

SAMANTHA BESSON<sup>\*</sup>

## General Principles in International Law – Whose Principles?

*‘Principles don’t fall from heaven, except, perhaps, in a very metaphorical sense.’<sup>1</sup>*

### Introduction

Where do principles come from if they do not fall from heaven? That will be my central question in this chapter.<sup>2</sup> More seriously, the chapter shall pertain to the subjects of general principles of international law and accordingly to their law-making processes: to whom do they apply and how, and who identifies them and how.

Fundamental or general principles of international law have become increasingly applicable within domestic constitutional law in recent years and they are often considered part of the internationalization of constitutional law. Indeed, and in the wake of the post-1945 value discourse within domestic constitutional law and the widespread reference to principles in that context, general principles of international law have been regarded as a confirmation of the universality of domestic constitutional

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<sup>1</sup> T. KOOPMANS, “Judicial Activism and Procedural Law”, *European Review of Private Law*, Vol. 1, 1993, pp. 67-81, 78.

<sup>2</sup> In S. BESSON, “Whose Constitution(s)? International Law, Constitutionalism and Democracy”, in J. DUNOFF, J. TRACHTMAN, eds, *Ruling the World? Constitutionalism, International Law and Global Governance*, Cambridge, Cambridge University Press, 2009, pp. 381-407, I raised and addressed the same question pertaining to international constitutional law.

values and of the existence of a common core of transnational constitutional law that should be respected everywhere. This is the case, for instance, of international human rights and in particular of *jus cogens* norms. Interestingly, and at the same time, those very same principles are usually taken as examples of the (material, or even formal) constitutionalization of international law itself.<sup>3</sup>

And this in turn explains the renewed interest in general principles and their legitimating function on the part of international lawyers who tended before to concentrate much more on the other sources of international law. Even those who object to a constitutional reading of international law<sup>4</sup> and, more generally, authors who openly favour a pluralist reading of the international legal order and its relationship with domestic and regional legal orders have now developed an interest in general principles. They have come to attribute a central and allegedly new role to those principles in the articulation of legal orders, but also of legal regimes and norms within international law itself.<sup>5</sup> This is particularly clear at a time of increased regionalization of international law, as exemplified in Europe, but also of specialization of international law into different regimes.<sup>6</sup>

Given their pivotal and arguably recently enhanced role both for domestic legal orders and the international legal order,<sup>7</sup> one may expect to find detailed legal theoretical treatment of the subject within the international law literature.

<sup>3</sup> See e.g. B. FASSBENDER, "The United Nations Charter as the Constitution of the International Community", *Columbia Journal of Transnational Law*, Vol. 36, 1998, pp. 529–619; A. PETERS, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures", *Leiden Journal of International Law*, Vol. 19, 2006, pp. 579–610; E. DE WET, "The International Constitutional Order", *International and Comparative Law Quarterly*, Vol. 55, 2006, pp. 51–76; S. GARDBAUM, "Human Rights and International Constitutionalism", in J. DUNOFF, J. TRACHTMAN, eds, *Ruling the World? Constitutionalism, International Law and Global Government*, Cambridge, Cambridge University Press, 2009.

<sup>4</sup> For a critique, see BESSON, "Whose Constitution(s)?", above, n. 2.

<sup>5</sup> See e.g. E. JOUANNET, "L'ambivalence des principes généraux face au caractère étrange et complexe de l'ordre juridique international", in R. HUESA VINAIXA, K. WELLENS, eds, *L'influence des sources sur l'unité et la fragmentation du droit international*, Bruxelles, Bruylant, 2006, pp. 115–54, 134 ff. drawing on M. KOSKENNIEMI, "General Principles: Reflections on Constructivist Thinking in International Law", in *Sources of International Law*, Aldershot, Ashgate, 2000, pp. 359–402.

<sup>6</sup> See e.g. JOUANNET, "L'ambivalence des principes généraux", above, n. 5, p. 115.

<sup>7</sup> See *ibid.*, pp. 116–7.

Despite the wealth of legal publications of the topic,<sup>8</sup> however, its theoretical dimensions have been largely neglected. General principles have been at the core of

<sup>8</sup> See e.g. for international law: G. GAJA, "General Principles of Law", in *Max Planck Encyclopedia of Public International Law*, Oxford, Oxford University Press, 2007, online edition, available at <http://www.mpepil.com/>; R. KOLB, "Principles as Sources of International Law (With Special Reference to Good Faith)", *Netherlands International Law Review*, Vol. 53, no 1, 2006, pp. 1-36; JOUANNET, "L'ambivalence des principes généraux", above, n. 5; H. ASCENSIO, "Principes généraux du droit", *Répertoire international Dalloz*, 2004; J.-Y. DE CARA, "Les principes généraux de droit au sens de l'article 38 du statut de la Cour internationale de Justice", in *Les dénominateurs communs entre les principes généraux du droit musulman et des droits des pays arabes et les principes généraux du droit français*, Actes du colloque Cedroma, Octobre 2001, available at <http://www.cedroma.usj.edu.lb/pdf/dencom/decara.pdf>; V.-D. DEGAN, "General principles of law (A Source of General International Law)", *The Finnish Yearbook of International Law*, Vol. 3, 1992, pp. 1-102; B. VITANYI, "Les positions doctrinales concernant le sens de la notion de 'Principes Généraux de Droit reconnus par les Nations Civilisées'", *Revue Générale de Droit International Public*, Vol. 86, 1982, pp. 48-116; A. PELLET, *Recherche sur les principes généraux de droit international*, Thèse Paris II, Paris, 1974; G. TUNKIN, "'General Principles of Law' in International Law", in M. RENÉ et al., eds, *Internationale Festschrift für Alfred Verdross zum 80. Geburtstag*, Munich/Salzburg, W. Fink Verlag, 1971, pp. 523-32; A. VERDROSS, "Les principes généraux du droit applicables dans le système des sources du droit international public", in M. BATTELLI et al., eds, *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève, 1968, pp. 521-530; M. VIRALLY, "Le rôle des 'principes' dans le développement du droit international", in M. BATTELLI et al., eds, *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève, 1968, pp. 531-554; M. SORESENSEN, "Les principes généraux de droit reconnus par les nations civilisées", in *Recueil des cours*, Vol. 101, 1960-III, Leiden, 1960, pp. 16-34; G. FITZMAURICE, "The General Principles of International Law, Considered from the Standpoint of the Rule of Law", *Recueil des cours*, La Haye, 1957; B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, Cambridge University Press, 1953. See e.g. for EU law: A. ARNULL, "What is a General Principle of EU Law?", in R. DE LA FERIA, S. VOGENAUER, eds, *Prohibition of Abuse of Law: A New General Principle of EU Law*, Oxford, Hart Publishing, 2011; R. DE LA FERIA, S. VOGENAUER, eds, *Prohibition of Abuse of Law: A New General Principle of EU Law*, Oxford, Hart Publishing, 2011; A. VON BOGDANDY, "Founding Principles of EU Law: A Theoretical and Doctrinal Sketch", *European Law Journal*, Vol. 16, no 2, 2010, pp. 95-111; D. SIMON, "Les principes en droit communautaire", in S. CAUDAL, ed., *Les principes en droit*, Paris, Economica, 2008, pp. 287-304; U. BERNITZ, J. NERGELIUS, C. CARDNER, eds, *General Principles of EC Law in a Process of Development - reports from a conference in Stockholm, 23-24 March 2007* / org. by the Swedish Network for European Legal Studies, Alphen aan den Rijn, Kluwer Law International, 2008; X. GROUSSOT, *General Principles of Community Law*, Groningen, Europa Law Publishing, 2006; T. TRIDIMAS, *The General Principles of EU Law*, 2<sup>nd</sup> ed., Oxford, Oxford University Press, 2006; C. FLAESCHMOUGIN, "Typologie des principes de l'Union européenne", in Centre d'excellence Jean Monnet, *Le droit de l'Union européenne en principes. Liber amicorum en l'honneur de Jean Raux*, Rennes, Apogée, 2006, pp. 99-152; U. BERNITZ, J. NERGELIUS, eds, *General Principles of European Community Law - reports from a conference in Malmö, 27-28 August 1999* / org. by the Swedish Network for European Legal Studies and the Faculty of Law, University of Lund, The Hague, Kluwer Law International, 2000; J. A. USHER, *General Principles of European Community Law*,

doctrinal debates about the sources of international law for years, but most discussions have focused on the identification and definition of general principles, and on their application.<sup>9</sup> Given the complexity of the topic in traditional legal theory -that has so far always conceived of them as confined to the boundaries of the domestic legal order-, this is not entirely surprising. To cite just a few of those debates, general principles raise difficult questions pertaining to the sources of law, the relationship between law and morality, the role and legitimacy of adjudication, and the nature of legal reasoning.<sup>10</sup> Transposed to the international legal order, but most importantly to the relations between legal orders, those questions become even more complex as they also require a background theory of the nature and sources of international law and a theory of international adjudication.

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London, Longman, 1998; F. PICOD, "Principes généraux du droit", in A. BARAV, C. PHILIP, *Dictionnaire Juridique des Communautés Européennes*, Paris, PUF, 1993, pp. 858-68; J. BOULOUIS, "Principes Généraux", in C. GAVALDA et al., eds, *Répertoire de Droit Communautaire – Tome III*, Paris, Dalloz, 1992; D. SIMON, "Y a-t-il des Principes Généraux du Droit Communautaire?", *Droits*, Vol. 14, 1991, pp. 73-86. Further references to the literature and the case-law about general principles may be found in those respective articles and books.

<sup>9</sup> There are a few exceptions, of course, and in particular JOUANNET, "L'ambivalence des principes généraux", above, n. 5; ASCENSIO, "Principes généraux du droit", above, n. 8; KOSKENNIEMI, "General Principles", above, n. 5, pp. 359-402. In EU law, the theorization of general principles is slightly more developed: see e.g. M. HERDEGEN, K. WOLTERS, "General Principles of EU Law – the Methodological Challenge", in U. BERNITZ, J. NERGELIUS, C. CARDNER, eds, *General Principles of EC Law in a Process of Development – reports from a conference in Stockholm*, 23-24 March 2007 / org. by the Swedish Network for European Legal Studies, Alphen aan den Rijn, Kluwer Law International, 2008, pp. 343-355; GROUSSOT, *General Principles*, above, n. 8; O. WIKLUND, J. BENGOTXEA, "General Constitutional Principles of Community Law", in U. BERNITZ, J. NERGELIUS, eds, *General principles of European Community law - reports from a conference in Malmö*, 27-28 August 1999 / org. by the Swedish Network for European Legal Studies and the Faculty of Law, University of Lund, The Hague, Kluwer Law International, 2000, pp. 119-135.

<sup>10</sup> See e.g. J. R. MANERO, "Rules and Principles", in *IVR Encyclopedia*, 2009; G. TUSSEAU, "Métathéorie de la notion de principe dans la théorie du droit contemporaine. Sur quelques écoles de définition des principes", in S. CAUDAL, ed., *Les principes en droit*, Paris, Economica, 2008, pp. 75-112; R. GUASTINI, "Les principes de droit en tant que source de perplexité théorique", in S. CAUDAL, ed., *Les principes en droit*, Paris, Economica, 2008, pp. 113-26; R. ALEXY, "On the Structure of Legal Principles", *Ratio Juris*, Vol. 13, no 2, 2000, pp. 294-304; R. ALEXY, "Zum Begriff des Rechtsprinzips", in R. ALEXY, ed., *Recht, Vernunft, Diskurs*, Francfort, Suhrkamp, 1995; M. ATIENZA, J. R. MANERO, *Ilícitos atípicos. Sobre el abuso del derecho, el fraude de ley y la desviación de poder*, Madrid, Trotta, 2000; R. DWORKIN, *Taking Rights Seriously*, London, Duckworth, 1978; J. RAZ, "Legal Principles and the Limits of Law", *Yale Law Journal*, Vol. 81, 1971-72, pp. 823-54; J. ESSER, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, Tübingen, J.C.B. Mohr, 1956.

Theoretical clarification of the nature and role of general principles in international law is not only interesting *per se* –for the theory of international law, but also for jurisprudence and legal theory in general–, but is also needed for practical reasons.

Due to international judicial proliferation, combined with the regionalization and specialization of international law and its enhanced legal density, the reference to general principles have increased in the case-law. Every single international legal regime or order has developed its own general principles, sometimes akin to other legal regimes and orders' general principles, but also different ones in other cases. Recent pragmatic and largely elliptic decisions of the International Court of Justice (ICJ) or the Court of Justice of the European Union (CJEU) on one or the other new general principle, but also ex-post doctrinal reconstructions of those general principles developed in the case-law have demonstrated the need for an in-depth understanding of what those principles are.<sup>11</sup> The practical importance of this effort in theoretical clarification can also be exemplified more specifically in the international human rights context where the sources issue is intimately linked to that of their legitimacy<sup>12</sup> and

<sup>11</sup> See on the existence of a general principle of precaution in international law, ICJ, 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment. See e.g. the contribution by Pierre D'ARGENT in this volume. See also in the EU, the discussion pertaining to the existence of a general principle of equality of shareholders or of abuse of law in the CJEU Case, *Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and Others, Bertelsmann AG and Others*, Case C-101/08, [2009] ECR I-9823 and CJEU, *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v. Commissioners of Customs & Excise*, Case C-255/02, [2006] ECR I-1609. See e.g. J. BENGOTXEA, "Case note on *Audiolux*", *Common Market Law Review*, Vol. 47, 2010, pp. 1173-86, 1180 and ARNULL, "What is a General Principle of EU Law?", above, n. 8, on the AG and CJEU decision in *Audiolux*; R. DE LA FERIA, "Reverberation of Legal Principles: Further Thoughts on the Development of an EU Principle of Prohibition of Abuse of Law", in R. DE LA FERIA, S. VOGENAUER, eds, *Prohibition of Abuse of Law: A New General Principle of EU Law*, Oxford, Hart Publishing, 2011 and ARNULL, "What is a General Principle of EU Law?", above, n. 8, on the CJEU decision in *Halifax*.

<sup>12</sup> On the legitimate authority of international law in general, see e.g. S. BESSON, "The Authority of International Law – Lifting the State Veil", *Sydney Law Review*, Vol. 31, no 3, 2009, pp. 343-80; A. BUCHANAN, R. KEOHANE, "The Legitimacy of Global Governance Institutions", *Ethics and International Affairs*, Vol. 20, no 4, 2006, pp. 405-37; M. KUMM, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", *European Journal of International Law*, Vol. 15, 2004, pp. 907-31; BESSON, "Whose Constitution(s)?" above, n. 2; A. BUCHANAN, "The Legitimacy of International Law" in S. BESSON, J. TASIOLAS, eds, *The Philosophy of International Law*, Oxford, Oxford University Press, 2010, pp. 79-96; J. TASIOLAS, "The Legitimacy of International Law" in S. BESSON, J. TASIOLAS, eds, *The Philosophy of International Law*, Oxford, Oxford University Press, 2010, pp. 97-116. On the relationship between the validity and the legitimacy of international law, see e.g. S. BESSON, "Theorizing the Sources of International Law", in S. BESSON, J. TASIOLAS, eds, *The Philosophy of International Law*, Oxford, Oxford University Press, 2010, pp. 163-85.

their democratic legitimacy in particular.<sup>13</sup>

In this chapter, I propose to look at general principles in international law from a theoretical perspective and an analytical one in particular, by addressing their nature, sources, content, rank and functions. My approach will be a legal positivist one and will aim at defeating the default natural law or interpretivist understanding of general principles of international law, albeit a rich legal positivist approach that avoids the consensualist readings that have plagued positivist accounts of the validity and legitimacy of international law for so long. In that theoretical exercise, I will try to always compare general principles in international law with those one finds in domestic law, on the one hand, and in European Union (EU) law,<sup>14</sup> on the other. This should enable me to avoid the mere transposition of a statist theoretical framework onto international law. But it should also provide for new theoretical insights about general principles of domestic law in a global context where the boundaries between legal orders and hence between theories of legal orders can no longer be drawn hermetically.

My argument will be three-pronged. After general theoretical considerations about general principles of law, I will turn to a legal theoretical argument about general principles in the international legal order. Consequences of that argument for the specific question of the sources of international human rights will be drawn in a third section of the chapter. The gist of my argument is that general principles of international law require clarifying who the authors and the subjects of international law are and, more specifically, can help us shed light on the complexity of the international law-making processes and accordingly the legitimacy of international law. Like other legal norms, general principles of international law draw their authority from their authorship.

## I. General Principles in Legal Theory

Providing a background theory to general principles in international law requires a background theory to general principles *tout court*. Given the complexity of the subject, it is important to flag the various jurisprudential controversies and justify

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<sup>13</sup> See e.g. A. BUCHANAN, R. POWELL, "Constitutional Democracy and the Rule of International Law: Are They Compatible?", *Journal of Political Philosophy*, Vol. 16, no 3, 2008, pp. 326-49; S. BESSON, "Human Rights and Democracy in a Global Context: De-coupling and Re-coupling", *Ethics & Global Politics*, Vol. 4, no 1, 2011, pp. 15-50.

<sup>14</sup> For a full theoretical discussion of European legal principles, see the contribution of J. BENGOTXEA in this volume; GROUSSOT, *General Principles*, above, n. 8.

certain normative choices about principles before turning to the legal theory of principles in international law. After a few general considerations about general principles in legal theory, I shall discuss the nature, sources, role and rank of those principles from the perspective of general jurisprudence.

## A. General

The question of the nature, sources, role and rank of general principles in a legal order is a classical riddle in modern legal theory. Legal principles started burgeoning in Western and European legal orders after 1945, together with the development of the value discourse in domestic and international law. In line with this new development in practice, legal theorists started developing theories of principles from the 1970s onwards, mostly in the context of German, Spanish, Italian and English analytical legal theory.<sup>15</sup>

Approaches to the nature, sources, rank and role of principles in a legal order can be organized along different variables and at least the following three. The first variable is one's background legal theory. Thus, whether one starts from legal positivist (whether inclusive or exclusive) or natural law theory, to cite just two of the alternatives, one's approach to the legal nature of principles will vary. This chapter relies on a legal positivist approach and more specifically an exclusive legal positivist albeit a normative one. Another variable is the legal domain. Indeed, principles do not have the same role whether they apply to public authorities or to individuals and hence to criminal, public or private law.<sup>16</sup> This chapter focuses on general principles of public law, i.e. on principles that apply to public authorities. A third variable is, of course, the legal order at stake. It is the point of this chapter to focus on principles in the international legal order. It also explores, however, the differences between general principles of domestic law and general principles one finds in international law. *Prima facie*, indeed, their nature, sources, role and rank seem to differ, and it would be dangerous to assume they are the same before testing that assumption.

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<sup>15</sup> See e.g. J. R. MANERO, "Rules and Principles", above, n. 10; TUSSEAU, "Métathéorie", above, n. 10; GUASTINI, "Les principes de droit", above, n. 10; ALEXY, "On the Structure", above, n. 10 and ALEXY, "Zum Begriff des Rechtsprinzips", above, n. 10; ATIENZA, MANERO, *Illicitos atipicos*, above, n. 10; DWORKIN, *Taking Rights Seriously*, above, n. 10; RAZ, "Legal Principles", above, n. 10; ESSER, *Grundsatz und Norm*, above, n. 10.

<sup>16</sup> This explains, for instance, why there is no unified theory of general principles to be developed for EU law that would explain principles of European private law such as the principle of equality between shareholders together with constitutional principles of EU law such as fundamental rights or the principle of equality in general. See the discussion in BENGOTXEA, "Case note", above, n. 11 or ARNULL, "What is a General Principle of EU Law?", above, n. 8.

Even with those delineations in mind, one should be aware that the term ‘legal principle’ remains largely indeterminate. To start with, it is often wrongly used. Not everything that is called a legal principle in practice necessarily is a legal principle. For instance, principles are often used to refer to a body of rules.<sup>17</sup> This is the case, for instance, when lawyers discuss or publish on ‘the principles of international law’ or ‘of EU law’. This is even more so at the international level where (translated) language can be even looser and conceptual indeterminacies more frequent. Even when it is used properly, secondly, the concept of principle is polysemic.<sup>18</sup> It can be used to refer, for instance, to a legal source, a kind of legal norm, a degree of legal normativity or a quality of legal content. The difficulty is not alleviated by the adjunction of qualifications such as ‘general’ or ‘fundamental’ before the term principle. Principles of law are usually qualified by their higher degree of generality than legal rules. If this is the case of all principles, is difficult to see what is added by the ‘general’ qualification of those principles. The same applies to the adjective ‘fundamental’ since legal principles are usually deemed to be fundamental either in their content and hence higher rank in the legal order or, and this is connected, in their prior nature (from the adjective ‘princeps’) to other legal norms. Their fundamental nature both in content and in origin explains therefore why they are often described as materially and/or formally constitutional. In what follows, I will refer to legal principles *tout court* in order to refer to general and fundamental legal principles interchangeably.

## B. Nature

Legal principles are a kind of legal standards and more particularly of legal norms. As such, legal principles have to be distinguished from legal goals. The latter are non-binding and are not applied by reference to a value. Of course, both share a difference to legal rules: they are to be optimized and applied by degree and not in an all or nothing fashion.

Among legal norms, another important distinction is that between legal rules and legal principles. Like legal rules, legal principles are general and not particular<sup>19</sup> legal norms in the sense that they apply to all situations covered by the legal order.<sup>20</sup> Legal principles differ from legal rules, however, by virtue of their structural indeterminacy and defeasibility.<sup>21</sup> This is a matter of degree of abstraction and not a logical

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<sup>17</sup> See RAZ, “Legal Principles”, above, n. 10, p. 828.

<sup>18</sup> See JOUANNET, “L’ambivalence des principes généraux”, above, n. 5, p. 117.

<sup>19</sup> Note that the use of the term ‘general’ in this context is ambivalent. It should not be understood to mean that there can be no general principles in specific legal regimes within a given legal order.

<sup>20</sup> See the distinctions in RAZ, “Legal Principles”, above, n. 10.

<sup>21</sup> See GUASTINI, “Les principes de droit”, above, n. 10.



distinction, however.<sup>22</sup> As a result, the distinction is fluid and principles can become so specific that they can be equated to rules or vice-versa. As explained by Joseph Raz, legal norms need to be individuated through interpretation and reasoning, and only then can they be qualified as rules or principles.<sup>23</sup> This explains why a legal principle may become gradually so specific as to be applied as a legal rule, but also how a legal principle may be deduced through abstraction from a legal rule in reverse. The abstraction and specification of principles is a dynamic phenomenon.<sup>24</sup>

More specifically, legal principles are (i) fundamental legal norms (ii) that are structurally indeterminate.<sup>25</sup> I will take both characteristics in turn.

To start with, legal principles are fundamental legal norms in the sense that they capture one or many moral and political values, on the one hand, and contribute to the axiological foundations and justification of the legal order and/or of other legal norms within the legal order, on the other. They are therefore fundamental both in their content and, this is connected, in their prior nature (from the adjective ‘princeps’) to other legal norms.<sup>26</sup> Legal principles need not correspond to moral principles, but once they capture a moral value, they create a moral principle. They are foundational or fundamental therefore: they do not need to be justified or only by reference to moral and political values, but on the contrary provide moral justifications to other legal principles of lesser importance, but also most importantly to legal rules and/or the legal order in general.

Legal principles’ second characteristic is their structural indeterminacy. That indeterminacy may itself be divided into two elements. Legal principles are defeasible, on the one hand, in the sense that they cannot be applied in an either/or fashion the way a legal rule may be, but they apply in degree. On the other hand, legal principles are deemed structurally vague in that they can be applied in multiple different ways depending on how the balancing is operated. Legal principles are indeterminate in other words: they cannot be applied in a syllogistic fashion.

<sup>22</sup> See also the contribution of J. BENGOTXEA in this volume; RAZ, “Legal Principles”, above, n. 10. Contra: DWORKIN, *Taking Rights Seriously*, above, n. 10; ALEXY, “On the Structure”, above, n. 10 and ALEXY, “Zum Begriff des Rechtsprinzips”, above, n. 10.

<sup>23</sup> RAZ, “Legal Principles”, above, n. 10, p. 838.

<sup>24</sup> An example one may give is the EU law principle of equality and its various specifications in fields of EU law such as company law or private law more generally. See e.g. on the CJEU decision in *Audiolux*, BENGOTXEA, “Case note”, above, n. 11 and ARNULL, “What is a General Principle of EU Law?”, above, n. 8.

<sup>25</sup> See GUASTINI, “Les principes de droit”, above, n. 10.

<sup>26</sup> On the relationship between general principles’ material importance and their formal priority, see JOUANNET, “L’ambivalence des principes généraux”, above, n. 5, p. 127.

## C. Sources

*Qua* types of legal norms, legal principles stem from various sources of law. One should distinguish between their formal sources and their material sources. To those two types of sources of legal principles correspond two challenges to legal positivism and the sources thesis.<sup>27</sup> I will take those two sets of sources and challenges in turn.

First of all, the formal sources of legal principles can be written or non-written. Some legal principles are explicit while others are deemed implicit. That distinction is largely contingent and fluid, however. Implicit principles often get codified and become explicit, but they subsist as implicit principles. Implicit principles may actually also be extracted from explicit ones through interpretation. As a result, codified implicit principles may impact on codified law through a retroaction process. This is why one often reads that principles may be identified through the operation of deductive but also inductive reasoning.

The formal sources of legal principles range from judicial law and customary law to legislation and constitutional law. Judicial law amounts obviously to the most important source of legal principles as the latter need to be identified, but also interpreted even if they are guaranteed constitutionally and pre-exist judicial interpretation. By nature, legal principles require interpretation and a normative assessment in every case. Arguably, not only do legal principles require the judiciary,<sup>28</sup> but judges need legal principles to exercise their functions fully.<sup>29</sup> Of course, this is entirely compatible with a requirement of self-restraint on the part of judges as they are not the main law-making institutions, or at least not ones of a legislative kind, and have to defer to the democratic legislature and even to the democratic constituent power in the case of supraconstitutional principles. This is precisely why there are so few principles being identified at the end of the day given both the moral and the political responsibility this implies on the part of the judiciary towards the legislature.<sup>30</sup>

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<sup>27</sup> See GUASTINI, “Les principes de droit”, above, n. 10 on those two challenges.

<sup>28</sup> This is why it may be illusory to hope for constraints on how judges identify and interpret legal principles in practice. They are two faces of the same phenomenon: the creation of legal norms through judicial interpretation. See e.g. P. BRUNET, “Les principes généraux du droit et la hiérarchie des normes”, in *L’architecture du droit. Mélanges en l’honneur de Michel Troper*, Études coord. par D. de Béchillon, P. Brunet, V. Champeil-Desplats et E. Millard, Paris, Economica, 2006, pp. 207-21.

<sup>29</sup> See e.g. GROUSSOT, *General Principles*, above, n. 8, pp. 105 ff. on the CJEU and legal principles; J. BENGOTXEA, “Review Essay on Xavier Groussot, *General Principles of Community Law*”, *Common Market Law Review*, Vol. 45, 2008, pp. 1279-1303.

<sup>30</sup> See BRUNET, “Les principes généraux”, above, n. 30.

The judicial dimension of legal principles brings up the vexed question of the applicability of the sources thesis propounded by legal positivists to legal principles. Its applicability has been challenged most famously by Ronald Dworkin who understands principles as non-legal standards.

Various replies to this challenge are available, however.<sup>31</sup> To start with, the challenge only applies to implicit principles as explicit ones go through a clear process of codification that marks their positive nature. Even when implicit, however, principles are identified through legal (and especially judicial) interpretation and become part of law *qua* judicial law, i.e. some kind of judicial customary law. It is a slow law-making process but it is definitely based on a rule of recognition and it legalizes moral values or principles by turning them into legal principles. Another reply to the challenge pertains to the existence of gaps in the law. Even if general principles were deemed moral and were not regarded as legal norms, the existence of gaps in the law would be plausible and make the distinction between morality and law tenable.

Secondly, the material sources of legal principles are moral and political values and principles. This triggers the question of the relationship between legal principles and morality. Here the challenge is that principles are morality-incorporating standards and that this implies rejecting legal positivism or at least endorsing inclusive legal positivism.

Again, various responses to this challenge are available.<sup>32</sup> Before considering them, it is important to stress that the distinction at stake here between law and morality is a conceptual one, and not a factual one; it does not deny that there is a factual relationship between law and morality.<sup>33</sup> To start with, law and legal principles cannot strictly speaking incorporate morality since law is already part of morality and morality necessarily applies to us and to our legal institutions, legal reasoning being a special kind of moral reasoning.<sup>34</sup> In those circumstances, law can only modulate or exclude morality. Legal principles act precisely as modulators of morality in the legal order: they transpose and specify moral principles or moral values in an institutional context by making normative choices. Furthermore, and this is a second objection to the challenge, even in cases in which legal principles are regarded as mere reflections of moral principles, they do not have to turn morality into law but could simply be giving

<sup>31</sup> See e.g. GUASTINI, "Les principes de droit", above, n. 10.

<sup>32</sup> See e.g. GUASTINI, "Les principes de droit", above, n. 10.

<sup>33</sup> See e.g. J. RAZ, "Incorporation by Law", *Legal Theory*, Vol. 10, 2004, pp. 1-17; GUASTINI, "Les principes de droit", above, n. 10.

<sup>34</sup> This explains why the law ought not be conceived as separate from morality and why general principles should not be regarded as windows or doors through which morality enters the legal order (see e.g. KOLB, "Principles as Sources", above, n. 8, p. 29 for this kind of analogy). It is the exact reverse, as demonstrated by RAZ, "Incorporation by Law", above, n. 35.

legal effects to morality within the legal order. This is done in the same way a legal order gives foreign law legal effects without necessarily turning it into domestic law.

In conclusion, legal principles may be considered as modulators, transformers or converters of moral principles or values in a legal order.<sup>35</sup> This matters by reference to the prevailing circumstances of both moral and social pluralism. Legal principles are, to start with, mediators of morality in the legal order in circumstances of moral pluralism. This enables the collective appropriation of an epistemologically complex and controversial moral question through legal specification. Legal principles also work as modulators between the general and the particular in circumstances of social pluralism. This enables sharing the general despite differing on the particular.

## D. Role

Legal principles play a central role in legal reasoning, and legal interpretation in particular. This is especially the case in judicial reasoning, whether legal principles have been previously codified or are simply identified in the case-law. This confirms the vertical dimension of legal principles that are not meant to apply directly to horizontal relationships between individuals.<sup>36</sup>

Among the different functions played by legal principles in legal reasoning, one should mention the most important ones. Legal principles ensure guidance and coherence in legal interpretation by reference to a set of values, but also dynamism through teleological interpretation. So-doing, the interpreter can contribute to the justification and hence the external legitimation of the legal norms applied and arguably to that of the legal order itself. From an institutional perspective, legal principles foster debate and disagreement and guarantee a form of institutional dialogue.

The different functions endorsed by legal principles have two implications for legal reasoning with principles: discretion and axiological hierarchization.<sup>37</sup> First of all, legal principles provide a certain discretion as they need to be specified in application. They require interpretation, in other words, both when being applied and when being identified in the first place (through induction or deduction). Legal principles presuppose and even justify judicial discretion therefore. Of course, at the same time, they guide and

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<sup>35</sup> For similar conceptions, see DE LA FERIA, "Reverberation", above, n. 11; JOUANNET, "L'ambivalence des principes généraux", above, n. 5; R. KOLB, "Principles as Sources", above, n. 8; ESSER, *Grundsatz und Norm*, above, n. 10.

<sup>36</sup> On the limitations of the horizontal direct effect of certain general principles in EU law and the private law competence issue, see e.g. ARNULL, "What is a General Principle of EU Law?", above, n. 8, pp. 13 ff.; BENGOTXEA, "Case note", above, n. 11.

<sup>37</sup> See GUASTINI, "Les principes de droit", above, n. 10 on those implications.

constrain it in return.<sup>38</sup> The second implication is that legal principles require normative ponderation when being specified according to other principles or values. This is also referred to as weighing and balancing of principles by reference to the values they protect and capture. This axiological hierarchization is mobile, however, in the sense that it will depend on the concrete circumstances and change from one application of legal principles to the next.

## E. Rank

It follows from the nature and role of legal principles that they need to be interpreted and specified when applied in concrete circumstances and in most cases weighed and balanced against other legal principles.

Their weighing and balancing ought to occur by reference to the moral and political values they protect. It cannot indeed be solved by reference to a formal hierarchy of legal norms: legal principles stem from different sources, on the one hand, and even when they stem from one single source such as judicial law, they are meant to refer the interpreter to moral values and hence relate to an axiological hierarchy and not a legal one, on the other. This becomes clear when one thinks of constitutional principles whose constitutional nature can stem *à la fois* from their constitutional entrenchment and from their use in constitutional judgements, without any difference being made either way as to their rank in case of weighing and balancing.

For the same reasons, when legal principles conflict with legal rules, i.e. legal norms deemed through interpretation as being of a more specific and determinate nature, the conflict may not be solved by reference to a legal hierarchization either. Nor can it be resolved therefore by reference to their logical difference and the idea of principles as necessary trumps over rules.<sup>39</sup>

## II. The Legal Theory of General Principles of International Law

Given the differences between domestic and international law, one may presume that the nature, sources, role and rank of general principles of international law offer specificities that are worth exploring and discussing from a theoretical perspective. The

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<sup>38</sup> See the contribution by J. BENGOTXEA in this volume.

<sup>39</sup> Contra: DWORKIN, *Taking Rights Seriously*, above, n. 10.

aim of this second section is to test that presumption and explain the differences between domestic and international legal principles.

Note that I will only expand on the specificities and will not address common features to domestic and international general principles anew. As we will see in detail, the role of general principles is actually exacerbated in the international and European legal orders, both as a type of legal norms and as a type of sources of law. This has to do with the special kind of legality at stake in international law and its necessary relationship to domestic law, but also with the lesser density of international law, and the absence of an international polity of individuals and of a centralized legislature and judiciary. In a last section, I will actually expand on a special kind of general principles of international law that differ in some of those respects from general principles of international law *tout court*: general principles of EU law.

## A. Nature

General principles of international law are a kind of international legal standards and more particularly of international legal norms. They share the main characteristics of general principles of domestic law presented above: they are general and abstract, but also fundamental and indeterminate legal norms.

Thus, they are general and not particular legal norms in the sense that they apply to all situations covered by the legal order. Unlike what is the case in the domestic legal order, however, general norms are not the only legal norms one finds in international law. Together with other norms of general international law, general principles differ from particular treaty norms that apply to specific legal subjects and given legal relations only. In other words, the amount of general principles of international law constitutes a barometer of the generality of the international legal order and hence arguably of its legality.<sup>40</sup> Of course, the generality of general principles is entirely compatible with the multiplicity of expressions they may take in different specific regimes or regional orders of international law.<sup>41</sup>

As to their fundamental nature, general principles of international law are fundamental legal norms in the sense that they capture one or many moral and political values, on

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<sup>40</sup> Scope precludes addressing the legality of international here, but also the question of whether there are international legal rules *stricto sensu* and whether the opposition between rules and principles is tenable in international law.

<sup>41</sup> See e.g. in international criminal law, international environmental law, international economic law in particular: JOUANNET, "L'ambivalence des principes généraux", above, n. 5, pp. 124-6; ASCENSIO, "Principes généraux du droit", above, n. 8, p. 6; DE CARA, "Les principes généraux", above, n. 8, pp. 11-4.

the one hand, and contribute to the axiological foundations and justification of the legal order and/or of other legal norms within the legal order, on the other. They are therefore ‘fundamental’ both in their content and, this is connected, in their prior nature to other legal norms.<sup>42</sup> Unlike what is the case domestically, the legitimation of international law has been dominated until recently by other paradigms of justification than moral justification.<sup>43</sup> This has to do with the fact that states have been (the) traditional subjects of international law by contrast to individuals as single subjects of domestic law. As a result, the formally foundational or original nature of general principles in the international legal order has been more contested than their materially fundamental nature or priority. Arguably, of course, with the development of direct international rights and obligations for individuals, individuals become subjects of legitimation and this in turn confirms the importance of the moral foundations of international law.

Interestingly, general principles of international law are traditionally divided into two groups: general principles of law and general principles of international law *stricto sensu*. In French, the former are referred to as ‘principes généraux de droit’ and the latter as ‘principes généraux du droit international’.<sup>44</sup>

General principles of law are principles that are fundamental to domestic legal orders and that may be extended to the international legal order. They stem from domestic law and are therefore principles held *in foro domestico*.<sup>45</sup> They include, for instance, the principles of good faith or estoppel. General principles of international law, by contrast, are principles that are fundamental to the international legal order itself. They stem from regular sources of international law, such as general treaties and customary international law. They include structural or founding principles of the international legal order such as the principles of territorial integrity, sovereign equality, primacy of international law or *pacta sunt servanda*. The first group of principles is the one envisaged by Article 38 par. 1 lit. c of the ICJ Statute. International legal practice, however, has quickly recognized the existence and significance of the second group of principles as well.

<sup>42</sup> On the relationship between general principles’ material importance and their formal priority, see JOUANNET, “L’ambivalence des principes généraux”, above, n. 5, p. 127.

<sup>43</sup> See e.g. S. BESSON, J. TASIOLAS, “Introduction”, in S. BESSON, J. TASIOLAS, eds, *The Philosophy of International Law*, Oxford, Oxford University Press, 2010, pp. 1-27; BESSON, “Theorizing the Sources”, above, n. 12; TASIOLAS, “The Legitimacy”, above, n. 12; and BUCHANAN, “The Legitimacy”, above, n. 12.

<sup>44</sup> On the distinction, see ASCENSIO, “Principes généraux du droit”, above, n. 8, p. 3.

<sup>45</sup> See PCIJ, Advisory Committee of Jurists, *Minutes of the Proceedings of the Committee*, June 16-July 24 1920, 335.

The difference between those two groups of general principles may be explained, as we will see, by reference to their different sources and to the fact that the former are actually themselves sources of international law. In fact, the different sources match the distinctive content of the respective general principles: in a nutshell, intrastate sources correspond to intrastate principles and interstate sources correspond to interstate principles. Of course, considering general principles as a source of international law reveals that the legality of parts of international law is or at least was in question: it was not meant to generate its own general principles but had to import them from domestic law.

In practice, the case-law does not clearly distinguish between the two types of general principles neither in terms of content nor in their respective sources, however. It usually refers to general principles to escape the strict conditions of customary international law and without always trying to link them back to domestic principles.<sup>46</sup> I will therefore refer to both categories as general principles of international law to refer to all the general and fundamental principles that are part of international law and to which the case-law refers to indistinctively.<sup>47</sup>

## B. Sources

Sources of international can be defined as the processes through which international legal norms are created, modified or annulled.<sup>48</sup> The sources of general principles of international law are just as complex to pin down as those of domestic law. Conceptually, however, the question is made even more difficult as some general principles of international law are themselves regarded as sources of international law. This demonstrates the difficulty of the relationship of international law to domestic law, on the one hand, and to morality, on the other, but also of the role of the international judge in that context.<sup>49</sup> This is the case in general international law, but also in EU law in particular.<sup>50</sup>

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<sup>46</sup> The ICJ conflates both categories of general principles and their sources. See for various examples, the contributions by Pierre D'ARGENT and Séverine KNUCHEL in this volume.

<sup>47</sup> See also JOUANNET, "L'ambivalence des principes généraux", above, n. 5, p. 129.

<sup>48</sup> BESSON, "Theorizing the Sources", above, n. 12, p. 170.

<sup>49</sup> One may even argue that it is precisely this conflation of the source-quality and the norm-quality of certain general principles of international law that explains why some authors reject their autonomous existence and want to reduce them to customary international law.

<sup>50</sup> This source-feature of general principles cannot be found in domestic law, however. Contra KOLB, "Principles as Sources", above, n. 8, pp. 9 ff. who argues that general principles are 'norm-sources' across the board and not just in international law and hence are sources of other legal norms, I have argued before that legal principles help justify other legal norms but do not consider that they can replace the latter's formal sources in legislation, custom or judicial law.



Thus, in what follows, I will distinguish between general principles as a source of general principles of international law, on the one hand, and as a type of legal norms that stem from other sources of international law, on the other.

## 1. General Principles *qua* Source of International Law

*Qua* source of international legal norms, general principles of (international) law appear in the list of Article 38 par. 1 lit. c ICJ Statute after treaties and customary international law. Those principles are general principles in nature albeit restricted in content to those one finds in domestic traditions, and, as a result, their sources are general principles generally recognized by states in their domestic law. They are regarded as stemming from an autonomous source of international law, and, in other words, a source that is distinct from other sources of international law such as custom or equity.

The idea of ‘general principle recognized by civilized nations’ can be explained by the resistance of UN Member States to conceiving of certain sources of international law, and in particular sources of general principles of international law, as independent of their legislating power. Restricting the only general principles explicitly recognized as international law by international law to those stemming from domestic law has at least three theoretical benefits. Those benefits may be explained not so much by reference to a legal positivist approach to international law, but more specifically to a consensualist positivist one.<sup>51</sup>

First of all, Article 38 par. 1 lit. c ICJ Statute turned or imported<sup>52</sup> a type of domestic legal norms into one of the formal sources of general principles of international law, thus clearly indicating that the reference community for the kind of general, fundamental, abstract and indeterminate norms that are general principles of international law remains the domestic one. This retroacting and intervalidating function of general principles of international law, that draws from domestic law to produce international law that will in return constrain domestic law, actually corresponds to the content and role of some important general principles of international law. One may think, for instance, of international human rights whose guarantees are abstracted bottom-up from domestic guarantees as general principles and then constrain those domestic practises in return. I will revert to this point in the last section of the chapter.

<sup>51</sup> On the difference, see BESSON, “Theorizing the Sources”, above, n. 12, stressing how legal positivism in international law need not imply consensualism and state consent as sources of either the validity of international law or its legitimacy.

<sup>52</sup> See ICJ, 18 July 1966, *South West Africa Cases, Second phase, Judgment*, ICJ Reports 1966, p. 47.

Secondly, the approach chosen for the sources of general principles of international law artificially severed any direct connection between those principles and morality by inserting a legal filter between them: that of general principles of domestic law.<sup>53</sup> This was meant to evade controversial considerations about the relationship between international law and morality, by making generalized domestic principles the material source of general principles of international law. Finally, Article 38 par. 1 lit. c ICJ Statute abstracted the identification of general principles from the judicial function and hence avoided having to justify the law-making role of the international judge in relation to general principles. The international judge would, of course, retain an identification and interpretation function in relation to those general principles, but their identification as general principles in the first place would pre-exist her judgement and have to have taken place in domestic law already, i.e. presumably by legitimate domestic authorities and domestic judges in particular.<sup>54</sup>

The difficulties with this provision are well-known, however. To start with, the conditions for this first kind of general principles to be deemed 'recognized by civilized nations' are still vague. One finds no clear indications in the ICJ's case-law despite multiple mentions of the term 'general principles'. Other (regional or specialized) courts have been a little more explicit, however; it has been the case of international criminal courts, the European Court of Human Rights (ECtHR) or the United Nations Administrative Tribunal.<sup>55</sup> In a nutshell, the method used by international courts is based on comparative law<sup>56</sup> and/or legal analogy,<sup>57</sup> but is not

<sup>53</sup> See PCIJ, Advisory Committee of Jurists, *Minutes of the Proceedings of the Committee*, June 16-July 24 1920, 309 and 319.

<sup>54</sup> See *Ibid.*, 346. See ASCENSIO, "Principes généraux du droit", above, n. 8, p. 4.

<sup>55</sup> See e.g. ICTY, 22 February 2001, *Prosecutor v. Dragoljub Kunarac*, Case IT-96-23-T& IT-96-23/1-T, par. 439: "As observed in the *Furundžija* case, the identification of the relevant international law on the nature of the circumstances in which the defined acts of sexual penetration will constitute rape is assisted, in the absence of customary or conventional international law on the subject, by reference to the general principles of law common to the major national legal systems of the world. The value of these sources is that they may disclose 'general concepts and legal institutions' which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject. In considering these national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles, or in the words of the *Furundžija* judgement, 'common denominators', in those legal systems which embody the *principles* which must be adopted in the international context." See also ASCENSIO, "Principes généraux du droit", above, n. 8 on this observation.

<sup>56</sup> See e.g. Judge Ammoun, Separate Opinion, ICJ, 20 February 1969, *Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969, p. 134 f.: "Incorporated into the great legal systems of the modern world referred to in Article 9 of the Statute of the Court, the

very strict. As to the criteria, there are two. They include, on the one hand, the generalizable (as opposed to unanimous or universal) nature of the principle that ought therefore to have been recognized legally in most (as opposed to all) states in the world (so-called 'generalization' or 'abstraction') and, on the other, the transposability or transportability to the international level by reference to the framework and objectives of the international legal order (so-called 'adaptation').<sup>58</sup>

Of course, one admits generally that no cultural restriction should be read nowadays into the obsolete reference to 'civilized nations'. That mention was inherited from the

principle of equity manifests itself in the law of Western Europe and of Latin America, the direct heirs of the Romano-Mediterranean *jus gentium*; in the common law, tempered and supplemented by equity described as accessory; in Muslim law which is placed on the basis of equity (and more particularly on its equivalent, equality) by the Koran and the teaching of the four great jurisconsults of Islam condensed in the Shari'a which comprises, among the sources of law, the *istihsan*, which authorizes equity-judgments; Chinese law, with its primacy for the moral law and the common sense of equity, in harmony with the Marxist-Leninist philosophy; Soviet law, which quite clearly provides a place for considerations of equity; Hindu law which recommends 'the individual to act, and the judge to decide, according to his conscience, according to justice, according to equity, if no other rule of law binds them'; finally the law of the other Asian countries, and of the African countries, the customs of which particularly urge the judge not to diverge from equity and of which 'the conciliating role and the equitable nature have often been undervalued by Europeans'; customs from which sprang a *jus gentium* constituted jointly with the rules of the *common law* in the former British possessions, the lacunae being filled in 'according to justice, equity and good conscience'; and in the former French possessions, jointly with the law of Western Europe, steeped in Roman law. A general principle of law has consequently become established, which the law of nations could not refrain from accepting, and which founds legal relations between nations on equity and justice." See more recently Judge Simma, Opinion, ICJ, 6 November 2003, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Reports 2003, par. 66 ff.: "In order to find a solution to our dilemma, I have engaged in some research in comparative law to see whether anything resembling a 'general principle of law' within the meaning of Article 38, paragraph 1 (c), of the Statute of the Court can be developed from solutions arrived at in domestic law to come to terms with the problem of multiple tortfeasors. I submit that we find ourselves here in what I would call a textbook situation calling for such an exercise in legal analogy. To state its result forthwith: research into various common law jurisdictions as well as French, Swiss and German tort law indicates that the question has been taken up and solved by these legal systems with a consistency that is striking. [...] 74. On the basis of the (admittedly modest) study of comparative tort law thus provided, I venture to conclude that the principle of joint-and-several responsibility common to the jurisdictions that I have considered can properly be regarded as a 'general principle of law' within the meaning of Article 38, paragraph 1 (c), of the Court's Statute. I submit that this principle should have been applied in our present case to the effect that, even though responsibility for the impediment caused to United States commerce with Iran cannot (and ought not, see *infra*) be apportioned between Iran and Iraq, Iran should nevertheless have been held in breach of its treaty obligations."

<sup>57</sup> See DE CARA, "Les principes généraux", above, n. 8, p. 7.

<sup>58</sup> PCIJ, Advisory Committee of Jurists, *Minutes of the Proceedings of the Committee*, June 16-July 24 1920, 335.

1920 Statute of the Permanent Court of International Justice and should simply be equated with a recognition of those principles within states' law.<sup>59</sup> An argument one may make, however, is that, if general principles of international law play a retroaction function between the domestic and international legal orders, function that is particularly important when guaranteeing the two pillars of the international legal order that are democratic self-determination and individual human rights, that function can only be taken to work properly if democratic states are the only states whose practice may be used to abstract international democratic standards and principles.<sup>60</sup> Indeed, as we will see, the recognition and existence of those rights *qua* international human rights that constrain domestic polities ought to be based on democratic practises recognized domestically. And only those polities that respect international human rights are deemed legitimate in specifying the content of those rights and hence in contributing to the recognition and existence of those rights *qua* international human rights that will constrain them in return.

The uneasiness that prevails in the international case-law about the origins and criteria for the identification of general principles of international law is not surprising, however. To start with, as mentioned before, the judicial dimension of the

<sup>59</sup> See ASCENSIO, "Principes généraux du droit", above, n. 8, pp. 4-5. See on this question, Judge Ammoun, Separate Opinion, ICJ, 20 February 1969, *North Sea Continental Shelf*, above, n. 56, p. 134 f.: "It is important in the first place to observe that the form of words of Article 38, paragraph 1 (c), of the Statute, referring to 'the general principles of law recognized by civilized nations', is inapplicable in the form in which it is set down, since the term 'civilized nations' is incompatible with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law. [...] In view of this contradiction between the fundamental principles of the Charter, and the universality of these principles, on the one hand, and the text of Article 38, paragraph I (c), of the Statute of the Court on the other, the latter text cannot be interpreted otherwise than by attributing to it a universal scope involving no discrimination between the members of a single community based upon sovereign equality. The criterion of the distinction between civilized nations and those which are allegedly not so has thus been a political criterion, -power politics, - and anything but an ethical or legal one. The system which it represents has not been without influence on the persistent aloofness of certain new States from the International Court of Justice. It is the common underlying principle of national rules in all latitudes which explains and justifies their annexation into public international law. Thus the general principles of law, when they effect a synthesis and digest of the law in foro domestico of the nations - of all the nations - seem closer than other sources of law to international morality. By being incorporated in the law of nations, they strip off any tincture of national-ism so as to represent, like the principle of equity, the purest moral values. Thus borne along by these values upon the path of development, international law approaches more and more closely to unity".

<sup>60</sup> On this bootstrapping phenomenon in the democratic legitimation of international law and so-called mutual or reciprocal legitimation of domestic and international human rights law, see A. BUCHANAN, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law*, Oxford, Oxford University Press, 2004, pp. 187-9; BESSON, "Human Rights and Democracy", above, n. 13.

ascertainment of Article 38 ICJ Statute's general principles was intentionally side-stepped or at least reduced in importance. Moreover, and this is related, Article 38 ICJ Statute's general principles are regarded as a subsidiary source of international law that can only be applied in the absence of legal norms stemming from the other two main sources of international law: treaties and customary international law.<sup>61</sup> Finally, it is difficult to draw a distinction between the two kinds of general principles in international law by reference to their content, and this in turn makes the distinction between their sources less easily tenable and judicial interpretation even less secure.<sup>62</sup>

No wonder therefore that the ICJ has very rarely referred explicitly to Article 38 par. 1 lit. c ICJ Statute and has never concluded positively to the existence of such principles in a case.<sup>63</sup> The only exceptions can be found in some rare and rather radical dissenting opinions that defend a natural law approach to general principles in international law.<sup>64</sup>

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<sup>61</sup> See e.g. PCIJ, Advisory Committee of Jurists, *Minutes of the Proceedings of the Committee*, June 16-July 24 1920, 318. See also PCIJ, 17 August 1923, *Case of the S.S. Wimbledon*, Judgment, Series A, p. 24; ICJ, 12 April 1960, *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment, ICJ Reports 1960, pp. 11-2.

<sup>62</sup> See also ASCENSIO, "Principes généraux du droit", above, n. 8, p. 3.

<sup>63</sup> The ICJ mentioned general principles of law twice explicitly, but also rejected them twice: ICJ, *South West Africa*, above, n. 52, p. 39; and ICJ, *Passage over Indian Territory*, above, n. 61.

<sup>64</sup> This is the case, for instance, of the opinions expressed by Judges Ammoun, *North Sea Continental Shelf*, above, n. 56, Tanaka, *South West Africa*, above, n. 52 or, more recently, Cançado Trindade, ICJ, *Case concerning Pulp Mills*, above, n. 11. See e.g. Judge Tanaka, Opinion, ICJ, *South West Africa*, above, n. 52, pp. 296 ff.: "If a law exists independently of the will of the State and, accordingly, cannot be abolished or modified even by its constitution, because it is deeply rooted in the conscience of mankind and of any reasonable man, it may be called 'natural law' in contrast to 'positive law'. Provisions of the constitutions of some countries characterize fundamental human rights and freedoms as 'inalienable', 'sacred', 'eternal', 'inviolable', etc. Therefore, the guarantee of fundamental human rights and freedoms possesses a super-constitutional significance. If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*. As an interpretation of Article 38, paragraph 1 (c), we consider that the concept of human rights and of their protection is included in the general principles mentioned in that Article. Such an interpretation would necessarily be open to the criticism of falling into the error of natural law dogma. But it is undeniable that in Article 38, paragraph 1 (c), some natural law elements are inherent. It extends the concept of the source of international law beyond the limit of legal positivism according to which, the States being bound only by their own will, international law is nothing but the law of the consent and auto-limitation of the State. But this viewpoint, we believe, was clearly overruled by Article 38, paragraph 1 (c), by the fact that 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 have the foundation of its validity extended beyond the will of

In practice, as a result, although general principles are regularly invoked and applied by the ICJ,<sup>65</sup> it is without drawing strict distinctions between general principles of international law *qua* source or *qua* norms, on the one hand, and between general principles of law stemming from domestic traditions and general principles of international law arising in the international practice, on the other.<sup>66</sup> Sometimes, thus making things even more confused, the ICJ actually also refers to principles in a loose sense to emphasize the generality of a given legal norm<sup>67</sup> or its fundamental nature.<sup>68</sup> When the ICJ refers to general principles as a specific type of international legal norm, however, it usually does so in a general sense to refer to general principles developed within the international legal order itself<sup>69</sup> and hence mostly on the basis of other sources of international law, thus circumventing the barriers of Article 38 par. 1 lit. c ICJ Statute. It is to that use of the concept that I will turn now.

## 2. General Principles *qua* Norms of International Law

*Qua* type of international legal norms, precisely, general principles of international law in general stem from various other sources of law. One should distinguish between their formal sources and their material sources. While material sources are all the moral

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States, that is to say, into the sphere of natural law and assume an aspect of its supra-national and suprapositive character. [...] Furthermore, an important role which can be played by Article 38, paragraph 1 (c), in filling in gaps in the positive sources in order to avoid non liquet decisions, can only be derived from the natural law character of this provision. Professor Brierly puts it, 'its inclusion is important as a rejection of the positivistic doctrine, according to which international law consists solely of rules to which States have given their consent' (J. L. Brierly, *The Law of Nations*, 6th ed., p. 63). Mr. Rosenne comments on the general principles of law as follows: 'Having independent existence, their validity as legal norms does not derive from the consent of the parties as such... The Statute places this element on a footing of formal equality with two positivist elements of custom and treaty, and thus is positivist recognitions of the Grotian concept of the co-existence implying no subjugation of positive law and so-called natural law of nations in the Grotian sense.' (Shabtai Rosenne, *The International Court of Justice*, 1965, Vol. II, p. 610.)"

<sup>65</sup> See e.g. ICJ, 15 June 1962, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, ICJ Reports 1962, p. 23.

<sup>66</sup> See e.g. ICJ, 27 June 1986, *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, pp. 107 and 145.

<sup>67</sup> See e.g. PCIJ, *Factory of Chorzow*, Judgment, PCIJ Series A, No 17, p. 29; ICJ, 4 June 2008, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Reports 2008, p. 203. See also the contribution by Pierre D'ARGENT in this volume for a detailed discussion of those occurrences of general principles in the ICJ's case-law.

<sup>68</sup> See e.g. ICJ, 12 October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, ICJ Reports 1984, p. 288.

<sup>69</sup> See e.g. ICJ, 22 July 2010, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports, no 141, p. 30; ICJ, *Military and Paramilitary Activities*, above, n. 66, p. 106.

or social processes by which the content of international law is developed, formal sources capture the specifically legal processes through which those norms become legally valid.<sup>70</sup>

As in the domestic context, and by reference to the distinction drawn in the first section, two challenges correspond to those two kinds of sources of general principles in international law: one that challenges the legal nature of general principles and the sources thesis in legal positivism, and the other the relationship between law and morality and exclusive legal positivism.

### a) Formal Sources of General Principles of International Law

In terms of their formal sources, general principles of international law may stem from all sources of general international law, ranging from general treaties and unilateral resolutions of multilateral organizations to, more commonly, customary international law. As in domestic law, there is no logical opposition between explicit and implicit general principles, and implicit principles may be codified while subsisting as implied principles.

The ICJ's case-law often refers to customary international law *qua* source of general principles.<sup>71</sup> Interestingly, however, it uses the fact that they are general principles *qua* type of norms to distance itself from a clear test of customary international law.<sup>72</sup> It is as if the Court considers general principles as an embryonic and lighter form of customary international law. As a result, the Court is often accused of using general principles rhetorically to erode the conditions of customary international law.<sup>73</sup>

One may also argue, however, that the Court is trying to extend the scope of general principles in the sense of Article 38 par. 1 lit. c ICJ Statute to include general principles of international law arising within the international legal order itself.<sup>74</sup> As indicated in

<sup>70</sup> BESSON, "Theorizing the Sources", above, n. 12, p. 170.

<sup>71</sup> See e.g. ICJ, *Military and Paramilitary Activities*, above, n. 66, par. 190, 202, 216-8, 220, 290; ICJ, *Case concerning Pulp Mills*, above, n. 11, p. 38, par. 101. See also ICJ, *Kosovo*, above, n. 69, No 141, p. 30, par. 80; ICJ, 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, 247. On the correspondence between the respective criteria for the identification of norms belonging to those two sources, see ASCENSIO, "Principes généraux du droit", above, n. 8, pp. 4-5.

<sup>72</sup> See e.g. ICJ, *Military and Paramilitary Activities*, above, n. 66, par. 202; ICJ, 22 December 1986, *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, ICJ Reports 1986, par. 20-21. See also the contribution by Pierre D'ARGENT in this volume.

<sup>73</sup> See e.g. G. M. DANILENKO, *Law-making in the International Community*, Dordrecht, Nijhoff, 1993, p. 187.

<sup>74</sup> See e.g. VIRALLY, "Le rôle des 'principes'", above, n. 8, pp. 541-2; J. G. LAMMERS, "General Principles of Law Recognized by Civilized Nations", in H. F. VAN PANHUYS et al., eds, *Essays on*

the first section of this chapter, this is what any judge would do in a given legal order. The problem with this approach, however, is that, in the face of the existing formal sources of international law, it is tautological: international law cannot be said to be a source of international law unless the former refers to a formal process of international law-making such as state practice or conventional recognition, thus bringing us back to square one.

Unless, of course, one turns to a third potential source of general principles of international law that cannot be derived from domestic principles: judicial law. Independently of the formal source of general principles of international law in each case, the international judge is called to identify, interpret and specify general principles the way she would in the domestic context. In certain cases, however, the judge does more than identify a pre-existing principle and actually contributes to turning it into law.<sup>75</sup> In this respect, she does not differ from the domestic judge, as alluded to in the previous section.

In practice, actually, judicial interpretations of international law are legally binding (see Article 94 par. 1 UN Charter) and hence are part of international law-making processes. As a matter of fact, the jurisgenerative function of international judges is even more important than in the domestic context given the limited number of sources of international law. Moreover, by virtue of the application of the *non-liquet* in international law, international judges already use general principles to fill gaps in international law. This is particularly true in relatively new fields of international law, such as international criminal law or international environmental law.

Judicial law *qua* source of general principles of international law triggers similar challenges to legal positivism and the sources thesis to the ones discussed previously, however, and some international lawyers have expressed their doubts at the legal nature of those standards. Those challenges may nevertheless be put at rest in the same fashion as in the domestic context. Judicial law turns moral values and principles into legal principles and hence respects the sources thesis.<sup>76</sup> The ICJ actually confirmed this in its *South West Africa* decision.<sup>77</sup>

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*the Development of the International Legal Order: in memory of Haro F. van Panhuys*, Alphen aan den Rijn, Sijthoff and Noordhoff, 1980, pp. 53-75, 67; P. ALSTON, B. SIMMA, "The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles", *Australian Yearbook of International Law*, Vol. 12, 1988-1989, pp. 82-108, 102-4.

<sup>75</sup> See e.g. E. JOUANNET, "La jurisprudence internationale en question", in *La juridictionnalisation du droit international*, Colloque de Lille SFDI, Paris, Pedone, 2003, pp. 343-91, 362.

<sup>76</sup> See e.g. JOUANNET, "L'ambivalence des principes généraux", above, n. 5, p. 122.

<sup>77</sup> ICJ, *South West Africa*, 1966, above, n. 52, par. 49 ff.: "49. The Court must now turn to certain questions of a wider character. Throughout this case it has been suggested, directly or indirectly,



A greater difficulty that is specific to the international realm, however, is that the international judicial function is relatively young and extremely diverse. Furthermore, it is even more complex theoretically than the domestic judge's function.<sup>78</sup> This is especially the case in its relationship to the sources of international law as international law always has to be identified before it can be applied<sup>79</sup> and there is no hierarchy among sources and regimes of international law.

Moreover, international judges' function is more akin to that of dispute settlers than to that of law-enforcers or law-makers (see e.g. Article 59 ICJ Statute) –not the least because states retain the general law-making competence and reject the idea of an attraction of legislative powers through judicial law and through the invocation of general principles in international law.<sup>80</sup> Of course, this hiatus between the dispute settlement and law-enforcement functions of international courts is not surprising given that international adjudication, at least adjudication by the only general international court that is the ICJ –unlike adjudication by European courts such as the CJEU or the ECtHR–, is still non-compulsory and non-exclusive. In those circumstances, the judge is not necessarily called to interpret the law and if she is, it is not necessarily in an

that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. *It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline.* Otherwise, it is not a legal service that would be rendered. 50. Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law. All States are interested-have an interest-in such matters. But the existence of an 'interest' does not of itself entail that this interest is specifically juridical in character." (emphasis added).

<sup>78</sup> See S. BESSON, "International Judges as Dispute-Settlers and Law-Enforcers – From International Law without Courts to International Courts without Law", *Loyola Law Review*, 2011, forthcoming.

<sup>79</sup> See e.g. H. ASCENSIO, "La notion de juridiction internationale en question", in *La juridictionnalisation du droit international*, Colloque de Lille SFDI, Paris, Pedone, 2003, pp. 163-202; J. ALLARD, A. GARAPON, *Les juges dans la mondialisation*, Paris, Seuil, 2005; D. REGAN, "International Adjudication: A Response to Paulus – Courts, Custom, Treaties, Regimes and the WTO", in S. BESSON, J. TASIOLAS, eds, *The Philosophy of International Law*, Oxford, Oxford University Press, 2010, pp. 225-41; B. KINGSBURY, "International Courts: Uneven Judicialization in Global Order", in J. CRAWFORD, M. KOSKENNIEMI, eds, *Cambridge Companion to International Law*, Cambridge, Cambridge University Press, 2011 forthcoming; A. VON BOGDANDY, I. VENZKE, "On the Democratic Legitimation of International Judicial Lawmaking", *German Law Journal*, Vol. 12, 2011, pp. 1341-70.

<sup>80</sup> This very concern for the vertical and horizontal division of powers is also at play in the EU and explains why the CJEU is extremely cautious in identifying new principles of EU law in its case-law. See e.g. on the CJEU decision in *Audiolux*, above, n. 11, par. 6-3; BENGOTEXEA, "Case note", above, n. 11, pp. 1174, 1179 and 1183.

exclusive and authoritative fashion. International courts have *jurisdictio*, in other words, but without the *imperium*, its usual correlative in domestic courts.<sup>81</sup> This hiatus or tension has only become a problem with the development of objective international law that is not based on state consent and hence whose authority does not stem only from the state.<sup>82</sup>

Finally, the caseload of international courts and of the ICJ in particular is most probably too small and too fragmented<sup>83</sup> to generate a judicial custom that would comply in judicial terms with the conditions of development of customary international law. All this explains why judicial law cannot (yet) be deemed a source of international law and can only be used as an auxiliary source to identify autonomous sources of international law.

Another related problem is that international adjudication does not benefit from the same legitimacy as domestic adjudication. Nor is it possible, in the absence of separation of powers within international institutions whose law would be interpreted by international judges, and in the absence of an international legislature representing the international community, to envisage democratic constraints on judicial discretion and ways of making sure international judges feel responsible.<sup>84</sup> This is particularly problematic for intrastate principles that are meant to apply within domestic boundaries and to individuals and not just to states, such as international human rights or democratic principles, for instance.

These are just a few examples of the difficulties raised by the legitimacy of international adjudication in the context of the identification and specification of general principles of international law.<sup>85</sup> This explains why judicial law is still regarded with apprehension by states and why international judges are usually reluctant in referring to or at least in applying general principles of international law. It is not that they shy away from their judicial responsibility as law-makers, nor that they hide

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<sup>81</sup> See also ALLARD, GARAPON, *Les juges*, above, n. 79; ASCENSIO, “La notion”, above, n. 79.

<sup>82</sup> This is why ASCENSIO, “La notion”, above, n. 79, p. 202 is right to mention the ‘amour impossible entre la juridiction et le droit international classique’; see also JOUANNET, “La jurisprudence”, above, n. 75, p. 390 on the intricate relationship between pre-existing international law and the international judicial function. See also BESSON, “International Judges”, above, n. 78 on the dangers of understanding international courts without international law and other law-making international institutions.

<sup>83</sup> See also the contribution by Pierre D’ARGENT in this volume.

<sup>84</sup> See for some of the critiques of the judicial use of general principles, KOSKENNIEMI, “General Principles”, above, n. 5; M. KOSKENNIEMI, P. LEINO, “Fragmentation of International Law? Postmodern Anxieties”, *Leiden Journal of International Law*, Vol. 15, no 3, 2002, pp. 553-79; JOUANNET, “L’ambivalence des principes généraux”, above, n. 5.

<sup>85</sup> See e.g. ALLARD, GARAPON, *Les juges*, above, n. 79; VON BOGDANDY, VENZKE, “On the Democratic Legitimation”, above, n. 79.

behind their law-identification function (Article 38 par. 1 lit. d ICJ Statute), but simply that they cannot embark into full-blown judicial law-making without corresponding legislative institutions to interact with.

In sum, a large part of the problem with the formal sources of general principles in international law is adjudication and the role of the international judiciary. As long as those difficulties with international adjudication remain and there is no theory of international adjudication available, the formal sources of general principles of international law will remain controversial.

## **b) Material Sources of General Principles of International Law**

The material sources of general principles of international law are moral values and principles as in the domestic context. Of course, this does not prevent them from being regarded as legal standards as they are recognized as such through legal interpretation and by legal institutions.

As in the domestic context, the axiological dimension of general principles triggers the question of the relationship between those principles and morality. Here the standard challenge is that principles are morality-incorporating standards and that understanding general principles of international law implies endorsing at least inclusive legal positivism. The same objections to that challenge may be put forward, however, as in the domestic context.

First of all, law is already part of morality and morality applies anyway to us and to our legal institutions, legal reasoning being a special kind of moral reasoning. In those circumstances, law can only modulate or exclude morality, but it cannot incorporate it. General principles transpose and specify moral principles or moral values in an institutional context and by legalizing them turn them into legal principles. Secondly, even in the cases in which legal principles are regarded as mere reflections of moral principles, they may not turn morality into law but simply give legal effects to morality within the legal order. This is done in the same way the legal order gives foreign law legal effects without turning it into domestic law. In international law, one may even argue that those general principles of international law that stem from domestic general principles, and hence from domestic law, are simply given legal effects by the international legal order and remain domestic general principles in nature.

Remember that the claim about the absence of conceptual connection between international law and morality does not equate with a claim about a lack of factual connection. On the contrary, there is clearly a continuity and factual relationship between law and morality. The difficulty in international law is that the false equation

between legal positivism and consensualism is held to imply not only a stark separation between law and morality, but also the absence of factual relationship between them.<sup>86</sup> From that perspective, general principles in international law are regarded as a form of natural law and evidence of the inclusion of morality within the international legal order.<sup>87</sup> Affirming a relationship between law and morality need not, however, imply a form of natural law: legal principles can be said to legalize moral values and principles.

<sup>86</sup> For examples of this misunderstanding of legal positivism in international law and hence of what a legal positivist's take on general principles would be, see e.g. KOLB, "Principles as Sources", above, n. 8, p. 36; or ALSTON, SIMMA, "The Sources", above, n. 74.

<sup>87</sup> See e.g. Judge Ammoun, Opinion, ICJ, *North Sea Continental Shelf*, 1969, above, n. 56, pp. 134 f.: "It is important in the first place to observe that the form of words of Article 38, paragraph 1 (c), of the Statute, referring to 'the general principles of law recognized by civilized nations', is inapplicable in the form in which it is set down, since the term 'civilized nations' is incompatible with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law. [...] In view of this contradiction between the fundamental principles of the Charter, and the universality of these principles, on the one hand, and the text of Article 38, paragraph 1 (c), of the Statute of the Court on the other, the latter text cannot be interpreted otherwise than by attributing to it a universal scope involving no discrimination between the members of a single community based upon sovereign equality. The criterion of the distinction between civilized nations and those which are allegedly not so has thus been a political criterion, power politics, and anything but an ethical or legal one. The system which it represents has not been without influence on the persistent aloofness of certain new States from the International Court of Justice. It is the common underlying principle of national rules in all latitudes which explains and justifies their annexation into public international law. Thus the general principles of law, when they effect a synthesis and digest of the law in foro domestico of the nations - of all the nations - seem closer than other sources of law to international morality. *By being incorporated in the law of nations, they strip off any tincture of nationalism so as to represent, like the principle of equity, the purest moral values. Thus borne along by these values upon the path of development, international law approaches more and more closely to unity*" (emphasis added). See also more recently, Judge Cançado Trindade, Opinion, ICJ, *Case concerning Pulp Mills*, above, n. 11, par. 47 and 200: "47. It is indeed significant and it should not pass unnoticed that Uruguay and Argentina, concurring in their invocation of general principles of law, were, both of them, being faithful to the long-standing tradition of Latin American international legal thinking, which has always been particularly attentive and devoted to general principles of law, in the contexts of both the formal 'sources' of international law as well of codification of international law. Even those who confess to reason still in an inter-State dimension, concede that general principles of law, in the light of natural law (preceding historically positive law), touch on the origins and foundations of international law, guide the interpretation and application of its rules, and point towards its universal dimension; those principles being of a general character, there is no sharp demarcation line between those recognized in domestic law (in foro domestico) and those of international law proper. [...] 200. Fundamental principles are consubstantial to the international legal order itself, wherein they give expression to the idea of an 'objective justice', proper of natural law (cf. supra). Principles of international law shed light into the interpretation and application of International Law as a whole, they pertain to the very substratum of this latter, and are identified with the very foundations of the international legal

As explained previously, therefore, general principles may be considered as moral modulators or converters in international law.

General principles are, first of all, modulators of morality in the international legal order in circumstances of moral pluralism, thus enabling universal coordination over conflicting moral values and principles. General principles act as specifiers or contextualizers of morality within the international legal order. General principles also work as modulators between the general and the particular in circumstances of social pluralism, holding a middle ground that allows for different normative appreciations in different circumstances. This is particularly interesting in the international legal order where social and cultural circumstances differ a lot and where reconciling the universal, and the shared, with the particular, and the different, without parochialism is important.<sup>88</sup>

Finally, and most specifically to the international legal order, general principles work as modulators of the relationship between legal orders in circumstances of legal pluralism. All legal orders share roughly the same general principles by virtue of their underlying moral values and principles, and this common identity of legal orders may help articulate their relationship.<sup>89</sup> General principles of international law enable either the formal reception in each legal order of the corresponding principles in other legal orders when the relationship between those legal orders is one of primacy, or the mere material reference to principles with a shared and common content when those legal orders are distinct and equivalent.<sup>90</sup> This is particularly important for human rights, for

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system. They permeate every legal system. Their continuing validity is beyond question. Principles of international law are essential to humankind's quest for justice, and of key importance to the endeavours of construction of a truly universal International Law."

<sup>88</sup> See A. BUCHANAN, "Human Rights and the Legitimacy of the International Legal Order", *Legal Theory*, Vol. 14, 2008, pp. 39-70 on the importance of institutions in that process and on the ways of enhancing those institutional processes epistemologically.

<sup>89</sup> It is essential to distinguish the relationship between general principles from the relationship between legal orders and their respective norms in general. In this chapter, therefore, I am not arguing in favour of general principles as a way to articulate the relationships between the respective legal regimes and orders in general and to mediate their conflicts. See BESSON, "Whose Constitution(s)?", above, n. 2 for a critique of human rights as single remedy to conflicts of legal regimes and orders. In short, my argument was that human rights are themselves plural and that international and domestic human rights play different roles, on the one hand, and that the respective authority of different norms and orders ought also be a function of their democratic legitimacy, on the other.

<sup>90</sup> The different modulating roles of general principles reflect different relationships between legal orders, therefore. It would be wrong to assimilate too quickly the case of mutual borrowing of general principles between independent domestic legal orders or international legal regimes with that of the formal reception of domestic general principles as source of international law and their consequent re-integration in domestic law.

instance, that are common norms to domestic, regional and international legal orders.<sup>91</sup> This inter-regime or inter-order modulation is multi-dimensional and can apply to the reception of international principles in domestic law and vice-versa. It amounts to a form of invalidity of norms stemming from distinct but interpenetrating orders, as much as to the transversal reference to principles across domestic orders or different regimes of international law. In this last respect, the development of comparative public law, with the conceptual clarifications it triggers, has facilitated the borrowing of principles across legal orders and the development of what Mireille Delmas-Marty refers to as a '*droit commun*' that constitutes the basis for a '*pluralisme ordonné*'.<sup>92</sup>

## C. Role

Among the different functions played by general principles of international law in legal reasoning and legal interpretation, one should mention the ones specific to the international legal order. The other functions mentioned before apply *mutatis mutandis*.

There are two main functions of general principles in international law worth emphasizing: the gap-filling function and the coherence function. Those functions are sometimes referred to as (materially) constitutional ones whether in international or in EU law.<sup>93</sup> Interestingly, they are even more important to international law than to domestic law.

As elegantly captured by Emmanuelle Jouannet, those functions have not only evolved quantitatively (more international law implies more general principles and vice-versa), but also qualitatively: with time and the qualitative developments of international law, general principles' functions have evolved.<sup>94</sup> Interestingly, the role of general principles has evolved qualitatively mostly due to the circumstances of enhanced legal pluralism and this can be said both with respect to the impact of pluralism on the validity of

<sup>91</sup> See e.g. V. CHAMPEIL-DESPLATS, "L'identité des ordres juridiques et les droits fondamentaux", in E. DUBOUT, S. TOUZÉ, eds, *Les droits fondamentaux : charnières entre ordres et systèmes juridiques*, Paris, Pedone, 2010, pp. 149-64.

<sup>92</sup> M. DELMAS-MARTY, *Le pluralisme ordonné : les forces imaginantes du droit II*, Paris, Seuil, 2006; M. DELMAS-MARTY, *Pour un droit commun*, Paris, Seuil, 1994. For a critique, see ALLARD, GARAPON, *Les juges*, above, n. 79.

<sup>93</sup> See e.g. KOLB, "Principles as Sources", above, n. 8. See also in EU law, TRIDIMAS, *The General Principles*, above, n. 8; N. TSAGOURIAS, "The Constitutional Role of General Principles of Law in International and European jurisprudence", in N. TSAGOURIAS, ed., *Transnational Constitutionalism - International and European Models*, Cambridge, Cambridge University Press, 2007, pp. 71-106.

<sup>94</sup> JOUANNET, "L'ambivalence des principes généraux", above, n. 5, pp. 134 ff. See also an echo in DELMAS-MARTY, *Le pluralisme ordonné*, above, n. 92, who distinguishes the '*incomplétude*' from the '*incohérence*' of legal orders through their internationalization.

international law and with respect to its impact on the rank of international law.<sup>95</sup> Indeed, as I will argue, general principles enable the intervalidity of some norms of international law that stem from domestic law through gap-filling and are reinserted into domestic law, and they enhance the material and transitive hierarchies between formally heterarchical and equivalent legal orders and regimes.

First of all, general principles of international law contribute to complementing international law and *filling its gaps*. More than domestic law, the international legal order, depending of course on the regimes and regions, is largely underdeveloped. This is at least the case in terms of legal rules and more generally determinate legal norms. Following the introduction of the prohibition of *non-liquet*, general principles have been used in law-enforcement and in particular in adjudication to fill the numerous gaps left in the legal regulation of various situations through conventional law or customary international law.<sup>96</sup> Unlike conventional law, however, general principles fill gaps in a flexible and dynamic fashion, as they are normative principles and hence may lead to new evaluations and interpretations from case to case.<sup>97</sup>

Of course, the denser and more specialized and regionalized the international legal order becomes, the lesser the quantitative importance of this function. General principles trigger gradual codification through conventional law or customary international law. Newer fields of international law, such as international criminal law, international investment law or international environmental law, are usually the ones where general principles are used most often. True, there are exceptions and general principles remain quantitatively important even in classical fields of general international law: one may think of structural principles such as the proportionality principle, for instance. Indeed, even if their gap-filling function is set aside, general principles retain their other functions notwithstanding codification, since, as indicated before, general principles remain in existence as implicit principles once codified.<sup>98</sup> By virtue of the autonomy of international law sources, once general principles are recognized as customary international law, nothing prevents them from subsisting aside *qua* general principles. Qualitatively, also, the gap-filling function of general principles of international law has evolved with increased legal pluralism and the need to fill gaps across legal regimes and legal orders. Here, by virtue of the intervalidity mentioned before, the source-modulating role of general principles enhances its gap-filling

<sup>95</sup> On those two understandings of legal pluralism, see BESSON, "Whose Constitution(s)?", above, n. 2.

<sup>96</sup> See e.g. ILO Administrative Tribunal, *Judgement no 11 Desgranges*, 12 August 1953; or Article 21 of the 1998 Rome Statute.

<sup>97</sup> See also PELLET, *Recherche sur les principes*, above, n. 8, p. 397.

<sup>98</sup> See ASCENSIO, "Principes généraux du droit", above, n. 8, p. 7.

function without, however, undermining the autonomy of each of the respective legal orders.

Secondly, general principles of international law contribute to resolving antinomies in international law and ensuring its *coherence*. Conflicts of norms, sources and regimes are more common in the international legal order in the absence of a single and centralized international legislature and of a hierarchy of norms, sources and regimes as a result. General principles help structure and unify the legal order through interpretation and by reference to common principles, without, however, unifying it formally.<sup>99</sup>

The denser, and the more specialized and regionalized the international legal order becomes, the more pluralist it is and the greater the quantitative importance of this function. Qualitatively, also, the function of general principles is affected by enhanced legal pluralism. The modulation of legal sources between different domestic, regional and international regimes contributes to the coherence of those legal orders, without, however, leading to formal hierarchies. If one endorses the terms and conclusions of the International Law Commission's report on the fragmentation of the international legal order,<sup>100</sup> general principles can even be regarded as a way of mediating the consequences of the fragmentation of that order between different sources, regimes and norms and of providing materially superior norms and a transitive normative hierarchy.<sup>101</sup> This has been exemplified in many human rights cases in the last few years.<sup>102</sup>

The two main functions endorsed by legal principles have two implications for legal reasoning with principles: discretion and axiological hierarchization. Those two consequences are particularly interesting in the international legal order. Legal principles presuppose and even justify judicial discretion. Of course, at the same time, they guide and constrain it in return. This has to do with the separation of powers and

<sup>99</sup> See VERDROSS, "Les principes généraux", above, n. 8, p. 52; KOLB, "Principles as Sources", above, n. 8, p. 27.

<sup>100</sup> See *Report of the International Law Commission*, UN Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10, UN Doc. A/55/10. See also *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682 p. 1-256 and 18 July 2006, UN Doc. A/CN.4/L.702, pp. 1-25.

<sup>101</sup> See on transitive material hierarchies in a pluralist international legal order, BESSON, "Theorizing the Sources", above, n. 12 and BESSON, "Whose Constitution(s)?", above, n. 2. See also on coherence and integrity in EU law in circumstances of legal pluralism, S. BESSON, "From European Integration to European Integrity. Should European law speak with just one voice?", *European Law Journal*, Vol. 10, no 3, 2004, pp. 257-81.

<sup>102</sup> See e.g. CJEU, *Kadi and Al Barakat International Foundation/Council and Commission*, Cases C-402/05 P and C-415/05 P, [2008] ECR, I-6351.



the democratic legitimation of the judiciary. In the international legal order, however, the international judiciary is not only pluralist, but it is not situated in an institutional rapport to other international law-makers and law-enforcers. Nor is there a direct institutional rapport between an international community and international judges. This makes any form of self-restraint difficult to organize and explains the reluctance on the part of states (but also, arguably, of judges) to expect international judges to exercise judicial creativity, for instance through interpreting and applying general principles of international law.<sup>103</sup>

## D. Rank

It follows from the nature and role of general principles of international law that they need to be interpreted and specified when applied to concrete circumstances and in most cases weighed and balanced against other legal principles.

Their weighing and balancing ought to occur by reference to the moral and political values they protect. This is even more the case in the international legal order in the absence of a hierarchy of regimes, sources and norms. Conflicts between general principles or between general principles and other international norms cannot indeed be solved by reference to a formal hierarchy of legal norms: legal principles stem from different sources, on the one hand, and even when they stem from one single source such as judicial law, they are meant to refer to moral values directly and hence relate to a mobile axiological hierarchy and not a legal one, on the other.

One may argue therefore that general principles are vested with a material and transitive kind of priority that even applies sometimes across orders and regimes, and can help settle conflicts of norms stemming from those different orders and regimes by reference to a shared set of general principles. Of course, in the context of EU law, as I will explain below, one may consider that the constitutional function of general principles combined with their normative importance would justify granting them constitutional rank in most cases.<sup>104</sup>

## E. Excursus: General Principles of European Union Law

General principles are broadly used and referred to throughout EU treaties and within the CJEU's case-law.<sup>105</sup> Interestingly since EU law has developed as (and arguably

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<sup>103</sup> See KOSKENNIEMI, "General Principles", above, n. 5.

<sup>104</sup> See e.g. CJEU, *Audiolux*, above, n. 11, par. 42; CJEU, *Kadi*, above, n. 102, par. 307-8.

<sup>105</sup> See ARNULL, "What is a General Principle of EU Law?", above, n. 8; DE LA FERIA, "Reverberation", above, n. 11; VON BOGDANDY, "Founding Principles", above, n. 8; SIMON, "Les

emancipated from) a kind of special and regional international law, general principles have a specific nature, specific sources and a specific role in EU law, or European law *lato sensu* one should say.<sup>106</sup>

In what follows, I will take all three dimensions in turn. Of course, those principles share a lot of the features of general principles of international law, and I will not rehearse the different features they have in common. General principles are less controversial in EU law, however, in that the practice and especially the judicial practice seems to trigger less legitimacy concerns than on the international plane. This is not surprising as the EU is a 'union of law' with a municipal legal order that is integrated in its Member States' respective legal orders, a polity of EU citizens and has a single, compulsory, exclusive and independent judiciary, the CJEU, that is integrated in an institutionally balanced regime. Interestingly, of course, most of those features have actually been developed as general principles of EU law by the CJEU itself.

To start with the *nature* of general principles, EU lawyers, like international lawyers, are familiar with general principles 'common to the laws of the Member States' that stem from common domestic traditions such as legal security or EU fundamental rights; 'general principles of international law' such as *pacta sunt servanda*; and 'general principles of EU law' such as direct applicability that are specific to the functioning of the EU. This third category entails all general principles that pertain to the constitutional and institutional articulation and organization of the EU.<sup>107</sup> EU law also knows of a fourth category of general principles, however: 'general principles of law'. Those are the principles one finds in any European legal system such as legal security. Arguably, the existence of this fourth category attests of the degree of maturity of the EU legal order and is a testimony not only to its autonomy but to its legitimacy. Of course, one may argue that this category of principles may also be found within

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principes en droit communautaire", above, n. 8; BERNITZ, NERGELIUS, CARDNER, eds, *General Principles*, above, n. 8; GROUSSOT, *General Principles*, above, n. 8; TRIDIMAS, *The General Principles*, above, n. 8; FLAESCH-MOUGIN, "Typologie", above, n. 8; BERNITZ, NERGELIUS, *General Principles of European Community Law*, above, n. 8; USHER, *General Principles*, above, n. 8; PICOD, "Principes généraux du droit", above, n. 8; J. BOULOUIS, "Principes Généraux", in C. GAVALDA et al., eds, *Répertoire de Droit Communautaire*, Tome III, Paris, Dalloz, 1992; SIMON, "Y a-t-il des Principes Généraux", above, n. 8.

<sup>106</sup> See BESSON, "From European Integration to European Integrity", above, n. 101, on the European legal order *lato sensu*.

<sup>107</sup> See VON BOGDANDY, "Founding Principles", above, n. 8; USHER, *General Principles*, above, n. 8; TSAGOURIAS, "The Constitutional Role", above, n. 94; TRIDIMAS, *The General Principles*, above, n. 8.

international law and that it is difficult to draw clear distinctions between the different categories.<sup>108</sup>

In terms of *sources*, EU general principles are both a type of EU legal norms and a source of EU (non-written or written) primary law.<sup>109</sup> One may derive the latter from Article 263 par. 1 and Article 340 par. 2 EUFT in particular. Of course, general principles of EU law *qua* source of EU law include in priority those general principles that stem from common domestic traditions, but need not exclude the others, by contrast to international law. This is particularly important for the retroaction effect of general principles that stem from domestic law, become European general principles and influence domestic principles in return. This has been the case for the principle of proportionality, in particular.

Interestingly, the CJEU is more specific than international courts regarding the method and criteria of identification of those general principles *qua* source. Denys Simon refers to that method as a '*méthode éclectique, sélective et filtrante*'.<sup>110</sup> The CJEU starts by a comparative law analysis, although it has done so less and less rigorously in recent times and leaves it to the Advocate General in most cases.<sup>111</sup> The criteria are, first of all, a commonality test that does not usually require unanimity among states or even a majority<sup>112</sup> and, secondly, a transposability test whose success depends on how well the principles fit the overall structure and objectives of the EU<sup>113</sup>. In view of the case-law, the two tests tend to merge into one another as certain domestic traditions are held to

<sup>108</sup> See e.g. ASCENSIO, "Principes généraux du droit", above, n. 8, p. 3.

<sup>109</sup> See P. PESCATORE, "Les principes généraux du droit en tant que source du droit communautaire", in P. PESCATORE, ed., *Études de droit communautaire européen 1962–2007*, Bruxelles, Bruylant, 2008, pp. 691–730.

<sup>110</sup> See SIMON, "Y a-t-il des Principes Généraux", above, n. 8 and SIMON, "Les principes en droit communautaire", above, n. 8.

<sup>111</sup> See ARNULL, "What is a General Principle of EU Law?", above, n. 8.

<sup>112</sup> See AG Lagrange, 14/61, *Koninklijke Nederlandsche Hoogovens en Staalfabrieken/ECSC High Authority*, 14/61, [1962] ECR, p. 539: "La jurisprudence de la Cour [...] ne se contente pas de puiser ses sources dans une sorte de 'moyenne' plus ou moins arithmétique entre les diverses solutions nationales, mais [choisit] dans chacun des Etats membres celles qui, compte tenu des objectifs du traité, paraissent les meilleures ou, si l'on veut employer ce mot, les plus progressistes."

<sup>113</sup> See CJEU, *Internationale Handelsgesellschaft mbH / Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 11/70, [1970] ECR, p. 1125, par. 4: "However, an examination should be made as to whether or not any analogous guarantee inherent in community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the court of justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the community legal system."

be compatible with the general objectives of the EU and hence to be sufficiently common, while others do not for the very same reasons.<sup>114</sup> A further difficulty lies in the potential contradictions between the EU's objectives and in particular the priority of some of them such as the internal market.

General principles of EU law also have other sources than domestic general principles and in particular (written) primary EU law, but also the CJEU's case-law. Of course, as in any legal order, whether one sees the CJEU as only interpreting and specifying general principles of EU law, or actually as creating them or turning them into EU law through judicial custom, its case-law is crucial to general principles. As in domestic and international law, general principles are gradually specified and codified in primary or secondary EU law, but this does not prevent their judicial interpretations from developing (see e.g. Article 6 par. 3 EUT in the context of EU fundamental rights). The CJEU has not yet defined a strict method as to how to identify general principles of EU law that do not stem from primary EU law and do not derive from domestic traditions.<sup>115</sup> This may be explained by the unease judicial law creates in general, and even more so in a post-national legal order.<sup>116</sup> By contrast to international law, the issue is not so much the lack of hierarchy or exclusivity of the judiciary and its lack of compulsory jurisdiction or of democratic legitimation and accountability, but it has to do with the vertical and horizontal division of powers within the EU and between the EU and its Member States. Recent case-law shows how justified those fears are<sup>117</sup> and how the CJEU is responding to those concerns by not overinterpreting general principles.<sup>118</sup> For the rest, one may actually argue that the CJEU, and the European

<sup>114</sup> Compare CJEU, *Society for the Protection of Unborn Children Ireland/Grogan and others*, C-159/90, [1991] ECR, I-4685 or CJEU, *Laval un Partneri*, C-341/05, [2007] ECR, I-11767 with CJEU, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02, [2004] ECR, par. 34 ff.

<sup>115</sup> See e.g. the discussion pertaining to the existence of a general principle of equality of shareholders or of abuse of law in the CJEU, *Audiolux*, above, n. 11 and CJEU, *Halifax*, above, n. 11. See e.g. BENGOTXEA, "Case note", above, n. 11, p. 1180 and ARNULL, "What is a General Principle of EU Law?", above, n. 8 on the AG and CJEU decision in *Audiolux*; DE LA FERIA, "Reverberation", above, n. 11 and ARNULL, "What is a General Principle of EU Law?", above, n. 8 on the CJEU decision in *Halifax*.

<sup>116</sup> See HERDEGEN, WOLTERS, "General Principles", above, n. 9; BENGOTXEA, "Case note", above, n. 11.

<sup>117</sup> See e.g. on the extension of the scope of EU fundamental rights into areas of residual competence of Member States: CJEU, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Case C-34/09, judgment of 8 March 2011, nyr; CJEU, *Janko Rottmann v Freistaat Bayern*, Case C-135/08, judgment of 2 March 2010, nyr. See also BESSON, "Human Rights and Democracy", above, n. 13.

<sup>118</sup> See CJEU, *Audiolux*, above, n. 11 and CJEU, *Halifax*, above, n. 11.

judicial dialogue that is so specific to the European legal order *lato sensu*, have actually developed the way they did through the elaboration of general principles.<sup>119</sup>

The role of general principles in EU law follows closely the different functions of general principles identified before in domestic law, but most importantly international law. General principles are both an aid and a constraint on judicial interpretation of EU law.<sup>120</sup> Their reference to values helps legitimating other EU law norms, but also contributes to the development of the rule of law in EU law and hence to the legitimacy of EU law as a whole.

The two functions I distinguished in international law, i.e. gap-filling and coherence, can also be identified in the Court's practice. They have evolved quantitatively and qualitatively, however.

General principles helped fill gaps, first of all, while EU law was developing.<sup>121</sup> It seems from the recent case law, however, that there are too many potential principles available currently and that the CJEU often chooses to leave a gap nowadays rather than fill it with yet another principle.<sup>122</sup> One may also observe how general principles

<sup>119</sup> See GROUSSOT, *General Principles*, above, n. 8.

<sup>120</sup> See also the contribution by J. BENGOTXEA in this volume.

<sup>121</sup> See HL, Lord Denning, *Bulmer v. Bollinger*, 1974: "The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have forgone brevity. They have become long and involved. In consequence, the judges have followed suit. They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation - which was not foreseen - the judges hold that they have no power to fill the gap. To do so would be a 'naked usurpation of the legislative function'... The gap must remain open until Parliament finds time to fill it. How different is this Treaty! It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges, or by Regulations or Directives. It is the European way ... much is left to the judges. The enactments give only an outline plan. The details are to be filled in by the judges. Seeing these differences, what are the English courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. To quote the words of the European Court. . . , they must deduce 'from the wording and the spirit of the Treaty the meaning of the community rules'. They must not confine themselves to the English text. They must consider, if need be, all the authentic texts ...".

<sup>122</sup> See the discussion pertaining to the existence of a general principle of equality of shareholders or of abuse of law in the CJEU decision in *Audiolux*, above, n. 11 and *Halifax*, above, n. 11. See e.g. BENGOTXEA, "Case note", above, n. 11, p. 1180 and ARNULL, "What is a General Principle of EU Law?", above, n. 8 on the AG and CJEU decision in *Audiolux*; DE LA FERIA, "Reverberation",

codified in EU primary law are constantly being re-interpreted by the CJEU thus ensuring a dynamic understanding of EU law. Qualitatively also, the gap-filling function has turned into a modulation and intervalidation function where general principles allow general principles to be transferred from one legal order to the other but in respecting the autonomy of each of the respective legal orders.<sup>123</sup>

General principles also ensure the coherence of EU law, secondly. Here again, coherence has evolved with EU law and the greater integration between legal orders in the EU. Although their invocation does not imply hierarchy or unity, general principles contribute to the integrity of the European legal order *lato sensu* and hence cater for its special kind of legal pluralism between the EU legal order and its Member States'.<sup>124</sup> General principles can even be regarded as a way of providing materially superior norms and a transitive normative hierarchy that can allow EU law and general international law to be articulated in richer terms than dualist ones within the European legal order *lato sensu*.<sup>125</sup>

### III. International Human Rights as General Principles

International human rights law has developed exponentially since 1945. In a nutshell, international human rights law is the regime of international legal norms that protect human rights and create human rights duties (i) and apply generally and objectively (ii) both in international relations and in domestic law (iii).

*Qua* regime of general international law, the sources of international human rights law are often expanded beyond its obvious conventional sources in multilateral treaties to include customary international law and general principles of international law. This is because customary international law and general principles of international law are sources of general (non-relative and non-mutual) and objective (non-consensual) international law and also the only sources of immediately valid norms in domestic law that do not vary depending on whether the domestic legal order endorses monism or dualism.

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above, n. 11 and ARNULL, "What is a General Principle of EU Law?", above, n. 8 on the CJEU decision in *Halifax*.

<sup>123</sup> See also DE LA FERIA, "Reverberation", above, n. 11.

<sup>124</sup> See BESSON, "From European Integration to European Integrity", above, n. 101, on Dworkinian integrity in EU law.

<sup>125</sup> See e.g. AG Maduro, *Kadi*, above, n. 102. See on European legal pluralism after the *Kadi* case, BESSON, "Whose Constitution(s)?", above, n. 2.

This inclusive approach to the sources of international human rights law was first ventured in a famous piece by Philip Alston and Bruno Simma.<sup>126</sup> In view of what has been said so far in the present chapter, I would like to test that statement and support the two authors' argument in favour of general principles *qua* source of international human rights law. As I will argue, the upshot of this argument is important both for the legitimate authority of international human rights and their effectiveness. It also presents the advantage of fitting and justifying international human rights practice.

Given the relationship between general principles *qua* source and general principles *qua* norms, it should not come as a surprise that the distinction needs to be made with respect to international human rights law as well; they may indeed be regarded as general principles *qua* norms without being their own source. I will therefore distinguish between the two in the development that follows. Note that this approach is specific to *international* human rights law. In domestic law, indeed, human rights may be regarded as principles *qua* norms but never *qua* source; their sources are indeed, for reasons of entrenchment and ranking but also more deeply for reasons of democratic legitimacy, usually constitutional and written or, at least, judicial.

## A. International Human Rights: General Principles *qua* Sources

One finds human rights norms in all sources of international law, including conventional law. In fact, most guarantees of international human rights law are conventional to date. However, because human rights norms are norms of general international law, they are also originally, or concurrently, based on either customary law or general principles. Evidence for this may be found in some ICJ decisions, whether they are antecedent<sup>127</sup> or posterior to the adoption and development of

<sup>126</sup> ALSTON, SIMMA, "The Sources", above, n. 74. See also J.-F. FLAUSS, "La protection des droits de l'homme et les sources du droit international", in *La protection des droits de l'homme et l'évolution du droit international*, Paris, Pedone, 1998. See for a general discussion of Alston and Simma's argument, Séverine KNUCHEL in this volume.

<sup>127</sup> See e.g. ICJ, 9 April 1949, *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, ICJ Reports 1949 and ICJ, 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951. See ICJ, *Corfu Channel*, p. 22: "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." See also ICJ,

conventional international human rights law.<sup>128</sup> In what follows, I will assess arguments in favour and against having either source of international law as source of international human rights law.

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*Convention on Genocide*, p. 23: “The principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest.”

<sup>128</sup> See e.g. ICJ, 5 February 1970, *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970; and ICJ, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004. See ICJ, *Barcelona Traction*, par. 33: “When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.” See also ICJ, *Palestinian Wall*, par. 155 and 159: “155. The Court would observe that the obligations violated by Israel include certain obligations erga omnes. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature ‘the concern of all States’ and, ‘In view of the importance of the rights involved, all States can be held to have a legal interest in their protection’ (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law. 159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.”



## 1. Customary Law *qua* Source of Human Rights

Among the elements that may justify choosing customary international law as source of international human rights law,<sup>129</sup> one may mention that custom requires state practice and hence comes closer to conventional law. It associates states more closely as collective international law-makers than general principles that can dispense with state practice and depends more directly on (domestic or international) judges.

The problem, of course, is precisely that requiring that a norm be practised to be recognized may hamper the recognition of international human rights law. It is important not to overstate this difficulty, however. Custom requires state practice, and not necessarily state consent.<sup>130</sup> Moreover, custom requires a practice of action or abstention and cannot be held to exclude abstentionary practises.<sup>131</sup> Finally, single violations of a customary norm do not imply the non-existence of the norm unless the conditions for a new customary norm are met which require regular, general and coherent violations.<sup>132</sup>

Another more serious problem with custom as a source of international human rights law, however, lies in the possibility of persistent objectors to customary international law.<sup>133</sup> Provided they are early and consistent, objecting states may escape customary international law, thus affecting its generality. Since the generality and objectivity of the obligations stemming from that source are among the arguments for it in the context of international human rights law, this is an important objection. Another one

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<sup>129</sup> See e.g. Human Rights Committee, *General Comment 24/52*, 2 November 1994: "8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. *Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations.* Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be." (my emphasis).

<sup>130</sup> Contra: ALSTON, SIMMA, "The Sources", above, n. 74, pp. 104-5.

<sup>131</sup> Contra: ALSTON, SIMMA, "The Sources", above, n. 74, pp. 103-4.

<sup>132</sup> See e.g. BESSON, "Theorizing the Sources", above, n. 12.

<sup>133</sup> See M. BYERS, "Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules", *Nordic Journal of International Law*, Vol. 66, 1997, pp. 211-40, 220-9.

lies in the kind of practice that sustains customary international law. If the kind of state practice at stake is only interstate, it may be difficult to sustain its pertinence in the process of developing international human rights obligations that bind *à la fois* states and international public officials and bind them not only within their domestic boundaries but also in international relations.

## 2. General Principles *qua* Source of Human Rights

Among the elements that can justify choosing general principles as source of international human rights law, one may mention that general principles do not depend on state practice for their existence as a source of international law. They merely have to be recognized by domestic institutions whether judicial or legislative and then ascertained as sufficiently general and transposable to the international level by the international judge. As a matter of fact, that domestic judicial dimension is particularly important for human rights given their relationship to democracy and the traditional judicial implication in their interpretation and implementation. This is particularly important because of the relevant community of individuals and because the latter is usually domestic.

Furthermore, general principles stem from generalizable domestic principles and hence from intrastate practice that is sufficiently widespread to become interstate practice, and they ally therefore both elements of intrastate and interstate practice. This is crucial to become a source of international human rights norms that apply to the domestic as much as to the international plane, on the one hand, and that can be regarded as belonging to international law as much as to domestic law, on the other. *Qua* legal rights, indeed, international human rights norms guarantee rights to individuals under a given state's jurisdiction, on the one hand, and to other states (or arguably international organizations [IOs]) (international human rights are usually guaranteed *erga omnes*), on the other, to have those rights guaranteed as 'human rights' within a given domestic community. They correspond to states' (and/or arguably IOs) duties to secure and ensure respect for those rights as 'human rights' within their own jurisdiction.<sup>134</sup> In this sense, international human rights duties are second-order duties for states (and/or arguably IOs) to generate first-order human rights duties for themselves under domestic law, i.e. international duties to have domestic duties.<sup>135</sup> This articulation of second-order and first-order human rights duties can be explained by the fact that human rights are intrinsically related to democracy and can only be generated in a

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<sup>134</sup> See O. O'NEILL, "The Dark Side of Human Rights", *International Affairs*, Vol. 81, no 2, March 2005, pp. 427-39, 433 on the distinction between first-order human rights duties at domestic level and second-order human rights duties generated by international human rights law.

<sup>135</sup> On the notion of human rights and the relationship between second-order and first-order human rights duties, see BESSON, "Human Rights and Democracy", above, n. 13.

given political community. Given the current political circumstances of international law-making, that community has to be the domestic polity.<sup>136</sup>

All this in turn explains why general principles of international law provide the best source of international human rights norms. By analogy to what was discussed in the second section relatively to general principles *qua* source of international law, the retroacting function of general principles of international law, that draws from domestic law to produce international law that will in return constrain domestic law, actually corresponds to the content and role of international legal norms that constrain domestic authorities. It is the case of international human rights whose guarantees are abstracted bottom-up from domestic guarantees as general principles and then constrain those domestic practises in return. As a result, the legalization of human rights is a two-way street that is not limited to a top-down reception or a bottom-up crystallization, but is a retroaction process. According to Buchanan, only those polities that respect international human rights are legitimate in specifying the content of those rights *qua* citizens' rights and hence in contributing to the recognition and existence of those rights *qua* international human rights that constrain polities in return and so on.<sup>137</sup> This retroaction process between human rights and citizens' rights is reminiscent of Arendt's universal right to have particular rights and the to-ing and fro-ing between the universal and the particular.<sup>138</sup>

The mutual relationship between international and domestic human rights, and the use of general principles as a source of human rights may actually be confirmed by recent human rights practice.

On the one hand, citizens' rights contribute to the development of the corresponding international human rights' judicial or quasi-judicial interpretations. International human rights are specified as domestic human rights but domestic human rights progressively consolidate into international human rights in return. This is clearly the case in the European Court of Human Rights' case-law where common ground is a constant concern and is sought after when interpreting the European Convention on Human Rights (ECHR). Consolidations of national best practises and benchmarking also occur, for instance, through general comments issued by the UN human rights treaty bodies. Within the EU, this actually occurs through the recognition of common

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<sup>136</sup> On the notion of human rights and their relationship to political equality, see BESSON, "Human Rights and Democracy", above, n. 13.

<sup>137</sup> See BUCHANAN, *Justice*, above, n. 60, pp. 187-9.

<sup>138</sup> See H. ARENDT, "The Decline of the Nation-State and the End of the Rights of Man", in *The Origins of Totalitarianism*, New York, Harcourt, 1973, pp. 177-8. For her first essay on the topic, see H. ARENDT, "'The Rights of Man': What Are They?", *Modern Review*, Vol. 3, no 1, 1949, pp. 24-37.

constitutional traditions *qua* non-written general principles of EU law and the fact that EU fundamental rights were originally derived exclusively from general principles of EU law (see e.g. Article 6 par. 3 EUT; Article 52 par. 4 EU FR Charter).<sup>139</sup> One should also mention, on the other hand, mechanisms of transnational consolidation of human rights. This takes place, for instance, through comparative constitutional borrowings of general principles in domestic courts and legislative debates.

## **B. International Human Rights: General Principles *qua* Norms**

Whether or not they are regarded as stemming from general principles of international law *qua* source, international human rights norms may be regarded as general principles *qua* norms. They fit the other key characteristics discussed in previous sections and in particular those pertaining to the nature, role and rank of general principles.

To start with, international human rights norms may be considered as general principles *in nature*. They are fundamental norms both in content and in origin, on the one hand, and are structurally indeterminate norms, on the other. They protect fundamental individual interests and as such are constitutive of individuals' political equality in a democracy.<sup>140</sup> They need to be weighed and balanced for their corresponding duties to be specified in a given domestic context. Human rights duties are morally and practically indeterminate<sup>141</sup> therefore and differ from case to case. Once specified, however, the corresponding human rights-duties may be regarded as rules in each case. This applies even better to *international* human rights norms that are abstract norms which can be contextualized in each domestic constitutional tradition and adopted anew by their respective right-holders.<sup>142</sup>

With respect to their *role*, international human rights norms may also be regarded as general principles of international law. As presented before, general principles work as modulators of the relationship between legal orders in circumstances of legal pluralism. They enable either the formal reception in each legal order of corresponding legal norms stemming from other legal orders or the mere material reference to a common content. This is particularly important for human rights that are common norms to

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<sup>139</sup> On general principles *qua* source of EU fundamental rights, see BESSON, "Human Rights and Democracy", above, n. 13.

<sup>140</sup> On the notion of human rights and their relationship to political equality, see BESSON, "Human Rights and Democracy", above, n. 13.

<sup>141</sup> See BUCHANAN, *Justice*, above, n. 60.

<sup>142</sup> See BESSON, "Human Rights and Democracy", above, n. 13.

domestic, regional and international legal orders.<sup>143</sup> This inter-regime or inter-order modulation is multi-dimensional and can apply to the reception of international human rights law in domestic law and vice-versa, as much as to the transversal reception of principles across domestic orders.

Finally, international human rights norms may also be regarded as general principles with respect to their *rank* in international law. In the absence of a hierarchy of sources, the mobile axiological hierarchy of general principles *qua* norms fits the priority attributed to international human rights in the material and transitive hierarchy of norms one observes in the recent practice of international law. Across legal orders, human rights have even become a common point of reference one may refer to in order to draw priorities between legal norms stemming from different orders and regimes.<sup>144</sup>

## Conclusions

Although there has been much theoretical discussion of general principles in the domestic context to date, a detailed theoretical analysis of general principles in international law is still missing. The point of this chapter was to propose one.

Koopmans is right:<sup>145</sup> general principles cannot fall from heaven and international law cannot become a *droit sans auteur* as some claim it should.<sup>146</sup> It is, on the contrary, a form of multi-authored law. Although general principles of international law are no one's law in particular, they are, and actually should be everyone's law. However complex that issue is, the democratic legitimacy of domestic law requires that we take it more seriously.

Authorship, and accordingly authority and legitimate authority in particular, constituted my *leitmotiv* throughout the chapter. It gave rise to interesting considerations pertaining to the nature, the sources and the role of general principles in general, but also of general principles in international law more specifically and of international human rights *qua* general principles, finally. Most importantly, it triggered a much needed

<sup>143</sup> See e.g. CHAMPEIL-DESPLATS, "L'identité", above, n. 91.

<sup>144</sup> See e.g. CJEU, *Kadi*, above, n. 102. See also S. BESSON, "European Legal Pluralism after *Kadi*", *European Constitutional Law Review*, Vol. 5, no 2, 2009, pp. 237-64.

<sup>145</sup> See KOOPMANS, "Judicial Activism", above, n. 1.

<sup>146</sup> See S. CASSESE, "La fonction constitutionnelle des juges non-nationaux. De l'espace juridique global à l'ordre juridique global", *Bulletin d'information de la Cour de cassation*, 15 décembre 2008; L. AZOULAI, "Conclusions générales", in E. DUBOUT, S. TOUZÉ, eds, *Les droits fondamentaux : charnières entre ordres et systèmes juridiques*, Paris, Pedone, 2010, pp. 327-33, 329.

discussion of the relationship between international law and morality, and the legitimacy of the international judiciary in that context.

In short, I have defended an exclusive legal positivist approach to general principles based on judicial custom and the legal modulation of morality. Transposed to the international context and the pluralist articulation of legal orders, I have argued that general principles may be regarded as sources of intervalid law, but also, as a result, as mechanisms of mobile and transitive hierarchization of norms among legal regimes and orders. In a nutshell, therefore, general principles of international law may be considered as modulators or converters of morality into law in circumstances of moral pluralism, as modulators between the general and the particular in circumstances of social pluralism and as modulators of the relationship between legal orders and regimes in circumstances of legal pluralism. International human rights norms provide, I have argued, an example in point of general principles of international law: not only do they find their sources in general principles, but they may also be regarded as general principles *qua* norms. This fits and justifies our current international human rights practice: it explains how human rights can be intervalid and multi-authored rights between domestic and international law, and accordingly part of the transitive scale of material legitimation of international, regional and domestic legal norms.

Much was touched upon in this chapter and many questions had to be left unanswered. This has been the case in particular of the many vexed issues pertaining to the role and legitimacy of the international judge. Addressing those questions requires articulating a theory of international adjudication. But this will have to wait for another occasion.