

Call for Papers

GENERAL PRINCIPLES OF INTERNATIONAL LAW: MORE THAN A GAP-FILLER?

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Seline Trevisanut and Panos Merkouris Volume Editors

Treaties and customary international law are the most cited and researched sources of international law, and used in almost all international legal proceedings as the legal basis of claims. Yet, according to classical doctrine on sources of international law, as enshrined in Article 38 of the Statute of the International Court of Justice (ICJ), there is one more formal source of international law, that of ‘general principles of law.’ An early attempt at defining it in international case-law appeared in the *Antoine Fabiani* case, where the tribunal opined that ‘the general principles of the law of nations on the denial of justice [are] ... the rules common to most legislations or taught by doctrines’.¹ The International Law Commission (ILC), recently added *general principles of law* as one of its topics under consideration for its study², and its reports so far have shed light on a variety of issues connected to this source of international law and keep on doing so.³

General principles have played a critical role in international law but their function remains unclear.⁴ International law scholars have been debating this issue, with views ranging from that they are:

- a source of various rules which are merely an expression of these principles;
- guidelines of framework for the interpretation/application of other rules;
- *lacuna*-filling principles;⁵
- a source of interpretation for treaties and custom;
- a means for developing new treaties and custom;
- a supplemental source to treaties and custom;
- and even a modifier of treaties and custom.⁶

¹ *Antoine Fabiani case* (31 July 1905) X UNRIAA 83, 117.

² ILC, ‘Report of the International Law Commission – Sixty-Ninth Session’ (1 May – 4 August 2017) UN Doc A/72/10 [267].

³ Indicatively, see the 11 agreed draft conclusion; ILC, ‘Consolidated Text of Draft Conclusions 1 to 11 Provisionally Adopted by the Drafting Committee’ (2022) UN Doc A/CN.4/L.971.

⁴ The topic was recommended for inclusion in the long-term programme work of the ILC in 2017, and the decision to actually include it was taken in 2018; see ILC, ‘2017 Recommendation of the Working-Group on the Long-term Programme of Work’ (2017) UN Doc A/72/10, Annex I.

⁵ B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens 1953).

⁶ *ibid*; M Cherif Bassiouni, ‘A Functional Approach to General Principles of International Law’ (1989-90) 11 MJIL 768.

Unlike treaties and custom, it has also been argued that they are not a self-standing source of obligation. This is somewhat reflected in *Border and Transborder Armed Actions* where the ICJ observed that good faith ‘is one of the basic principles governing the creation and performance of legal obligations’ and, in the same breath, added that ‘it is in itself not a source of obligation where none would otherwise exist.’⁷ But is this true for every general principle? The ILC in its Draft Conclusion 10 seems to think somewhat otherwise.⁸

However, it is not just the role of general principles that is debated, but even what constitutes a general principle and how they should be defined. Famously, the definition adopted in the aforementioned Article 38 of the ICJ Statute has the - rightly so - much criticised terminology of ‘the general principles of law recognized by *civilised nations*’. Judge Ammoun, in his celebrated Separate Opinion in the *North Sea Continental Shelf* cases, noted that such a construction not only perpetuates colonial ideology but flies at the face of the general principles of the United Nations (UN) Charter.⁹ Attempts to amend this wording, to bring it in line with the contemporary[?] spirit of the UN Charter,¹⁰ have unfortunately failed, a constant reminder and scathing critique of the effectiveness of the amendment procedures of the UN Charter.

This is only the tip of the iceberg. Where do these general principles emerge from? Do they stem merely from domestic legal systems or can they, as the ILC has suggested, also emerge directly from the international legal system?¹¹ The latter raises important questions, as to how such general principles will and can be identified in a manner that avoids conflation with customary law. As the German representative commented during the debate of the Report of the ILC in the UN General Assembly’s Sixth Committee, ‘[w]hile Germany does not exclude the possibility that general principles of law derived from the international legal system exist as a source of international law, we underline that the criteria for identifying them must in any case be sufficiently strict, so as to minimize the risk that the rules governing the identification of customary international law are undermined or bypassed in practice’.¹² This need for methodological rigour becomes even more

⁷ *Border and Transborder Armed Actions (Nicaragua v. Honduras)* (Jurisdiction and Admissibility) [1988] ICJ Rep 69, 105 [94].

⁸ ILC (n 3) Draft Conclusion 10 - Functions of general principles of law

1. General principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part.

2. General principles of law contribute to the coherence of the international legal system. They may serve, inter alia:

(a) to interpret and complement other rules of international law; (b) *as a basis for primary rights and obligations, as well as a basis for secondary and procedural rules* (emphasis added).

⁹ *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3, Separate Opinion of Judge Ammoun, 132–3.

¹⁰ Mexico & Guatemala in UNGA, ‘Review of the Role of the International Court of Justice: Report of the Secretary-General’ (15 September 1971) UN Doc A/8382, 23-5.

¹¹ ILC (n 3) Draft Conclusion 3.

¹² Germany, ‘Statement by the Federal Republic of Germany on Cluster 3 (Succession of States in Respect of State Responsibility and General Principles of Law) in the Debate of the Sixth Committee of the Report of the International

imperative in the case of a proposed new category of principles widely recognized in treaties and ‘other international instruments’.¹³ A good example here is the precautionary approach, also referred to as principle of precaution. However, the reference to ‘other international instruments’ raises methodological concerns, when those instruments are non-legally binding ones and are not corroborated by other legally binding instruments.¹⁴ But even when general principles stem from domestic legal systems, the methodology to be applied is a difficult knot to untangle. Members of the Advisory Committee of Jurists debating the Statute of the Permanent Court of International Justice already suggested a variety of approaches, as have since then international courts and tribunals,¹⁵ and more recently the ILC.¹⁶

Matters become even more complicated since the term ‘principle’ is used sometimes inconsistently to refer not only to general principles (e.g., good faith) but also to rules that can be considered as customary (e.g., the no harm principle). Sometimes the term is even used to refer to concepts that although neither principle, custom or treaty do have some normative value. What is meant by this is that they colour our understanding of rules stemming from them and which fall within one of the three formal sources. This is what Lowe would call an ‘interstitial norm’¹⁷ (e.g., the principle of sustainable development).

In response to such developments and uncertainties, the overarching question that emerges is: *What is meant by general principles of law?* In this volume, we invite papers that critically reflect on the variety of manifestations of and controversies surrounding ‘general principles of law’.

We welcome contributions engaging with the following questions:

- What is the nature of general principles and how can we discern a typology of general principles, e.g., those stemming from domestic legal systems and/or those deriving from the international legal system itself?
- What is(are) the role(s) played by general principles? Are they gap-filling, guidelines for interpretation, etc.?
- What are the methods of their identification? E.g., which and how many legal families need to be considered to make a substantiated claim that something represents a general principle?

Law Commission, November 2021’ (3 November 2021) available at: <https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_germany_3.pdf> (last accessed 1 June 2023).

¹³ ILC, ‘Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur’ (9 April 2020) UN Doc A/CN.4/741 Draft Conclusion 7(a) [171].

¹⁴ Germany (n 14).

¹⁵ For a good overview see Cheng (n 5); Bassiouni (n 6) and the reports of the Special Rapporteur and the ILC on the topic.

¹⁶ ILC (n 3) Draft Conclusions 3-6 (where the approach to recognition focuses on representativeness, transposability and compatibility).

¹⁷ V Lowe, ‘Sustainable Development and Unsustainable Arguments’ in A Boyle and D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999) 19.

- How are general principles interpreted and applied?
- How is the potential evolution of a general principle accounted for and determined both in theory and practice?
- How do general principles distinguish themselves from other sources of international law, e.g., how does one distinguish between general principles stemming from the international legal system and customary international law?
- How do general principles interact with each other and with rules stemming from other sources of international law?
- What are the implications of using the term ‘principles’ to refer to something that may or may not fall within what is classically understood as a general principle, e.g., principle of good faith, principle of sustainable development, principle of equity, principle of effectiveness, etc.?

We welcome papers that:

- examine the jurisprudence of international courts and tribunals on general principles of law (whether focusing on a particular court/tribunal or a cross-tribunal analysis or comparison);
- focus on specific principles and how they function, either focusing on a specific principle or principles specific to certain regimes or areas of international law (indicatively, but not restricted to, environmental law, law of treaties, law of the sea, reparations);
- apply a critical lens on general principles (e.g., from a TWAIL, decolonial or feminist perspective).

Seline Trevisanut and Panos Merkouris, the editors of Volume 54 of the Netherlands Yearbook of International Law, are pleased to invite submissions for this volume, to be published in February of 2025. Authors are invited to submit an abstract of no more than 400 words by 14 January 2024. Authors of selected abstracts will then be invited to send a first full draft of no more than 10,000 words including footnotes by 30 April 2024. All emails and files should be sent to *all the following addresses*: nyil@asser.nl; p.merkouris@rug.nl; s.trevisanut@uu.nl). Kindly note that invitation to submit a draft paper does not guarantee selection for publication. All submitted drafts will undergo a double-blind peer review process and upon the recommendation of the reviewers a decision will be made.

Authors may feel free to contact the volume editors in case you need further information, or if you want to check whether your paper idea fits with the overall theme of the volume. All abstracts and drafts must be submitted in Word (.docx) format and must conform to our style guidelines, which are available at the publisher’s website: <https://www.springer.com/series/8913>. Further information about the process can be obtained from the volume editors, and from the Yearbook’s Managing Editor, Carl Emilio Lewis: nyil@asser.nl.