the horrific circumstances surrounding their commission, there is some justification for granting the prosecutor a right of appeal. However, the Appeals Chamber had to have a clear and unequivocal basis for overturning an acquittal.[72]

46. In *Strugar*, the Appeals Chamber referred to the principle of fitness to stand trial (in particular, on minimum age or mental incapacity), 'drawing upon general principles of law recognized by all nations.'[73] First the chamber reviewed *international* jurisdictions, (previous decisions of the ICTY, the International Military Tribunals, the European Court of Human Rights, the International Criminal Court and the Special Court for Sierra Leone), and then some *national* jurisdictions.[74] In the absence of express provisions in the statute regarding various personal defences which may relieve a person of individual criminal responsibility such as minimum age or mental incapacity, the Appeals Chamber approved the Trial Chamber's reliance on general principles of law recognized by all nations. It distinguished between common law and civil law jurisdictions, and then gave a brief overview of the procedures in the former Yugoslavia

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[65] ICTY, *Prosecutor v. Erdemović, Judgment, Separate and Dissenting Opinion of Judge Cassese*, Case No. IT-96-22-A, App. Ch., 7 October 1997.
[66] Id., paras. 2-5.
[67] ICTY, *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case No. IT-94-1-AR72, App. Ch., 2 October 1995, paras. 42-43.
[68] Id., para. 45.
[69] ICTY, *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82, TC, July 2008.
[70] ICTY, *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82, AC, May 2010.
[71] Id., para 603.
[72] ICTY, *Prosecutor v. Haradinaj et al*., Case No. IT-04-84, AC, July 2010, para. 27.
[73] ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-A, AC, 17 July 2008, paras. 44 (quoting the decision of the Trial Chamber of 26 May 2004, para. 20).
[74] Id., paras. 45 ff.

and a recent judgment by the War Crimes Chamber of the District Court in Belgrade which rejected an indictment against Kovacevic. The Chamber referred to the national criminal jurisdictions of: Australia, Canada, India, Malaysia, the UK, the USA, Japan, Korea, the Netherlands, Germany, Belgium, and the Russian Federation.[75] It analysed the tests for fitness to stand trial in common law and in civil law jurisdictions, and on this basis defined the applicable standard for fitness to stand trial as that of meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings.[76]

47. In *Brima* the Appeals Chamber of the ICTY distinguished the application of the principle of specificity in international criminal jurisdictions from that in domestic jurisdictions.[77] It stated that the pleading principles that apply to indictments before international criminal tribunals differ from those in domestic jurisdictions because of the nature and scale of the crimes, different from those in domestic jurisdictions. For this reason, there is a narrow exception to the specificity requirement for indictments before international criminal tribunals. In some cases, the widespread nature and sheer scale of the alleged crimes make it unnecessary and impracticable to require a high degree of specificity.

48. In *Popović*, the Trial Chamber of the ICTY discussed the question of cumulative convictions of conspiracy and an underlying offense.[78] Under the tribunal's case law, cumulative convictions are permissible if each statutory provision involved has a materially distinct element not contained in the other. In the case of the crime of genocide, the Chamber noted that the Genocide Convention defined conspiracy in accordance with the common law notion of the term. In most common law countries, convictions may be entered for both conspiracy and the underlying substantive offence, but this approach had been roundly criticised. The Trial Chamber also noted that in civil law countries, convicting for both conspiracy and underlying offence is not possible. Given the variety of approaches, the Trial Chamber found resort to national jurisprudence to be of limited utility.[79] Hence, it turned to the principle of fairness to the accused[80] which is also relevant regarding multiple convictions for the same act. It noted that this principle was also applied by the ICTR jurisprudence which stated in the *Musema* Trial Judgment that the position most favourable to the accused must be paramount.[81]

II.1.b.ii 'Internationalized' National Criminal Courts[82]

49. Certain national criminal courts, while formally comprising part of the judicial system of a particular state, are vested with jurisdiction *ratione materiae* over international crimes as such and are directed to apply international law directly. They are staffed in part or in whole by 'international' judges and prosecutors, or represent in some other way a special jurisdiction within the criminal justice system of that state. The descriptive term 'internationalized' is sometimes used as shorthand for such courts, even if formally they remain purely national courts. The jurisprudence of such 'internationalized' national criminal courts, while formally national jurisprudence, may be of a sufficiently distinctive character to justify its functional, as opposed to formal, treatment as international jurisprudence.

50. Some 'internationalized' national criminal courts are examined here: the Bosnia and Herzegovina War Crimes Chamber (BWCC), the Special Panel for Serious Crimes in the District Court of Dili (East Timor Court- SPSC), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL). These courts have been travelling the path marked by international criminal courts and tribunals, using similar approaches to apply general principles, and giving them the same gap-filling and interpretative function. However, these courts have not dealt as much with general principles of domestic legal systems. Instead, they relied on the jurisprudence of international criminal courts and tribunals, on international instruments and on the jurisprudence of the European Court of Human Rights (ECtHR). This was done in order to obtain more legitimacy for their decisions.

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[75] Id., paras. 52-54.
[76] Id., para 55.
[77] SCSL, *Prosecutor v. Alex Tamba Brima*, Case No. SCSL-2004-16-A (AC, 3 March 2008).
[78] ICTY, *Prosecutor v. Popović*, Case No. IT0588T, Trial Chamber, Judgement, 10 June 2010.
[79] Id., para. 2122.
[80] Id., para. 2123.
[81] Id., para 2127.
[82] Based on the analysis provided by Hilly Moodrick-Even Khen.

51. In addition, the 'internationalized' national criminal courts studied have been mindful of the fact that they were under a statutory obligation to apply international law as well as their own domestic law, but also took into account the characteristics of their own legal system when dealing with general principles. As an example, in the *Mitrović* case, the BWCC addressed the treatment of testimony given by a witness pursuant to a plea agreement.[83] Here, the Chamber drew connections between the obligation to evaluate each item of evidence and the right to a fair trial, as understood in civil law systems. Another example would the ECCC dealing with the standard of proof in criminal trials in circumstances where the English and Khmer text of its statute required the standard of 'beyond reasonable doubt', yet the French text and civil law jurisdictions, like Cambodia, recognised the notion of 'intimate conviction'.[84] Despite these conceptual differences, the Chamber adopted a common approach to evaluating the sufficiency of the evidence.

52. One of the major issues on the agenda of a hybrid court is the principle of legality (including the specificity of crimes, which requires that a criminal rule be detailed and indicate in clear terms the various elements of the crime). As pointed out by the SPSC, quoting Prof. Bassiouni and engaging in a{?} brief historical overview of the permissibility of analogy in several criminal law systems,[85] the use of analogy is necessary 'because traditionally, international criminal law has lacked the specificity of national criminal law in defining crimes.'[86] However, the SPSC referred to the use of analogy 'in applying customary definitions', without any reference to domestic principles.

II.1.b.iii Interim Conclusion

53. Sometimes references to domestic principles are quite vague and general, with reference to international decisions in support, even if the Statutes and Rules of Procedure of the courts contain a similar institution. E.g:

- the SPSC considered (with reference to ICTY, in *Tadic*)[87] that 'there can be no violation of *nonbis inidem*, *under any known formulation of this principle*, unless the accused has already been tried*.'* (emphasis added)
- Similarly, a SCSL Trial Chamber arrived at the conclusion (after examining Canadian law and decisions of the ICTR)[88] that a trial *in absentia* in the context of the SCSL was permissible and lawful under certain circumstances (in fact, Article 17 of the Statute and Rule 60), and that in most national law systems, 'exceptionally, courts of justice can have recourse to trial of an accused person in his absence where such an option becomes imperative but in limited circumstances'.[89]
- In another SCSL decision, the Trial Chamber examined the nature and scope of 'judicial notice' under national and international laws (even if already covered by Rule 94(A) of the Rules of Court) concluding that the notion enjoyed universal recognition.[90] The Trial Chamber referred to the German and the Russian penal codes as national criminal laws recognizing judicial notice, while mentioning the Austrian Penal Code and the Slovenian Criminal Act as examples of the contrary.[91] In addition, the Trial Chamber examined only judgments of English

[83] BWCC, Case No. X-KR-05/24-1, *Prosecutor's Office of Bosnia and Herzegovina v. Petar Mitrović*, 29 July 2008 (First Instance).
[84] ECCC, *Prosecutors v. Kaing Guek Eav alias Duch*, Case No. 001/18072007/ECCC/TC, Judgment (Trial Chamber, 26 July 2010), paras. 44-45.
[85] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd revised ed., Martinus Nijhoff, 1999, 143-144.
[86] SPSC, *Prosecutor v. Joao Franca da Silva Alias Jhoni Franca*, Case No. 04a/2001, Judgment, 12 December 2002, paras. 74-75.
[87] ICTY, *Decision on the Defence Motion on the Principle of Non-Bis-In-Idem*, 14 November 1994.
[88] SCSL, *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days*, Case No. SCSL-04-15-T, T. Ch., 12 July 2004, at 9-10.
[89] Id., at 9. A similar decision was adopted in *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Accused, Sesay and Kallon to Appear for their Trial*, Case No. SCSL-04-15-T, T. Ch., 12 January 2005, at 12.
[90] SCSL, *Prosecutor v. Sesay el al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-15-PT, T. Ch., 24 June 2004, at 26. Similarly in *Prosecutor v. Norman et al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-14-PT, T. Ch., 2 June 2004, at 15.
[91] Id., at 15.

courts and the US procedural law (and no other common law jurisdiction).[92] Yet, in the end, it relied upon the relevant jurisprudence of the ICTR.[93]

54. In some cases, the local legal system is resorted to for 'establishing that the accused could reasonably have known that the offense in question or the offense committed in the way charged in the indictment was prohibited and punishable'[94] (as required by the international principle of legality); or to establish some limitations (e.g. in relation to conditions for the admission of witnesses or for the hearing of witnesses for their protection)[95] or deviations (e.g. the BWCC in relation to the general principle of *lex mitior* with reference to the Criminal Code of Bosnia and Herzegovina, which adopted the provisions contained in the European Convention on Human Rights and the ICCPR, and the jurisprudence of the Court of Bosnia and Herzegovina, following international jurisprudence).[96] Similarly, the Appeals Chamber of the SCSL confirmed that '[a]s essential elements of all legal systems, the fundamental principle *nullum crimen sine lege* and the ancient principle *nullum crimen sine poena*, need to be considered.'[97] It also recognized the requirement of *lex certa* as being an essential element of the *nullum crimen sine lege* principle, by pointing to the jurisprudence of the ICTY.[98]

55. Only in some cases there is a clearer reference to domestic principles. E.g. the Trial Chamber of the ECCC in the *Duch* Case found it necessary to discuss the legal standard required for the establishment of guilt under the different legal families, since the Cambodian legal system belongs to the civil law one, and yet, the ECCC established a standard of proof of guilt as accepted in the common law system (apparently it has done so following the legacy of the international criminal tribunals, such as the ICTY). Despite these conceptual differences, the Chamber adopted a common approach that has evaluated, in all circumstances, the sufficiency of the evidence.[99]

56. The principal conclusion is that while there is indeed a major tendency to base some parts of the decisions on general principles of law, it is done mostly by resorting to the practice and jurisdiction of other international tribunals (either the legacy of each tribunal or mostly that of the ICTY jurisprudence). The courts and tribunals seem to find less of a need to transpose those principles from national jurisdictions. This seems to mean that these principles are regarded more as an integral part of international criminal law and less as domestic law principles that need to be transposed into international criminal law.

II.1.c International Arbitration[100, 101]

57. For the purposes of this report the overview of cases will include inter-State arbitration (*ad hoc*, Annex VII of the UN Convention on the Law of the Sea [UNCLOS], and Eritrea-Ethiopia Commission) and investor-State arbitration (Iran-US Claims Tribunal [IUSCT] and investment treaty tribunals under the arbitration rules of the International Centre for Settlement of Investment Disputes [ICSID], the UN Commission on International Trade Law [UNCITRAL], and

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[92] Id., at 18-20.
[93] Id., at 30.
[94] ECCC, in the *Duch* case, *supra* note 83, para. 96 (quoting *Prosecutor v. Ojdanic et al.,* IT-99-37-AR72, Appeal Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction-Joint Criminal Enterprise, Appeals Chamber, 21 May 2003, 40).
[95] See BWCC, *Prosecutor v. Nedo Samardzic*, Case No. X-KRZ-05/49, 7 April 2006, Trial panel 1, with reference also to ECtHR decision in the case of *Doorson v. The Netherlands* of 26.3.1996, at 70.
[96] See BWCC, *Prosecutor's office of Bosnia and Herzegovina v. Suljo Karajić*, Case No. X-KR-07/336, 13 April 2010, First Instance, para. 43.
[97] SCSL, *Prosecutor v. Norman et al., Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, Case No. SCSL-04-14-AR72(E), App. Ch., 31 May 2004, 24.
[98] Id., 25.
[99] *Supra* note 84, paras. 44-45.
[100] Based on the analysis provided by Yas Banifatemi and Martins Paparinskis. They are grateful for the research support of Ira Ryk-Lakhman.
[101] In relation to International Investment Law, see A. Gattini, A. Tanzi and F. Fontanelli (eds.), *General Principles of Law and International Investment Arbitration*, Brill, 2018; S.W. Schill, "General Principles of Law and International Investment Law" in T. Gazzini & E. de Brabandere (eds.), *International Investment Law - The Sources of Rights and Obligations*, Martinus Nijhoff, 2012, 133; T. Gazzini, "General Principles of Law in the Field of Foreign Investment", 10 J. of world Investment & Trade (2009), 103.

the Stockholm Chamber of Commerce [SCC]). Purely commercial international arbitration is excluded, in light of the scope of the report. This section will examine the manner in which domestic law principles have been used in publicly available recent decisions of international arbitration (rendered from 1980s onwards).

58. While the terminology of 'principles' is often encountered in contemporary international arbitration, many of these decisions do not engage with domestic law principles in the technical sense.

59. Some of the cases rather address primary rules of international law (with 'general' often signifying the abstractness of expression of the rule or its importance in the particular area). One line of authorities relating to fair and equitable treatment may be found in decisions of investment treaty tribunals, relying on the various ways that general principles of international law (particularly good faith) interrelate with fair and equitable treatment.[102] Another line of cases relates to different aspects of the law of expropriation, mostly rendered by the Iran-US Claims Tribunal (IUSCTR).[103] These cases directly engage with international law, rather than domestic principles, and therefore are of no direct relevance for this report.

60. Other cases address the law of treaties and secondary rules of State responsibility (particularly in relation to the remedial aspects of content of responsibility), both bodies of law mostly expressed at the level of general international law:

- The law of treaties, as expressed in the 1969 Vienna Convention on the Law of Treaties (VCLT), is, for modern international arbitration, a statement of general *international* law on most issues likely to arise, and therefore will very rarely require the arbitrator to go back to domestic law.[104] There are many instances where 'principles' of treaty interpretation have been referred to by arbitral tribunals, both by the IUSCTR[105] and investment tribunals.[106]

- Many awards refer to 'principles' in relation to remedies, often explicitly situating themselves within the line of authority of *Chorzów Factory* or the 2001 ILC Articles on State responsibility. As is not uncommon in the law of State responsibility, it may be hard to draw the line between arguments regarding secondary rules of State responsibility and those concerning primary rules. But whatever the precise classification of the rules that the legal argument addresses, the *source* of those rules is treaty or custom, and thus is of no direct relevance to the present inquiry into domestic law. For example, in *Iran v US (A27)*, Chamber Two of the IUSCTR relied on the 'well-settled principle of international law that every international wrongful act of the judiciary of a state is attributable to that state'.[107] In *Petrobart v Kyrgyz Republic*, the SCC tribunal referred

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[102] M. Paparinskis, "Good Faith and Fair and Equitable Treatment in International Investment Law" in A. Mitchell et al (eds), *Good Faith and International Economic Law*, OUP, 2015.

[103] To consider some of its foundational decisions, in *American International Group, Inc. and American Life Insurance Co. v Iran and Central Insurance of Iran* (1983) 4 IUSCTR 96, para 2a, the Tribunal stated that 'it is a general principle of public international law that even in a case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken.'; similarly, *James M Saghi et al v Iran,* (1993) 29 IUSCTR 20, para. 71.

[104] Although the VCLT is considered to reflect general international law, in some aspects it was based on general principles, rather than customary law - e.g. in relation to the loss of right to terminate, see M. Kohen and S. Heathcote, "Article 45: Convention of 1969" in O. Corten and P. Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary*, OUP 2011, 1066; and fraud, G. Niyungeko, "Article 49: Convention of 1969", id., 1145-46.

[105] *Agrostruct International Inc v Iran State Cereals Organization (1988) 18 IUSCT 180*, Arbitrator Noori's concurring and dissenting opinion, para. 28: 'the fundamental principles of international law requiring that conditions governing the competence of an international tribunal be interpreted restrictively' – 'the Tribunal should not, without giving sufficiently careful attention to the nature of the evidence submitted by the Claimant, accept its United States nationality as proved.'

[106] *Petrobart Limited v The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005, 23; *Eureko B.V. v Republic of Poland,* Partial Award, 19 August 2005, para 177 ('Without deciding whether the exception of non performance is a maxim of interpretation or a rule of international law, the Tribunal is of the view that the exception cannot assist Claimant because it essentially applies to cases of simultaneous or conditional performance').

[107] *The Islamic Republic of Iran v the United States of America (A27)* (1998) IUSCTR 39, para 71.

to '[t]he relevant general principle of international law […] stated clearly in Article 12 of the' 2001 ILC Articles that *mens rea*/intention is irrelevant for assessing breach of an international obligation. [108]

61. A fourth category deals with general principles of international law. While some of those principles have originated in domestic legal traditions, they have long become solidly anchored in the international legal order, and therefore do not require contemporary arbitrators to engage with domestic law to develop international law. A number of arbitral tribunals have referred to general principles of international law in that sense, particularly in relation to good faith[109] but not exclusively.[110] Estoppel is a clear example: as the UNCLOS Annex VII arbitral tribunal in the *Mauritius v UK* case suggests, estoppel in international law might have originally emerged from domestic law, but is now a principle of international law that has its own terminology and distinctions that are no longer dependent upon domestic law:

> Estoppel is a general principle of law […] Estoppel in international law differs from "complicated classifications, modalities, species, sub-species and procedural features" of its municipal law counterpart […] but its frequent invocation in international proceedings has added definition to the scope of the principle. […] Additionally—and in contrast to at least some forms of estoppel in municipal law—the principle in international law does not distinguish between representations as to existing facts and those regarding promises of future action or declarations of law.[111]

62. Sometimes it is unclear what type of legal argument the tribunal is employing but it appears to be (in its own view) related to general principles of international law. E.g. in the *Final Award: Pensions: Eritrea's Claims 15, 19 & 23,* the Eritrea-Ethiopia Claims Commission considered 'Eritrea's invocation of the customary law doctrine of unjust enrichment', viewing it as a 'doctrine predicated upon general principles of international law', noted that 'it must be applied cautiously', and did not find it applicable.[112] In the *Duke Energy v Ecuador* case, an ICSID arbitral tribunal observed that 'although increasingly common in ICSID practice, the award of compound interest is not a principle of international law'.[113] The challenge of drawing the line between general principles within international law and those

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[108] *Petrobart* (*supra* note 106), 24.

[109] *Vigotop Limited v Hungary,* ICSID Case No. ARB/11/22, Award, 1 October 2014, para 310 ('it is undisputed that the principle of good faith is a fundamental principle of international law'); *Gustav F W Hamester GmbH & Co KG v Republic of Ghana,* ICSID Case No. ARB/07/24, Award, 18 June 2010, paras. 123-24 ('An investment will not be protected if it has been created in violation of national or international principles of good faith […] These are general principles that exist independently of specific language to this effect in the Treaty'); *Phoenix Action Ltd. v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras 77-8, 110, 113 ('In the instant case, no question of violation of a national principle of good faith or of international public policy related with corruption or deceitful conduct is at stake. The Tribunal is concerned here with the international principle of good faith as applied to the international arbitration mechanism of ICSID); *Quiborax S.A., Non Metalic Minderals S.A. and Allan Fosk Kaplun v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision in Jurisdiction, 27 September 2012, para. 298; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 142-44.

[110] Consent as a basis of international arbitration, *pacta sunt servanda,* and deciding like things alike, *Daimler Financial Services A.G. v Argentina,* ICSID Case No. ARB/05/1, Award, 22 August 2012, paras. 174, 146, 52 (respectively); inter-temporal law, *Eritrea v Yemen, Award on Territorial Sovereignty and Scope of the Dispute* (1999) 119 ILR 1, para. 444; scope of sovereign rights of the State in relation to pension systems, *Catherine Etezadi v the Government of the Islamic Republic of Iran* (1994) 25 IUSCTR 264, para. 75; *res judicata, Petrobart* (*supra* note 106), 64 ('The Treaty contains no provisions about *res judicata*, but the notion of *res judicata* is undoubtedly recognised in international law').

[111] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* Final Award, ICGJ 486 (PCA 2015), paras. 435-37; In *Grynberg et al v Grenada,* ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 7.1.2, the Tribunal noted that 'it is also not disputed that the doctrine of collateral estoppel is now well established as a general principle of law applicable in the international courts and tribunals such as this one.' In *Canfor Corporation v US, TEMBEC v US, Terminal Forests Products Ltd. v US*, UNCITRAL/NAFTA, Order of the Consolidation Tribunal, 7 September 2005, para. 168, the Tribunal noted that '[e]stoppel is a recognized general principle of law that has been applied by many international tribunals.'

[112] *Final Award: Eritrea's Claims 15, 19, and 23*, 19 December 2005, RIAA XXVI, para. 43.

[113] *Duke Energy Electroquil Partners et al v Ecuador,* ICSID Case No ARB/04/19, Award, 18 August 2008, para. 473. Before making that point, the Tribunal stated that 'the prohibition of compound interest contained in local law must be enforced especially considering Article VIII of the BIT which specifies that the Treaty shall not derogate from the laws and regulations of the host State', so it appears that the Tribunal was contrasting a (properly) international principle with a domestic rule here, rather than deriving the former from the latter.

derived from domestic law is illustrated by the *Yukos* matter, where an Energy Charter Treaty Tribunal considered the submission by the respondent that the 'clean hands' doctrine constituted a 'general principle of law recognised by civilized nations.' The Tribunal noted that

> General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an "unclean hands" principle in international law.[114]

63. In ultimately rejecting Russia's argument, the Tribunal emphasised that

> Respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of "unclean hands" in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim.[115]

64. The Tribunal discussed various *international* judgments and opinions but was not invited by Russia to engage with or cite approaches taken by *domestic* legal orders and courts, and so could not examine the possibility of deriving general principles from domestic law. Overall, cases examined in this section, while engaging with 'general principles' in the technical sense, are not (any longer) directed at principles of domestic law. They are thus just as irrelevant for the present inquiry as the cases considered above.

II.1.c.i 'Principles' that Engage with Domestic Law of a Single State

65. Even when arbitral tribunals do refer to domestic law, they are not necessarily engaged in the use of domestic law principles for the development of international law. In certain regimes of international arbitration, particularly international investment arbitration, interpretation and application of international law may require close engagement with domestic law of a particular State. For example, arbitral tribunals may have to consider whether an investment has been made in accordance with domestic law of State A, or whether State B has provided due process under its domestic law. There may be ground for reasonable disagreement over the precise role of each of these spheres.[116] But it is tolerably clear that they engage with domestic law of a single State and do not attempt to use domestic law principles for broader purposes, and are thus irrelevant for this inquiry.

66. A slightly more complicated challenge is presented by certain cases, particularly in the IUSCT, where tribunals consider principles that are both general *and* belong to the legal order of the State that is a party to the arbitration. For example, in the *Pomeroy v Iran* case, the Tribunal stated in relation to judicial estoppel that '[i]t is both a general principle of law and a principle embodied in Articles 247 and 248 of the Civil Code of Iran, that a party may not deny the validity of a contract entered into on its behalf by another if, by its conduct, it later consents to the contract'.[117] Closer examination of particular awards is necessary to identify the precise character of the legal argument. For the purposes of this report, these cases have been treated as relating to general principles of (at least in part) domestic law, and will be discussed in the next section.

II.1.c.ii 'Principles' that Engage with Domestic Law Principles

A. Reliance upon general principles

67. International arbitral tribunals have relied upon general principles in a variety of cases. One area where reliance on general principles may be particularly fruitful is international procedural law (even if it may be complicated to determine whether tribunals are relying on general principles in the technical sense, or rather elaborating their statutory

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[114] *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, para. 1359.
[115] Id., para. 1362.
[116] E. Gaillard and Y. Banifatemi, "The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process", 18 ICSID Review (2003) – FILJ 375; Z. Douglas, *The International Law of Investment Claims*, CUP, 2009, ch 2.
[117] *R.N. Pomeroy, et.al. v Government of the Islamic Republic of Iran* (1983) 2 IUSCTR 372, para V(1).

or inherent powers, or applying customary law or general principles of international law).[118] To select a few examples: in the *Fritz v Iran* case, the IUSCT relied on the 'accepted principle that an adverse inference may be drawn from a party's failure to submit evidence likely to be at its disposal. In weighing the evidence before it, the Tribunal must therefore take into account the Respondents' omission to produce the directors' reports'.[119] In *American Bell International v Iran*, the Tribunal relied on 'a general principle of law that a party which at some stage of judicial or arbitral proceedings admits that certain legal conclusions can be drawn from some facts or circumstances is thereafter estopped from arguing otherwise in the same proceedings'.[120] In the *Futura v NIOC*, the IUSCT relied on the principle *actio non datur non damnificato* to dismiss the claim because the claimant had suffered no damage.[121]

68. In the *Economy Forms Corporation v Iran*, the IUSCT relied on 'a generally accepted principle of private international law' that the formation of and the requirements as to the form of a contract are governed by the law which would be the proper law of the contract, if the contract was validly concluded (however, there are only two citations).[122] In the *AAPL v Sri Lanka* case, an ICSID arbitral tribunal confirmed that it was a general principle of law that the claimant bears the burden of proof.[123] In the *US v Iran (B36)* case, the IUSCT relied upon 'the public international law principle of extinctive prescription', noting that '[n]o rule of international law specifies the time period which must elapse in order to render extinctive prescription operative. The principle is flexible and the decision as to its applicability is left at the discretion of the Tribunal' (and the particular claim was allowed).[124] In *Waste Management II*, an ICSID Additional Facility arbitral Tribunal stated that '[t]here is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice', considered various international authorities and judgments of two domestic courts in elaborating its content, and applied it in rejecting an objection by Mexico.[125]

69. There is a significant corpus of decisions relating to general principles in contractual and other private law matters, particularly rendered by the IUSCT in light of its broad jurisdiction that included contractual claims. Some decisions are directed at principles that are general in the sense of underpinning the legal systems. In the *Amoco v Iran* case, the IUSCT stated that '[t]he principles of good will and good faith apply in practically all systems of law to contracts as well as to treaties'. [126] In the *Mobil v Iran* case, the IUSCTR noted that '[i]t also is admitted generally that *force majeure*, as a cause of full or partial suspension or termination of a contract, is a general principle of law which applies even when the contract is silent'.[127] In the *Sea-Land Service v Iran* case, the IUSCT identified and relied upon the principle of unjust enrichment,

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[118] C. Brown, *A Common Law of International Adjudication*, OUP, 2007, 85-90.

[119] Even an adverse inference was not in fact made against Iran: 'the Tribunal finds that insufficient evidence has been presented that on 19 January1981 STSS was an entity controlled by Iran as required by the Claims Settlement Declaration. Consequently, the Tribunal dismisses the claim against STSS for lack of jurisdiction', *Arthur J. Fritz & Co. v STSS and the Government of the Islamic Republic of Iran* (1989) 22 IUSCTR 170, paras 42 and 48.

[120] *American Bell International Inc. v the Islamic Republic of Iran, et.al* (1986) 11 IUSCTR 320, para. 16. See also *Pomeroy* (supra note 117), para V(1).

[121] *Futura Trading Incorporated v the National Iranian Oil Company* (1986) 13 IUSCTR 99, para. 62.

[122] *Economy Forms Corporation v the Government of the Islamic Republic of Iran* (1983) 3 IUSCTR 42, para III(1), quoting Dicey & Morris, The Conflict of Laws Rule 146 at 775 and Rule 148 at 784 (10th ed. 1980); O. Lando, Contracts, in III International Encyclopedia of Comparative Law, Chapter 24 at 102-103.

[123] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 56. In *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 89, the arbitral Tribunal relied on *AAPL* and noted that '[t]he respective provisions of the BIT confirm what can be considered as a general principle of international procedure - and probably also of virtually all national procedural laws - namely that it is the Claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim.'

[124] *The United States of America v the Islamic Republic of Iran (B36)* (1996) 32 IUSCTR 162, paras. 72 and 74. In the *Iran National Airlines Company v the Government of the United States of America (B8)* (1987) 17 IUSCTR 187, paras. 6 and 11. The Tribunal accepted that the principle, which the US invoked by reference to statutes of limitation in the US and Iran, is 'an established principle of public international law', but did not apply it to the commercial transactions in the case.

[125] *Waste Management, Inc. v United Mexican States ('Number 2')*, ICSID Case No. ARB(AF)/00/3, Decision as to Mexico's Preliminary Objection, 26 June 2002, paras. 39-47.

[126] *Amoco International Finance Corporation v the Government of the Islamic Republic of Iran* (1987) 15 IUSCTR 189, para. 169.

[127] *Mobil Oil Iran, Inc. v Government of the Islamic Republic of Iran* (1987) 16 IUSCTR3, para. 117.

> The concept of unjust enrichment had its origins in Roman Law, where it emerged as an equitable device 'to cover those cases in which a general action for damages was not available.' It is codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals.[128]

70. In the *Inceysa v El Salvador* award, an ICSID arbitral tribunal relied upon unjust enrichment in a similar vein, noting that '[t]he written legal systems of the nations governed by the Civil Law system recognize that, when the cause of the increase in the assets of a certain person is illegal, such enrichment must be sanctioned by preventing its consummation.'[129]

71. In the *Questech v Ministry of National Defence of Iran* case, the IUSCT identified and relied upon change of circumstances principle, noting that

> This concept of changed circumstances, also referred to as clausula rebus sic stantibus, has in its basic form been incorporated into so many legal systems that it may be regarded as a general principle of law; it has also found a widely recognized expression in Article 62 of the Vienna Convention on the Law of Treaties of 1969. While it might be argued that, in view of wider and narrower formulations of the clausula in different legal systems and of certain differences in its practical application, it would not be easy to establish a common core of such a general principle of law, the consideration of changed circumstances in the present context is warranted by the express wording of Article V of the Claims Settlement Declaration.[130]

72. The Tribunal found that the change of circumstances principle applied in the case, and ordered compensation for damages.[131] In his separate opinion, Judge Holtzmann disagreed with the application of principle of changed circumstances, explaining that

> Concepts by which parties are excused from contractual obligations by certain changed circumstances are found in many legal systems and are known by various names. In common law systems they are embraced within doctrines of 'frustration' and 'impossibility'; in the civil law they are often known as clausula rebus sic stantibus. All of these doctrines excuse parties in case of supervening circumstances caused by outside events beyond their control that have made continued performance of a contract unreasonable. All of these doctrines are seen as exceptions to the paramount rule of pacta sunt servanda ('agreements are to be observed'). Because they are exceptions to the contractual obligation to perform they must be proven and applied with care.[132]

73. In other decisions, the IUSCT identified general principles of a more technical character. In the *Dames & Moore v Iran* case, the IUSCT relied on the principle of payment upon invoice (albeit rejecting it in the particular case).[133] In the *Schering Corporation v Iran* case, the IUSCT stated that '[i]t is a generally accepted legal principle that when a promissory note is given for an obligation, the obligation is, unless otherwise agreed, at least suspended until the note matures'.[134] In the *Morrison-Knudsen Pacific Limited v Iran*, the IUSCT rejected Respondents' submission that the

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[128] *Sea-Land Service, Inc. v the Government of the Islamic Republic of Iran, Ports and Shipping Organization* (1984) 6 IUSCTR 149, para (v). See also *PHIBRO Corporation v. Ministry of War-ETKA Co. Ltd., et.al.* (1991) 26 IUSCTR, paras. 46-8; *Alfred Haber, P.A. v the Islamic Republic of Iran* (1989) 23 IUSCTR 133, para. 56; *Flexi-Van Leasing, Inc. v the Government of the Islamic Republic of Iran* (1986) 12 IUSCTR 335 pt III(e); *Schlegel Corporation v. National Iranian Copper Industries Company* (1987) 14 IUSCTR 176, paras. 13-7.

[129] *Inceysa v El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras 254-55.

[130] *Questech, Inc. v the Ministry of National Defence of the Islamic Republic of Iran* (1985) 9 IUSCTR 170, pt 2(c).

[131] Ibid; see also *Rockwell International v The Government of the Islamic Republic of Iran* (1989) 23 IUSCTR 150, para 92 ('The concept of "changed circumstances," also referred to as clausula *rebus sic stantibus*, in its basic form, has been recognized in Tribunal practice as a general principle of law').

[132] *Questech* (*supra* note 130), pt I.

[133] *Dames & Moore v the Islamic Republic of Iran, et.al.* (1983) 4 IUSCTR 212, para 4.b.ii ('It is a well-established general principle in various legal systems that in commercial relationships one party may be obligated to pay another party, with which it has been doing business, a sum specified in an invoice if it receives the invoice but does not object to it within a certain period of time').

[134] *Schering Corporation v the Islamic Republic of Iran* (1984) 5 IUSCTR 361, pt VI.

remedy provided in article 16 of the contract which was the subject-matter of the claim constituted an exclusive remedy for termination, relying on the 'general principle of law [that] a party may recover losses suffered as a consequence of contract breach irrespective of whether a right also exists to terminate a contract.'[135] In the *Reynolds v Iran* case, the IUSCT noted that '[u]nder generally accepted principles of contract law, a contractually stipulated rate of interest is normally binding on the parties', although it is true that '[a]n international Tribunal will not enforce the provisions of a contract stipulating that a highly unreasonable or usurious rate of interest should be paid', which was not the case in that instance.[136] In the *DIC v Iran et al*, the IUSCT relied on general principles regarding the existence of contracts ('is widely accepted by municipal systems of law that one can prove the existence of an enforceable oral contract through evidence demonstrating part […] Such a principle must be taken to constitute a general principle of law')[137] and recovery for work performed ('It is well established under Iranian law and general principles of law that under the doctrine of *quantum meruit* there may be a recovery for work performed').[138] In the *Iran v US (B1-5)* case, the IUSCT relied on the general principle of the allocation of risks and obligations between buyer and seller in a purchase/sale contract.[139] In the *Middle East Cement Shipping* case, an ICSID arbitral tribunal noted that '[t]he duty to mitigate damages […] can be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law which are applicable in this dispute according to Art. 42 of the ICSID Convention'.[140] In the *Saluka v Czech Republic* partial award, an UNCITRAL arbitral tribunal relied upon the 'general principle of company law that a company is a legal entity separate from its shareholders', applying it to find that anything acquired by CSOB was not acquired by the State.[141]

74. In several investment arbitration awards, the UNIDROIT Principles of International Commercial Contracts (which are essentially a restatement of general principles found in major domestic law traditions) have been invoked as a source of general principles of contract law derived from the domestic legal systems. Some examples are: *Joseph C. Lemire v. Ukraine* (interpretation of contracts),[142] *Petrobart v. Kygyz Republic* (interest),[143] *Eureko Bv v. Poland* (the application of the *exceptio non adimpleti contractus*),[144] *PSEG Global v. Turkey* (the validity of contracts),[145] *African Holding et ~~A~~al. V. Congo* (non-performance and conclusion of contracts).[146]

75. Finally, in a number of decisions in international investment arbitration, tribunals have relied upon general principles to elaborate primary obligations. In the *Saluka* case noted above, the Tribunal identified the general principle of unjust

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[135] *Morrison-Knudsen Pacific Limited v the Ministry of Roads and Transportation and the Islamic Republic of Iran* (1984) 7 IUSCTR 54, pt 3(b).

[136] *R.J. Reynolds Tobacco Company v the Government of the Islamic Republic of Iran and Iranian Tobacco Company (ITC)* (1984) 7 IUSCTR 181, pt IV(4).

[137] *DIC of Delaware Inc., Underhill of Delaware, Inc. v Tehran Redevelopment Corporation, the Government of the Islamic Republic of Iran* (1985) 8 IUSCTR 144, pt B(1).

[138] Ibid.

[139] *The Islamic Republic of Iran v the United States of America (B1 Claim 5)* (1988) 19 IUSCTR 3, para 38 ('It is an accepted general principle that someone who buys goods and pays a consideration therefor to the seller, enters into the transaction in the belief that the goods are sound, unless the contrary is expressly stated in the contract. The other side of the coin is, that the seller is the guarantor of the soundness of the goods, and this warranty is imposed on him pursuant to the contract').

[140] *Middle East Cement Shipping and Handling Co SA v Egypt,* ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 167.

[141] *Saluka Investments BV v Czech Republic*, UNCITRAL, PCA administered, Partial Award, IIC 210 (2006), 17 March 2006, para. 452.

[142] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award of 28 March 2011.

[143] *Supra* note 106.

[144] *Eureko B.V. v. Republic of Poland*, UNCITRAL ad hoc, Partial Award, 19 August 2005.

[145] *PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICISD Case No. ARB/02/5, Award of 19 January 2007.

[146] *African Holding Company of America Inc. et al. v. Democratic Republic of Congo*, ICISD Case No. ARB/05/21, Award of 29 July 2008. For additional discussion on the application of UNIDROIT Principles, see J. Hepburn, "The UNIDROIT Principles of International Commercial Contracts and Investment Treaty Arbitration: A Limited Relationship" 64 ICLQ (2015), 905. Also the 2016 lecture of Lauro da Gama E Souza on UNIDROIT Principles at the Hague Academy of International Law.

enrichment and applied it as part of fair and equitable treatment.[147] In the *Total v Argentina* case, an ICSID arbitral tribunal engaged in 'a comparative analysis of the protection of expectations in domestic jurisdictions', concluding that '[w]hile the scope and legal basis of the principle varies, it has been recognized lately both in civil law and common law jurisdictions within well defined limits.'[148] Other decisions relate to proportionality. In the *Occidental v Ecuador* case, an ICSID arbitral tribunal observed that '[t]he application of the principle of proportionality may be observed in a variety of international law settings', and further noted that

> On the application of proportionality generally in the context of administrative action, the most developed body of jurisprudence is in Europe. It is very well-established law in a number of European countries that there is a principle of proportionality which requires that administrative measures must not be any more drastic than is necessary for achieving the desired end. The principle has been adopted and applied countless times by the European Court of Justice in Luxembourg, and by the European Court of Human Rights in Strasbourg.[149]

76. Ecuador's annulment challenge on the issue was rejected because, in the opinion of the annulment committee, 'the Tribunal has convincingly explained that the principle of proportionality between intensity and scope of the illicit activity, and severity of the sanction is a general principle of punitive and tort law, both under Ecuadorian and under international law.'[150]

B. Affirmation of general principles

77. A considerable number of decisions that rely upon general principles and are discussed in the previous section also affirm and explain, in general terms, why they count as general principles. In some cases, the affirmation may stand on its own (or be expressed in terms so broad that they may be relating to general principles of international law). In the *Amco v Indonesia* case, an ICSID arbitral tribunal discussed the approach to be taken to interpret an agreement to arbitrate and noted that 'the fundamental principle *pacta sunt servanda*, [is] a principle, common, indeed, to all systems of internal law and to international law.'[151] In the *Inceysa v El Salvador* case, an ICSID arbitral tribunal made a broad statement in the following terms:

> Without attempting to define what the general principles of law are, the Tribunal notes that, in general, they have been understood as general rules on which there is international consensus to consider them as universal standards and rules of conduct that must always be applied and which, in the opinion of important commentators, are rules of law on which the legal systems of the States are based.[152]

C. Negation of general principles

78. In a limited number of cases, arbitral tribunals have explicitly rejected arguments for the existence of general principles. In the *US v Iran (B36)*, the IUSCT (possibly) rejected the argument that there was a general principle of international law setting a time period within which claims could be made, noting that it

> is not aware of State Practice clearly supporting the period of four years, especially with regard to intergovernmental contracts of this type for the sale of goods. The period is much longer, though the length of such period is difficult to define and may vary in different circumstances. […] there is no rule of general international

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[147] *Supra* note 141, paras 449-50.

[148] *Total S.A. v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, paras. 128 and 129-30.

[149] *Occidental Petroleum Corporation et al v Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paras. 402-3.

[150] Id., Decision on Annulment, 2 November 2015, para. 350. Other authorities are more cautious, e.g. *Adel A Hamadi Al Tamimi v Oman,* ICSID Case no ARB/11/33, Award, 3 November 2015, para 261 ('the minimum standard of treatment under customary international law, the United States submitted, does not include a general obligation of proportionality. Proportionality is not a self-standing obligation.'); M. Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, OUP, paperback ed., 2014, lv ('*Occidental* is a complex case, both at the level of domestic law as well as primary and secondary rules of international law, and one should evaluate its reasoning with great care, but there is something to be said for pausing before one substitutes and rewrites contractual terms and consequences by reference to such a general and vague standard as proportionality.')

[151] *Amco Asia Corporation et al v Indonesia,* ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, para 14.

[152] *Inceysa* (*supra* note 129), para 227.

law that would fix a time period. In the absence of specific guidance the international judge or arbitrator enjoys a measure of discretion restricted by his duty to give due regard to the facts of the particular case.[153]

79. In the *Canfor v US* case, the consolidation Tribunal was unimpressed by the investor's argument that the US request was barred by laches, noting that:

> the general principle underlying the Anglo-American doctrine of laches has been invoked before international tribunals, and […] a number of international legal scholars have argued for its existence in international law. However, the Tribunal questions the application of the doctrine in the context of the present request for consolidation. […] While there is a borrowing of principles derived from domestic legal systems in public international law, this takes the form of general principles of law that do not necessarily replicate the rules of domestic law from which they derive their common origin.[154]

80. In the *Final Award on Eritrea's Damages Claims,* the Eritrea-Ethiopia Claims Commission rejected the proposition that consequential damages were a general principle of law, by noting that

> international law does not recognize a separate category of compensable "consequential damages" involving different standards of legal causation or other distinctive legal elements. The concept of consequential damages has a significant role in some national legal systems, but does not exist in others, and so cannot be viewed as a general principle of law.[155]

81. In the Partial Award on the Merits in the *Chevron v Ecuador* case, an UNCITRAL arbitral tribunal rejected 'loss of chance' as a general principle of international law (responding to Ecuador's arguments regarding reparation for loss caused by undue delay by Ecuador's courts):

> [T]he 'loss of chance' principle does not have wide acceptance across legal systems such that it can be considered a 'general principle of law recognized by civilized nations.' At most it can be said that the 'loss of chance' principle is applied in exceptional situations where there exists a 'harm whose existence cannot be disputed but which it is difficult to quantify,' (sic) as noted in the commentary to the UNIDROIT Principles cited by the Respondent. In this case, the Tribunal finds no exceptional difficulties in coming to a conclusion as to what should have occurred but for the breach of the BIT and what damages result therefrom. The Tribunal therefore declines to apply the 'loss of chance' principle.[156]

82. There may be other cases where reliance on domestic law principles has been negated by implication. Decisions in investment arbitration that do not find unjust enrichment, legitimate expectations, or proportionality to be elements of particular primary obligations may be counted as rejecting the reliance on these principles in *Saluka*, *Total*, and *Occidental* cases discussed in the previous section.

II.1.c.iii Interim Conclusion

83. Domestic law principles play a role in modern international arbitrations, and it is not an insignificant one. But it is important to be clear about whether tribunals are really relying on domestic law principles in the technical sense, and why they are doing it. In many – most – cases where the term 'principles' is employed, they are not engaged with as domestic law principles but as rules expressed directly at the level of international law, be they rules of treaty law, particular primary obligations, the law of State responsibility, or other principles of general international law. Similarly, in many cases where 'domestic law' is relied upon, it is used to resolve a particular dispute that partly hinges on the domestic law of a litigating party, especially in investor-State arbitration.

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[153] *US v Iran (B36)* (*supra* note 124), para 61 and foot note 11. These passages may also be read as relating to customary international law or inherent power of tribunals.

[154] *Canfor* (*supra* note 111) paras. 164-66.

[155] *Final Award: Eritrea's Damages Claim (Eritrea v Ethiopia)*, Eritrea Ethiopia Claims Commission, 17 August 2009, 26 RIAA 505, para 203.

[156] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v Ecuador,* UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, para 382.

84. Once these irrelevancies are disposed of, it is possible to concentrate on the cases that do engage with principles of domestic law. There are several strands of cases where tribunals have *relied* upon such principles. They may be loosely divided into principles of procedural law, principles of contractual/private law (both of general and more technical nature), and principles elaborating the content of primary international obligations, particularly in investment law. There is also a number of cases where domestic law principles have been *negated* explicitly, and there may be more, again particularly in investment law, where it has been done by implication. At the end of the day, principles of domestic law have a role to play -- sometimes a very important one – but one that should not be viewed in isolation from the development of international law through treaties, customary law, and general principles of international law.

II.1.d WTO dispute settlement[157]

85. One would have expected private law analogies to have been particularly influential in WTO law given the predominantly private law character of trade. However, private law analogies seem to have played a surprisingly small role. Beyond some brief and informal discussions on the relevance of domestic law among WTO committees, it is within the framework of the dispute settlement system that WTO tribunals have assessed in a small number of cases the potential use of domestic rules and principles in the context of WTO law. This limited role is in large part due to the last sentence of Article 3 (2) of the Dispute Settlement Understanding (DSU) ('Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements').
86. Although the DSU does not make an explicit reference to the general principles of law, the Appellate Body had early recognized that WTO agreements '[are] not to be read in clinical isolation from public international law'[158] since Article 3.2 of the WTO DSU provides that the dispute settlement system of the WTO 'serves […] to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.'

87. Among these customary rules of interpretation, Article 31.3.c of the 1969 Vienna Convention on the Law of Treaties stipulates that, for the purpose of interpreting a treaty, '[t]here shall be taken into account together with the context […] any relevant rules of international law applicable in the relations between the parties.*'* On this basis, the Appellate Body has recognized that its task is to interpret the language of the agreements 'seeking additional interpretative guidance, as appropriate, from the general principles of international law.'[159] The WTO website lists several 'principles and concepts of general public international law*'* contained in the WTO Appellate Body Repertory of Reports and Awards (1995-2013).[160] However, no specific mention is made to general principles of *domestic* law.

88. While several WTO rulings have discussed, mentioned or referred to 'general principles of law'[161] such as 'good faith',[162] '*res judicata'*,[163] 'estoppel'[164] or 'non-retroactivity',[165] they have done so by relying – *inter alia* – on international instruments, the writings of international law scholars or previous decisions of the ICJ and PCIJ, but not by assessing how these principles were understood in domestic law.

89. Beyond this general overview suggesting the irrelevance of domestic law principles in the context of WTO dispute resolution, two issues deserve to be highlighted:

- the interpretation of the principle '*onus probandi actori incumbit*' for which WTO

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157 Based on the analysis provided by Régis Bismuth with peer review of Michael Waibel.

158 Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 29 April 1996, WT/DS2/AB/R, p. 17.

159 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, WT/DS58/AB/R, at 158.

160 https://www.wto.org/english/tratop_e/dispu_e/repertory_e/p3_e.htm

161 For an overview, see P. C. Mavroidis, "No Outsourcing of Law? WTO Law as Practiced by WTO Courts", 102 AM. J. INT'L L. (2008) 421, 439 *et seq.*; P. Van Den Bossche, *The law and policy of the world trade organization – text, cases and materials*, CUP, 2005, at 58.

162 E.g., *U.S. – Shrimp*, *supra* note 159, at 158

163 E.g., Panel Report, *India – Measures Affecting the Automotive Sector*, 21 December 2001, WT/DS146/R, WT/DS175/R, at 7. 54 *et seq.*

164 E.g., Panel Report, *Guatemala – Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico*, 24 October 2000, WT/DS156/R, at 8.23-8.24

165 E.g., Appellate Body Report, *Canada – Term of Patent Protection*, 18 September 2000, WT/DS170/AB/R, at 71 *et seq.*

courts have expressly referred to domestic law;
- the specific case of the use of domestic law for the interpretation of WTO agreements.

II.1.d.i The interpretation of the principle 'onus probandi actori incumbit'

90. In *United States – Shirts and Blouses*, the Appellate Body addressed the issue of the allocation of the burden of proof between the parties in a dispute. Without explicitly mentioning the principle '*onus probandi actori incumbit*', the Appellate Body implicitly referred to it when it stated:

> [T]he issue in this case is which party must first show that there is, or is not, a violation. More specifically, the issue in this case is which party has the burden of demonstrating that there has, or has not been, an infringement of the obligations […] In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof (15).[166]

91. It is beyond doubt that the Appellate Body implicitly referred to this principle (it is noteworthy to mention that the Latin expression has to date never been expressly cited in the WTO case-law but is an 'entry' in the WTO Analytical Index). Indeed, the writing on which the Appellate Body relied mentions at the cited page:

> A study of the practice of international tribunals shows that it could easily be concluded that, in spite of variety of approaches and differences of opinions as to the legal degree of applicability of the rule under different circumstances, the logical and legal concept of *actori incumbit probatio* has generally been accepted and applied by international tribunals.[167]

II.1.d.ii The use of domestic law for the interpretation of WTO agreements

92. States involved in WTO dispute settlement proceedings have occasionally invoked various concepts or principles of domestic law in order to suggest an interpretation of some provisions in WTO agreements. In a few cases, panels and the Appellate Body discussed the relevance of domestic law in interpreting such provisions, the meaning of which being potentially clarified by way of analogy with domestic concepts and principles.

93. In *US – Countervailing Measures*, the United States sought to interpret the terms "benefit" and "recipient" mentioned in the Agreement on Subsidies and Countervailing Measures (SCM) in order to determine the recipient of the benefit in the case of a change in ownership. It did so by using the traditional distinction in domestic law between a corporation as a distinct legal person and its shareholders.[168]

94. The panel did not follow the argumentation put forward by the United States. Rather, it considered

> that the distinction between a company and its shareholders as used by the United States is not appropriate in the context of the SCM Agreement. We agree that for the purpose of the national corporate law of the United States and many other WTO Members, a distinction may be drawn between shareholders and the company. However the SCM Agreement does not make any reference or any distinction between shareholders and the company when it discusses the need to establish the benefit. Articles 1, 10 and 14 of the SCM Agreement make references only to

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[166] Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, 25 April 1997, WT/DS33/AB/R, at 14.

[167] M. Kazazi, *Burden of Proof and Related Issues – A Study of Evidence Before International Tribunals*, Kluwer International, 1996, 117. The expressions '*onus probandi actori incumbit*' and '*actori incumbit probatio*' are understood as equivalent. See, A.X. Fellmeth & M. Horwitz, *Guide to Latin in International Law*, OUP, 2009, 13. See also, C.F. Amerasinghe, *Evidence in International Litigation*, Martinus Nijhoff, 2005, 95.

[168] Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, 21 July 2002, WT/DS212/R, at 7.49. (Footnotes omitted)

'recipient' (or 'benefit to recipient') and to 'producer.' The concept of benefit is independent of the legal business structure established pursuant to national corporate law.[169]

95. While the panel dismissed *in casu* the argument of the United States, interestingly, it did not reject *per se* the potential relevance of domestic law concepts and principles for the purpose of interpreting the provisions of the SCM Agreement.

96. Perhaps more relevantly, in *US – FSC*, the Appellate Body had to interpret the meaning of the expression 'foreign-source income' included in the SCM Agreement. Although it did so *prima facie* by having recourse to State practice as stemming from international tax treaties or model conventions, it also relied on national laws implementing a different standard in order to identify the 'lowest common denominator' of State practice and, eventually, these 'widely recognized principles of taxation'. The following excerpt[170] best encapsulates the reasoning of the Appellate Body

> 141. Although there is no universally agreed meaning for the term 'foreign-source income' in international tax law, we observe that many States have adopted bilateral or multilateral treaties to address double taxation. The United States, for instance, has more than fifty bilateral tax treaties addressing double taxation. […]
>
> 142. *Although these instruments do not define 'foreign-source income' uniformly, it appears to us that certain widely recognized principles of taxation emerge from them (121).*[171] In seeking to give meaning to the term "foreign-source income" in footnote 59 to the *SCM Agreement*, which is a tax-related provision in an international trade treaty, we believe that it is appropriate for us to derive assistance from these widely recognized principles which many States generally apply in the field of taxation. In identifying these principles, we bear in mind that the measure at issue seeks to address foreign-source income of United States citizens and residents – that is, income earned by these taxpayers in "foreign" States where the taxpayers are not resident.
>
> 143. *We recognize, of course, that the detailed rules on taxation of non-residents differ considerably from State-to-State, with some States applying rules which may be more likely to tax the income of non-residents than the rules applied by other States (122).*[172] *However, despite the differences, there seems to us to be a widely accepted common element to these rules. The common element is that a 'foreign' State will tax a non-resident on income which is generated by activities of the non-resident that have some link with that State.* Thus, whether a 'foreign' State decides to tax non-residents on income generated by a permanent establishment or whether, absent such an establishment, it decides to tax a non-resident on income generated by the conduct of a trade or business on its territory, the 'foreign' State taxes a non-resident only on income generated by activities linked to the territory of that State (123).[173] As a result of this link, the 'foreign' State treats the income in question as domestic-source, under its source rules, and taxes it. Conversely, where the income of a non-resident does not have any links with a 'foreign' State, it is widely accepted that the income will be subject to tax only in the taxpayer's State of residence, and that this income will not be subject to taxation by a 'foreign' State. (emphasis added)

97. In *Mexico-Telecoms*, the Panel was called upon to interpret provisions of the Telecommunications Reference Paper, which formed an integral part of Mexico's schedule of liberalisation commitments under the GATS.[174] The Panel considered that some technical terms may have a special meaning (in the sense of Article 31.4 of the VCLT) of common use in the telecommunications sector, and which the parties can be presumed to have been aware of. In

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[169] Id., at 7.50.

[170] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* (Recourse to Article 21.5 of the DSU by the European Communities), 14 January 2002, WT/DS108/AB/RW, 141-142.

[171] '(121) We observe that, before the Panel, the United States provided examples of the source rules applied by Brazil, Canada, Chile, Malaysia, Panama, Saudi Arabia, Taiwan, the United Kingdom and the United States. The widely recognized principles of taxation appear to be reflected in these domestic rules of taxation […]'

[172] '(122) The *O.E.C.D. Model Tax Convention* itself, therefore, admits of differing standards to determine whether business income was generated by activities linked to the territory of a "foreign" State.'

[173] '(123) We note that the *Andean Community Agreement*, the *CARICOM Agreement*, and the *Andean Community Model Tax Agreement and the O.E.C.D.* and *U.N. Model Tax Conventions* describe a variety of situations in which a "foreign" State is entitled to tax a non-resident on income generated through activities which are linked to that State.'

[174] Report of the Panel, *Mexico - Measures Affecting Telecommunications Services*, 2 April 2004, WT/DS204/R.

particular, regarding the special meaning of the term 'cost-oriented' the Panel refers to a comparative report made by the International Telecommunications Union (ITU)

> ITU, *Trends in Telecommunications Reform: Interconnection Regulation*, 3rd edition, sec. 4.2.1.2, p. 40. This paragraph also states that countries that apply long run incremental cost methodologies include United States, Australia, EC, Colombia, and South Africa, and that "numerous developing countries have adopted or proposed" some form of this model.[175]

98. In addition, the Panel stated that 'the term "interconnection" appears as a technical term with a possible "special meaning" in national laws and regulations'.[176] However, in doing so, the Panel only refers to Mexico's Federal Communications Law since

> [w]e have not been provided evidence of laws or regulations of other Members which offer definitions or usage that indicate that the definition of "interconnection" is inconsistent with the ordinary meaning of the term "linking" in Section 2 of Mexico's Reference paper. We note that under EC law, the term "interconnection" is defined comprehensively in a manner that is consistent with the ordinary meaning of the term "linking" […]
>
> 7.112 A "special meaning" of the term "interconnection" in Section 2, inconsistent with the ordinary meaning of this term, is also not evident from an examination of the differences between domestic and international interconnection from *commercial*, *contractual*, *or technical* points of view.[177]

99. These cases deserved to be examined separately since they are not related to 'general principles of law' already used or identified by other international tribunals (notably the PCIJ and the ICJ). Rather, they demonstrate another way of using domestic law in the context of WTO dispute resolution for the interpretation – beyond what is literally prescribed by the 1969 Vienna Convention on the Law of Treaties – of ambiguous terms in WTO agreements.

II.1.e International Administrative Tribunals (IATs)[178,179]

100. International Administrative Tribunals (ITAs) are independent judicial bodies established by international organisations to settle the disputes between them and their employees on labour issues. In the *Judgments of the ILO Administrative Tribunal* case, the ICJ confirmed that '[t]he Court does not deny that the Administrative Tribunal is an international tribunal.'[180] IATs enjoy the limited jurisdiction given by their statutes. Over the years they have created a mature body of law which has a distinctive character and does not duplicate any national law.

101. Due to the lack of clarity in their statutes, IATs decisions have accepted a variety of sources of law. In particular, general principles of law have been applied by most IATs as early as 1929 (by the then Administrative Tribunal of the League of Nations –LNT–).[181] The Administrative Tribunals of the World Bank (WBAT),[182] UN Dispute Tribunal (UNDT) and Appeals Tribunal (UNAT),[183] the International Labour Organisation (ILOAT),[184] the NATO

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[175] Id., para. 7.175.

[176] Id., para 7.110.

[177] Id., paras. 7.111 and 7.112, with references to the United States, *47 CFR Ch. 1 §51.5 (10-1-02 Edition) (FCC) [Interconnection regulations implementing ss. 251-252 of the Communications Act of 1934]*; and Article 2 of EC Directive 2002/19/EC (Access Directive), OJ 2002 L108, p. 33.

[178] Based on the analysis provided by Diana Louise.

[179] For a more detailed discussion on the internal law of international organisations and IATs, see C.F. Amerasinghe in *Principles of the Institutional Law of International Organizations*, 2005 (2nd ed.), CUP, Chapter 3; *Law of the International Civil Service*, Clarendon Press, 1994 (Vol. I); and in Chapter 15 of C.P.R. Romano, K. Alter, Y. Shany (eds), *The Oxford Handbook of International Adjudication*, OUP, 2013.

[180] I.C.J. Rep. 1956, 77, 97.

[181] *Di Palma Castiglione* [1929], LNT judgment No. 1.

[182] *De Merode*, WBAT Rep [1981], Decision No. 1, at 9 and 12. In this case, the parties agreed on the relevance of general principles of law.

[183] Formerly, UN Administrative Tribunal (UNAT). See *Howrani*, UNAT judgment No. 4 [1951] and *Vassiliou*, UNAT judgment No. 275 [1981].

[184] *Ferrechia*, ILOAT judgment No. 203 [1973] and *Gubin and Nemo*, ILOAT judgment No. 429 [1980].

Administrative Tribunal,[185] the Administrative Tribunal of the Organization of American States (OASAT),[186] and the OECD Administrative Tribunal[187] have all applied general principles of law –without any reference to Article 38.1 of the ICJ Statute– usually as a way of interpreting and filling the gaps of internal regulation of the organisations (which were initially derived from national systems). For instance, in *Wakley*, the ILOAT mentioned that 'in the absence of relevant provisions in the staff rules, the general principle of law according to which the payer is entitled to pursue the recovery against the payee of sums paid in error is applicable to the present case.'[188]

102. Usually, IATs try to interpret existing internal rules in conformity with general principles of law but in case of direct conflict between the internal written regulation and general principles, usually the latter prevail (only in a few cases the opposite approach has apparently been adopted):[189]

    a. in *Ferrechia*,[190] the ILOAT confirmed that: 'A staff member against whom disciplinary proceedings are taken has the right to be heard before a sanction is imposed on him. This right includes inter alia the opportunity to participate in the examination of the evidence. *Deriving as it does from a general principle*, it must be respected *even where contrary provisions exist* or in the absence of any explicit text.' (emphasis added).

    b. in *Callewaert-Haezebrouck*,[191] the ILOAT stated that: 'The Director-General contends that that text explicitly applies only to […] The Director-General so interprets Article 28 as to discriminate between male and female staff members, only the wives of male staff members being entitled to benefit from the insurance of their husbands. *Such discrimination offends against the general principles of law, and particularly of the international civil service, and the Tribunal cannot allow application of a text which so discriminates*.' (emphasis added)

103. IATs have also applied general principles as a way of controlling the exercise of administrative powers and discretions by the international organisations; including procedural irregularities (with particular reference to the principle of due process)[192].

104. However, there is lack of clarity on the methods used for identifying general principles and on whether those principles come from domestic law or from international law. Nevertheless, most of the general principles applied are found in domestic administrative or civil service regimes of many civil law systems (but also, in common law countries), in the area of contract law –e.g. *force majeure*, [193] unjust enrichment,[194] or estoppel–[195] or even of conflict of laws[196]. In some cases, the IATs just refer to previous decisions of other administrative tribunals.

II.2 INTERNATIONAL LAW-MAKING

105. In the case of international law-making, there seems to be more room for flexibility (in the way domestic principles are used) than in the case of adjudication. There is also the need to rely more on those particular legal systems which are more advanced in dealing with the specific problem at hand.

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[185] Formerly, NATO Appeals Board. See *Warren*, NATO Appeals Board, Decision No. 57 [1974].
[186] *Alanitz*, OASAT Decision no. 13 [1975]; *Bauta*, OASAT judgment No. 25 [1976] at 21: 'this is a general principle imported from national laws.'
[187] Formerly, OECD Appeals Board. See *Angelopoulos*, OECD Appeals Board Decision No. 57 [1976].
[188] ILOAT judgment No. 53 [1961].
[189] In *Di Palma Castiglione*, supra note 194, the LNT made clear that only in case of absence of internal rules the application of general principles could be considered.
[190] *Supra* note 184.
[191] ILOAT judgment No. 344 [1978].
[192] E.g. in *Kissaun* (ILOAT judgment no. 69 [1964]), the ILOAT confirmed that the right to be heard is a *principle* 'which applies even in the absence of express texts'.
[193] *Mayras* (LNT judgment No. 24 [1946] at 5) although it was found to be inapplicable in the case.
[194] *Wakley*, *supra* n. 188; *Ogle*, OASAT judgment No. 34 [1978] and *Reeve*, OASAT judgment no. 59 [1981].
[195] *Smith*, UNAT Judgment no. 249 [1979], JUNAT Nos. 231-300, p. 202; *Waghorn*, ILOAT Judgment No. 28 [1957] at p. 7.
[196] In *Hatt and Leuba* (ILOAT judgment No. 382 [1979]), the ILOAT invoked the principles of *forum conveniens* and of comity in order to apply a decision of the UNAT on a matter within the competence of UNAT.

II.2.a International Law Commission[197]

106. In its founding statute, no reference is made to the sources of public international law the International Law Commission can turn to. In practice, the Commission has looked to the list of sources of the law provided in article 38 of the Statute of the ICJ. This is perhaps not surprising given its close institutional relationship with the International Court.

107. Since its creation, the Commission has had over 200 members from all over the globe. This means that it has served as a microcosm of the various approaches to international law found throughout the world. Such variation in approach to international law has also extended to the understanding of the importance of domestic law principles as potential sources of the law. The variation of position within the Commission simply mirrors the variation of view which already exists in international law. Nonetheless, the work of the Commission over more than sixty years of existence provides a useful repository of material for illustrating the various approaches taken to domestic law principles.

108. In carrying out such review, it is worth recalling the distinction between the position taken by the Commission as a whole, and that taken by its individual members. The working methods of the Commission are based on deliberation and negotiation. It is rare for the negotiated outcome of such deliberation to include (typically in the commentaries accompanying a text adopted by the Commission) an indication as to, for example, the applicability of principles of domestic law. Nor to the knowledge of the Study Group has the Commission ever taken a general position as to the relevance of domestic law principles. It is in the exposition of views by individual members where the bulk of references to domestic law principles are to be found.

109. In most cases, a consideration (if any) of domestic law principles typically arises as part of the background to the work of the Commission on this or that topic, sometimes only in connection with a specific rule or aspect thereof. It may be one of several considerations taken on board during the deliberations, and not always or consistently the most important such consideration. This means that it is difficult to undertake a definitive assessment of the impact of domestic law principles on the development of international law by the Commission. No such assessment will be attempted here.

110. Nonetheless, a review of the records of the Commission reveals the fact that references to the significance (or not) of domestic law principles have, on numerous occasions, been part of the argumentation pattern, usually associated with certain members. In some cases, several such arguments have enjoyed sufficient general support to find their way into the common view of the Commission as typically reflected in its commentaries.

111. An essentially inductive approach is taken here, whereby the Commission's records (including the reports of the Special Rapporteurs, as well as the final texts and the commentaries adopted by the Commission) have been reviewed for references to domestic law principles. Those references found have been analysed, on the basis of which several categories of positions or stances taken can be identified. Such categories are presented below with a description and illustrative examples drawn from the records of the Commission. The research was undertaken on the basis of a search for the term 'private law', which is the phrase commonly used by the Commission in its work to denote domestic law.

II.2.a.ii Positions identified

A. General statements about the relationship of domestic law principles with international law

112. An inference as to the view taken regarding the structural relationship between domestic law principles and international law can be drawn from the willingness (or not) of the Commission or one of its members to accept the relevance of the former in the formation, interpretation or application of the latter. In some cases, however, the position expressed is more direct, in the sense that Commission members have sought to express their views, or to take a position, at the level of the *relationship* between the two bodies of law. Different views, both in favour and against, have been expressed, indicating a difference of perspective as to the relevance of domestic law principles to international law. The following are a sample of the range of views expressed.

[197] Based on the analysis provided by Arnold Pronto.

A.1. *Favourable statements*

113. In his report of the Sub-Committee on State Responsibility, in 1963, Mr. Ago recorded an exchange of views in which Mr. Gros had indicated that '[i]nternational law was not a totally different technique from private law and it was impossible to regard it as an island by itself.' In turn, Mr. De Luna, 'agreeing with Mr. Gros, said that many of the rules formulated in the course of the development of international law had had their origin in municipal law.'[198]
114. During the debate on the topic of succession of States, the previous year, Mr. Pessou expressed the view that 'it would be difficult to avoid reasoning by analogy with existing rules of law, even if those rules belonged to private law.'[199] In 1963, in the context of the debate on the law of treaties, Mr. Paredes confirmed that 'he held to the view that international law had been greatly influenced in its formation and development by the principles of private law, which had stimulated and guided it within the limits imposed, of course, by the differences between those two branches of law arising from the subjects they governed', and that 'he was not afraid to seek clarification of international law in the principles of internal law.'[200]

115. In 1977, Sir Francis Vallat, in the context of the work on succession of States in respect of matters other than treaties, was of the view that there existed

> *a very subtle relationship between public international law and internal law*. It could be affirmed that matters which might have been regarded 50 years ago as falling under private law had now entered an area in which they were protected by public international law and, in principle, he saw no reason why that should not apply in the case of State debts towards private creditors.[201] (emphasis added)

116. He had occasion to repeat the point, in an indirect way, two years later, in the context of the work on jurisdictional immunities of States and their property, when he referred to the 'difficult task of isolating the concepts of public international law from those of […] private law.'[202]

A.2. *Unfavourable statements*

117. In some cases, doubts as to the relevance of domestic principles were expressed in a more nuanced manner, subject to qualifications, and leaving room for the possible applicability of domestic principles. Other statements reflected a more emphatic rejection of the analysis that such principles may be of relevance to the study of international law.

- *Qualified statements*

118. In his 1963 working document, reproduced in the report by the Chairman of the Sub-Committee on State Responsibility, Mr. Tsuruoka took the view that

> [i]n international law, the question of due diligence is not necessarily related to the notion of negligence. International responsibility may sometimes arise from the mere fact that injury has been caused. In some cases, therefore, we would have to recognize an objective responsibility related to the injured right. *But I do not go so far as to say that the principle of responsibility without fault recognized in some national laws should be generally recognized in international law*.[203] (emphasis added)

119. The same year, during the consideration of the law of treaties, Mr. El-Erian, indicated that

> he did not favour undue analogy to rules of municipal law in international law. International law had developed its own jurisprudence and there was no need to indulge in drawing analogies to private law, which did not take into proper account the different nature of international relations. However, since the end of the second world war, a

[198] A/CN.4/152, p. 234.
[199] A/CN.4/SR.633, para. 36.
[200] A/CN.4/SR.679, para. 63.
[201] A/CN.4/SR.1424, para. 30.
[202] A/CN.4/SR.1575, para. 21.
[203] A/CN.4/152, at para. 13.

> number of constitutions had been enacted which incorporated principles of international law […] That interaction of international law and municipal law showed that the two were not separate, but closely interrelated.[204]

120. Sir Humphrey Waldock, in turn, indicated that he felt it 'unwise to assume that concepts applicable in private law would necessarily be relevant to international relations, though they would provide some broad indications of what was understood by "fraudulent conduct" and to that extent could be helpful.'[205]

121. The following year (1964), Mr. de Luna expressed the view that

> Mr. El-Erian had […] been right in saying that it was dangerous to carry the analogy between private law and international law too far. Nevertheless, it was noteworthy that article 1119 of the French Civil Code, which had inherited formalist concepts from Roman law, laid down that a person could normally enter into an undertaking or make a stipulation in his own name only for himself — a principle to which it then admitted exceptions — whereas article 328 of the German Civil Code and article 112 of the Swiss Code of obligations laid down that a contract could create a right in favour of a third party direct, without its knowledge or consent.[206]

122. During the same debate that year, Mr. Tunkin stated that '[a]dmittedly, some rules might occasionally be borrowed from private law; but, in [the] particular case, the rule did not fully cover the situation.'[207]

123. Several years later, Mr. Ramangasoavina, during the debate on the question of representation of States in their relations with international organizations, expressed the view that '[a]lthough it was sometimes a mistake to borrow from private law, it might be worth considering the notion of the "universal legatee", an expression used to denote a person who inherited a share of the whole of an inheritable estate.'[208] In 1970, Mr. Tammes expressed the view, during the debate on the succession of States in respect of treaties, that 'all analogies with the private law governing inheritance were tending to disappear.'[209]

124. In its 1971 survey of international law, the Secretariat of the International Law Commission, indicated that the rules of international law applicable to the acquisition of territorial sovereignty were

> [h]istorically […] based on institutions of private law, developed and amplified to fit the circumstances of a society of independent States. Any attempt to codify those rules which might be undertaken at the present time would need, however, to reflect the progress made in the development and application of a number of fundamental principles of international law—in particular the principle of the prohibition of the threat or use of force and the principle of equal rights and self-determination of peoples—and to assess their effect upon the rules relating to the acquisition of territory by a State.[210]

125. In 1973, in the context of discussing whether, in the event of a succession of States, there was a transfer of property or only extinction of the right of the predecessor State and creation of the right of the successor State, Mr. Castañeda qualified his reference to the example of sale under domestic law with the statement that 'analogies with private law were often misleading.'[211]

126. In 1976, Mr. El-Erian, in discussing the concept of responsibility under international law expressed the view that 'it was not possible to use the analogy of the private law system of responsibility, which drew a distinction between criminal liability and liability at tort, to use the common law terminology. The position in municipal law was less complex than in international law.'[212] For his part, Mr. Quentin-Baxter put the matter more succinctly when he stated that, in his view, 'because international law in general lacked a system of compulsory jurisdiction, analogies from

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[204] A/CN.4/SR.676, para. 42.
[205] Id., para. 102.
[206] A/CN.4/SR.737, para. 28.
[207] A/CN.4/SR.742, para. 19.
[208] A/CN.4/SR.972, para. 87.
[209] A/CN.4/SR.1068, para. 25.
[210] A/CN.4/245, para. 42.
[211] A/CN.4/SR.1227, para. 27.
[212] A/CN.4/SR.1370, para. 7.

private law must be considered sparingly.'[213] In 1979, also in the context of the work on state responsibility, Mr. Sucharitkul, indicated that while 'he had mentioned the danger of adopting private law terminology in international law […] as a general reminder', he, nonetheless, could accept the use of the phrase 'force majeure'.[214]

127. In his second report on State responsibility, issued in 1989, Special Rapporteur Arango-Ruiz, after analysing the views of academic writers as to the extent to which claims commissions and arbitral tribunals had had recourse to rules of private law in the ascertainment of damages, drew the conclusion that

> [a]s noted by Anzilotti and Reitzer, the rules and standards applied by international judicial bodies are often very similar to, if not identical with, the corresponding rules and standards of municipal law (Roman law, civil law or common law). This means, in the opinion of the Special Rapporteur, not so much an application of municipal legal rules by mere renvoi; it means rather that, through the work of international judicial bodies and the agreed settlements achieved directly between themselves, States have gradually worked out and accepted rules and standards on compensation. Even where such rules and standards were originally modelled partly on municipal law, they may well be found to be now in existence as part of general international law.[215]

- *Unqualified statements*

128. On several occasions, members of the Commission have expressed a more categorical rejection of the applicability of principles of domestic law to international law. As early as 1951, Mr. Hudson, in the context of the law of treaties, expressed the view that 'nothing was more dangerous than an attempt to draw analogies between the two types of law […] The discussion should keep to matters of public international law.'[216] Several years later (1963), Mr. Gros took the position that a theory of nullity of treaties on the ground of defective consent was unnecessary in international law, and expressed the view that

> one should not automatically transfer to international law concepts recognized in private law, that was to say in a society organized around an authority recognized by everyone and enforced by the courts. International law, having no common authority and no compulsory jurisdiction, was more flexible, and should remain so.[217]

129. Similarly, in the context of the discussion of whether acts performed prior to a treaty's annulment retained their full force and effect, Mr. Bartos, in the same year, confirmed that 'he wished to rule out any analogy with private law, for relations between sovereign States raised problems different from those of private law.'[218] This position was also maintained by Mr. Tunkin who in 1966, also in the context of the law of treaties, expressed the view that '[t]o draw analogies with private law was usually dangerous, because the position of third States on the international plane was so different from the position of third parties in municipal contract law.'[219]

130. Mr. Yasseen, in 1970, in expressing support for the definition of succession being proposed in the context of the succession of States in respect of treaties, expressed the view that it 'avoided the enormous difficulties which would have arisen if the definition had been based on traditional considerations of private law.'[220] Several years later, during the debate on the second succession topic, namely that in respect of matters other than treaties, Mr. El-Erian stated that

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[213] A/CN.4/1369, para. 28.
[214] A/CN.4/SR.1573, para. 20.
[215] A/CN.4/425 & Corr.1, para. 29.
[216] A/CN.4/SR.98, para. 44.
[217] A/CN.4/SR.679, para. 36. See also A/CN.4/SR.704, para. 100.
[218] A/CN.4/SR.707, para. 64. See also A/CN.4/SR.683, para. 82.
[219] A/CN.4/SR.854, para. 59. See also his statement in 1964 ('[t]here appeared to be a tendency to discuss representation on the analogy of private law, but the situation in international relations was completely different from that obtaining under municipal law'), A/CN.4/SR.733, para. 19.
[220] A/CN.4/SR.1071, para. 50.

> [g]reat care should be exercised in drawing analogies between private and international law, for while the former was at the origin of the latter, international law had now become a separate science and obligations under it differed from the obligations between individuals governed by private law.[221]

131. In 1990, Mr. Barsegov expressed a similar view when, in commenting on the report of the Special Rapporteur on State responsibility that year, he 'warn[ed] against introducing too many concepts and rules of private law— particularly Roman law— into political and public-law relations between States.'[222] More recently (2003), Mr. Pellet, in the course of the work on the responsibility of international organizations, expressed the view that 'it was ill advised to refer, even implicitly, to concepts of internal law in an international legal instrument […] International law was neither civil, criminal, Romano-Germanic nor common law, and he saw no reason to refer to concepts of internal law in the draft articles.'[223]

B. Statements concerning the applicability of domestic law in particular cases

132. The second set of statements identified are those which go further than the first, in the sense that they are aimed less (or not only) at the *general* relationship between domestic and international law, and more directly at the applicability of particular domestic principles or rules in international law.

B.1 *Favourable statements*

133. From the official records of the Commission it is clear that statements asserting the applicability of domestic rules and principles in international law have been made on numerous occasions.

- *Statements citing domestic rules in support of an international rule*

134. Favourable statements, in their most affirmative form, cite domestic rules directly in support of the existence of their counterparts under international law. Early examples are to be found in the work on the law of treaties. Hence, Sir Gerald Fitzmaurice, in his third report on the law of treaties, proposed dealing with fraud or misrepresentation, which 'correspond[ed] with the relevant rule of private law and seem[ed] necessary.'[224] Some years later (1963), during the debate on the doctrine of *rebus sic stantibus*, also in the context of the work on the law of treaties, Mr. Pal pointed to its domestic law origins when he recalled that

> Gentilis was generally credited with having introduced the maxim *omnis conventio intelligitur rebus sic stantibus* in the sixteenth century, when he had asserted the existence of a tacit condition in the treaty itself that treaties were binding only if circumstances remained unchanged. In developing that theory he had drawn upon the writings of the civilians, but the theory was in fact older still and had originated in canon law, which had sought to temper the rigour of Roman private law with considerations of equity. Suarez had also recognized the doctrine of *rebus sic stantibus*.[225]

135. Similarly, several years later (1966), Mr. Ago considered the comparison between international law and private law to be 'a perfectly valid comparison, since error, fraud and coercion were also grounds for alleging the invalidity or nullity of acts in private law.'[226]

136. Mr. Yasseen, in 1968, during the debate on the question of the succession of States in respect of matters other than treaties, expressed support for the use of the term 'succession', since, in his view, 'it was not the only case in which public international law had borrowed an expression from private law. Everyone knew what was meant and there was no risk of confusion […]'[227] The following year, Mr. Ago, in introducing his first report on State responsibility recalled

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[221] A/CN.4/SR.1417, para. 23.
[222] A/CN.4/SR.2172, para. 19.
[223] A/CN.4/SR.2753, para. 33.
[224] A/CN.4/115 and Corr.1 (English and French), para. 59. See also para. 60, where Sir Gerald Fitzmaurice deals with the concept of 'undue influence', which he suggests 'is perhaps mainly a doctrine of Anglo- American jurisprudence.'
[225] A/CN.4/SR.694, para. 7.
[226] A/CN.4/SR.845, para. 38.
[227] A/CN.4/SR.963, para. 16.

that, when codifying the law of treaties, it had been possible for the Commission 'to refer quite extensively to the general theory of obligations in private law.'[228]

137. In 1972, when dealing with the question of treaties establishing boundaries, in the context of the consideration of the succession of States with respect to treaties, Mr. Ramangasoavina noted that most members had agreed that a treaty establishing a boundary should not be affected by a succession of States since

> a State possessed 'title' to a certain territory with well defined boundaries. *It was the same in private law,* under which, when property was transferred, the change of ownership in no way affected the previously established boundaries.[229] (emphasis added)

138. The following year, Mr. Ramangasoavina, this time in the context of the discussion on State responsibility, observed that '[i]n private law, any act causing injury involved the responsibility of the person who committed it, and required reparation, even if the act causing the injury was not intentional. Similarly, a State might, without any intention to harm, and even in a humanitarian spirit, carry out scientific experiments the consequences of which caused injury requiring reparation.'[230]

139. In 1975, Mr. Sette Camara, in the context of the work on the succession of States in respect of matters other than treaties, noted that the right of eminent domain 'which corresponded to the *nuda proprietas* of private law', would conceivably pass to the successor State.[231] In 1979, when discussing consent as a circumstance precluding wrongfulness, Mr. Pinto observed that the draft article in question 'was firmly rooted in concepts of private law.'[232]

140. In 1980, the Special Rapporteur on the topic 'treaties concluded between States and international organizations or between two or more international organizations', Mr. Reuter, in explaining his use of the term 'succession', indicated that '[i]n private law, succession related to rights and obligations; as applied to States, it was also connected with the transfer of rights and obligations.'[233] Mr. Arangio-Ruiz, when commenting on the duty to provide reparation in 1990, pointed to the fact that various authors had, in his view,

> Persuasively […] applied international legal principles modelled on municipal principles or rules. In other words, on the basis of what Lauterpacht had called 'private-law analogies' in international law, States had, through case-law and their own diplomatic practice and through the process known as international custom, developed rules that were part and parcel of international law, however similar to rules of municipal law they might be…[and that]… [i]t was mainly in relation to patrimonial injury that judicial decisions and doctrine had had recourse to distinctions and categories typical of private law—whether civil or common—and had adapted them to the peculiar features of international responsibility.[234]

141. Two years later, also during the debate on State responsibility, Mr. Al-Khasawneh observed that

> […] the principle *inadimplenti non est adimplendum* was known to have evolved by analogy from private law and it was also known, thanks to Anzilotti, when the transformation had taken place. In the *Diversion of Water from the Meuse* case, Anzilotti had said that the principle was " . . . so just, so equitable, so universally recognized, that it must be applied in international relations also".[235]

142. In some cases, the applicability of domestic law was anticipated in the form of an express *renvoi* to the internal law of the State. For example, in his fifth report on jurisdictional immunities of States and their property, the Special Rapporteur, Mr. Sucharitkul, indicated that the acquisition by one State of property in the territory of another State

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[228] A/CN.4/SR.1011, para. 2.
[229] A/CN.4/SR.1193, para. 43.
[230] A/CN.4/SR.1202, para. 44.
[231] A/CN.4/SR.1321, para. 4.
[232] A/CN.4/SR.1538, para. 14.
[233] A/CN.4/SR.1592, para. 16.
[234] A/CN.4/SR.2168, paras. 12 and 19.
[235] A/CN.4/SR.2278, para. 16.

'was made possible only by virtue of the application of the internal law or private law of the State of the situs.'[236] Another example is to be found in the seventh report of the Special Rapporteur on the responsibility of international organizations, Mr. Gaja, in which it was indicated that:

> The fact that a rule of the organization 'bound, or granted rights to, persons or entities that were subjects of international law' cannot be a decisive criterion for identifying which rules of the organization pertain to international law, because certain relations between subjects of international law could well be regulated by private law.[237]

- *Statements referring to domestic rules or concepts by way of providing guidance in the formulation of international rules*

143. More prevalent are statements in which private law rules are referred to by way of guidance as to which rule to adopt at the international level. Admittedly the difference between supporting and guiding statements is relatively slight, and merely a matter of degree. With the former, the claim being made is more emphatically that international law should adopt the domestic law rule, while with statements falling into the latter category the emphasis is placed on the usefulness of domestic rules in guiding an outcome at the international level -the assumption being that the lawmaker at the international level is not constrained to follow the domestic rule, regardless of how influential it might be.

144. In 1950, Mr. Yepes, in dealing with the question of the legal status of the continental shelf, in the context of the work on the law of the sea, indicated that '*[j]ust as in private law*, accession was a legitimate source of increment to property so, in international law, the conclusion must be reached that the continental shelf "must belong to the countries with whose coasts it was contiguous".'[238] (emphasis added) References to private law principles or rules, by way of providing guidance, are also relatively easy to find in the official records of the debates on the law of treaties. Hence, in 1950, Mr. Hudson, cited the consequences of the private law concept of a deed of transfer of title of land to illustrate his doubts with the description of a treaty being 'an agreement recorded in writing.'[239] The following year, Mr. Sandstorm drew an analogy with the rules governing contracts under private law by way of confirming the significance of ascertaining the intention of the parties.[240] Mr. Scelle pointed to the wide connotation of the concept of abuse of rights that existed under private law.[241] Several years later (1956), Mr. El-Khouri drew the analogy with contracts between individuals in private law, which was limited to adults, in support of his argument that inter-State treaties should be concluded between equal and independent States and not between such a State and, for instance, a Protectorate.[242] That same year, Mr. Bartos, commenting on different types of treaty clauses, remarked that

> [i]t was possible in multilateral conventions to draw a distinction between those clauses which admitted reservations and those to which reservations were clearly impossible. On the analogy of private law, the latter could be considered as in the nature of *jus cogens* and the former as in the nature of *jus dispositivum.*[243]

145. Similarly, Sir Gerald Fitzmaurice, referring to certain aspects of the law of treaties, in his second report issued in 1957, expressed the view that

> [a]nalogous principles—or principles leading to very similar results—have received a wide degree of recognition in private law. While this is not conclusive (see for instance the different treatment given by private, as compared with international law, to the question of duress as a ground voiding contracts), it suggests that there is a case for some degree of recognition of the principle under international law.[244]

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[236] A/CN.4/363 & Corr.1, para. 112.
[237] A/CN.4/610, para. 41 (footnote omitted).
[238] A/CN.4/SR.67, para. 1(b).
[239] A/CN.4/SR.52, para. 3.
[240] A/CN.4/SR.86, para. 99.
[241] A/CN.4/SR.86, para. 116.
[242] A/CN.4/SR.369, para. 30.
[243] A/CN.4/SR.651, para. 42.
[244] A/CN.4/107, in *Yearbook of the International Law Commission*, 1957, Vol. II, p. 57, para. (3).

146. Likewise, when drawing a distinction between the object of the treaty itself, and what may have been the motives of the parties in entering into it, Fitzmaurice remarked that 'such distinction [was] fully recognized in private law.'[245] Two years later, in his fourth report, he again cited the private law analogy in support of a contention as to the prevailing rule of international law, when he noted that the principle that reparation by way of payment of damages was not necessarily sufficient was 'well known in private law.'[246] In his fifth report, issued the following year, Fitzmaurice expressed support for the recognition in international law of the *stipulation pour autrui* in the following terms: '[w]hen international law in so many ways contains analogies with private law, and reflects or applies private law doctrines, it is difficult to see why that possibility should be regarded as wholly excluded in the case of the *stipulation pour autrui*.'[247]

147. Mr. de Luna, in 1962, also in the context of the consideration of the law of treaties, discussed the different doctrines relating to the ratification of treaties, and observed that

> the first of those doctrines was the historical one which treated ratification by a Head of State of the signature of his representative almost on a par with ratification by a principal of his attorney's act when executing a power-of-attorney in private law. Grotius and many other early writers had viewed ratification in that light. Under that ancient doctrine, subsequent ratification could be held to have a retroactive effect, because it confirmed and validated the signature given by the representative. The consent given to a treaty by the signature was deemed to be conditional upon ratification.[248]

148. In 1963, Mr. Liang, Secretary of the Commission, also in the context of the work on the law of treaties, indicated '[b]y way of analogy […] that, in private law, the validity of a contract depended on such matters as the legality of the object, the reality of consent and the question of capacity.'[249] In turn, Mr. de Luna 'endorsed Mr. Liang's remark concerning the principles of private law. The doctrine in question was the broad doctrine of *falsus procurator*, where there was not merely usurpation, but also an act *ultra vires*; it was not possible, however, to transpose all the demands of the *falsus procurator* doctrine into international law by analogy.'[250] The same year, Mr. Bartos, when considering the issue of error, also looked to private law for guidance when he observed that '[h]aving regard to the stability of contractual relations, all errors could not be regarded as reasons for invalidation. Moreover, they were not so regarded either in Roman law or in comparative private law.'[251]

149. The following year, Mr. de Luna when confronted with the question of the acquisition of a right by a third State through the effect of a treaty, observed that:

> [i]t had also been asked how a third State, which was absent and unaware of the proceedings could acquire such a right. That was certainly what happened in private law— in testamentary disposition, for example, though it was true that in that case there was a legal norm. In international law the norm was the *pacta sunt servanda* principle, and the right derived from the reciprocal undertaking entered into by the parties to the treaty.[252]

150. Mr. Briggs, the same year, observed that '[i]n private law, stipulation on behalf of another or the concept of trust had been found serviceable, even if not always theoretically satisfactory from the point of view of legal logic. In international law, past practice and possible future needs suggested that it might be useful to include in the draft on the law of treaties an article setting out a comparable concept […]'[253]

151. In 1966, Mr. Bartos again looked to private law for guidance, this time in the context of the discussion on the termination of treaties, when he observed that

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[245] Id., para. 154.
[246] A/CN.4/120, in *Yearbook of the International Law Commission*, 1959, Vol. II, para. 171.
[247] A/CN.4/130, in *Yearbook of the International Law Commission*, 1960, Vol. II, p. 103, para. 85.
[248] A/CN.4/SR.646, para. 71.
[249] A/CN.4/SR. 677, para. 39.
[250] Id., para. 49.
[251] A/CN.4/SR.680, para. 40.
[252] A/CN.4/SR.737, para. 31.
[253] A/CN.4/SR.738, para. 13.

> it sometimes happened that, without any intention by the parties to terminate the earlier treaty, the actual object of the second treaty conflicted with that of the first. If a conflict of objects appeared in one and the same instrument, that instrument would be void; but if the conflict appeared between successive instruments, it was the later instrument which prevailed, just as in private law the testator's last will prevailed.[254]

152. The following year, Mr. Bartos, in his capacity as Special Rapporteur for the topic 'special missions', looked again to private law for guidance, this time in connection with the expression 'third State'. He noted that '[i]n private law the analogous expression "third party" denoted a person who was not a party to a juridical relationship but who might in certain cases have certain rights and obligations by virtue of that relationship.'[255] In 1968, the Special Rapporteur on the question of the succession of States in respect of rights and duties resulting from sources other than treaties, Mr. Bedjaoui, in his first report, dealt with some of the theories that sought to justify succession to debts, and observed that '[a]ccepted rules of private law, such as those relating to unjustified enrichment and the maxim "*res transit cum suo onere"*, and considerations of equity had also been cited.'[256] The following year, Mr. Reuter, on the same topic, called for a study of the consequences of changes made by a State in its economic policy or structures, which established 'a case for application of the *rebus sic stantibus* clause, a legitimate case for the modification of certain contractual balances. In private law and in collective property relationships, amendments to contracts were common, and examples could also be found in public international law.'[257]

153. In 1977, Mr. Bedjaoui, in his ninth report on succession of states in respect of matters other than treaties, analysed the concept of debt under private law, *inter alia*, as follows: '[i]n private law, only the estate of the debtor, as composed at the time when the creditor initiates action to obtain performance of the obligation due to him, is liable for the debt […] In short, the relationship between debtor and creditor is personal, at least in private law', but then added that '[o]ne of the problems that will arise in the course of this study is whether this also applies in international law.'[258] For his part, Mr. Ago, in his sixth report on State responsibility, issued the same year, analysed the distinction between obligations of conduct and those of result as 'simply […] following the model furnished by the systems of internal private law originating in Roman law.'[259]

154. In its study on '*force majeure'* and 'fortuitous event' as circumstances precluding wrongfulness, issued in 1978, the Secretariat of the Commission noted that 'the defining features of the exception of *force majeure* [were] underlined [inter alia] by private law writers.'[260] In 1979, Special Rapporteur Ago, in his eighth report on State responsibility grappled with the excuse of necessity in international legal relations. In expressing the view that the issue could not be resolved 'solely on the basis of general principles of internal law', he indicated, generally, that

> such principles can no doubt be of some help to us, provided, however, that it is borne in mind, firstly, that determining their existence in this matter is by no means as easy as one might wish, and, secondly, that transferring them from the field of relations between individuals to that of relations between States is a dubious undertaking.[261]

155. Sir Francis Vallat also looked to private law for guidance when he observed, during the debate on the same topic, that

> [u]nder private law in common-law countries, it was clear that, in the event of damage to property or injury to life caused by the negligent act of a lorry driver employed by a company, the lorry driver incurred personal responsibility or liability for his own negligent act, and the employer also incurred vicarious responsibility or liability if the driver had been acting within the scope of his employment. The position in international law was not exactly the same, but analogous situations might nevertheless arise.[262]

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[254] A/CN.4/SR.830, para. 83.
[255] A/CN.4/SR.908, para. 74.
[256] A/CN.4/204 and Corr.1 (French only), in *Yearbook of the International Law Commission*, 1968, Vol. II, p. 109, para. 97.
[257] A/CN.4/SR. 1005, para. 2.
[258] A/CN.4/301 and Add.1, in *Yearbook of the International Law Commission*, 1977, Vol. II (Part One), p. 50, paras. 3–5.
[259] A/CN.4/302 and Add.1, 2 and 3, Id., para. 12.
[260] A/CN.4/315, in *Yearbook of the International Law Commission*, 1978, Vol. II (Part One), p. 70, para. 16.
[261] A/CN.4/318/Add.5-7, in *Yearbook of the International Law Commission*, 1979, Vol. II (Part One), p. 18, para. 11
[262] A/CN.4/1534, para. 25.

156. Mr. Reuter, also in the context of the debate on State responsibility in 1979, referred to the 'idea of an act of State, taken from private law, where it described the act of a State that prevented the performance of private contracts.' In his view, '[s]uch a situation could in fact arise in international relations, especially where treaty implementation was prevented by an international decision.'[263]

157. In 1983, Mr. Riphagen, Ago's successor as Special Rapporteur on State responsibility, pointed to the domestic law analogy when confronting the fact that

> [t]he insistence, in international law, even in its present-day stage of development, on the international right of sovereignty of States and on international obligations of a State as resulting, in the final analysis, from the consent of that State, seems to exclude the construction of a (primary) rule of general international law, to the effect that the fault of one State, causing damage to another State, entails a duty of the first State to make reparation to the second. At any rate *it is significant that, in municipal law systems which contain such a rule for private law relationships,* the courts feel the need for a legal analysis of its three elements—'fault', 'cause', and 'damage'—which, apart from liability for injurious consequences of acts not prohibited by law, comes close to stipulating rights and obligations.[264] (emphasis added)

158. In 1989, during the debate on the topic international liability for injurious consequences arising out of acts not prohibited by international law, Mr. Al-Baharna referred to private law in the context of the discussion on the concept of 'reparation', when he indicated that '[i]n private law, reparation meant payment for an injury and redress for a wrong. Thus defined, reparation was probably not confined to pecuniary damages.'[265] That same year, Mr. McCaffrey, during the debate on the law of the non-navigational uses of international watercourses, referring to the question of compensation by States benefiting from measures of protection adopted by other States, expressed the view that '[s]uch compensation could indeed be envisaged, provided that it was based on the principle of equitable distribution, […] A problem akin to the private-law notion of unjust enrichment was, after all, involved.'[266]

159. In 1991, Mr. Arangio-Ruiz, Special Rapporteur on State responsibility, pointing to the difficulties posed by the question of countermeasures, noted 'a total absence of any similarities with the regime of responsibility within national legal systems which would make it relatively easy to transplant into international law, in the area of substantive consequences […] private law sources and analogies.'[267] Yet another Special Rapporteur on State responsibility, Mr. Crawford, in his third report, issued in 2000, referred to the phenomenon of 'the language of national law (the so-called "private law analogy") quite often creep[ing] into international judicial decisions', in the context of a discussion on the remedies being envisaged in what became the articles on the responsibility of States for internationally wrongful acts.[268]

160. In 2004, in his second report on responsibility of international organizations, the Special Rapporteur, Mr. Gaja, referring to private law claims against the United Nations for the conduct of peacekeeping forces, noted that 'the same principle concerning attribution of conduct would apply in relation to responsibility under international law.'[269]

- *Statements pointing to domestic rules to fill lacunae in international law*

161. Perhaps more interesting are statements suggesting the function of domestic rules or principles as potential sources to draw upon in filling lacunae in international law. For example, in 1966, Mr. Jimenez de Arechaga, in the context of the debate on the law of treaties, made the following statement:

> [t]he complete nullity of a treaty as a whole should be the rule in cases where the offending clauses formed its object, but if the clauses in question were accessory stipulations, separability could be allowed; in that regard *the*

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[263] A/CN.4/SR.1573, para. 16.
[264] A/CN.4/366 and Add.1 & Add.1/Corr.1, in *Yearbook of the International Law Commission*, 1983, Vol. II (Part One), p. 21, para. 113
[265] A/CN.4/SR.2113, para. 50.
[266] A/CN.4/SR.2124, para. 13.
[267] A/CN.4/440 and Add.l, in *Yearbook of the International Law Commission*, 1991, Vol. II (Part One), p. 7, para. 2.
[268] A/CN.4/507 and Add. 1–4, in *Yearbook of the International Law Commission*, 2000, Vol. II (Part One), p. 13, para. 7.
[269] A/CN.4/541, in *Yearbook of the International Law Commission*, 2004, Vol. II (Part One), p. 11, para. 36.

Commission might follow private law where a contract was void if its object were found to be illegal but where an accessory clause contrary to public order would be regarded, to use the French expression, as "réputée non écrite" and would not render the contract as a whole void.[270] (emphasis added)

162. In 1969, Mr. Bartos, while discussing the question of the representation of States in their relations with international organizations indicated that, in his view, '[i]t would be enough to specify in the commentary that the term "civil jurisdiction" was to be understood in the old private law sense […]'[271]

163. An even clearer example is to be found in the second report on State responsibility of the Special Rapporteur, Mr. Arangio-Ruiz, issued in 1989, in which he stated

> [i]t follows, in the Special Rapporteur's view, that whenever the study of the doctrine and practice of pecuniary compensation indicates a lack of clarity, uncertainty or, so to speak, a 'gap' in existing law, it should not be inevitable for the Commission to declare a *non liquet.* An effort could and should be made to examine the issue *de lege ferenda* in order to see whether, in what direction and to what extent the uncertainty could be removed or reduced or the 'gap' filled in as a matter of development. This should be done, of course, in the light of a realistic appraisal of the needs of the international community, of *available private law sources and analogies,* and under the guidance of realism and common sense.[272] (emphasis added)

164. In 1999, Mr. Al-Khasawneh, commenting on the report of the Special Rapporteur on the unilateral acts of States, expressed the view that the 'Special Rapporteur's attempt to draw analogies with the law of treaties was not always convincing. For example, concerning the concept of promise, he might have done better to seek private-law analogies.'[273]

- *Statements in which deference is given to domestic rules*

165. A particularly strong form in which statements in favour of the applicability of domestic principles and rules arise is that in which specific deference is given to such principles and rules. While relatively rare, examples do exist. Thus, during the debate on State responsibility, held in 1990, Mr. Tomuschat commented on the requirement to pay compensation that such 'compensation would be reduced in cases where the victim had contributed to the emergence of the damage. The rule corresponded to established principles of private law from time immemorial and no different solution could be applicable in public international law.'[274]

B.2. *Statements disputing the applicability of domestic rules*

166. As in the case of statements about the *general* relationship between international and domestic law, the records of the International Law Commission also reveal numerous instances where members expressly ruled out the application of domestic principles or rules *in specific contexts*. In 1951, Mr. Scelle, during the initial discussions on the law of treaties, discussed the wide connotation enjoyed by the doctrine of the abuse of rights: '[a]buse of rights occurred not only where there was an intent to cause harm, but also in the case of merely frivolous acts. In international law it might perhaps be going too far to admit such an extension.'[275]

167. The same member expressed a similar concern in the context of the work on the law of the sea, five years later (1956), when he indicated his inclination to correct an erroneous impression given by the Special Rapporteur and Mr. Sandstrom 'both of whom had based their argument on a concept of private law.'[276]

168. In his second report on the law of treaties, of 1957, Sir Gerald Fitzmaurice remarked that

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[270] A/CN.4/SR.836, para. 17
[271] A/CN.4/SR.1019, para. 38.
[272] A/CN.4/425 and Corr.1, and Add.1 and Corr.1, in *Yearbook of the International Law Commission*, 1989, Vol. II (Part One), p. 11, para. 32 (emphasis added).
[273] A/CN.4/SR.2596, para. 7.
[274] A/CN.4/SR.2170, para. 9.
[275] A/CN.4/SR.86, para. 116.
[276] A/CN.4/SR.356, para. 73.

> [t]here are few questions of treaty law more controversial, and more controverted, than that of the place to be given to essential (or vital) change of circumstances as a ground of termination, on the basis of the principle of *rebus sic stantibus (conventio omnis intellegitur rebus sic stantibus).* Within certain limits, analogous principles find a place in many systems of private law, but in the international field, although much discussed in the literature of treaty law, the doctrine is accorded a mixed reception, compounded of attraction in theory and fear as to the practical consequences of admitting it.[277]

169. He took a similar position the following year, in his third report, when dealing with the question of the essential validity of treaties, when he observed that 'a large part of the private law on the essential validity of contracts—which has been evolved mainly with reference to the position and actions of individuals rather than of corporate entities—is inapplicable or inappropriate to the case of States, international organizations and other entities that may possess a certain treaty-making capacity […]'[278] In his fourth report, issued in 1959, Sir Gerald Fitzmaurice also cast doubt as to the applicability of private law concepts when coming to the doctrine of legitimate self-redress: '[…] analogies drawn from private law do not hold in this case, for private law has nothing corresponding to the international law doctrine of legitimate self-redress in certain circumstances, by way of counter-action or reprisals.'[279]

170. In 1963, Special Rapporteur Waldock, in his second report, in explaining his proposal for the effect of treaties void *ab initio*, indicated that

> It could perhaps be urged that in the case of a treaty void *ab initio* for conflict with a rule of *jus cogens*, the private law principle *in pari delicto potior est conditio defendentis* should be applied. But it is believed that a rule requiring the parties to be restored as far as possible to their previous positions would be more suitable for treaties between States and more conducive to the general international interest.[280]

171. Several further examples of similar stances being taken vis-a-vis the applicability of private law are to be found in the debate on the law of treaties that year. Thus, Mr. Gros, indicated that '[t]here seemed to be no justification for transferring to international law a case of defect in consent in private law […] It would indeed be hazardous to take rules applicable to contracts between private persons and apply them to treaties between States which, as the Commission's discussions in 1962 had shown, were not the same as ordinary contracts.'[281] Mr. Ago was of the same opinion, when he stated that 'there was a great temptation to transfer to international law the principles of private law relating to unreality of consent. But there were wide differences between the practical situations to which private law and international law applied[…]'[282] For his part, Mr. Amado, when considering the question of error, indicated that '[t]he parties' intentions, which were a key factor in private law, could not carry equal weight in international law.'[283]

172. The following year (1964), Sir Humphrey Waldock, in his third report, considered the origin of exceptions to the rule *pacta tertiis nec nocent nec prosunt*, and indicated that

> it is by no means clear that the admission of exceptions to the *pacta tertiis* rule in State practice or in the jurisprudence of international tribunals has been based directly upon an analogy from private law rather than upon the consent of States and the requirements of international life…while taking due note of the analogies which exist in national systems of contract law, the Commission should base its proposals on State practice and on the jurisprudence of international tribunals.[284]

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[277] A/CN.4/107, para. 141.

[278] A/CN.4/115 and Corr.1, para. 3. See too, para. 39 dealing with error and lack of consensus ad idem ('the sheer inapplicability in the international field of many of the private law doctrines of contract on which these concepts are based').

[279] A/CN.4/120, para. 88.

[280] A/CN.4/156 and Add.1-3, in *Yearbook of the International Law Commission*, 1963, Vol. II, p. 94, para. 2.

[281] A/CN.4/SR.678, para. 18.

[282] Id., para. 46.

[283] A/CN.4/SR.680, para. 56.

[284] A/CN.4/167 and Add.1-3, in *Yearbook of the International Law Commission*, 1964, Vol. II, p. 20, para. (1) of the commentary to draft art. 62.

173. That year, Mr. Tunkin, who doubted that representation of one State by another in the conclusion of treaties was a normal practice, indicated that '[t]here appeared to be a tendency to discuss representation on the analogy of private law, but the situation in international relations was completely different from that obtaining under municipal law.'[285] On the question of the rights of third parties, Mr. Ago expressed his view that '[i]n private law, the right of the third party derived from the law, not from the contract. He himself did not believe that practice proved the existence of such a rule in international law.'[286] Mr. El-Erian further stated that '[t]he starting point should not be the principle of a stipulation in favour of another, drawn from private law.'[287] On the question of amendment of treaties, Mr. Rosenne, also in 1964, noted that '[a]lthough a strict parallelism between rights and obligations was a concept that was deeply rooted in private law, in the present context it was not really necessary, because the process of amendment was essentially one that was governed by political considerations.'[288]

174. During the second reading of the articles on the law of treaties, held in 1966, Mr. Rosenne 'suggested that the Commission refrain from introducing […] any subtle distinctions drawn from private law, and from requiring any investigation into the state of mind of a State.'[289] Mr. El-Erian recalled the debate held during the first reading on the effects of treaties vis-a-vis third parties, and observed that 'while the principle *pacta tertiis nec nocent nec prosunt* appeared originally to have been derived from Roman law, in international law the justification for the rule did not rest simply on a general concept of the law of contract, but on the sovereignty and independence of States.'[290] Mr. Pessou, in referring to general principles of law such as *lex posterior derogate priori* or *pacta sunt servanda*, considered them to be 'principles […] taken from private law [which] were not very apposite.'[291] For his part, Mr. Tunkin, on the question of restitution, indicated that '[s]ome members might have had in mind obligations of a type to be found in private law when the rule of complete restitution would be relevant, but treaties could impose obligations of a very different character […]'[292]

175. Several years later (1968), Mr. Bedjaoui, Special Rapporteur for the work on succession of states in respect of rights and duties resulting from sources other than treaties, referred to the inherent differences between succession under private law, and that as conceived in international law.[293] In his second report, issued the following year, Mr. Bedjaoui, in considering the possibility of an acquired right to compensation and the doctrine of unjust enrichment, noted that '[t]his doctrine, which has been carried over from municipal private law, is open to methodological objections based on the principle of such transposition. Above all, however, it is largely inapplicable in the case of succession resulting from decolonization.'[294]

176. A similar discussion was held that year (1969), in the context of the work on State responsibility. Mr. Kearney, discussing the question of available remedies for harm caused by transboundary pollution, stated that '[t]he usual procedure for righting wrongs of that kind was to restore the situation to what it had been before; under the common law system of private law, that might take the form of issuing injunctions to prevent persons from taking certain undesirable kinds of action. It was extremely difficult, however, to construct such a system of remedies at the international level […]'[295] The following year (1970), Mr. Yasseen, during the debate on the succession of States with respect to treaties, expressed support for the proposed definition of succession, because 'it avoided the enormous difficulties which would have arisen if the definition had been based on traditional considerations of private law.'[296]

177. In 1976, Mr. Kearney expressed the view, during the debate on State responsibility, that 'it did not appear appropriate to import into international law as an analogy the private law antithesis between tort law and contract law […]'[297] Mr.

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[285] A/CN.4/SR.733, para. 19.
[286] A/CN.4/SR.737, para. 35.
[287] Id., para. 52.
[288] A/CN.4/SR.744, para. 28.
[289] A/CN.4/SR.825, para. 9.
[290] A/CN.4/SR.853, para. 17.
[291] A/CN.4/SR.857, para. 20.
[292] Id., para. 68.
[293] A/CN.4/204 and Corr.1, in *Yearbook of the International Law Commission*, 1968, Vol. II, p. 102, para. 53.
[294] A/CN.4/216/REV.1, in *Yearbook of the International Law Commission*, 1969, Vol. II, p.95, para. 127.
[295] A/CN.4/SR.1012, para. 26.
[296] A/CN.4/SR.1071, para. 50.
[297] A/CN.4/SR.1365, para. 26.

El-Erian agreed that 'it was not possible to use the analogy of the private law system of responsibility, which drew a distinction between criminal liability and liability at tort, to use the common law terminology. The position in municipal law was less complex than in international law.'[298] A decade later, Mr. Calero Rodrigues expressed the same view when he stated that '[i]t should be remembered […] that the position was very different from that obtaining under a system of private law, where the injured party could sue the author of the wrongful act directly in the ordinary courts. Where a State claimed to be injured by an internationally wrongful act committed by another State, it was necessary to enter into negotiations.'[299] Two years later (1988), Special Rapporteur Arangio-Ruiz, in his preliminary report on State responsibility, confronted the complexities arising from the question of legal impossibility, and noted that 'municipal law is not part of international law and its rules are not really relevant as legal rules.'[300] During the ensuring debate, he explained further that 'the validity of the [private law] analogy was reduced very considerably by the high degree of relativity of international legal rules, situations and relationships.'[301]

178. The following year (1989), Mr. Barsegov, also in the context of the work on State responsibility, referred to the difficulties arising from the concept of restitution as follows:

> [s]pecific problems arose from the private-law form of the institution, which led in his view to some confusion between the notions and institutions relevant to legal relations of a public character and those relevant to private civil law. Although he had reverence for the legal genius of Rome and the highest regard for Roman civil law, the possibility of importing the concepts of that law into the totally different area of inter-State relations had its limits as considerable difficulties would arise with respect to the content of those concepts.[302]

179. For his part, Mr. Al-Baharna, in 1990, remarked that '[h]e had occasionally noticed in the Commission's deliberations a tendency to look to the law of torts for guidance in developing the international rules of State responsibility and he was somewhat skeptical about the value of that tendency.' His doubts were rooted elsewhere however. In his view,

> [t]he law of torts, as it had developed, was for the most part a Western contribution, and even in the West it differed from country to country, depending on the state of the economy, industrial growth, trade unionism, group action, judicial review, etc. In developing countries, the law was still in its primitive stage and it would therefore be injudicious to develop international rules on State responsibility by analogy with the present principles of tort law. Such development would run counter to the interests of the developing countries, which formed the overwhelming majority of nations.[303]

180. In 1996, Mr. de Saram, commenting on the work of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, was of the view 'that there had been excessive reliance on procedures of consultation and private law remedies.'[304]

181. In his fourth report on diplomatic protection, issued in 2003, the Special Rapporteur, Mr. Dugard, referred to the doubts that had been expressed among authorities 'as to whether it would be appropriate to apply […] private law tests [concerning the nationality of corporations] to a problem of public international law.'[305] The Special Rapporteur on unilateral acts of States, Mr. Rodríguez Cedeño, in his ninth report (issues in 2006), made a similar observation as to the points of view among authorities, when he indicated that 'attempts to extrapolate certain concepts emanating from internal law have given rise to some doubts in the literature.'[306]

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[298] A/CN.4/SR.1370, para. 7.
[299] A/CN.4/SR.1953, para. 30.
[300] A/CN.4/416 & Corr.1 & 2 and Add.1 & Corr.1, in *Yearbook of the International Law Commission*, 1988, Vol. II (Part One), pp. 28–29. para. 86.
[301] A/CN.4/SR.2082, para. 5.
[302] A/CN.4/SR.2104, para. 51.
[303] A/CN.4/SR.2174, para. 37. See also the view of Mr. Koroma, at para. 57 ("[i]nternational law did not, of course, make the same sharp distinction between private-law and public law remedies as did municipal law.").
[304] A/CN.4/SR.2472, para. 62.
[305] A/CN.4/530 and Add.1, in *Yearbook of the International Law Commission*, 2003, Vol. II (Part One), p. 12, para. 33.
[306] A/CN.4/569 and Add.1, in *Yearbook of the International Law Commission*, 2006, Vol. II (Part One), p. 153, para. 13.

II.2.b Criminal law[307]

182. Criminal law is public law *par excellence*. On the understanding, however, that the reference in the Study Group's mandate to 'private law principles' is to the 'general principles of law recognized by civilized nations' referred to in article 38(1)(*c*) of the Statute of the ICJ, it is possible to seek to identify in the field of international criminal law some reliance on general principles of criminal law more or less common to national criminal justice systems.

183. The focus of this section of the study is on the reliance in treaties and other international instruments, as well as in draft international instruments, law reform proposals and the like, on such general principles of criminal law.[308]

II.2.b.i International treaties and draft instruments

184. The ILC's commentary to the *Draft Statute for an international Criminal Court* (as finally adopted in 1994) points out that[309]

> In drafting the statute, the Working Group did not purport to adjust itself to any specific criminal legal system but rather, to amalgamate into a coherent whole the most appropriate elements for the goals envisaged, having regard to existing treaties, earlier proposals for an international court or tribunals and *relevant provisions in national criminal justice systems within the different legal traditions*. (emphasis added)

185. However, the commentary mainly refers to international instruments and decisions of international criminal tribunals. As an example, the commentary to Draft Article 42.1-2 ('*Non bis in idem*'), which is almost identical to article 20.2-3 of the eventual Statute of the International Criminal Court (ICC), provides in relevant part:[310]

> (1) The maxim *non bis in idem* […] is an important principle of criminal law, recognized as such in article 14, paragraph 7, of the International Covenant on Civil and Political Rights.
> (2) Article 14, paragraph 7, of the International Covenant has been interpreted as limited to trials within a single jurisdiction. The Commission believes that a greater degree of protection against double jeopardy is required under the statute and article 42 gives effect to this view, drawing heavily on article 10 of the statute of the International Tribunal [for the former Yugoslavia], with minor modifications to take account of the possibility of a previous trial in another international court or tribunal.

186. Similarly, the commentary to Draft article 39, on the 'Principle of legality' (*nullum crimen sine lege*), provides in relevant part:[311]

> (1) The principle *nullum crimen sine lege* is a fundamental principle of criminal law, recognized in article 15 of the International Covenant on Civil and Political Rights. Article 39 gives direct effect to this principle in the particular context of the statute.
> […]
> (4) Having regard to subparagraph (a), there may be circumstances in which an individual could be convicted for a crime under international law in an international court although the same person could not be tried in a national court—although these cases will be rare. The position is different in the case of treaty crimes under subparagraph (b), since the mere existence of a treaty definition of a crime may be insufficient to make the treaty applicable to the conduct of individuals. No doubt such cases (which are also likely to be rare, and may be hypothetical) might raise issues of the failure of a State to comply with its treaty obligations, but that is not a matter which should prejudice the rights of an individual accused.

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[307] Based on the analysis provided by Roger O'Keefe.
[308] No position is taken here on whether the principles discussed are indeed general principles of law within the meaning of article 38(1)(*d*) of the ICJ Statute. What matters for present purposes is that they could reasonably be claimed to be so.
[309] *YILC 1994*, vol. II/2, 26, para. 84.
[310] Id., 57.
[311] Id., 55–56.

187. Also the ILC's commentary *Draft Code of Crimes against the Peace and Security of Mankind* (as finally adopted in 1996) contains only a minor reference to domestic legal systems. E.g., when dealing with Article 11 on 'judicial guarantees':[312]

> The difficulty of reconciling the different rules for conducting criminal proceedings in the civil law and the common law systems has been encountered by the Commission in elaborating the draft statute for an international criminal court.

188. The commentary mainly refers to general principles of public international law as recognized by international instruments and decisions of some international criminal tribunals. As an example, the commentary to draft article 12 ('*Non bis in idem*') reads in relevant part (without reference to domestic principles but to 'justice' and to the ICCPR):[313]

> (2) […] The possibility of multiple trials conducted in the national courts of different States as well as an international criminal court raises the question of whether the *non bis in idem* principle should be applicable under international law. The Commission recognized that this question involved theoretical and practical issues. In theoretical terms, it was noted that this principle was applicable in internal law and that its implementation in relations between States gave rise to the problem of respect by one State for final judgments pronounced in another State, since international law did not make it an obligation for States to recognize a criminal judgment handed down in a foreign State. […]
> (3) […] This fundamental guarantee protects an individual against multiple prosecutions or punishments by a given State for the same crime and is reflected in the International Covenant on Civil and Political Rights (art. 14, para. 7). […] To impose such a punishment on an individual on more than one occasion for the same crime would exceed the requirements of justice.
> (4) The Commission decided to include the *non bis in idem* principle in the article subject to certain exceptions which were intended to address the various concerns regarding the principle. […]

189. Similarly, the commentary to Article 13 ('Non-retroactivity') contains no reference to domestic principles but to several international instruments:

> The prosecution and punishment of an individual for an act or omission that was not prohibited when the individual decided to act or to refrain from acting would be manifestly unjust. The prohibition of the retroactive application of criminal law is reflected in the principle *nullum crimen sine lege.* This principle has been embodied in a number of international instruments, such as the Universal Declaration of Human Rights (art. 11, para. 2), the International Covenant on Civil and Political Rights (art. 15, para. 1), the European Convention on Human Rights (art. 7, para. 1), the American Convention on Human Rights (art. 9) and the African Charter on Human and Peoples' Rights (art. 7, para. 2).[314]

190. Also the comments and observations received from Governments on the draft Code mainly quote international instruments and the references to general principles of criminal law do not clearly involve domestic principles. As example, regarding comments to Draft Article 14 as adopted on the first reading by the Commission:

- Paraguay stated that[315] '[d]efences (justifications, grounds for inculpability and for non-imputability) are so important a matter in criminal law that to refer to "general principles of law", thereby leaving a great deal to the judge's discretion, seems inappropriate.'

- Brazil stated that[316] '[a]s far as article 14 is concerned, what is stated about the "defence and extenuating circumstances under the general principles of law" seems to be insufficient. The provisions are somewhat vague since it is difficult, based only upon "the general principles of law", to indicate which circumstances

[312] *YILC 1996*, vol. II/2, p. 34.
[313] Id., para. 50.
[314] Id., 38–39, para. (1).
[315] A/CN.4/448 and Add.1, in *YILC 1993*, vol. II/1, 92.
[316] Id., 73.

should be taken into account. As a matter of fact, the large number of such broad-ranging provisions seems to be one of the most difficult problems hampering the Commission's effort to codify.'

- Belgium stated that[317] '[t]he question thus arises whether it would be preferable to delete article 14. Hypothetically, a judge could invoke the general principles of criminal law, such as extenuating circumstances, when having to assess the situation in which the crime was perpetrated.'

191. Nevertheless, there are references to domestic principles of criminal law in the preparatory works of the ILC to the draft code. E.g. in the fourth report on the draft code, by Mr. Thiam, Special Rapporteur,[318] it is mentioned (with a single footnote quoting only one book),[319] in relation to the content of attempt in internal law:[320]

> 137. The question then arises whether it is commencement of execution which constitutes attempt. That is the solution adopted, for example, in the French Penal Code, which regards as attempt any commencement of execution which failed or was halted only because of circumstances independent of the perpetrator's intention. Even so, it is necessary to determine what constitutes commencement of execution. It is not easy to draw a distinction between commencement of execution and preparatory acts. Some turn to objective criteria: the acquisition of the physical means for committing the crime, for example, would constitute a preparatory act, but when one "starts to make use of them", that is the commencement of execution. Others turn to subjective criteria: the intention to use those means.
> 138. Certain national legislations did not, at first, concern themselves with these subtleties. Soviet law, for example, in the Leading Principles of Criminal Legislation of the RSFSR (1919) specifically stated that "the stage of execution of the intention of the perpetrator does not in itself influence the penalty, which is determined by the extent of the danger which the offender" (art. 20) "and the act he has committed represent" (art. 21). In a circular relating to the draft penal code of 1920, it was stated that "the outward forms of execution of the act, the degree to which intentions were realized, the forms of complicity in violating the law lose their meaning as limits necessarily defining the extent of the punishment or the penalty itself". Today, the Fundamental Principles of Criminal Legislation of the USSR and the Union Republics (1958) provide for the penalization of both attempt and preparatory acts, and the court is obliged to take into consideration "the nature and degree of social danger of the acts committed, the extent to which the criminal intent is realized and the factors which prevented the offence from being perpetrated" (art. 15)
> 139. As regards the penalization of attempt, the socialist countries can be divided into three groups. The first group consists of those which abide by the general principle of penalizing attempt and preparatory acts. Apart from the USSR, these include Albania, Czechoslovakia, the Democratic People's Republic of Korea and Poland. In the second group, attempt is penalized as a general rule, but preparatory acts are penalized only in the cases provided by law: this is the case, for example, of the Bulgarian Code (art. 17) and the Hungarian Code (art. 11 (1)). In the last group, attempt and preparatory acts are penalized only in the cases stipulated by law. For example, in Yugoslavia, the 1951 Penal Code (art. 16) and the 1976 Penal Code (art. 19) penalize attempt to commit offences that are punishable by imprisonment of five years or more.
> 140. This is a solution closely related to that adopted in the French Penal Code, which lays down the general rule that attempt is punishable only in the case of criminal offences, but that attempt to commit correctional offences may be qualified as an offence only in the cases stipulated by law.
> 141. It is clear, therefore, that legal systems vary. As for the content, some legislations draw a distinction between attempt and preparatory acts, with each category being the subject of separate provisions. Other legislations do not draw this distinction and make attempt a crime only in the case of serious offences; others make attempt a crime without drawing a distinction between serious offences and other offences. All, however, recognize attempt as a juridical concept.

192. In the same report, it is mentioned in relation to the principle of *nullum crimen sine lege, nulla poena sine lege*[321]

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[317] Id., 71.
[318] A/CN.4/398 and Corr. 1-3, in *YILC 1986*, vol. II/1, 53 ff.
[319] I. Andrejew, *Le droit pénal comparé des pays socialistes*, Pedone, 1981.
[320] *Supra* note 318, 68-69.
[321] Id., 70.

151. The content of the rule *nullum crimen sine lege, nulla poena sine lege* may vary according to the sources of law cited.
152. According to a legalistic conception preferred in certain systems of law, the only law is written law. According to this school of thought, a system of law based on custom necessarily ignores the principle *nullum crimen sine lege*, because custom is not law, just as general principles, natural law and moral or philosophical maxims and prescriptions are not law. […]
153. The rule first appeared in France during the Revolution, and spread throughout Continental Europe. Even though it disappeared for a time in certain countries (in Germany, for example, under the National Socialist regime, with the application in 1935 of article 2 of the Penal Code, which introduced "the sound instinct of the people" as the source of criminal law),or underwent certain changes when recourse was made to interpretation by analogy, the rule *nullum crimen sine lege* has remained a fundamental principle of Continental criminal law and of the legal systems based on it. […]

193. In addition, while several international treaties contain an express reference to general principles of criminal law, or incorporate a similar content without mentioning the principle, it is not clear to what extent domestic principles where considered. E.g.:

a. Regarding the principle of ('*Ne bis in idem*'):

- Article 20 of the Rome Statute of the ICC;
- Article 10 ('*Non-bis-in-idem*') of the Statute of the ICTY, which terms are identical, *mutatis mutandis*, to Article 9 ('*Non bis in idem*') of the Statute of the International Criminal Tribunal for Rwanda (ICTR);
- Article 9 ('*Non bis in idem*') of the Statute of the Special Court for Sierra Leone (SCSL);
- Article 5 ('*Non bis in idem*') of the Statute of the Special Tribunal for Lebanon (STL);
- Several instruments adopted by the Council of Europe such as: Article 9 ('*Ne bis in idem*') of the European Convention on Extradition[322] and the European Convention on the Punishment of Road Traffic Offences,[323] Article 7 of the European Convention on Supervision of Conditionally Sentenced or Conditionally Released Offenders 1964,[324] Article 8 of the European Convention on Insider Trading 1989,[325] Article 18 of the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990,[326] Article 28 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005,[327] Section 1 ('*Ne bis in idem*') of Part III ('International effects of European Criminal Judgments') of the European Convention on the International Validity of Criminal Judgments,[328] Part V ('*Ne bis in idem*') of the European Convention on the Transfer of Proceedings in Criminal Matters 1972[329] and Section 4 ('*Ne bis in idem*') of Part V of the European Convention on offences relating to Cultural Property 1985[330] (not in force);
- Chapter 3 ('Application of the *ne bis in idem* principle') of Title III of the 'Schengen Convention' contains a detailed regime of horizontal *ne bis in idem*. In 2009, the Council of the EU adopted Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings. As among the member states of the European Union (EU), extradition has now been replaced by the regime of the 'European arrest warrant', as provided for in Council Framework Decision 2002/584/JHA of 13 June 2002, which articles 3.2 and 4.2-5 contain provisions dealing with the *ne bis in idem* principle.
- Article 9(*a*) The Inter-American Convention on Mutual Assistance in Criminal Matters 1992;[331]

[322] Paris, 13 December 1957, ETS No. 24.
[323] Strasbourg, 30 November 1964, ETS No. 52.
[324] Strasbourg, 30 November 1964, ETS No. 51.
[325] Strasbourg, 20 April 1989, CETS No. 130.
[326] Strasbourg, 8 November 1990, CETS 141.
[327] Warsaw, 16 May 2005, CETS No. 198.
[328] The Hague, 28 May 1970, CETS No. 70.
[329] Strasbourg, 15 May 1972, CETS No. 73.
[330] Delphi, 23 June 1985, CETS No. 119.
[331] Nassau, 23 May 1992, OASTS No. 75.

- African Union (formerly Organization of African Unity), Article 8(3) of the Convention on the Prevention and Combating of Terrorism 1999;[332]
- Bilateral extradition treaties between certain states contain provisions on prior prosecution in another state. For example, Article 5 ('Prior Prosecution') of the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America 2003;[333] or Article 11(1)(*d*) of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters 2009;[334]

b. Articles 22 ('*Nullum crimen sine lege*') and 23 ('*Nulla poena sine lege*'), ICC Statute;
c. Article 22(2) of the ICC Statute, regarding the principle of *in dubio pro reo*;
d. Paragraph 2 of Article 24 ('Non-retroactivity *ratione personae*') of the ICC Statute.

194. The same problem can be found in several draft international instruments. E.g.:

a. Articles 3 and 4 of the 1990 UN General Assembly so-called Model Treaty on Extradition.[335]
b. Paragraph 1 of Principle 9 ('*Non Bis In Idem*/Double Jeopardy') of the Princeton Principles on Universal Jurisdiction,[336] developed by the Princeton Project on Universal Jurisdiction, a private initiative of scholars and other jurists. The commentary to such Principle reads:[337]

> There was no objection among the participants as to desirability of such safeguards. Several of the participants, however, questioned whether the prohibition on double jeopardy—*non bis in idem*—was a recognized principle of international law. Under regional human rights agreements, *non bis in idem* has been interpreted to apply within a state, but not between states. It was noted, however, that the importance of the doctrine of *non bis in idem* is recognized in almost all legal systems: it qualifies as a general principle of law and, as such, could be said to apply under international law.

c. In its resolution entitled 'International crimes and domestic criminal law' adopted at the XIVth International Congress on Penal Law (Vienna, 1989), the International Association for Penal Law (*Association Internationale de Droit Pénal* or AIDP) stated that 'multiple prosecutions before domestic courts of different states for the same offence should be avoided by international recognition of the principle *ne bis in idem*'.[338] At the XVIth International Congress, in a resolution entitled 'International Criminal Law', the AIDP took the view that '[t]he principle of *ne bis in idem* should be regarded as a human right that is also applicable on the international or transnational level'.[339] Finally, at the XVIIth International Congress, the AIDP adopted a resolution entitled 'Concurrent National and International Criminal Jurisdiction and the Principle "*Ne bis in idem*"'.[340]

II.2.b.ii International instruments establishing national courts

195. Pursuant to its Regulation 2000/15 of 6 June 2000, the United Nations Transitional Authority in East Timor (UNTAET) established panels within the District Court in Dili with exclusive jurisdiction over the offences of genocide, war crimes, crimes against humanity, murder, sexual offences and torture (in many cases, the wording is

[332] Algiers, 14 July 1999, 2219 UNTS 179.
[333] Washington, 31 March 2003, UKTS No. 13 (2007), Cm 7146.
[334] Brussels, 30 November 2009, OJ L 39/20, 12.2.2010.
[335] UNGA res. 45/116, 14 December 1990, para. 1. The UN Model Treaty is annexed to the resolution.
[336] Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (2001).
[337] Id., page 54.
[338] XIVth International Congress on Penal Law (Vienna, 1989), 'International crimes and domestic criminal law', part II.5, in J. L. de la Cuesta (ed.), *Resolutions of the Congresses of the International Association of Penal Law (1926–2004)*, Éditions érès, 2009, 146.
[339] XVIth International Congress on Penal Law (Budapest, 1999), 'International Criminal Law', part B.4, in id., 183.
[340] XVIIth International Congress on Penal Law (Beijing, 2004), 'Concurrent National and International Criminal Jurisdiction and the Principle "*Ne bis in idem*"', part II, in id., 203.

similar to the ICC Statute).[341] It contains references to several general principles of criminal law but, once again, is not clear to what extent domestic principles where considered:

a. Section 11 ('*Ne bis in idem*');
b. Sections 12 ('*Nullum crimen sine lege*') and 13 ('*Nulla poena sine lege*');
c. The second sentence of Section 22.2 ('*in dubio pro reo*');
d. Paragraph 2 of Article 3 ('Applicable law');

II.2.b.iii Discussion

196. It is not obvious that the various principles relied on in the above contexts are always or, for that matter, ever relied on specifically in their putative quality as 'general principles of law recognized by civilized nations' within the meaning of article 38(1)(c) of the ICJ Statute – still less as general principles of domestic law as such. When it comes to the unadorned provisions of treaties and other international instruments, there is no explicit indication of why a particular principle has been incorporated in the text. As for those instances in which a commentary or some other discursive text is available, the indications are ambivalent. Reference is commonly made to terms like 'general principle', but the meaning remains unstated.

197. Moreover, and more significantly, the confounding factor in any analysis in this regard is that two major principles — *nullum crimen sine lege* and *ne bis in idem*—are also international human rights guarantees, as expressly recalled in the relevant commentaries and similar documents. As such, it would be more likely than not that the aforementioned principles are being relied on in this more specific and more overtly normative quality of international human rights guarantees, rather than in their arguable quality as general principles of criminal law.

198. The method (for want of a better word) of reliance on general principles of law in the context of international criminal law is significantly different from the method of such reliance in other fields of public international law. Reliance in other fields of public international law is traditionally by way of analogy between the position of natural and legal persons under domestic private law and the position of states under public international law. A degree of modification of the relevant principles is required for them to fit within the interstate environment. In the criminal context, however, no recourse to analogy is needed. Under both national and international criminal law, the subject-matter of the relevant rules is the repression of punishable conduct committed by individuals; as such, principles pertinent in the domestic legal sphere can be more directly translated to the international one. That being said, questions always remain as to how these principles ought to apply within a system of overlapping competences (i.e. overlap amongst respective national jurisdictions, amongst respective international jurisdictions, as well as between national and international jurisdictions), and within a system where the relevant rules may apply only as amongst States parties to a particular treaty.

199. The role of reliance on general principles of law in the development of international criminal law is significantly different in the context of prospective law-making via treaties and similar international instruments than in the context of the essentially retrospective exercise that is adjudication. In the prospective law-making context, reliance on general principles does not perform a gap-filling function. Rather, general principles serve merely as the inspiration for positive rules, in the same way elementary notions of justice or specific international human rights standards may do. In this context, general principles signal desirable policy—policy which may eventually be embodied in a binding legal form.

200. There are no specific problems implicated in the reliance on general principles of law in the context of prospective law-making in the field of international criminal law. In most instances, it comes down to a simple policy choice by the drafters as to whether and how the principle in question is to be reflected. This is often as much a question of competing views on the precise content of the general principle in the first place as it is of its appropriate translation to the international plane. Specific principles may pose specific challenges, but these are not challenges inherent in the reliance on such principles for the prospective development of international criminal law.

[341] See UNTAET Regulation 2000/15 on the Establishment Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, s. 1.

II.2.c Financial/Trade[342]

201. Domestic law principles are also used to develop new international/transnational rules[343] in fields where domestic legal systems have gathered extensive experience and where international regulation is needed; in particular in the financial/trade area (intellectual property,[344] financial regulation, etc.). The chances of general acceptance by States are greater if established domestic practices support the content of the international rule. In a 1992 ILA Resolution, the term 'transnational law' is equated, among other things, to 'general principles of law and principles common to several jurisdictions' and juxtaposed to particular national law. However, in this context the approach appears to be more of looking for the lowest common denominator or the recognized best practices among domestic legal systems. As a consequence, the role and weight of each domestic legal system may vary considerably depending on the subject matter.

202. Some relevant examples would be:

- the OECD Anti-Bribery Convention,[345] which is the result of a comparative legal analysis of a domestic institution to address an international problem;

- the UNCTAD's Principles on Promoting Responsible Sovereign Lending and Borrowing.[346] The project, launched in 2009, aimed to develop a set of principles to establish internationally recognized principles that promote and reinforce responsible sovereign lending and borrowing practices. Those principles (the result of collaborative effort involving experts from the academia, civil society and financial institutions, as well as governments) relied on existing domestic legal concepts (such as insolvency) and agency patterns, while still going beyond a mere codification of existing practice (which is rarely consistent).[347]

II.2.d Global Administrative Law[348]

203. Domestic public law principles are also progressively implemented at the international level, in particular following the institutionalization of international relations and the growing powers of international organizations. International institutions have an incentive to comply with domestic standards if non-compliance induces a risk that their decisions might be challenged or ineffective at the domestic level. An illustration of such a risk refers to the implementation of UN Security Council sanctions in Europe and their subsequent challenges before European courts because of due process deficiencies.[349] Therefore, particularly in relation to certain international standard-setting processes, international institutions that have increased the transparency of their functioning tend to implement administrative consultation procedures similar to those existing at the domestic level.

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[342] Based on the analysis provided by Régis Bismuth and Michael Waibel. For additional references, see C. Brummer, *Soft law and the global financial system: rule making in the 21st century*, CUP, 2012; T. Büthe & W. Mattli, *The new global rulers: the privatization of regulation in the world economy*, Princeton University Press, 2011.

[343] On transnational rules, see P.C. Jessup, *Transnational Law*, Yale University Press, 1956; D.F. Vagts and H.J. Steiner, *Transnational Legal Problems*, The foundation Press, 1976; O. Dilling, M. Herberg and G. Winter, Transnational Administrative Rule-Making, Hart Publishing, 2011.

[344] See the current debate on the intersection of patent and international investment law in *Eli Lilly and Company v. Canada* (ICSID Case No. UNCT/14/2).

[345] http://www.oecd.org/corruption/oecdantibriberyconvention.htm

[346] http://unctad.org/en/Docs/gdsddf2011misc1_en.pdf

[347] For critical study on whether the Principles reflect existing or emerging general principles of law, guiding principles recognized in domestic jurisdictions, emerging principles, or mere structural principles, see M. Goldmann, "Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions", 2012, available at http://unctad.org/en/PublicationsLibrary/gdsddf2012misc3_en.pdf

[348] Based on the analysis provided by Régis Bismuth and Diana Louise.

[349] Case C–402/05 P and C–415/05, P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351; *Nada v. Switzerland*, App no. 10593/08 (ECtHR judgment of 12 Sept. 2012); *Al-Dulimi and Montana Management Inc v. Switzerland*, App no 5809/08 (ECtHR Judgment of 26 November 2013).

204. This 'Global Administrative Law' system (in the context of global governance) differs from what traditionally was considered as 'international administrative law' (dealing with the internal law of international organisations, mainly in relation to employment relationships).[350] The structure of this growing field has developed an irregular shape. While domestic experiences of public authority were used as a model, the relevance of domestic principles is not absolute. As argued by Von Bogdandy, '[t]here is a presumption that an established principle of domestic public authority raises an issue to which the law of an international institution should provide a principled answer, which, however, in most cases will differ from that given in domestic legal orders.'[351]

205. As an example, the operation of a pluralist model in the governance of international trade can be traced in the regulation of genetically modified organisms (GMO). The regime illustrates how accountability mechanisms in global administrative law differ from these of domestic settings. The United States adopted a 'permissive approach' which opposes restrictions on the production unless there are scientifically proven risks for human health. Meanwhile, Europe adopted a 'precautionary' approach insisting restriction in production because of uncertainty and potential serious risk. Nevertheless, those two approaches co-exist and only conflict in trade-related institutions.[352] However, there is no overarching, hierarchically ordered scheme as would exist in domestic administrative law systems.

206. The constraints weighing on international institutions involved in standard-setting processes in the field of international financial regulation have driven them to gradually implement domestic administrative rules and principles at the international level. As an example, the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO) and the International Associations of Insurance Supervisors (IAIS)[353] all decided to follow UK and US administrative procedures that are considered as the most stringent in this area. Arguably, they have done so because there is an inherent incentive to comply with the strictest procedures in order to ensure the effectiveness and a smooth implementation of their international standards at the national level.

III. CONCLUSIONS

207. As stated in the introduction, the work of the Study Group focused on general principles derived from domestic law without considering whether general principles could also be derived from other sources (e.g. from the international legal system).

208. As a result of the empirical study of the current practice (which was not confined to decisions of international courts and tribunals but also considered the law-making phase of international law), the Study Group reached the following conclusions:

- *Clear reference*

209. It will often be helpful if decisions of the relevant decision-maker(s) make it clear when they are referring to the general principles derived from domestic law, avoiding ambiguities. An example of such ambiguity could be found in the *Klöckner* case, as pointed out by the *ad hoc* committee on annulment:

> Furthermore, the reference to "other national codes which we know of," to the "particularly appropriate" character of the rule "in more complex international ventures, such as the present one" (p. 105) and to the particular importance that "universal requirements of frankness and loyalty . . . be applied in cases such as this one" *seem to indicate* that the Tribunal *may have wanted to base, or thought it was basing, its decision on* the general principles of law recognized by civilized nations, as that term is used in Article 38(3) of the Statute of the International Court of Justice.[354] (emphasis added)

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[350] See "Symposium: Global Governance and Global Administrative Law in the International Legal Order" 17 EJIL (2006) 1.

[351] A. von Bogdandy, "General Principles of International Public Authority: Sketching a Research Field", 9-11 German Law Journal (2008), 1917-1918.

[352] See *EC – Approval and Marketing of Biotech Products.*

[353] For a general overview of these institutions, see, R. Bismuth, La Coopérat*ion Internationale des Autorités de Régulation du Secteur Financier et le Droit International Public*, Bruylant 2011.

[354] *Klöckner v. Cameroon*, Decision on Annulment, 3.5.1985, ICSID Case no. Arb/81/2, para 69..

- *How to identify the principles*

210. The comparative method could be used.[355] In doing so, however, the interpretative evolution of the principles should also be considered. One of the primary comparative law methods is functionalism:[356] comparisons should focus on legal institutions with similar functions within the legal system (regardless of their external characteristics, the compared legal institutions are designed to address similar legal problems). More importantly, all the reasoning process should be summarised in the decision, including supporting evidence, in order to facilitate a later review.

> It is impossible to answer this question by reading the Award, which contains no reference whatsoever to legislative texts, to judgments, or to scholarly opinions. In this respect the contrast is striking between Section 2 (on the "duty of full disclosure") and Section 3 (on the *exceptio non adimpleti contractus*, pp. 109-114 and pp. 118, 124, 126, etc). Section 3 contains a great number of references to scholarly opinion (doctrine) as well as, directly or indirectly, to case law (jurisprudence). One could therefore assume that in the case of Section 2, regarding the duty of frankness, the arbitrators either began a similar search for authorities but found it unproductive or, more likely, thought that a search for positive law was unnecessary.[357]

211. In addition, the identified general principle should fit into the international context and be able to address the specific legal problem at international level. As an example, in the *Status of South West Africa*, the ICJ stated that

> The mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object […] It is therefore, not possible to draw any conclusion by analogy form the notions of mandate in national law or from any other legal conception of that law.[358]

212. International courts and tribunals seem to rely quite often on previous decisions of other international courts and tribunals that have declared the existence of a general principle of law, without discussing such categorization and without further analysis. Some arbitral tribunals had also referred (of their own motion or at the request of the parties) to some useful compilations of principles of contractual obligations, such as the UNIDROIT Principles of International Commercial Contracts. While previous decisions and internationally recognised compilations could be useful as supporting evidence, it should not excuse the absence of proper discussion by the adjudicating body explaining how it arrived at the confirmation of the general principle derived from domestic law and its fitness to the specific legal problem.

- *The problem of their universality*

213. It could be argued that the search ~~of~~ for unanimity amongst domestic legal systems is utopian and, in any event, impractical. The analysis must be extensive (widespread) and representative, without necessarily being universal. The general principles should reflect the main forms of civilization and of the principal legal systems of the world (a general principle could be deemed to exist if it is recognized by a prevailing - or at least a significant - number of nations within each legal culture). This dichotomy – required reflection of the main forms of civilizations and legal systems - influenced article 9 of the ICJ Statute and was recognised by Judge Weeramantry ('the integrated values of any civilization are the source from which its legal concepts derive […] international law would require a worldwide

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[355] For the comparative law method, see also M. Bogdan, *Concise Introduction to Comparative Law*, Europa Law Publishing, 2013; W. Menski, *Comparative Law in a Global Context*, CUP, 2nd ed, 2006 ; E. Gaillard, "Transnational Law: A Legal System or a Method of Decision-Making?", 17 *Arbitration International* 59 (2001); K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, OUP, 3rd ed., 1998;

[356] See generally, R. Michaels, "The Functionalist Method of Comparative Law", in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (2006), 339.

[357] See *Klöckner*, *supra* note 354, at 71.

[358] *International Status of South-West Africa*, Advisory Opinion, I.C.J. Rep 1950, p. 128, at 132.

recognition of those values')[359] and Judge Jennings ('[…] important to stress the imperative need to develop international law to comprehend within itself the rich diversity of cultures, civilizations and legal traditions[…]').[360]

214. Therefore, it is also not enough to 'identify' a general principle among the main legal systems if there is not enough geographical representation, e.g. a general principle shared by Civil Law countries in Europe should also be identified in other Civil Law countries located in different geographical areas and belonging to different civilizations.

215. While Article 38(1)(c) literally refers to principles as such, not to their expression in specific legal rules, in 1984 the ICJ stated that in its opinion the terms 'rules' and 'principles' can be considered as 'a dual expression to convey one and the same idea.'[361] Therefore, it could be argued that if there is a specific legal rule generally accepted, then there is probably also some common principle behind it. The particular common legal rule could thus be seen as an expression of the common principle.

216. Similar to the existence of regional customary law, the possibility exists of the existence of regional general principles derived from the domestic laws of a specific region. As an example, the Court of Justice of the European Union (CJEU) often refers to principles found in the domestic legal systems of its Member States[362] and EU legislation also refers to general principles common to the domestic laws of its member states.[363]

- *How the principles should be applied*

217. There is a general understanding that the principles should sometimes be adapted since the conditions of the international legal system sometimes differ from those prevailing in the domestic systems. As suggested by Judge McNair in his much-quoted separate opinion to the International Status of South West Africa Advisory Opinion:

> the way in which international law borrows from this source is not by importing private law institutions "lock, stock and barrel," ready made and fully equipped with a set of rules [...] the true view of the duty of international tribunals [...] is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.[364]

218. In addition, general principles of law - unless and until reflected in a specific rule of customary international law convincingly evidenced by sufficient and sufficiently representative state practice and *opinio juris* - remain general principles of law. They are not, once identified, transmuted *ipso facto* into rules of customary international law.

The Study Group has concluded its work but, considering the complexity and continuing relevance of the topic, it would recommend that the Association considers establishing a Committee with broader representation to contribute to the work of the UN International Law Commission on the broader topic of general principles of law (including other potential sources from which general principles could be derived).

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[359] *Case Concerning the Gabcikovo-Nagymoros Project*, Order of 5 February 1997, 1997 ICJ Reports, Separate Opinion of Judge Weeramantry, p. 245.

[360] R.Y. Jennings, "Universal International Law in a Multicultural World", in *International Law and the Grotium Heritage*, TMC Asser Institute, The Hague, 1985, 195.

[361] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), Judgment of 12 October 1984, ICJ Reports 1984, 246, at 288-290, para.79

[362] The Court, or the Advocate General, not only checks the commonality of a domestic principle, but also if the principle fits the objectives of the EU. E.g. see Opinion of A.G. Lagrange in Case C-14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken v ECSC High Authority* [1962] ECR 485 ECLI:EU:C:1962:19, pages 282-283. More recently, Case C-550/07, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010] ECLI:EU:C:2010:512, paras. 69-76.

[363] E.g. Article 340(2) of the Treaty on the Functioning of the EU (TFEU) states (emphasis added) that '[i]n the case of non-contractual liability, the Union shall, *in accordance with the general principles common to the laws of the Member States*, make good any damage caused by its institutions or by its servants in the performance of their duties.'

[364] *Supra* note 358, p. 146, at p. 148.