General Principles and the Other Sources of International Law: Conclusions

in M Andenas, M Fitzmaurice, A Tanzi, and J Wouters (eds), *General Principles and the Coherence of International Law* (Brill Nijhoff 2018) (forthcoming)

Martins Paparinskis*

1. Introduction

The starting point for my reflection on general principles and the other sources of international law is the proposition that 'general principles' is the most peculiar source of international law. The sense of peculiarity and associated normative unease has been a theme in the discussion of general principles throughout the last century. In an intervention in the 2017 meeting of the Sixth Committee of the UN General Assembly, the Austrian representative noted that '[t]he source of international law known as "general principles of law" was subject to the most divergent interpretations and needed urgent clarification'.[1] That is not a new concern. The members of the Advisory Committee of Jurists tasked with drafting the Statute of the Permanent Court of International Justice held and articulated significantly different views about the nature and function of what was eventually expressed as 'the general principles of law recognized by civilised nations'.[2]

The exchanges between Descamps, Root, Phillimore, and others in the Advisory Committee show disagreement and confusion,[3] but there is no cause for comfortable retrospective smugness. Uncertainties of the summer of 1920 are to a considerable extent part of the normative fabric of the international legal order 98 years later. To put the point in perspective, it is doubtful that a judge of an international court tasked with taking stock of contemporary customary law[4] or law of treaties would pay much heed to the drafting discussion of the

* Reader in Public International Law, University College London.

1 Sixth Committee, Summary Records of the 18th Meeting, UN Doc A/C.6/72/SR.18 (23 October 2017), para 80.

2 Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice* (CUP 2005) 57-62.

3 Ibid.

4 See the finest doctrinal treatment of the issue, Maurice Mendelson, 'The Formation of Customary International Law' (1998) 272 Hague Recueil 155, 195 ('the members of the Committee did not, on the whole, have a clear idea of what exactly they meant. In any case, they did not do a very good job.') (footnotes omitted), and the qualified acknowledgment in the International Law Commission's (ILC) conclusions adopted in the first reading, Draft Conclusions on Identification of Customary International Law, 'Report of the International Law Commission on the Work of its 68th Session' (2 May–10 June and 4 July–12 August 2016) UN Doc A/71/10, General Commentary 4, fn 237 ('The wording was proposed by the Advisory Committee of Jurists … . While the drafting has been

Advisory Committee[5] -- it would be an understatement to describe the doctrine and practice on sources of international law as having slightly moved on in the last century. Yet 1920 is the starting point for the contributions by Judge Gaja and President Yusuf that bracket this volume.[6] That says something, probably not entirely complementary, about the quality of contribution to the topic of general principles by the entire Versailles and post-Versailles international legal order.[7]

States' observations in the 2017 Sixth Committee on the International Law Commission's (ILC) proposal of 'General Principles of Law' as a new topic provide a good snapshot of contemporary uncertainties and disagreements. Austria put forward a clear argument for drawing a sharp line between other sources and general principles:

> they must be clearly distinguished from the general principles of international law, although they were frequently treated as identical. Whereas the general principles of international law were general normative concepts created by customary international law of treaties, the general principles of law originally resided in the legal framework of national law and acquired their nature as sources of international law only through their acknowledgment as such by States. … It would first be necessary to … distinguish them from other concepts, such as rules or norms.[8]

India's position was equally clear but saw a much closer connection between various sources:

> those principles were already being considered under a number of other topics, including "Identification of customary international law" and "*Jus cogens*". It would therefore be advisable to devise a single topic that would cover the general principles of international law, the identification of customary international law and *jus cogens*, rather than have three separate topics addressing essentially the same thing.[9]

Finally, Sweden (speaking on behalf of the Nordic countries) openly acknowledged the uncertainties:

> that important source of law … in doctrinal discussions had been distinguished from other concepts, such as "general principles of international law" or "fundamental

---

criticized as imprecise, the formula is nevertheless widely considered as capturing the essence of customary international law.').

[5] The Advisory Committee is not mentioned once in the 1966 Commentary to the Draft Articles on the Law of Treaties, ILC, 'Report of the International Law Commission on the Work of its 18th Session' (4 May–19 July 1966) UN Doc A/CN.4/191 187.

[6] Giorgio Gaja, 'General Principles in the Jurisprudence of the International Court of Justice', Section 2; Abdulqawi Ahmed Yusuf, 'Concluding Remarks', para 3.

[7] See Austria's concluding observation that '[t]he uncertainties inherent in the notion of general principles of law had prevented the [International] Court [of Justice] from resorting to those principles explicitly', Sixth Committee, 18th Meeting (2017) (n 1), para 84.

[8] ibid, paras 81, 84.

[9] Sixth Committee, Summary Records of the 19th Meeting, UN Doc A/C.6/72/SR.19 (24 October 2017), para 15.

> principles". Despite that fact, international courts and tribunals had applied, more or less explicitly, "general principles of law" as sources of law.[10]

This is a snapshot and should not be taken to be more than that -- but States' interventions do suggest a lack of obvious cross-cutting consensus on the relationship between general principles and other sources, with both certainties and uncertainties pointing in significantly different directions.

I will discuss the five contributions to Part I against this rather daunting background, and do so in four steps, moving from the general to particular and considering in turn the relationship between general principles and the international legal order (Section 2), customary law (Section 3), treaties (Section 4), and judgments (Section 5). The key question, it seems to me, is this: is the (relative) messiness of general principles A Bad Thing, reflecting the immaturity of this aspect of the international legal architecture, or A Good Thing, providing flexibility to the international legal argument so as to better address challenges of (a particular field of) international law (at a particular stage of development)?

2. General principles and the international legal order

The first and broadest aspect of the relationship addresses the impact of general principles on, as it were, the constitutional architecture of international law. Robert Kolb addresses 'the role of general principle in the unification of the international legal order', suggesting in his chapter on *jus cogens* that '[g]eneral principles are not only substantive. Legal technique devices are also part of their body … . *Jus cogens* is at least partly an issue of legal technique'. Indeed, the 'general international law' language of Article 53 of the Vienna Convention on the Law of Treaties (VCLT) supports the view that general principles can serve as the basis for *jus cogens*[11] (although the discussion of the issue at the ILC and the Sixth Committee has revealed a perhaps surprising degree of divergences[12]). Kolb argues that *jus cogens* may further the unity of the international

[10] Sixth Committee, 18th Meeting (2017) (n 1), para 63.

[11] Draft Conclusions on peremptory norms of general international law (*jus cogens*), ILC, 'Report of the ILC on the Work of the Sixty-ninth Session' (1 May–2 June and 3 July-4 August 2017) UN Doc A/72/10 fn 146, Draft Conclusion 5(2).

[12] ibid, para 173 ('Divergent views were expressed with regard to the role of general principles of law. While many members accepted that general principles could form the basis for *jus cogens,* others recalled the lack of common understanding of the general principles of law that had led members of the Commission to set general principles of law aside at the time of the drafting of article 53 of the 1969 Vienna Convention, and noted that the Commission should accordingly refrain from referring to general principles in its consideration of *jus cogens.* Some members further questioned whether or not State practice supported the status of general principles of law as the basis for *jus cogens* and called for examples thereof.'); 'Report of the International Law Commission on the work of its sixty-ninth

legal order if conceived as a technique of limiting derogations 'upholding the unaltered applicability of the general norm to all its parties', or, as a hierarchy technique, 'fall back into a device for fragmentation and possibly of legal cacophony'. The explanation of the cost of uncertainty that has to be paid for strengthening the primacy of some norms is very fine indeed, and it must be right that, '[a]ccording to the forum chosen and the domain of the law at stake, different "priorities" would be set'. I wonder, though, whether the current international legal order, combining the traditionally decentralized structure with increasingly formalized institutions of dispute settlement, might not be ready to pay that cost. It seems to me that the choice, at least for the more judicialised fields of international law, is not between certainty and uncertainty but, increasingly, between uncertainty in the applicability of rules and uncertainty of their content.[13]

3. General principles and customary international law

The relationship between general principles and customary law gives rise to a number of complicated technical questions of sources of international law, and Paolo Palchetti teases out these subtle points very well indeed. Palchetti first addresses the notion that general principles of domestic law are a 'transitory source' of international law and gives it conditional support: 'there is merit in this view. At the same time, it would be excessive to regard this process of transformation as ineludible. For such a process to take place, the development of a general practice of states supporting the existence of a custom would be required'. The qualification is correct (if perhaps would not apply too commonly in practice[14]). And, of course, State practice will often take concepts derived from domestic legal orders as a starting point, and then either shape them out of all recognition or discard because of their inferior quality by comparison to the native language of international law.[15]

---

session (2017): Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-second session, prepared by the Secretariat' (26 February 2018) UN Doc A/CN.4/713, para 54 ('Divergent views were conveyed with regard to general principles of law, with some delegations in favour of using them as a basis for peremptory norms while others expressed doubts in that regard.').

[13] Cf. uncertainty of content, *Al-Dulimi v Switzerland* App no 5809/08 [GC] (ECtHR, 21 June 2016), paras 137-49; Case C-266/16 *Western Sahara Campaign UK* ECLI:EU:C:2018:118, paras 57-83, and uncertainty of applicability, *Al-Dulimi,* ibid, Concurring Opinion of Judge de Albuquerque and others, paras 33-5, 37; *Western Sahara,* ibid, Opinion of AG Wathelet, ECLI:EU:C:2018:1, Sections V.B, 6.

[14] Fraud as a ground of invalidity of treaties could be an example of a positive rule of international law, based on a general principle, that States have not generally invoked in practice, Gérard Niyungeko, 'Convention of 1969: Article 49' in Olivier Corten and Pierre Klein, *The Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, OUP 2011) 1145-6.

[15] Roger O'Keefe, 'Legal Title versus *Effectivités*: Prescription and the Promise and Problems of Private Law Analogies' (2011) 13 Int'l Community L Rev 147, 188. Lauterpacht's 1920s argument about general principles is

Palchetti also suggests that 'the question of determining whether, or when, a general principle of national law has become part of customary international law seems to be devoid of practical implications'. That must be right, if, as he implies, the principle is adopted into State practice *verbatim* – if, however, State practice shapes it into a rule with different content, the inter-temporal question may become important (with all the problems associated with pinpointing the moment when a customary rule is formed). He also suggests that, due to a lack of hierarchy between general principles and custom, there is little practical significance to the distinction in particular disputes, and 'rules, which have their origin in general principles of national laws but find also some support in the practice of states, continue to be qualified as 'principles' in the case law of international tribunals'. Discussion of estoppel in the *Chagos Marine Protected Area Arbitration* award is a recent example of this practice: the Tribunal emphasised how 'its frequent invocation in international proceedings has added definition to the scope of the principle' but still, with a nod to 'its municipal law counterpart', described estoppel as 'a general principle of law'.[16]

Palchetti also notes the important role of general principles in both identifying and deducing customary rules. That is an important point of systemic cohesion, also taken up elsewhere in the volume.[17] An international legal argument is greatly strengthened if it goes with, rather than against the grain of international law. That is true whether the argument is directed at elaboration of unclear rules or development of new ones.[18]

4. General principles and the law of treaties

Ulf Linderfalk's chapter makes an argument for viewing general principles as principles of international legal pragmatics, with a particular reference to good faith: '[w]hile the principle of good faith builds on the assumption that parties to a treaty act for a reason, it does not itself presuppose the good of any such reason – apart, of course, from the rationality of communication among international law-makers. Its function is tied not so much to a moral or political agenda as to the needs of international legal discourse'. He provides a number of

valuable because of its methodology, but its substance bears little resemblance to current international law, particularly in fields like law of treaties or State responsibility where States have seriously engaged with the topic at the international level, Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans 1927).

[16] *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland* (2015) 31 RIAA 359, paras 435-6.

[17] Mads Andenas and Ludovica Chiussi, 'General Principles: Cohesion and Expansion of International Law', particularly Section III.

[18] Vaughan Lowe, 'The Limits of the Law' (2016) 379 Hague Recueil 26, 28-30; also Vaughan Lowe, 'The Iraq Crisis: What Now?' (2003) 52 ICLQ 859, 862-4.

pertinent examples, including how 'the principle of good faith serves to constrain the exercise of treaty-based discretionary powers'. That is an important constraint, and has been recognised and applied by the ICJ in a number of important judgments, including in recent years.[19]

A related but somewhat different way of approaching the issue would be to inquire whether treaty-makers can be irrational in their communications. For example, Linderfalk notes the established jurisprudence on withdrawal of the ICJ Optional Clause declarations, and suggests that '[t]he discretion conferred on states under Article 36, paragraph 2 [of the ICJ Statute] does not extend as far as to completely negate its purpose'. But the revised declaration submitted by the United Kingdom in 2017 contains language that purports to have precisely that effect (as do the other declarations made in that year).[20] It is also rational to assume that 'no provision should be interpreted in a way that renders it devoid of purport or effect' -- but sometimes 'the parties to a treaty adopt a provision for avoidance of doubt even if such a provision is not strictly necessary'.[21] And many people will view as irrational 'an undertaking in which the applicant party reserves for itself the exclusive right to determine the extent or the very existence of its obligation'[22] – but there may good systemic reasons (or at least arguments) in favour of such rules.[23] Conscious irrationality is, a modest but not entirely irrelevant wrinkle to the argument of rational communication, and seems to me to reinforce rather than undermine Linderfalk's main thesis. Good faith fosters rational communication but does not preclude an irrational message -- the law-maker simply has to run twice as hard to go there.[24]

---

[19] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177, para 145. In the *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, para 87, the Court concluded that an apparently discretionary regulation had to have a legitimate purpose and could not be either discriminatory or unreasonable (note, though, that the rationale of this decision may be limited because the Court was interpreting a bilateral treaty and parties had agreed on issues of principle, ibid, para 86).

[20] Declarations recognizing the jurisdiction of the Court as compulsory: United Kingdom (22 February 2017) <www.icj-cij.org/en/declarations/gb> accessed 1 May 2018, para 2 ('The Government of the United Kingdom also reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added.'); similarly the Netherlands (21 February 2017) <http://www.icj-cij.org/en/declarations/nl> accessed 1 May 2018; Pakistan (29 March 2017) <http://www.icj-cij.org/en/declarations/pk> accessed 1 May 2018, para 2; Equatorial Guinea (11 August 2017) <http://www.icj-cij.org/en/declarations/gq> accessed 1 May 2018, para 2.

[21] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 3, para 43.

[22] *Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9, Dissenting Opinion of Judge Lauterpacht 34, 49. But see James Crawford, 'The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court' (1979) 50 BYBIL 63, 74-5.

[23] *UAE-Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm> accessed 1 May 2018.

[24] Lewis Carrol, *Through the Looking Glass*, and VCLT art 31(4) ('A special meaning shall be given to a term if it is established that the parties so intended'.).

5. General principles and judicial decisions

Do general principles exist outside the courtroom? After all, the Advisory Committee of Jurists drafted what is now Article 38(1)(c) of the Statute of the International Court of Justice to assist adjudicators faced with possible gaps,[25] so it is plausible to inquire whether general principles have a necessary relationship with the exercise of the international judicial function. In the Sixth Committee discussion, some States approached general principles exclusively in judicial terms; El Salvador, for example, suggested that

> in any national, regional or international legal order, courts might be faced with circumstances that were not governed by any conventional norm, custom or legal precedent. In that event, it would be necessary to apply existing precepts of the general principles of law.[26]

Other States saw a closer connection between general principles and international rules generated in the traditional manner of inter-State relations. India's observation that general principles, customary law, and *jus cogens* were 'essentially the same thing' was quoted above,[27] and the US emphasised, perhaps somewhat similarly, the role of State practice.[28] (Without generalising unduly, these submissions are in line with the plausible expectation that States, if particularly effective in shaping international law through practice, will be sceptical about rules and means for their determination that downplay the role of practice[29] – and, of course, *vice versa,* because every State plays to their strength or at least against their weakness.)

What, then, is the relationship between the judicial and inter-State aspects of elaboration of general principles? In his chapter on the juridical nature of general principles, Johann Ruben Leiss acknowledges the relevance of both perspectives: 'recognition of general principles within international adjudication seems sufficient at least at the initial stage of a principle's formation. … For the further development and further prospect of the general principle, reactions by states, however, remain the reference …'. That is an important point, and the

[25] Hersch Lauterpacht, '"Non Liquet" and the Completeness of the Law' in *Symbolae Verzijl* (Martinus Nijhoff 1958) 196, 205-6.
[26] Sixth Committee, 19th Meeting (2017) (n 9), para 33.
[27] N 9.
[28] Sixth Committee, Summary Records of the 21st Meeting, UN Doc A/C.6/72/SR.21 (25 October 2017), para 32 ('it was concerned that there might not be enough State practice for the Commission to reach any helpful conclusions on the topic').
[29] E.g. the US attitude to determination of customary law, George H Aldrich, 'Customary International Humanitarian Law – An Interpretation on Behalf of the International Committee of the Red Cross' (2005) 76 BYBIL 503; *Lone Pine Resources Inc. v Canada,* ICSID Case no UNCT/15/2, Submission of the US, 16 August 2017, paras 23-30.

example of precautionary principle illustrates the importance of States' positions.[30] But is the importance of States' reactions in some way limited to general principles, perhaps because of the limited involvement of States in their formation? Or is it a particular application of the general technique by which the international legal process deals with international judicial decisions on all sources? After all, courts leapfrog;[31] States react. It is the latters' choice to endorse enthusiastically, grudgingly acquiesce in, ignore, or reject judicial developments that matter at the end of the day, whether these developments are related to general principles or to treaties and customary law.

Enrico Milano's chapter addresses an important aspect of judicial engagement with general principles in the law of remedies, considering 'different functions that equity and equitable considerations play in the identification of appropriate remedies for violations of international law in inter-State relations.' The contribution is timely: as the ICJ recently noted in concluding its summary of legal principles applicable to compensation:

> In respect of the valuation of damage, the Court recalls that the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage. For example, in the *Ahmadou Sadio Diallo* case, the Court determined the amount of compensation due on the basis of equitable considerations.[32]

In relation to moral damages, Milano notes the functions of forensic efficiency and distributive justice in determination of amounts of compensation. That seems to me to be correct, and the recent award in *Arctic Sunrise* has emphasised the methodological importance of comparison of instances of application as a means of contributing to consistency and coherence.[33] On material damages, Milano points to instances in judicial practice where equity may have resulted in diminished compensation. These are passages that will repay careful perusal, both because of their conceptual importance[34] and also the possibility of considerable practical impact in

---

[30] See, most recently, positions by Pakistan and India in the Partial Award, *Award in the Arbitration regarding the Indus Waters Kishenganga between Pakistan and India* (2013) 31 RIAA 55, paras 223, 227 ('India disputes Pakistan's position that a precautionary approach is mandated by the applicable customary law. According to India, "some major countries take the strongly held view that precaution is not customary international law"').

[31] Eyal Benvenisti, 'Customary international law as a judicial tool for promoting efficiency' in Eyal Benvenisti and Moshe Hisch (eds), *The Impact of International Law on International Cooperation: Theoretical Perspectives* (CUP 2009).

[32] *Certain Activities Carried out by Nicaragua in the Border Sea (Costa Rica v Nicaragua)* (Compensation owed by Nicaragua to Costa Rica) [2018] Judgment of 2 February 2018, para 35.

[33] *In the Matter of the Arctic Sunrise Arbitration (The Netherlands v Russia),* PCA Case no 2014-02, Award on Compensation, 10 July 2017, paras 74-84.

[34] Cf. 1996 ILC Draft Articles on responsibility of States for internationally wrongful acts art 42(3) ('In no case shall reparation result in depriving the population of a State of its own means of subsistence'); and the lack of such a provision in 2001 ILC Articles on State responsibility for internationally wrongful acts, James Crawford, *State Responsibility: The General Part* (CUP 2013) 481-5.

international dispute settlement, both for pending inter-State cases[35] as well as the work of international tribunals that deal with States responsibility invoked by non-State actors.[36] Milano also addresses the point noted in the Court's quote above, and explains *Diallo,* rightly in my view, as a case where 'equity was employed to calculate compensation for material damage, when the latter can be inferred from contextual circumstances'.[37] There is much to appreciate in this fine chapter, both in terms of technical skill and broader jurisprudential and policy considerations that frame the discussion.

6. Conclusion

To return to the question posed in the introduction: is the messiness of general principles A Bad Thing or A Good Thing? In a typically lawyerly fashion, my answer is 'both': much depends on the level of analysis. I cannot see how it can contribute to the quality of individual instances of interpretation and application of international law, particularly within the more formalised settings for peaceful settlement of international disputes. The Johannesburg Report of the International Law Association's Study Group on the Use of Domestic Law Principles in the Development of International Law makes the point in the following terms (the section addresses international arbitration, but the sentiment may be applicable more generally):

> Domestic law principles play a role in modern international arbitrations, and it is not an insignificant one. But it is important to be clear about whether tribunals are really relying on domestic law principles in the technical sense of the term, and why they are doing it. In many – most – cases where the term 'principles' is employed, they are not domestic law principles but rules expressed directly at the level of international law, be they rules of treaty law, the law of State responsibility, particular primary obligations, or principles of general international law. Similarly, in many cases where 'domestic law' is relied upon, it is not used to develop international law but to resolve a particular dispute that partly hinges on the domestic law of a litigating party, particularly likely in investor-State arbitration.
>
> Once these irrelevancies are disposed of, it is possible to concentrate on the cases that actually engage with general principles of domestic law. … At the end of the day, principles of domestic law have a role to play – sometimes a very important one – but one that should not be viewed in isolation from the development of international law that takes place directly at the international level through treaties, customary law, and general principles of international law.[38]

[35] *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Order of 6 December 2016) [2016] ICJ Rep 1135.
[36] *Burlington Resources, Inc v Ecuador,* ICSID Case no ARB/08/5, Decision on Stay of Enforcement of the Award, 31 August 2017, paras 79-86.
[37] See a similar reading in *Arctic Sunrise* (n 33), para 98.
[38] *Report of the Seventy-Seventh Conference of the International Law Association* (ILA 2017) 1118, paras 78-9.

It would be troubling if international dispute settlement bodies were to leave aside queries of treaty interpretation or determination of customary law – quite possibly hard but perfectly solvable through diligent application of the vocabulary of international law -- with a perfunctory nod to general principles, whether of domestic or international variety. General principles are not alchemy, if I may respectfully paraphrase Judge Greenwood's declaration in *Diallo* (quoted by Milano).[39]

At a systemic level, however, it is easier to sympathise with the challenge of setting out clear rules of recognition that would capture the variety of possible legal relationships between general principles and other sources. Three examples will illustrate that complexity: *pacta sunt servanda,* estoppel, and unilateral acts, and I will approach them in the reverse order. If one takes the pronouncement on unilateral acts in *Nuclear Tests* seriously,[40] some general principles are capable of providing a basis for new sources of international law – a proposition that will operate, as Malgosia Fitzmaurice notes, only in very rare circumstances in practice,[41] but a point of fundamental systemic importance nevertheless. Secondly, estoppel, as discussed in the *Chagos* award, shows the variety of sources that may shape a general principle: 'municipal law', coming in, as it were, from below; 'general requirement that States act in their mutual relations in good faith' from above; and 'jurisprudence' in 'international proceedings' that 'added definition to the scope of the principle'.[42] Thirdly, the principle of *pacta sunt servanda* is nowadays mostly viewed, it seems to me, as logically inevitable (or natural, if one is so inclined):[43] in the words of Gerald Fitzmaurice, '[i]t could neither not be, nor be other than what it is'.[44] But relatively recently – by the standard of epochs of international law – whether and what *pacta sunt servanda* was *was* a question, and indeed one of the great questions of international politics (AJP Taylor devotes two pages of his treatise on European international relations to explaining how war and peace turned on its explicit confirmation in the international conferences of 1870s[45]).

---

[39] *Ahmadou Sadio Diallo (Guinea v DRC)* (Compensation) [2012] ICJ Rep 324, Declaration of Judge Greenwood 391, para 5 ('equity is not alchemy').
[40] *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, paras 42-6.
[41] Malgosia Fitzmaurice, 'The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 179, 196-7.
[42] *Chagos* (n 16), paras 435-8.
[43] See Attila Tanzi, who describes *pacta sunt servanda* as a foundational principle of the legal order, partaking aspects of law and morality, social awareness and legal process, Attila Tanzi, *Introduzione al diritto internazionale contemporaneo* (5th edn, CEDAM 2016) 115.
[44] Gerald Fitzmaurice, 'The Formal Sources of International Law' in *Symbolae Verzijl* (Martinus Nijhoff 1958) 153, 164.
[45] AJP Taylor, *The Struggle for Mastery in Europe: 1848-1918* (OUP 1954) 215-6, also Hersch Lauterpacht (ed), *Oppenheim's International Law: Peace* (Volume I, 8th edn, Longmans 1955) 943-4.

It would not be easy to draft a description of the law-making process that both explains these examples and is set at a level of specificity helpful for addressing future challenges. There is something to be said, therefore, for not excessively constraining the systemically important effects of general principles, so as to enable them to address such challenges that the legal order may face at a particular stage of development of the international society. I do not doubt that reasonable people may disagree about either or both of these concluding points (or indeed the line to be drawn between them). But the quality of their disagreement will only be improved by reading the very fine chapters contained in this part.