

Chapter 15

General Principles of Law and International Law-Making

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12 Introduction

14 General principles of law are frequently ranked among the most controversial 14
15 categories of international law. Nearly each and every important parameter of 15
16 these principles has induced prolonged and intense academic debates ever since 16
17 the advisory committee of distinguished jurists entrusted with the preparation of 17
18 a report on the Statute of the Permanent Court of International Justice decided 18
19 nine decades ago to include ‘the general principles of law recognized by civilized 19
20 nations’ in the catalogue of sources that would be applied by the future judicial 20
21 organ.¹ In the spirit of expediency and positive experiences, a quarter-century later 21
22 the drafters of the Statute of the International Court of Justice took over from the 22
23 preceding document the provision on applicable sources in an identical shape, save 23
24 for a minor specifying addendum.² Nevertheless, it remains a matter of debate 24
25 whether general principles of law form part of positive law or natural law, originate 25
26 from domestic law or international law, carry a distinctively private law or public 26
27 law content, possess a subsidiary or supreme character, qualify as an independent 27
28 source of international law, and occupy a separate, if any, position in the 28
29 international legal order. Finally, the methods and conditions of their international 29
30 applicability likewise yield much disagreement in the scholarly community.³ 30

31 This chapter merely seeks to examine whether general principles of law 31
32 constitute a source of international law, and by what legislative means they 32
33 might achieve that status. The following investigation is based on the assumption 33
34 that general principles – this complex set of private and public, substantive and 34
35 procedural rules, such as the principle of equity, the prohibition of abuse of rights, 35
36 the prohibition of unjust enrichment, the protection of acquired rights, the principle 36
37 of reparation, *res iudicata*, *audiatur et altera pars* or *pacta sunt servanda* – belong 37
38 to the domain of positive law and originate from domestic law. Hence these rules 38
39 should not be deemed equivalent to the so-called ‘principles of international law’, 39
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41 1 Statute of the Permanent Court of International Justice, Article 38, paragraph 3. 41

42 2 Statute of the International Court of Justice, Article 38, paragraph 1, sub-paragraph c). 42

43 3 B. Cheng, *General Principles of Law, as Applied by International Courts and* 43
44 *Tribunals*. Reprint (Cambridge: Cambridge University Press, 1994), 2–5. 44

1 such as the sovereign equality of states, the prohibition of threat or use of force, 1
2 the prohibition of intervention, the peaceful settlement of international disputes 2
3 and the right to self-determination of peoples. Nor should they be seen as totally 3
4 synonymous with the ‘general principles of international law’, ‘principles of 4
5 international organizations’, ‘principles of transnational law’ and ‘principles of 5
6 supranational law’. Though these latter categories may occasionally overlap with 6
7 general principles of law, it is but a terminological anomaly that does not have 7
8 any significance here.⁴ 8

9 International lawyers have been divided over the questions in the focus of our 9
10 investigation from the outset. The negative position typically holds that general 10
11 principles originating from domestic law cannot be categorized as a source of 11
12 international law, as they were not created by the concurrent wills of two or more 12
13 states to govern their international relations. Their international application is 13
14 based on a special rule of customary law that authorizes international judicial 14
15 organs, with a view to avoid *non liquet*, to resort, by way of analogy, to principles 15
16 borrowed from the technically more advanced national legal systems in the 16
17 settlement of disputes, where gaps in the system of international law would 17
18 otherwise render a decision impossible. That rule of authorization was codified 18
19 in Article 38, paragraph 3, of the Statute of the Permanent Court of International 19
20 Justice and Article 38, paragraph 1, sub-paragraph c) of the Statute of the 20
21 International Court of Justice.⁵ 21

22 Incontestably, the abstract and general principles at issue spring from the 22
23 legislative will of a single state, derive from a multitude of specific interconnected 23
24 legal norms, permeate the entirety or segments of the legal system, and are meant 24
25 to regulate domestic social relations, and to provide guidelines for national law- 25
26 making and law enforcement. These features obviously do not match those of the 26
27 sources of international law. However, it would lead to premature and tenuous 27
28 results, if we ceased our investigation here, relying on a brief and superficial 28
29 analysis of the problem. In order to answer the question concerning their nature 29
30 as a source of international law, we must disregard the peculiar formation and 30
31 characteristics of general principles. Instead, it should be thoroughly examined 31
32 whether there has been any legislative act in the international level after the 32
33 domestic consolidation of these principles, which made them an independent 33
34 source of international law. 34

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37 4 For more details, see, G. Sulyok, ‘General Principles of Law as a Source of 37
38 International Law’, in *International Law – A Quiet Strength (Miscellanea in memoriam 38*
39 *Géza Herczegh)*, ed. P. Kovács (Budapest: Pázmány Press, 2011), 166–68. 39

40 5 G. Herczegh, *General Principles of Law and the International Legal Order 40*
41 (Budapest: Akadémiai Kiadó, 1969), 97–100. See also, H. Bokor-Szegő, ‘Les principes 41
42 généraux du droit’, in *Droit international: bilan et perspectives*, vol. 1, ed. M. Bedjaoui 42
43 *A Critical Analysis of Its Fundamental Problems, with Supplement* (London: Stevens & 43
44 Sons Ltd, 1951), 533. 44

1 Reception of General Principles of Law

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3 Erstwhile literature suggests that the necessity to apply domestic legal rules, as a
4 separate source of law, to the international conduct of states had already surfaced
5 in the period of traditional international law. In the nineteenth century these rules
6 had been supplied by internationally relevant municipal laws and regulations of
7 selected states,⁶ but at the beginning of the twentieth century their place was taken
8 over, for various theoretical and practical reasons, by ‘the general principles of law
9 recognized by civilized nations’.⁷ Thus the development of international law has
10 and does not terminate the need for assistance by the technically more advanced
11 national legal systems. The explanation lies in the paradoxical effects of progress:
12 while the growth of conventional and customary law decreases the number of gaps
13 and the value of domestic legal solutions, the expansion of legal regulation to new
14 fields generates new gaps, and maintains the demand for provisions originating
15 from domestic law.

16 If the picture canvassed by scholars of traditional international law broadly
17 corresponds to past realities, the elevation of certain rules of national legal
18 systems, including general principles of law, to the international level primarily
19 served to more comprehensively govern the international conduct of states in
20 fields inadequately regulated by other sources of law rather than to facilitate the
21 settlement of disputes submitted to international judicial organs by the prevention of

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23 6 See, for example, J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten*
24 *als Rechtsbuch dargestellt* (Nördlingen: C.H. Beck’schen, 1868), 58–59; C. Calvo, *Le*
25 *droit international théorique et pratique, précédé d’un exposé historique des progrès de la*
26 *science du droit des gens*, 4th edn, vol. 1 (Paris – Berlin: Guillaumin et Cie – Puttkammer et
27 Mühlbrecht, 1887), 161–62; P. Fiore, *Nouveau droit international public, suivant les besoins*
28 *de la civilisation moderne*, 2nd edn, vol. 1 (Paris: G. Pedone-Lauriel, 1885), 158–59; F.
29 von Holzendorff and A. Rivier, *Introduction au droit des gens: recherches philosophiques,*
30 *historiques et bibliographiques* (Hamburg: Verlagsanstalt und Druckerei AG, 1889), 83;
31 T.J. Lawrence, *The Principles of International Law* (Boston: D.C. Heath and Co, 1895),
32 105–06; F.F. Martens, *Traité de droit international* (Paris: A. Chevalier-Marescq, 1883),
33 252–53; P.L.E. Pradier-Fodéré, *Traité de droit international public européen & américain,*
34 *suivant les progrès de la science et de la pratique contemporaines*, vol. 1 (Paris: G. Pedone-
35 Lauriel, 1885), 88–89; H. Wheaton, *Elements of International Law, with a Sketch of the*
36 *History of the Science* (Philadelphia: Carey, Lea and Blanchard, 1836), 49.

37 7 See, for example, E.M. Borchard, ‘The Theory and Sources of International Law’,
38 in *Recueil d’études sur les sources du droit en l’honneur de François Gény*, vol. 3 (Paris:
39 Sirey, 1934), 354–56; L. Le Fur, ‘La coutume et les principes généraux du droit comme
40 sources du droit international public’, *ibid.*, 366–72; A. Verdross, ‘Les principes généraux
41 du droit comme source du droit des gens’, *ibid.*, 383–86; C. de Visscher, ‘Contribution à
42 l’étude des sources du droit international’, *ibid.*, 395–98. See also, H. Lauterpacht, *Private*
43 *Law Sources and Analogies of International Law, with Special Reference to International*
44 *Arbitration* (London: Longmans, Green, and Co, 1927), 69–71; J.B. Scott, ed., *The*
45 *Proceedings of the Hague Peace Conferences: The Conference of 1907*, vol. 1 (New York:
46 Oxford University Press, 1920), 351.

1 *non liquet*.⁸ That presupposes international law-making, even if its exact course and 1
2 date can hardly be ascertained from the distance of approximately one and a half 2
3 centuries. Its occurrence is confirmed by its results only: the disturbingly chaotic 3
4 literary reflections and the vague remarks made by international judicial organs. 4

5 However, it causes little difficulty to outline the hypothesis of a law-making 5
6 process culminating in the international recognition of general principles of law. 6
7 This process is arguably based on an automatism, the beginning of which is 7
8 marked by the emergence of a customary rule of reception. Accordingly, states 8
9 accept, without exhaustive enumeration or further measures, principles originating 9
10 from domestic law as an integral part and unwritten source of international law, 10
11 if they are generally recognized and suitable to govern international relations. 11
12 Following the emergence of the rule of reception, the incorporation of general 12
13 principles takes place automatically, provided that the two conjunctive conditions 13
14 are met. The fulfilment of these conditions is continuously ‘verified’ by the rule of 14
15 reception, as it will be displayed later with regard to the question of termination. 15
16 (It may be inferred by exclusion of other possibilities that the rule of reception 16
17 forms part of universal customary law. Simply put, it could not have come into 17
18 existence in any other way.) 18

19 The requirement of general recognition does not imply that a principle has 19
20 to exist in the domestic law of every state in the world. Notwithstanding that the 20
21 reference to ‘civilized nations’ in the Statute of the International Court of Justice 21
22 is utterly obsolete and rightly criticized,¹⁰ it seems sufficient, if the dominant legal 22
23 systems of principal families of law accept a provision with identical or similar 23
24 content.¹¹ Notably, this allegation may prove implausible for extreme positivists, 24
25 who have been reluctant to regard general principles of law as a source of law, unless 25
26 they are recognized by every state, claiming ‘those are the rules of international 26

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33 8 ‘The general principles of law, therefore, permanently rectify a more primitive law 29
34 in the spirit of a more advanced and progressive law.’ J. Csiky, *Az általános jogelvek, mint 30
35 a nemzetközi jog forrása [General Principles of Law as a Source of International Law]* 31
36 (Szeged: Szeged Városi Nyomda és Könyvkiadó, 1934), 43. (Emphasis omitted.) 32

33 9 In the past, a less-known scholar also traced back the legal nature of general 33
34 principles of law to customary law, but he did not hypothesize the existence of a rule of 34
35 reception. Instead, he suggested that customary law behaved as ‘a source of law, which 35
36 designates another source of law’. Csiky, *Az általános jogelvek, mint a nemzetközi jog 36
37 forrása [General Principles of Law as a Source of International Law]*, 21–22. 37

38 10 *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark)* 38
39 (*Federal Republic of Germany/Netherlands*), Judgment of 20 February 1969, ICJ Reports 39
40 1969, Separate Opinion of Judge Fouad Ammoun, 132–34. Cf. *Reparation for Injuries 40
41 Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ 41
42 Reports 1949, Dissenting Opinion by Judge Krylov, 219.

42 11 Distant similarities can be revealed in this respect between general principles 42
43 of law and ancient Roman *ius gentium*. Gaius, *Institutionum commentarii quattuor*, I.1; 43
44 *Digest*, 1.1.9. 44

1 law only, to which states in some way consent'.¹² Yet such an interpretation of
 2 general recognition is dubious, as it looks for the intentions of states in the wrong
 3 place, and erroneously confounds their domestic and international legislative
 4 wills. The international legislative will that manifests itself in the rule of reception
 5 and elevates general principles to the international level is not an aggregate or
 6 a reflection of domestic legislative wills that originally establish the principles
 7 concerned. These wills prevail in different realms, pursue different objectives,
 8 and carry different contents. Hence the internationally relevant manifestation of
 9 legislative intention and engagement should be sought not in domestic law, but in
 10 the rule of reception, which does not demand recognition by every state for the
 11 elevation of a principle to the international level. Indications are that it is enough,
 12 if the dominant legal systems of principal families of law accept it with identical
 13 or similar content. The verification of general recognition calls for the application
 14 of the comparative method,¹³ but in the procedure of the International Court of
 15 Justice, a consensus among judges representing the main forms of civilization and
 16 the principal legal systems of the world might as well suffice.¹⁴

17 The requirement of suitability to govern international relations must likewise
 18 be interpreted in a flexible manner. This condition merely implies that a domestic
 19 provision, which is to be reckoned as a general principle, must be capable of
 20 producing effects on the international plane in view of the similarities between
 21 the typical behaviour of private persons and states. Once these conditions are met,
 22 a principle is elevated to the international level, albeit its content is at this point

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27 12 Csiky, *Az általános jogelvek, mint a nemzetközi jog forrása [General Principles of*
 28 *Law as a Source of International Law]*, 15. (Emphasis omitted.)

29 13 It has been submitted that this process consists of two operations. The vertical
 30 move involves the abstraction of legal principles from domestic rules; the horizontal move
 31 involves the verification of general recognition of principles thus obtained. F.O. Raimondo,
 32 *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*
 33 (Leiden – Boston: Martinus Nijhoff, 2008), 45 *et seq.* The process has also been described
 34 as a threefold test comprising the verification of general character, recognition by civilized
 35 nations and capability of being incorporated into international law. M. Bos, *A Methodology*
 36 *of International Law* (Amsterdam – New York – Oxford: North-Holland, 1984), 262. See
 37 also, M.C. Bassiouni, 'A Functional Approach to "General Principles of International Law"',
 38 *Michigan Journal of International Law* 11, no. 3 (1990): 809–16; B. Conforti, *International*
 39 *Law and the Role of Domestic Legal Systems* (Dordrecht: Martinus Nijhoff, 1993), 64–65. It
 40 is essential to prevent imbalances caused by the dominance of world languages, especially
 41 English and French, in the course of the process. C. Tomuschat, 'International Law:
 42 Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public
 43 International Law', *Recueil des Cours* vol. 281 (1999): 339.

44 14 Statute of the International Court of Justice, Article 9. Cf. *Anglo-Iranian Oil Co.*
 45 *Case (United Kingdom v Iran)*, Preliminary Objection, Judgment of 22 July 1952, ICJ
 46 Reports 1952, Dissenting Opinion of Judge Levi Carneiro, 161.

1 still extremely abstract and raw. It is primarily the task of the judiciary to disclose, 1
2 specify and elaborate on that content.¹⁵ 2

3 Even though the process under deliberation rests on a rule of customary law, 3
4 it does not yield as an outcome new customary norms, for it is not a convergence 4
5 of general practice and *opinio iuris* of states that creates the domestic provisions 5
6 elevated to the international level. In fact, states endeavoured by the establishment 6
7 of the rule of reception to fill the gaps of conventional and customary law by 7
8 generally recognized domestic principles capable of governing international 8
9 relations. Consequently, on account of its gap-filling function and the differences of 9
10 various law-making processes, the rule of reception incorporates general principles 10
11 of law into the system of international law as an independent source of law rather 11
12 than as customary law. This surely does not preclude a subsequent conventional 12
13 or customary reaffirmation of certain principles,¹⁶ but it will affect neither their 13
14 nature as general principles of law nor the independence of this unique source of 14
15 law. Similar intertwinements regularly occur between conventional and customary 15
16 international law without any bearing on their respective self-identities.¹⁷ 16

17 Due to the exceptionally high degree of abstraction of general principles, their 17
18 effects can barely be perceived in everyday life: upon the examination of the 18
19 conduct of members of the international community, we much earlier and more 19
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21 15 Cf. ‘International law has recruited and continues to recruit many of its rules 21
22 and institutions from private systems of law. [...] The way in which international law 22
23 borrows from this source is not by means of importing private law institutions “lock, stock 23
24 and barrel”, ready-made and fully equipped with a set of rules. It would be difficult to 24
25 reconcile such a process with the application of “the general principles of law”. In my 25
26 opinion, the true view of the duty of international tribunals in this matter is to regard any 26
27 features or terminology which are reminiscent of the rules and institutions of private law 27
28 as an indication of policy and principles rather than as directly importing these rules and 28
29 institutions’. *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, 29
30 ICJ Reports 1950, Separate Opinion by Sir Arnold McNair, 148. 30

31 16 G. Gaja, ‘General Principles of Law’, in *The Max Planck Encyclopedia of Public* 31
32 *International Law*, vol. 4, ed. R. Wolfrum (Oxford: Oxford University Press, 2012), 375. 31
33 It is often regarded as a fundamental function of general principles of law to facilitate 32
34 the development of international law. Cheng, *General Principles of Law, as Applied by* 33
35 *International Courts and Tribunals*, 39; Herczegh, *General Principles of Law and the* 34
36 *International Legal Order*, 116; P. Kovács, *A nemzetközi jog fejlesztésének lehetőségei* 35
37 *és korlátai a nemzetközi bíróságok joggyakorlatában [The Perspectives and Obstacles of* 36
38 *the Development of International Law in the Practice of International Courts]* (Budapest: 37
39 Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar, 2010), 85–88; Raimondo, 38
40 *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, 39
41 50. See also, M. Bartoš, ‘Transformation des principes généraux en règles positives du 40
42 droit international’, in *Mélanges offerts à Juraj Andrassy*, ed. V. Ibler (La Haye: Martinus 41
43 Nijhoff, 1968), 1–12; W. Friedmann, ‘The Uses of “General Principles” in the Development 42
44 of International Law’, *American Journal of International Law* 57, no. 2 (1963): 279–99. 42

43 17 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v* 43
44 *United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, 93–96. 44

1 easily come across a relevant conventional or customary norm, than a general 1
2 principle of law, as the former relates to the latter as *lex specialis* relates to *lex* 2
3 *generalis*. Therefore, these provisions mostly surface in judicial proceedings, when 3
4 judges encounter gaps in the law during the peaceful settlement of international 4
5 disputes. It is no coincidence that the literature of general principles of law focuses 5
6 on the practice of international judicial organs, as their existence, contents and 6
7 effects are best observable in that field. Otherwise, these provisions are not a 7
8 particularly effective source of international law.¹⁸ 8

9 It should be added that the customary rule of reception is not identical to the 9
10 rule of authorization, as codified in Article 38, paragraph 3, of the Statute of the 10
11 Permanent Court of International Justice and Article 38, paragraph 1, sub-paragraph 11
12 c) of the Statute of the International Court of Justice, which permits international 12
13 judicial organs to resort to general principles of law by way of analogy. The rule of 13
14 reception precedes the rule of authorization in terms of both the time of formation 14
15 and the logic of functioning. That leads to two further conclusions. First, the rule of 15
16 authorization sanctions the application of international law rather than domestic law. 16
17 Second, it was not the cited statutes that established the general principles of law – 17
18 these documents only rendered them applicable in the procedure of the two courts. 18

19 Let us recall at this point a remark made by the Permanent Court of International 19
20 Justice that portrayed municipal laws as mere facts from the standpoint of 20
21 international law.¹⁹ If we project this statement to Article 38, paragraph 3, of 21
22 the Statute of that court, it becomes evident that ‘the general principles of law 22
23 recognized by civilized nations’, considered by several prominent drafters of the 23
24 document as provisions originating from national legal systems, could be important 24
25 for the judicial settlement of international disputes insofar as they were applied in 25
26 their international rather than domestic legal capacity. Article 38, paragraph 1, of 26
27 the Statute of the International Court of Justice explicitly confirms this assessment 27
28 by virtue of the sole amendment to the text of the former provision, as a result 28
29 of which the sentence introducing the catalogue of applicable sources, including 29
30 general principles of law, now reads as follows: ‘The Court, whose function is to 30
31 decide *in accordance with international law* such disputes as are submitted to it, 31
32 shall apply [...]’.²⁰ (It reaffirms the disparity of the rule of reception and the rule 32
33 of authorization, as well.) 33

34 The significance of the highlighted reference to international law has at times 34
35 been rejected on the basis that it does not prove that general principles of law truly 35
36 constitute a source of international law.²¹ This approach obviously contradicts the 36

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39 18 G.J.H. van Hoof, *Rethinking the Sources of International Law* (Deventer: Kluwer, 39
40 1983), 146–48.

41 19 *German Interests in Polish Upper Silesia (Germany v Poland)*, Judgment No. 7, 40
42 25 May 1926, PCIJ Series A, No. 7, 19.

43 20 Statute of the International Court of Justice, Article 38, paragraph 1. (Emphasis 42
43 added.) 43

44 21 Cf. Herczegh, *General Principles of Law and the International Legal Order*, 18–19. 44

1 basic rules of treaty interpretation, and may lead to other misconceptions.²² These 1
2 misconceptions include, for example, the parallel treatment of the application 2
3 of general principles and the choice of law method, claiming that both point 3
4 towards a foreign legal system as seen from the perspective of the forum applying 4
5 the law. This parallel has far-reaching consequences. It amounts to a denial of 5
6 general principles of law as a source of law to regard their application as a special 6
7 manifestation of the choice of law method, for that method does not entail the 7
8 incorporation of foreign legal rules into the law of the forum.²³ However, it 8
9 requires little effort to explore the fundamental differences in the respective bases, 9
10 techniques and normative backgrounds of the application of general principles 10
11 and foreign legal rules, and in the contents and characteristics of the provisions 11
12 invoked. Therefore, no matter how appealing this parallel may appear, it can be 12
13 challenged along several dimensions, and has to be deemed unsubstantiated. 13

14 Finally, we need to counter a negative position, which maintains that, in spite 14
15 of the identical wording, the sub-paragraph of the Statute of the International 15
16 Court of Justice concerning general principles of law has a meaning different 16
17 from that of the Statute of the Permanent Court of International Justice due 17
18 to the divergent historical circumstances prevailing at the time of adoption of 18
19 the two documents.²⁴ Though historical interpretation is a universally accepted 19
20 supplementary means of interpretation of international treaties,²⁵ the *travaux* 20
21 *préparatoires* of the statutes do not support this allegation. Nor can a fundamental 21
22 change of circumstances explain the alleged modification of the original content 22
23 of the provision, because the wording, as already mentioned, was deliberately left 23
24 unaltered in light of positive experiences. 24

25 Beyond the introductory sentence of Article 38, paragraph 1, of the Statute 25
26 of the International Court of Justice, miscellaneous other pieces of indirect 26
27 evidence too attest that general principles of law constitute an independent source 27
28 of international law. These pieces of evidence include the law of the European 28
29 Union, a legal order distinct from both international law and the national legal 29
30 systems of member states, where the development of law and the strengthening 30
31 of integration necessitated the recognition of general principles of law as a source 31
32 of law. The European Court of Justice has played an instrumental role in the 32
33 process. Notwithstanding that the founding treaties do not expressly authorize 33
34 the application of general principles, there is widespread agreement that the legal 34
35 basis of this practice can be derived from Article 19, paragraph 1, of the Treaty 35

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40 22 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Article 31, 40
41 paragraphs 1 and 4.

42 23 Cf. Herczegh, *General Principles of Law and the International Legal Order*, 99. 41

43 24 G.I. Tunkin, *A nemzetközi jog elméletének kérdései [Questions of the Theory of 42
43 International Law]* (Budapest: Közgazdasági és Jogi Könyvkiadó, 1963), 154.

44 25 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Article 32. 44

1 on European Union, and Articles 263 and 340, paragraph 2, of the Treaty on the
2 Functioning of the European Union.²⁶ 2

3 The European Court of Justice has taken into account the domestic laws of 3
4 member states, the law of the European Community, and later the law of the 4
5 European Union, and international law, especially the European regime of human 5
6 rights protection, for the determination and application of general principles of law. 6
7 Several groups of principles have so crystallized, but a consensus on their exact 7
8 boundaries has not been reached yet. Nevertheless, the extensive case law of the 8
9 body indicates that general principles of law that have been incorporated into the 9
10 law of the European Union include, for example, the respect for fundamental rights,²⁷ 10
11 the prohibition of discrimination,²⁸ the protection of legitimate expectation,²⁹ the 11
12 requirement of effective judicial control,³⁰ the prohibition of retroactive effect,³¹ *ne* 12
13 *bis in idem*³² and *pacta sunt servanda*.³³ The founding treaties, on the other hand, 13
14 scarcely contain explicit references to general principles. Such references can be 14
15 found in Article 6, paragraph 3, of the Treaty on European Union, concerning the 15
16 protection of fundamental rights, and Article 340, paragraphs 2 and 3, of the Treaty 16
17 on the Functioning of the European Union, concerning the obligation to make 17
18 good any damage caused by the institutions or their servants in the performance 18
19 of their duties.³⁴ 19

20 General principles of law undoubtedly rank among the primary sources of 20
21 the law of the European Union, and possess a ‘constitutional status’.³⁵ Knowing 21
22 that the development of the law of the European Union has been greatly inspired 22

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25 26 O.J. C 326, 26.10.2012, 27, 162–63, 193. 25

26 27 C-29/69, *Erich Stauder v City of Ulm, Sozialamt* [1969] ECR 419; C-11/70, 26
27 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und* 27
28 *Futtermittel* [1970] ECR 1125; C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v* 28
29 *Commission of the European Communities* [1974] ECR 491. 29

30 28 C-20/71, *Luisa Sabbatini, née Bertoni v European Parliament* [1972] ECR 345; 29
31 C-149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* 30
32 [1978] ECR 1365. 31

32 29 C-112/77, *August Töpfer & Co. GmbH v Commission of the European Communities* 32
33 [1978] ECR 1019. 33

34 30 C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* 34
35 [1986] ECR 1651. 35

36 31 C-63/83, *Regina v Kent Kirk* [1984] ECR 2689. 36

37 32 C-14/68, *Walt Wilhelm and Others v Bundeskartellamt* [1969] ECR 1. 37

38 33 C-162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655. 38

39 34 O.J. C 326, 26.10.2012, 19, 193. 39

40 35 Opinion of Advocate General Trstenjak, delivered on 30 June 2009, C-101/08, 40
41 *Audiolux SA e.a. v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG* 41
42 *and Others* [2009] ECR I-9823, para. 70. See also, C-101/08, *Audiolux SA e.a. v Groupe* 41
43 *Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* [2009] ECR 42
44 I-9823, para. 63. For more details, see, T. Tridimas, *The General Principles of EU Law*, 2nd 43
44 edn (Oxford – New York: Oxford University Press, 2006). 44

1 by international law, the recognition as a source of law of general principles 1
 2 partly derived from the national legal systems of member states should not be 2
 3 underestimated regardless of the particular circumstances. If this process came 3
 4 to pass in a short period of time in the European legal order, it could also have 4
 5 easily happened in the considerably older and in many ways standard-setting 5
 6 international law. The special features of the law of the European Union do not 6
 7 undermine the validity of this assumption. Thus it seems permissible to draw a 7
 8 parallel between international law and the law of the European Union as regards 8
 9 their attitude towards the general principles of law. 9

10 Elements of the practice of international organizations and institutions and 10
 11 states likewise indirectly prove that general principles of law constitute a source 11
 12 of international law. For example, the Secretary-General of the United Nations 12
 13 described them as one of the principal sources of law in an early memorandum on 13
 14 the codification of international law.³⁶ The World Trade Organization has adopted 14
 15 a similar approach, and general principles now play an important role in its 15
 16 dispute settlement mechanism.³⁷ Furthermore, selected principles originating from 16
 17 domestic law have gained special emphasis in international criminal law, where 17
 18 different international and hybrid, *ad hoc* and permanent judicial organs have 18
 19 resorted to them on many occasions since the end of World War II.³⁸ (International 19
 20 human rights instruments too tend to recall general principles with respect to 20
 21 criminal procedure.³⁹) 21

22 National legal systems treat general principles of law as a source of international 22
 23 law, as well. It is true that the diverse constitutional clauses on the relationship of 23
 24 international law and domestic law typically reaffirm the generally recognized 24
 25 principles and/or rules of international law, and omit express references to general 25
 26 principles of law, but they are habitually interpreted in a manner so as to embrace 26
 27 these principles.⁴⁰ However, the constitutional clauses on international law are not 27
 28 28

29 _____ 29
 30 36 Survey of International Law in Relation to the Work of Codification of the 30
 31 International Law Commission: Preparatory Work within the Purview of Article 18, 31
 32 Paragraph 1, of the Statute of the International Law Commission. Memorandum submitted 32
 33 by the Secretary-General, 10 February 1949, UN Doc. A/CN.4/1/Rev.1, 22. 32

33 37 J. Cameron and K.R. Gray, 'Principles of International Law in the WTO Dispute 33
 34 Settlement Body', *International and Comparative Law Quarterly* 50, no. 2 (2001): 248–98. 34

35 38 Raimondo, *General Principles of Law in the Decisions of International Criminal* 35
 36 *Courts and Tribunals*, 73 *et seq.* See, for example, United States of America v Wilhelm List 36
 37 *et al.*, Judgment of 19 February 1948, Nürnberg Military Tribunal, vol. 11, 1235. 37

38 39 See, International Covenant on Civil and Political Rights, New York, 16 38
 39 December 1966, Article 15, paragraph 2; Convention for the Protection of Human Rights 39
 40 and Fundamental Freedoms (European Convention on Human Rights), Rome, 4 November 40
 41 1950, Article 7, paragraph 2. See also, N.K. Hevener and S.A. Mosher, 'General Principles 41
 42 of Law and the UN Covenant on Civil and Political Rights', *International and Comparative* 41
 42 *Law Quarterly* 27, no. 3 (1978): 596–613. 42

43 40 For a European overview, see, V.S. Vereshchetin, 'New Constitutions and the 43
 44 Old Problem of the Relationship between International Law and National Law', *European* 44

1 the only domestic provisions that need to be taken into account. General principles 1
 2 of law also appear in fundamental rights catalogues of constitutions or other laws 2
 3 and regulations in connection with the guarantees of criminal procedure, often 3
 4 indicating the influence of international human rights instruments.⁴¹ 4

5

6

7 **Modification and Termination of General Principles of Law** 7

8

9 If we accept that general principles of law constitute a source of international law, 9
 10 we inevitably face the questions of modification and termination. It has to be stated 10
 11 at the outset that modification, in this context, does not designate the indispensable 11
 12 process by which the inherently abstract and raw content of principles originating 12
 13 from domestic law is disclosed and specified by the judiciary. Nor does it amount 13
 14 to modification, if various judicial organs interpret the same principle, within their 14
 15 margin of discretion, with negligible differences. Modification here denotes any 15
 16 alteration of the content of a general principle, which occurs after its reception 16
 17 into international law, and substantially transforms its nature in line with the 17
 18 intentions of states. 18

19 Since general principles of law originate from domestic law, the question 19
 20 of modification must be examined in the realms of both international law and 20
 21 domestic law. We may draw a surprising conclusion at the very beginning of our 21
 22 investigation: general principles cannot be directly modified by international 22
 23 law-making, for it is incompatible with the peculiar way of their creation. These 23
 24 principles are automatically incorporated into international law by a customary rule 24
 25 of reception, if they are generally recognized and suitable to govern international 25
 26 relations. Apart from the establishment of the continuously functioning rule of 26
 27 reception, no other legislative act has taken place in the international level. Hence 27
 28 states could make an attempt to modify the content of a general principle by 28
 29 conventional or customary law-making only.⁴² Still neither of these processes can 29

30

31 *Journal of International Law* 7, no. 1 (1996): 29–41; L. Wildhaber and S. Breitenmoser, 31
 32 ‘The Relationship between Customary International Law and Municipal Law in Western 32
 33 European Countries’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 48, 33
 34 no. 2 (1988): 163–207. 34

35 41 See, for example, Canada, Constitution Act 1982, Part I, Article 11, paragraph g); 35
 36 Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Article 13, paragraph 36
 37 6; Hong Kong Bill of Rights Ordinance, 1991, Part II, Article 12, paragraph 2. 37

38 42 The question of modification has already been raised in the practice of the 38
 39 International Court of Justice. The relevant separate opinion did not rule out that an 39
 40 international treaty may provide further rights in addition to those that spring from a general 40
 41 principle of law, but the interpretation of treaty stipulations led the judge to doubt that 41
 42 it had actually happened in the present case. Despite that the wording leaves room for 42
 43 different interpretations, the structure of reasoning suggests that the granting of further 43
 44 rights would have taken place within the framework of the treaty, and would not have 44
 45 modified the principle itself: ‘That general principle of law concerning the rights or status 44

1 perform the expected adjustment. They would instead produce a new conventional 1
 2 or customary rule with a content different from the general principle concerned 2
 3 that, in turn, would remain unaltered and preserve its independent existence. The 3
 4 explanation is simple: different law-making processes necessarily yield different 4
 5 sources of law.⁴³ Given that the general principle would retain its original content 5
 6 and independence regardless of the modifying conventional or customary rule, a 6
 7 dual regime would emerge, in which potential conflicts would have to be resolved 7
 8 by rules of legal logic, such as *lex specialis derogat legi generali* and *lex posterior* 8
 9 *derogat legi priori*. That is why conventional or customary rules cannot formally 9
 10 modify, only derogate from general principles that have become undesirable by 10
 11 reason of their contents. 11

12 General principles of law can be modified exclusively through the medium of 12
 13 domestic law. Remarkably, this process may be attributed not only to national, but 13
 14 also to international legal factors. However, in the latter case the conventional or 14
 15 customary rules of international law cannot and do not directly modify the general 15
 16 principles, as this possibility has just been ruled out – international law merely 16
 17 induces the modification of these principles through the medium of domestic law. 17
 18 In order to comprehend this process, we need to reach back to the relationship of 18
 19 international law and domestic law. It is commonly known that states incorporate 19
 20 the rules of international law into their national legal systems either by the 20
 21 monistic technique of adoption or the dualistic technique of transformation, and, at 21
 22 the same time, they must ensure harmony between international law and domestic 22
 23 law.⁴⁴ Naturally, the techniques of adoption and transformation too incorporate 23
 24 into domestic law the conventional or customary rules that have been created 24
 25 by states with a view to derogate from the content of a general principle of law. 25
 26 Having been incorporated into domestic law, these conventional or customary 26
 27 rules may induce a change in the content of the domestic legal principle from 27
 28 which the general principle originates, in conformity with the requirement to 28
 29 ensure harmony between international law and domestic law. If this process 29
 30 30

31 of shareholders, which underlies not only Italian Company law but also the company law 31
 32 of some other civil law countries, may not be altered by any treaty aimed at the protection 32
 33 of investments unless that treaty contains some express provision to that end. [...] Yet there 33
 34 is no reason to interpret the [treaty] as *having granted* [...] *any further rights in addition* 34
 35 *to those to which the same shareholders would have been entitled under Italian law as well* 35
 36 *as under the general principles of company law.* *Elettronica Sicula S.p.A. (ELSI) (United* 36
 37 *States of America v Italy)*, Judgment of 20 July 1989, ICJ Reports 1989, Separate Opinion 37
 38 of Judge Oda, 86, 88–89. (Insertion and emphasis added.) 38

39 43 With the establishment of the rule of reception, an automatic mechanism emerged 39
 40 in customary international law, the products of which – that is, the general principles of law 40
 41 – cannot be directly influenced or modified by other customary rules due to the differences 41
 42 of various law-making processes. 42

42 44 See, for example, I. Seidl-Hohenveldern, ‘Transformation or Adoption of 42
 43 International Law into Municipal Law’, *International and Comparative Law Quarterly* 12, 43
 44 no. 1 (1963): 88–124. 44

1 uniformly takes place throughout the dominant legal systems of principal families 1
2 of law, the customary rule of reception will elevate the domestic legal principle to 2
3 the international level with its new content, and overwrite the general principle of 3
4 law, from which states previously strove to derogate by conventional or customary 4
5 law-making. (Evidently, this process presupposes general international treaties or 5
6 universal customary rules.) 6

7 Domestic legal factors may change the content of a domestic legal principle, 7
8 as well. If the new content becomes generally recognized and continuously allows 8
9 the international application of the provision, the content of the corresponding 9
10 general principle of law will automatically and accordingly change in international 10
11 law by virtue of the rule of reception.⁴⁵ Normally, this is a subtle and lengthy 11
12 evolution that can be perceived from a distance of decades or centuries only. 12
13 Fast and radical changes, on the other hand, may also occur, and reveal an odd 13
14 phenomenon. Similarly to the conventional and customary rules of international 14
15 law, general principles of law are incorporated by states into their national legal 15
16 systems. These provisions travel an intriguing road: they depart from domestic 16
17 law, gain reception into international law, then return to domestic law as rules of 17
18 international law. Hence selected principles exist in national legal systems in two 18
19 forms: as general principles of law and as principles of domestic law. In spite of 19
20 expectations to the contrary, a change of the latter does not immediately modify 20
21 the former. It should not be forgotten that such modification takes place only if 21
22 a change becomes generally recognized in the dominant legal systems of the 22
23 principal families of law. In other words, a change in the content of a domestic 23
24 legal principle is followed by a change of the corresponding general principle of 24
25 law with a delay. Until the general recognition of the new content of a domestic 25
26 legal principle and the resulting modification of the general principle of law, the 26
27 principle concerned exists in the national legal system not only in two forms, but 27
28 also with two different contents. If a change is modest and tolerable, practical 28
29 problems are unlikely. But in extreme cases, the requirement of harmony between 29
30 international law and domestic law may slow or delay the modification of a 30
31 domestic legal principle, and secure the preservation of the minimum standards of 31
32 the rule of law. 32

33 The termination of general principles of law must also be examined in the 33
34 realms of both international law and domestic law. Yet it would be a grave mistake 34
35 to automatically adopt the conclusions drawn with regard to modification to the 35
36 question of termination, and to presume that the only feasible way of termination 36
37 is through the medium of domestic law. The situation is quite different. In the 37
38 international level, it is equally possible to terminate the entire category of general 38
39 principles of law, and to terminate individual principles. The total elimination 39
40 of general principles of law as a source of law requires the termination of the 40
41 customary rule of reception, or the substantial modification of its purpose and 41

42 _____ 42
43 45 Cf. Csiky, *Az általános jogelvek, mint a nemzetközi jog forrása [General Principles* 43
44 *of Law as a Source of International Law]*, 43. 44

1 functioning. Conversely and understandably, it is impossible to directly terminate 1
2 individual principles by persistent objection⁴⁶ or international law-making.⁴⁷ There 2
3 is but one scenario that involves the termination of a general principle on account 3
4 of circumstances in the international level: if the provision is rendered unable to 4
5 govern international relations by changes in the international environment. Let 5
6 there be no misunderstanding: it is not the mere fact of alteration of international 6
7 relations that terminates the general principle, but the rule of reception that reacts 7
8 to this alteration automatically, in absence of further measures by states. Since 8
9 international applicability is an essential condition of their recognition as a source 9
10 of law, objectively inapplicable general principles cannot exist in the system of 10
11 international law. If a general principle is no longer able to govern international 11
12 relations due to changes in the international environment, and as such, one of the 12
13 features required for its elevation to the international level fades away, then it will 13
14 become invisible to the rule of reception, and ultimately disappear from international 14
15 law. (Theoretically speaking, nothing precludes the 'revival' of principles that have 15
16 so been terminated by subsequent changes in the international environment.) 16

17 The termination of individual general principles can also be achieved through 17
18 the medium of domestic law. All it takes to realize that is to breach the requirement 18
19 of general recognition by removing the principle from a large number of national 19
20 legal systems, or to widely modify its domestic legal content in a manner that it 20
21 becomes unable to govern international relations in the future. Such a generally 21
22 unrecognized principle may nevertheless continue to exist in national legal systems, 22
23 but it will remain invisible to the rule of reception and ineligible for elevation to 23
24 the international level, for failing to meet the required conjunctive conditions. 24

25 It should be stressed that the question of modification or termination is mainly 25
26 of academic importance. The practical probability of these measures is negligible. 26
27 The overwhelming majority of general principles of law came into existence several 27
28 centuries ago, and have become inseparable from the normal functioning of law. 28
29 Substantial alterations of any kind thus seem unnecessary and futile. Moreover, it 29
30 is always far more convenient for states to derogate from an undesirable general 30

31
32 ⁴⁶ In light that the customary rule of reception was established more than a century 32
33 ago, a detailed examination of persistent objection may be dispensed with. Suffice it to 33
34 note that persistent objection would have thwarted the elevation of general principles to 34
35 the international level *in toto* (as such, it would have been ineffective against individual 35
36 principles), and it would have had an effect on those states only that had rejected the rule of 36
37 reception in the course of its formation. (On the recognition of general principles of law by 37
38 newly independent states, see, S.P. Sinha, 'Perspective of the Newly Independent States on 38
39 the Binding Quality of International Law', *International and Comparative Law Quarterly* 39
40 14, no. 1 (1965): 124.)

41 ⁴⁷ Since states are not at all defenceless against the flow of principles towards 40
42 international law, and have numerous ways to dispose of undesirable provisions, this 41
43 statement is not irreconcilable with the postulation that international law does not bind 42
44 sovereign states against their will. *S.S. Lotus (France/Turkey)*, Judgment No. 9, 7 September 43
44 1927, PCIJ Series A, No. 10, 18. 44

1 principle by conventional or customary law-making. Derogation, of course, would 1
 2 not bring about the modification or termination of the principle, but at least it 2
 3 offers a chance to evade its application with the help of rules of legal logic, such 3
 4 as *lex specialis derogat legi generali* and *lex posterior derogat legi priori*. 4

5 5
 6 6

7 **Conclusion** 7

8 8

9 In sum, it may be stated that general principles of law constitute an independent 9
 10 source of international law, created and maintained by a customary rule of reception. 10
 11 Due to their unwritten character, gap-filling function and insignificant influence 11
 12 on the everyday life of the international community, the existence, contents and 12
 13 effects of these principles mainly become palpable in the practice of international 13
 14 judicial organs. Hence they are frequently described as being subsidiary or 14
 15 auxiliary in nature, though it should not be taken as if they actually occupied a 15
 16 subordinate or inferior position in the international legal order. In absence of a 16
 17 hierarchy between the various sources of international law, general principles of 17
 18 law are of equal rank with their more ‘robust’ counterparts, including international 18
 19 treaties and customary international law. For that reason, the catalogue contained 19
 20 in Article 38, paragraph 1, of the Statute of the International Court of Justice 20
 21 reflects the logical train of thought of a judge in search of rules applicable to a 21
 22 particular case, not a hierarchy of sources.⁴⁸ Clearly, general principles of law may 22
 23 be labelled as a source of law in a formal sense only. In a material sense, the source 23
 24 of law is the community of states that established the customary rule of reception, 24
 25 or alternatively, the circumstances that necessitated this legislative act. General 25
 26 principles of law themselves can at best be deemed a material source of law in 26
 27 the context of the development of international law; even so, it is most doubtful 27
 28 whether rules are capable of serving as a means of laying down new rules.⁴⁹ But 28
 29 it is exactly how this ethereal source of law attracts the attention of generations of 29
 30 international lawyers: every question answered leads to even more. 30

31 31

32 32

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34 34

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38 *Audiolux SA e.a. v Groupe Bruxelles Lambert SA (GBL) and Others and* 38

39 *Bertelsmann AG and Others* [2009] ECR I-9823, C-101/08. 39

40 40

41 ⁴⁸ Cheng, *General Principles of Law, as Applied by International Courts and* 41

42 *Tribunals*, 22; Gaja, ‘General Principles of Law’, 375. 42

43 ⁴⁹ M. Virally, ‘The Sources of International Law’, in *Manual of Public International* 43

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