

September 2014

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Recommended Citation

Michelle Biddulph and Dwight Newman, *A Contextualized Account of General Principles of International Law*, 26 Pace Int'l L. Rev. 286 (2014)

Available at: <https://digitalcommons.pace.edu/pilr/vol26/iss2/8>

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A CONTEXTUALIZED ACCOUNT OF GENERAL PRINCIPLES OF INTERNATIONAL LAW[±]

Michelle Biddulph * & Dwight Newman **

ABSTRACT

This Article examines general principles of international law through the innovative means of comparing their use in four different, novel areas of international law—international environmental law, international investment law, international criminal law, and international indigenous rights. By doing so, the Article is able to make the distinct claim that there is no one, single methodology for analysis of general principles of international law. Rather, each area of international law tends to use a methodology suited to its policy objectives and overall characteristics as a specific area of law. The Article characterizes two predominant academic approaches to general principles: a purely “domestic approach” and a “hybrid approach”. The Article argues that international environmental law has tended to use a hybrid approach, whereas international in-

[±]Portions of this paper have been presented at the Cambridge Conference on Interpretation in International Law at the Lauterpacht Centre / Cambridge Faculty of Law in August 2013 and at the Canadian Council of International Law (CCIL) Annual Meeting in November 2013. We are grateful for comments on those occasions from individuals who included Natasha Affolder, Phillip Allott, John Martin-Gillroy, Joanna Harrington, Gleider Hernandez, Gary Luton, John Morss, Daniel Peat, Sara Seck, John Tasioulas, and Rumiana Yatova. We are also especially grateful to Ibronke Odumosu-Ayanu for her thorough read of and commentary on the draft Article.

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vestment law has limited itself to a domestic approach, manifesting immediately the differentiated analysis in different areas. International criminal law and international law on indigenous rights manifest more mixed approaches to analysis, again based on the needs of these different areas. These areas, however, also manifest some criticisms of the use of general principles that have led sometimes to restraints on them in the service of policy needs of different areas of international law. The Article ultimately puts the novel argument that this contextual analysis is not simply descriptively accurate but is a manifestation of an appropriate contextually-differentiated development of international law in light of concerns for its legitimacy in regulating actors other than state entities.

I. INTRODUCTION

Understandings on the sources of international law are in significant flux. Some have argued for meaningfully different approaches to customary international law.¹ Others have raised deeper theoretical questions about the sources of international law.² Yet others worry about the debate's movement away from traditional approaches.³ Amid the debate, the source contained within section 38(1)(c) of the Statute of the International Court of Justice,⁴ "the general principles of law recognized by civilized nations",⁵ does not always receive as much attention as other sources, although others see it as having enormous potential, albeit of different sorts.

Certain traditionalists say that the evolving debate on the elements of customary international law has now created such

¹ See e.g., ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971) (more traditional statement on customary international law); A. Roberts, *Traditional and Modern Approaches to Customary International Law*, 95 AM. J. INT'L L. 757 (2001) (overview of shifting terrain of the analysis of customary international law); BRIAN D. LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* (2010) (arguing for significantly modified approach).

² See e.g., Samantha Besson, *Theorizing the Sources of International Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* (Samantha Besson & John Tasioulas eds., 2010).

³ See e.g., Anthony D'Amato, *New Approaches to Customary International Law*, 105 AM. J. INT'L L. 163 (2011).

⁴ Statute of the International Court of Justice, art. 38.1(b) T.S. No. 993 (1945).

⁵ *Id.*

problematic consequences, particularly through neglect of actual state practice, that general principles of international law may actually be a preferable source for international lawyers to use so as to restore some element of rigour to the analysis.⁶ Others see general principles as part of a broader constitutional dimension of the international legal order,⁷ although yet others then wonder if one is still speaking of “general principles” in the technical sense that amounts to a source of international law.⁸

General principles are potentially a very different type of source of international law. The International Court of Justice’s references to general principles have had, according to some authors, “a natural law overtone”.⁹ Yet the detailed application of general principles is seldom examined. This Article seeks to make a novel contribution to the understanding of general principles by surveying and analyzing their use in four different areas of international law, thereby contributing to their analysis an actual textured, comparative use across these areas—international environmental law, international investment law, international criminal law, and indigenous rights. Using this comparative analysis, the Article makes the distinctive claim that there is not one specific approach to general principles in international law, but rather that there are contextually-differentiated approaches within specialized areas of international law that respond to the unique nature of each area.

Each of the four areas examined has featured significant recent use of general principles, perhaps because they are relatively novel areas of international law doctrine, although this Article will also point to other factors. At the same time, there is also the possibility that each of these areas has seen interna-

⁶ Cf. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *AUST. J. INT'L L.* 82 (1988).

⁷ See S. Kadelbach & T. Kleinlein, *International Law—A Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles*, 50 *GERMAN Y.B. INT'L L.* 340 (2007).

⁸ Cf. Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, 11 *GERMAN L.J.* 1909 (2008).

⁹ INGO VENZKE, *HOW INTERPRETATION MAKES INTERNATIONAL LAW: ON SEMANTIC CHANGE AND NORMATIVE TWISTS* 25 (2012) (referring inter alia to *Corfu Channel Case (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, 22 (Apr. 9) (“general and well-recognized principles [like] elementary considerations of humanity”).).

tional adjudicative bodies identifying extant general principles in somewhat different ways. This Article will compare those methodologies and go on to offer some critique of them. In doing so, this Article seeks to make a significant contribution to the understanding of general principles through a more contextual analysis than they are often given. Indeed, one of the Article's ultimate conclusions is that they may actually need to be understood contextually, with the possibility that international law actually has contextually-differentiated modes of formation—as one of the Article's authors has begun to argue elsewhere.¹⁰

Part II of the Article traces the longer trajectory on the concept of general principles, from the drafting history on the concept to their use in the Permanent Court of International Justice and the International Court of Justice. Thereafter, it categorizes the academic approaches to general principles, differentiating those who argue that general principles are derived from domestic legal systems and those who take a more hybrid approach.

The first pairing of areas helps to show that different areas of international law can correspond more closely to one or the other of these academic approaches. Part III traces the use of general principles in international environmental law, showing this area's use of the hybrid approach. Part IV traces the use of general principles in international investment law and shows its strict adherence to the domestic approach. That these two areas can take fundamentally different approaches to the methodology for general principles contributes to the Article's ultimate argument of the need for close contextual consideration of the use of this source.

The second pairing of areas of international law involves two areas that use mixed approaches in terms of their methodology and that thereby raise some critical questions about the

¹⁰ See Dwight Newman, *Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Role?*, in *INTERNATIONAL LAW IN THE NEW AGE OF GLOBALIZATION* 267 (Andrew Byrnes, Mika Hayashi & Christopher Michaelsen eds., 2013). See also, Dwight Newman, *Legitimate Authority and Contextually-Differentiated Modes of Interpretation of International Law Norms*, Presentation to Cambridge Conference on Interpretation in International Law, Lauterpacht Centre for International Law, Cambridge University, Cambridge, U.K., (Aug. 2013).

use of this source. Part V traces the use of general principles in international criminal law, showing a period of intensive use of general principles, with some criticism and possible concerns about the methodology, followed by state desires to rein in their use, with new constraints imposed on them on a go-forward basis. Part VI examines a recent, sudden use of general principles in an indigenous rights context and shows how it raises anew the questions about the relationship between customary international law and general principles.

The concluding Part VII of the Article argues that this contextually rich analysis of general principles helps further an understanding of the concept in novel ways, with their use in different areas responding in some ways to needs in those areas and thus being contextually differentiated. The Article ultimately suggests that there may not be a univocal concept of general principles but a broader spectrum of principles that enter into international law in different ways. At the same time, the potential that this contextually differentiated account means that different general principles could exist in different areas of international law, sometimes inconsistently, also ends up highlighting the possibility that the legitimacy understanding of international law formation is incomplete in some areas of international law. The close contextual analysis that this Article uniquely brings enables the identification of some highly distinctive conclusions and some new understandings of general principles.

II. GENERAL PRINCIPLES DEFINED

While the formation of treaties and customary international law has been fairly well-settled, no consensus has emerged on the correct methodology for identifying and applying a general principle of law on the international plane.¹¹

¹¹ The Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) sets out the well-known definition of a treaty in Article 2: “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. The ICJ articulated the classic requirements for formulation of customary international law in its oft-quoted case of the North Sea Continental Shelf (Fed. Rep. of Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20): customary international law requires a “settled practice” of states combined with a belief that the practice is legally required (*opinio juris sive*

General principles do not arise solely from state action, like treaties or custom. They have been identified in the municipal systems of states,¹² in the underpinnings of the international legal system as a whole,¹³ in natural law,¹⁴ as inchoate custom,¹⁵ in the tenets of legal logic,¹⁶ and in non-binding “soft law” instruments.¹⁷ As the discussion below indicates, no consensus has emerged on what a general principle is nor on how it is formed, despite the frequent use of general principles in international jurisprudence.

A. *The Drafting of the Statute of the PCIJ*

When the drafters of the Statute of the PCIJ were debating the sources of law that the new court would apply, they agreed that general principles should be included as a source of law to avoid a *non liquet* situation—that is, a situation where no law applies.¹⁸ However, a divide emerged as to whether general principles as a source of international law should be derived from municipal law or from natural law. President Edward

necessitatis). States are the sole creators of both of these sources of international law, at least in a general sense.

¹² HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES IN INTERNATIONAL LAW* 85 (1970) (identifying general principles in international law as only those derived from municipal private law sources).

¹³ *See, e.g.*, GIDEON BOAS, *PUBLIC INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PERSPECTIVES* 107 (2012) (referencing some general principles of law as the “foundational principles of the international community”—for example, the principle of *pacta sunt servanda*).

¹⁴ *See, e.g.*, *Case Concerning Pulp Mills on the River Uruguay* (Arg. v. Urug.), 2010 I.C.J. 14, ¶ 52 (Apr. 20) (Separate Opinion of Judge Cançado Trindade); MALCOLM SHAW, *INTERNATIONAL LAW* 99 (6th ed., 2008) (referencing the arguments of some authors that general principles derive from natural law).

¹⁵ Olufemi Elias and Chin Lim, *General Principles of Law, Soft Law and the Identification of International Law*, 28 *NETH. Y.B. INT'L. L.* 3, 35-37 (1997).

¹⁶ Hermann Mosler, *General Principles of Law*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 89, 90 (vol. 7, 1984).

¹⁷ *See, e.g.*, the precautionary principle set out in Principle 15 in the 1992 Rio Declaration on the Environment: Report of the United Nations Conference on Environment and Development, Annex I, GAOR, 47th Sess., UN Doc A/CONF.151/26 (Vol. I) (1992) [hereinafter Rio Declaration]. Discussed further in Part III, below.

¹⁸ PCIJ/Advisory Committee of Jurists, Procès-verbeaux of the Proceedings of the Committee (16 June – 24 July 1920) with Annexes 310-19 (1920), available at <http://www.icj-cij.org/pcij/other-documents.php?p1=9&p2=8>.

Descamps advocated for the naturalist approach, identifying general principles in the “legal conscience of civilized nations”,¹⁹ derived from notions of “objective justice”.²⁰ The English representative, Lord Phillimore, remained adamant that general principles of law are only those accepted by states *in foro domestico* and thus could only be derived from municipal law.²¹ The articulation in Article 38(3) of the Statute of the PCIJ (now Article 38(1)(c) of the Statute of the ICJ) was accepted as a compromise between these two positions.²²

B. General Principles in the Majority Judgments of the PCIJ and ICJ

Despite rarely mentioning Art. 38(3) of the Statute of the PCIJ or Art. 38(1)(c) of the Statute of the ICJ, both world courts have engaged rather frequently with general principles of law. The PCIJ engaged with general principles in three majority decisions, while the ICJ has engaged with general principles of law in approximately twenty of its majority judgments, though only mentioning Article 38(1)(c) three times and never applying it.²³ The principles that the PCIJ affirmed are: the general principle requiring states to respect the vested rights of foreigners in their territory,²⁴ the duty to make reparations for a breach of a legal obligation,²⁵ and the principle of diplomatic protection.²⁶ The principles that the ICJ has affirmed include: the freedom of maritime communication,²⁷ the prohibition on

¹⁹ *Id.* at 310-11.

²⁰ *Id.* at 323.

²¹ *Id.* at 335.

²² *Id.* at 344.

²³ These instances were: Right of Passage over Indian Territory (Port. v. Ind.), 1960 I.C.J. 6, 43 (Apr. 12); North Sea Continental Shelf case, *supra* note 4, at ¶ 17; and Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶ 127 (Mar. 31).

²⁴ Oscar Chinn (Brit. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63, at 87-88 (Dec. 12).

²⁵ Chorzów Factory (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 17, at 29 (Jul. 26).

²⁶ Mavrommatis Palestinian Concessions (Greece v. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

²⁷ Corfu Channel, *supra* note 9, at 22 (describing Albania’s obligation to refrain from notifying Great Britain of mines in its waters as deriving from general principles rather than from the Hague Convention of 1907).

genocide,²⁸ principles of humanitarian law,²⁹ the principle of self-determination,³⁰ *uti possidetis juris*,³¹ the principle of good faith,³² the requirement of procedural fairness,³³ the principle

²⁸ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23-24 (May 28), available at http://sitemaker.umich.edu/drwcasebook/files/icj_advisory_opinion_on_reservations_to_the_genocide_convention.pdf (referring to the principles underlying the Convention as being “recognized by civilized nations as binding on states, even without any conventional obligation”).

²⁹ Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 218, 220 (June 27), available at <http://www.ilsa.org/jessup/jessup08/basicmats/icjnicaragua.pdf> (describing the Geneva Conventions as a “development” or an “expression” of general principles of humanitarian law, with those general principles giving rise to the obligation on the United States to respect the laws of armed conflict).

³⁰ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, 1971 I.C.J. 16, ¶ 52 (June 21), available at <http://www.icj-cij.org/docket/files/53/5595.pdf> (referring to the principle of self-determination as pre-existing the Charter of the United Nations, with the Charter merely codifying that principle); East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 90, 79 (June 30), available at <http://www.icj-cij.org/docket/files/84/6951.pdf> (describing the principle as “one of the essential principles of contemporary international law”, recognized by the Charter of the United Nations—this recognition implying that it pre-existed the development of the Charter); *but see*, Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 55 (Oct. 16), available at <http://www.icj-cij.org/docket/files/61/6195.pdf> (identifying the principle of self-determination in the Declaration on the Granting of Independence to Colonial Countries and the Peoples, G.A. Res. 1514 (XV), UN Doc A/PV.948 (Dec. 14, 1960).

³¹ Frontier Dispute (Burkina Faso/Mali), Judgment, 1986 I.C.J. 554, ¶ 25 (Dec. 22), available at http://sitemaker.umich.edu/drwcasebook/files/case_concerning_the_frontier_dispute_burkina_faso_v._mali_1986_i.c.j._554_dec_22.pdf (describing it as a “time-hallowed” principle, though later implying that its validity vis-a-vis the principle of self-determination derives from the consent of states to the respecting of colonial frontiers); Frontier Dispute (Burkina Faso/Niger), Judgment, 2013 I.C.J. 1, ¶¶ 63-64 (Apr. 16) available at <http://www.icj-cij.org/docket/files/151/17704.pdf>.

³² Nuclear Tests Case (Austr. v Fr.), Judgment, 1974 I.C.J. 253, 99 (Dec. 20), available at <http://www.icj-cij.org/docket/files/59/6161.pdf> (describing it as “one of the basic principles governing the creation and performance of legal obligations”); Border and Transborder Armed Actions (Nicar. v. Hond.), Jurisdiction and Admissibility, 1988 I.C.J. 69, ¶ 94 (Dec. 20), available at <http://www.icj-cij.org/docket/files/120/14075.pdf> (quoting the Nuclear Tests case with approval); Land and Maritime Boundary Between Cameroon and Nigeria (Cam. v. Nigeria), Preliminary Objections, 1998 I.C.J. 275, ¶ 38 (June 11), available at <http://www.icj-cij.org/docket/files/94/7453.pdf>; Fisheries Jurisdiction (Fed. Rep. Ger. v. Iceland), Judgment, 1974 I.C.J. 175, ¶¶ 69-70 (Jul. 25) (imposing a duty on the parties to negotiate in good faith as part of a “self-evident” principle), available at <http://www.icj-cij.org/docket/files/56/6001.pdf>; Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 74, ¶ 43 (May 21), available

of *res judicata*,³⁴ the principle of corporate legal personality,³⁵ the necessary third party rule,³⁶ and the principle of acquiescence/estoppel.³⁷ Some of these principles are procedural in nature—*res judicata*, for example—while others have attained the status of a *jus cogens* norm— for example, the prohibition on genocide.³⁸ Some are similar to principles contained in domestic law like good faith and estoppel, while others, such as the principle of *uti possidetis juris*, are more unique to interna-

at <http://www.icj-cij.org/docket/files/65/6303.pdf> (identifying the principle of good faith as applicable in the relationship between the host state and an international institution); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 99 (Jul. 8), available at <http://www.ijl.org/courses/documents/NuclearWeapons.pdf> (recognizing the duty to negotiate in good faith as enshrined in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons).

³³ Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J. 166, ¶ 36 (Apr. 28), available at <http://www.icj-cij.org/docket/files/57/6027.pdf> (stating that general principles of law require that interested parties have an opportunity to submit all relevant arguments to the review tribunal, though this requirement may be satisfied through the submission of written statements).

³⁴ Effect of Award of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 53 (Jul. 13), available at <http://www.icj-cij.org/docket/files/21/2123.pdf> (“according to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute.”). See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 43, ¶¶ 115-116 (Feb. 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

³⁵ Barcelona Traction, Light, and Power Company, Limited (Belg. v. Spain), Judgment (Second Phase), 1970 I.C.J. 3, ¶ 50 (Feb. 5), available at <http://www.icj-cij.org/docket/files/50/5387.pdf> (referring to the domestic concept of separate corporate legal personality as a rule generally accepted by municipal legal systems and thus applicable in this case).

³⁶ Monetary Gold Removed From Rome in 1943 (Ital. v. Fr.; U.K. & U.S.), Preliminary Question, Judgment, 1954 I.C.J. 19, 32-33 (June 15), available at <http://www.icj-cij.org/docket/files/19/4761.pdf>. Reaffirmed in East Timor, *supra* note 30, at ¶ 34 and Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, 2011 I.C.J. 1, ¶ 43 (Dec. 5), available at <http://www.icj-cij.org/docket/files/142/16827.pdf>.

³⁷ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. 246, ¶ 130 (Oct. 12), available at <http://www.icj-cij.org/docket/files/67/6369.pdf> (observing that the principles of acquiescence and estoppel are both applicable in international law as derivatives of the fundamental principles of good faith and equity).

³⁸ Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwan.), Judgment, 2006 I.C.J. 6, ¶ 64 (Feb. 3), available at <http://www.icj-cij.org/docket/files/126/10435.pdf> (referring to the prohibition on genocide as “assuredly” having the character of a *jus cogens* norm).

tional law.

The ICJ has blurred these categories, vaguely referring to them as “principles”,³⁹ “fundamental principles”,⁴⁰ “generally-recognized” principles,⁴¹ “well-recognized” principles,⁴² “basic principles”,⁴³ and “time-hallowed” principles.⁴⁴ Some may indeed fall under Article 38(1)(c) as general principles of law, while others are better characterized as rules of customary international law under Article 38(1)(b). The Court’s failure to specify the source of these principles makes it difficult to identify a workable method for identifying new rules of international law, whatever their source. However, judges in separate and dissenting opinions have been somewhat more willing to engage with Article 38(1)(c), giving some clarity to this little-understood provision.

C. Separate and Dissenting Opinions

In separate and dissenting opinions, the judges of the ICJ and PCIJ have exhibited two distinct approaches to general principles: (1) identifying general principles solely in domestic legal systems; and (2) identifying general principles from natural law or the international legal system itself. In support of the first approach, Judge Simma’s separate opinion in the *Oil Platforms* case is illustrative.⁴⁵ He stated:

In order to find a solution to our dilemma, I have engaged in some research in comparative law to see whether anything resembling a ‘general principle of law’ within the meaning of Arti-

³⁹ See, e.g., *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶ 55 (Oct. 16), available at <http://www.icj-cij.org/docket/files/61/6195.pdf>.

⁴⁰ See, e.g., *Military and Paramilitary Activities In and Against Nicaragua*, (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 218 (June 27), available at <http://www.icj-cij.org/docket/files/70/6503.pdf>

⁴¹ *Effect of Award of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47, 53 (Jul. 13), available at <http://www.icj-cij.org/docket/files/21/2123.pdf>.

⁴² *Corfu Channel Case* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 22 (Apr. 9), available at <http://www.icj-cij.org/docket/files/1/1645.pdf>.

⁴³ *Nuclear Tests Case* (Austr. v Fr.), Judgment, 1974 I.C.J. 253, ¶ 46 (Dec. 20), available at <http://www.icj-cij.org/docket/files/59/6161.pdf>.

⁴⁴ *Frontier Dispute* (Burkina Faso/Mali), Judgment, 2013 I.C.J. 1, ¶25 (Apr. 16) available at <http://www.icj-cij.org/docket/files/151/17704.pdf>.

⁴⁵ *Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. 324, ¶66 (Nov. 6) (Separate opinion of Judge Simma), available at <http://www.icj-cij.org/docket/files/90/9735.pdf>.

cle 38, paragraph 1 (c), of the Statute of the Court can be developed from solutions arrived at in domestic law to come to terms with the problem of multiple tortfeasors [...]. [O]n the basis of the (admittedly modest) study of comparative tort law thus provided, I venture to conclude that the principle of joint-and-several responsibility common to the jurisdictions I have considered can properly be regarded as a 'general principle of law' within the meaning of Article 38, paragraph 1 (c), of the Court's statute.⁴⁶

On the second approach, Judge Tanaka's dissenting opinion in the *South West Africa* case is illustrative, as he took a more natural law approach to general principles.⁴⁷ He stated, in the context of human rights, that

The existence of a human right does not depend on the will of a State; neither internally on its law or on any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element. A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more than declaratory. [...] As an interpretation of Article 38, paragraph 1 (c), we consider that the concept of human rights and of their protection is included in the general principles mentioned in that Article.⁴⁸

Other judges manifest a combination of the two approaches. Principles identified as general principles in separate and dissenting opinions include the principle of restrictive interpretation of provisions stipulating servitudes in treaties,⁴⁹ the right of access to enclaved property,⁵⁰ the principle of good faith,⁵¹ the right of self-defence,⁵² the precautionary principle,⁵³

⁴⁶ *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 324, ¶¶ 66-74 (Nov. 6) (Separate opinion of Judge Simma),

⁴⁷ *South West Africa (Eth. v S. Afr.; Lib. v S. Afr.)* Judgment, 1966 I.C.J. 6 (Jul. 18) (Dissenting Opinion of Judge Tanaka), available at <http://www.icj-cij.org/docket/files/47/4969.pdf>.

⁴⁸ *Id.*, at 297-298.

⁴⁹ *Lighthouses in Crete and Samos (Fr. v. Greece)*, 1937 P.C.I.J. (ser. A/B) No. 71, 137-138 (Oct. 8) (Separate opinion of Judge Sfériades), available at http://www.worldcourts.com/pcij/eng/decisions/1937.10.08_lighthouses.htm.

⁵⁰ *Right of Passage over Indian Territory (Ind. v. Port.)*, Judgment, 1960 I.C.J. 6, 66-67 (Apr. 12) (Separate opinion of Judge Wellington Koo) available at <http://www.icj-cij.org/docket/files/32/4535.pdf>.

⁵¹ *Temple of Preah Vihear (Camb. v. Thai.)*, 1962 I.C.J. 6, 43 (June 15) (Separate opinion of Vice-President Alfaro) available at <http://www.icj-cij.org/docket/files/45/4877.pdf> (he explicitly classified the principle under Ar-

the principle of sustainable development,⁵⁴ the principle of *ex injuria jus non oritur*,⁵⁵ and the principle of *exceptio non adimpleti contractus*.⁵⁶

As demonstrated, then, there is no well-settled approach to Article 38(1)(c) in the world courts. Yet, it remains as a formal source of international law beyond treaties and custom, potentially offering an alternative means to develop new rules of international law outside of the dominant methods of treaty and custom. While the PCIJ and ICJ have offered little elaboration on how Article 38(1)(c) should be interpreted, this source of international law has spawned a wealth of academic literature that has attempted to offer more detailed guidance. Though this Article will not discuss at length all of the extant academic literature on the use of general principles of law in international law, the next section will briefly characterize the general trends in the academic literature, and the theories that scholars have developed and employed to determine the scope and future of this source.

ticle 38(1)(c)).

⁵² Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 308-309 (Jul. 8) (Separate opinion of Judge Fleischhauer) available at <http://www.icj-cij.org/docket/index.php?sum=498&code=unan&p1=3&p2=4&case=95&k=e1&p3=5> (the right exists both in customary international law and in all domestic legal systems).

⁵³ Case Concerning Pulp Mills on the River Uruguay (Arg. v. Urug.), 2010 I.C.J. 14, ¶ 56 (Apr. 20) (Separate Opinion of Judge Cançado Trindade) available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

⁵⁴ Case Concerning Pulp Mills on the River Uruguay (Arg. v. Urug.), 2010 I.C.J. 14, ¶¶ 141-144 (Apr. 20) (Separate Opinion of Judge Cançado Trindade); Case Concerning the Gabčíkovo-Nagymaros Project (Hung./Slovak.), Judgment, 1997 I.C.J. 7, 88 (Sept. 25) available at <http://www.icj-cij.org/docket/files/92/7383.pdf> (Separate opinion of Vice-President Weeramantry).

⁵⁵ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 132 (Jul. 22) (Separate opinion of Judge Cançado Trindade) available at <http://www.icj-cij.org/docket/files/141/16003.pdf>.

⁵⁶ Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), 2011 I.C.J. 1, ¶ 12 (Dec. 5). (Separate opinion of Judge Simma) (referring to it as a general principle under Article 38(1)(c) because it is widely accepted in the common and civil law systems). Judge Ad Hoc Roucouas came to the same conclusion regarding the principle under Article 38(1)(c) in his dissenting opinion in the same case.

D. Academic Approaches

Interestingly enough, the dominant academic approaches to general principles are both positivist approaches that source general principles in the positive law of the legal system. Academic approaches to Article 38(1)(c) can be classified into two main camps: (1) academics who maintain that general principles can be derived only from domestic legal systems; and (2) academics who suggest that general principles can be derived from domestic legal systems, as in the domestic approach, but also from the structure of the international system itself.⁵⁷

1. The Domestic Approach

A number of scholars follow the approach originally articulated by Lord Phillimore in the drafting of the Statute of the PCIJ. General principles of law are only those that can be identified in domestic legal systems and transposed to the international sphere.⁵⁸ William Friedmann,⁵⁹ Jaye Ellis,⁶⁰ C. Wilfred Jenks,⁶¹ A.D. McNair,⁶² Hersch Lauterpacht,⁶³ Fabiàn O. Ro-

⁵⁷ There are two other less-accepted approaches taken. The first, based on the *Lotus* principle (that any act not prohibited by international law is implicitly permitted by international law), rejects general principles altogether as superfluous. See HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 540 (2d ed. 1966). The second rejects general principles as an autonomous source of law while accepting their utility as a subsidiary means of interpretation, similar to judicial decisions or the teachings of publicists. For examples of this approach, see e.g., GAETANO ARANGIO-RUIZ, *THE UN DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW* 66 (1979); Shaw, *supra* note 14, at 99 (summarizing this conception of general principles while not necessarily adhering to this view himself); V.D. DEGAN, *SOURCES OF INTERNATIONAL LAW* 16 (1997) (similarly summarizing this approach); G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 184-85, 191 (1974) (the Soviet theorist often cited as the main proponent of this approach) *But see* ELIAS & LIM, *supra* note 8, at 21-23 (extensively criticizing the conception of general principles as a subsidiary source).

⁵⁸ *Proces-Verbaux of the Proceeding of the Committee (16 June – 24 July 1920)* with Annexes, *supra* note 18, at 335.

⁵⁹ Wolfgang Friedmann, *The Uses of General Principles in the Development of International Law* 57 *AM. J. INT'L. L.* 279, 284 (1963).

⁶⁰ Jaye Ellis, *General Principles and Comparative Law* 22 *EUR. J. INT'L. L.* 949 (2011).

⁶¹ CLARENCE W. JENKS, *THE COMMON LAW OF MANKIND* 109-66 (1958).

⁶² Arnold Duncan McNair, *The General Principles of Law as Recognized by Civilized Nations* 33 *BRITISH Y.B. INT'L. L.* 1 (1957).

⁶³ Lauterpacht, *supra* note 12.

mano,⁶⁴ Campbell McLachlan,⁶⁵ David Bederman,⁶⁶ and the American Law Institute⁶⁷ are all examples of scholars who adhere to this approach.

These scholars recognize that general principles are an autonomous source of law, but argue that they can be derived only from municipal legal systems because their ability to bind the actions of states depends on the consent of those states. That consent can be implied from the common existence of a principle in the domestic legal systems of a majority of the world's states. Thus, a comparative assessment of municipal legal systems can demonstrate a general principle of law, and it then becomes possible to transpose that principle into the international legal regime.⁶⁸ They support this account by pointing to the wording of Article 38(1)(c). It is the general principles of law "as recognized by civilized nations" that are applicable; not general principles of international law full stop.⁶⁹ While the word "civilized" in the provision is obsolete,⁷⁰ the textual reference to "nations" is interpreted within these accounts as a reference to domestic legal systems.⁷¹

2. The Hybrid Approach: General Principles in the Domestic and International Legal Orders

This hybrid approach is still a positivist approach, but it identifies general principles of law both in domestic legal orders and in the international system itself. A general principle of law may be identified and adapted from domestic law into the international legal order—the principle of *res judicata*, for example—but it also may be identified from the international

⁶⁴ FABIÀN O. RAIMONDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 45-50 (2008).]

⁶⁵ CAMPBELL MCLACHLAN ET. AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 259 (2007).

⁶⁶ DAVID J. BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW 30 (2002).

⁶⁷ Restatement of the Law (Third): The Foreign Relations Law of the United States §§34-35 (1987).

⁶⁸ Alain Pellet, *Article 38 in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 677, 770 (Andreas Zimmermann et al. eds., 2006).

⁶⁹ Bederman, *supra* note 66, at 30.

⁷⁰ Boas, *supra* note 13, at 105.

⁷¹ See e.g., GENNADY M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 176-77 (1993) (identifying this view out of the debates of the drafters of the Statute of the PCIJ).

system itself. There are varying degrees of opinion on this approach. Some adhere primarily to the domestic approach while accepting that certain principles derived from the unique nature of the international system are still general principles under Article 38(1)(c)—the principle of sovereign equality of states, for example.⁷² Others go further, arguing that general principles can develop at the international level, usually embodied in a number of soft law international instruments that eventually accumulate binding force for the general principle.⁷³

There has been little development of methodology under this approach. While these scholars approve of the comparative inductive approach to deriving principles of law from municipal legal systems,⁷⁴ few other scholars have attempted to develop a methodology for deriving general principles of law from the international level. Thomas Franck has argued that general principles become binding when they pass what he calls the “but of course” test: a general principle “should be recognized

⁷² For examples of this approach, *see generally* Molser, *supra* note 16, at 95; Boas, *supra* note 13, at 107; M Cherif Bassiouni, *A Functional Approach to General Principles of International Law*, 11 MICH. J. INT'L. L. 768, 772 (1989); HUGH THIRLWAY, *The Sources of International Law*, in INTERNATIONAL LAW 90, 109 (Malcolm D. Evans ed., 2010); Degan, *supra* note 57, at 106; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 19 (8th ed. 2008); BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 24-25 (1987); JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 125-131 (2003).

⁷³ This is a somewhat unorthodox approach, found mainly in ‘soft law’ scholarship. *See e.g.* ALAN BOYLE, *Soft Law in International Law-Making*, in INTERNATIONAL LAW 122, 132-34, (Malcolm D. Evans ed., 2010); DINAH SHELTON, *International Law and Relative Normativity*, in INTERNATIONAL LAW 141, 167 (Malcolm D. Evans ed., 2010) (while not explicitly mentioning soft law instruments as general principles, her discussion of the use of soft law in international law is strikingly similar to most uses of general principles—for example, general principles preceding treaties and custom or being used to fill in gaps in existing international legal instruments); PIERRE-MARIE DUPUY, *Formation of Customary International Law and General Principles*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 449, 458-462 (Daniel Bodansky et al. eds., 2007); ELIAS & LIM, *supra* note 15, at 45-49 (discussing the problem of ‘soft law’ as being quite similar to the problems identified with general principles of law, though providing no guidance on how a soft law norm might crystallize into a general principle).

⁷⁴ *See, e.g.*, Mosler, *supra* note 16, at 95; Thirlway, *supra* note 72, at 109; Pauwelyn, *supra* note 72, at 125-126; Boas, *supra* note 13, at 107; Bassiouni, *supra* note 72, at 809; Christina Voigt, *The Role of General Principles in International Law and their Relationship to Treaty Law* 31 RETFÆRD ÅRGANG 3, 7 (2008).

as a legitimate norm when the common sense of the interpretive community (governments, judges, scholars) coalesces around the principle and regards it as applicable.”⁷⁵ Others have argued that the method for identifying general principles is almost identical to the method applied to identify customary international law. To identify a general principle in the international legal order, one must examine state practice, policies, statements, writings of scholars, and international jurisprudence as relevant sources.⁷⁶ This lack of methodological clarity makes it difficult to distinguish a general principle from customary international law.⁷⁷ However, these scholars all accept that general principles can emerge from international legal relations in themselves, though there is no consensus on how such a principle precisely emerges.

E. Summary

As the above discussion shows, no consensus has been reached on the status and substance of general principles. Yet, this uncertainty may be their greatest strength. They are inherently flexible, able to transpose legal ideas from one system to another—in Robert Kolb’s words, “general principles are the bees of law,”⁷⁸ providing a means for cross-pollination of rules between legal regimes. They can be applied in resolving disputes where treaties and custom are absent, or concurrently with those other sources in order to develop and strengthen new norms of international law. They thus have the potential

⁷⁵ Thomas M. Franck, *Non-Treaty Law-Making: When, Where, and How?*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 417, 423 (Rüdger Wolfrum & Volker Röben eds., 2005).

⁷⁶ Bassiouni, *supra* note 72, at 789. Brownlie also makes brief reference to this methodology, though not in much detail. *See* Brownlie, *supra* note 72, at 19.

⁷⁷ Some argue that general principles are *lex generalis* and customary international law is *lex specialis*: see, e.g., Mosler, *supra* note 16, at 91; Pauwelyn, *supra* note 72, at 131-132; Report of the Int’l. L. Comm’n., Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, 58th Sess., May 1- June 9, July 3 – Aug. 11, 2006, U.N. Doc. A/CN.4/L.682, 47 (2006). Others argue that general principles are an inchoate form of customary international law, reflecting *opinio juris* without the concomitant state practice necessary to form a customary rule: see, e.g., Voigt, *supra* note 74, at 8; Bassiouni, *supra* note 72, at 791.

⁷⁸ Robert Kolb, *Principles as Sources of International Law (With Special Reference to Good Faith)*, 53 NETHL. INT’L. L. REV. 1, 27 (2006).

to spur the development of international law, providing a means for courts and tribunals to construe the formal sources of international law in a dynamic fashion in order to adequately respond to today's problems.⁷⁹

However, potential does not always equate to practice. To assess the utility of general principles of international law in the dynamic development of new areas of international law, this Article compares four specialized areas of international law: a) international environmental law, b) international investment law, c) international criminal law, and d) international indigenous law. The methodology for identifying principles of international environmental and investment law is relatively clear. The hybrid approach has been applied to identify new principles of environmental law, while the domestic approach has been applied to identify principles of investment law. The methodology applied to general principles of criminal law and indigenous law is less clear. While criminal law does exhibit some form of the domestic approach, there is uncertainty and overlap among international criminal courts and tribunals as to the proper methodology applied. In indigenous rights law, little development has been made on subject-specific principles, and where such principles have been identified, the methodology used has not been clear.

III. INTERNATIONAL ENVIRONMENTAL LAW

International environmental law is an area of law that has rapidly evolved in response to time-sensitive needs. Some would take the view that as the needs of international legal actors for legal regulation rapidly develop, it is difficult for treaties or custom to maintain the necessary pace of development. Because general principles can be identified in a pre-existing form in domestic legal orders or in the international legal order (depending on the theoretical approach taken), some have taken them to offer significant utility in resolving pressing international disputes that cannot wait for treaties and custom to catch up to the issues of the day.

Recent writing on the doctrine of international environmental law in public international law has expanded dramati-

⁷⁹ Voigt, *supra* note 74, at 11.

cally.⁸⁰ Many trace the origins of modern international environmental law to the 1972 United Nations Conference on the Human Environment in Stockholm. The resulting *Declaration of the United Nations Conference on the Human Environment* proclaimed twenty-six principles that should guide the behaviour of states and other international actors in their behaviour toward each other and toward their common environment.⁸¹ These were adopted again in the 1992 *Rio Declaration on Environment and Development*.⁸² International environmental law is also governed by a plethora of multilateral treaties⁸³ and soft-law instruments.⁸⁴ However, it is only the use of general principles in international environmental law that is of interest here.

⁸⁰ As only a small sample of the wealth of recent literature on the topic, see Sandrine Maljean-Dubois, *The Making of International Law Challenging Environmental Protection*, in THE TRANSFORMATION OF INTERNATIONAL ENVIRONMENTAL LAW 27 (Yann Kerbrat and Sandrine Maljean-Dubois eds., 2011); PATRICIA BERNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT (2009); DANIEL BODANSKY ET AL EDS, THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (2007); ULRICH BEYERLIN & THILO MARAUHN, INTERNATIONAL ENVIRONMENTAL LAW (2011); ALEXANDER KISS & DINAH SHELTON, GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW (2007); VED P. NANDA & GEORGE (ROCK) PRING, INTERNATIONAL ENVIRONMENTAL LAW FOR THE 21ST CENTURY (2003); PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (2003).

⁸¹ *Stockholm Declaration on the Human Environment*, in Report of the United Nations Conference on the Human Environment, U.N. Doc.A/CONF.48/14, 2 and Corr.1 (1972).

⁸² Rio Declaration, *supra* note 17.

⁸³ See, e.g., Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 1046 U.N.T.S. 138 (entered into force Aug. 30 1975); Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293 (entered into force Sept. 22, 1988); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3 (entered into force Jan. 1, 1989); Basel Convention on the Control of Transboundary Movement of Hazardous Wastes, Mar. 22, 1989, 1673 U.N.T.S. 57 (entered into force May 5, 1992); United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994); Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148 (entered into force Feb. 16, 2005); Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993); Cartagena Protocol on Biosafety, Jan. 29, 2000, 2226 U.N.T.S. 208 (entered into force Sept. 11, 2003). There are many other bilateral and multilateral treaties governing international environmental law—this list is merely a brief sample.

⁸⁴ See generally Jason Morrison & Naomi Roht-Arriaza, *Private and Quasi-Private Standard Setting*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 498 (Daniel Bodansky et al. eds., 2007).

International environmental law, like other areas of international law, is generally governed by the sources of law set out in Article 38(1) of the Statute of the ICJ.⁸⁵ General principles of law are applicable in international environmental law pursuant to Article 38(1)(c). A number of international environmental principles have been identified by states, courts, and scholars: the principles of precaution, polluter pays, common but differentiated responsibilities, equitable utilization of shared natural resources, intergenerational equity, common concern of mankind, and sustainable development.⁸⁶ This Article will focus on two: the precautionary principle and the principle of sustainable development.

A. *The Precautionary Principle*

The precautionary principle is succinctly articulated in the 1992 Rio Declaration. Principle 15 states:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.⁸⁷

This principle requires states to mitigate the risk of environmental damage even where there is no full scientific consensus on what those risks are. The principle has been incorporated in the domestic laws of a number of states and included in over fifty multilateral instruments.⁸⁸ States have argued that the precautionary principle is a general principle of law or a rule of customary international law before the ICJ in three cases, and will likely make similar arguments in future cases.⁸⁹

⁸⁵ Catherine Redgwell, *International Environmental Law*, in INTERNATIONAL LAW 687, 693 (Malcolm D. Evans ed., 2010).

⁸⁶ Ulrich Beyerlin, *Different Types of Norms in International Environmental Law: Policies, Principles, and Rules*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 426, 426 (Daniel Bodansky et al. eds., 2007).

⁸⁷ Rio Declaration, *supra* note 17.

⁸⁸ Jonathan B. Wiener, *Precaution*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 597, 599-601 (Daniel Bodansky et al. eds., 2007).

⁸⁹ The two cases are Application Instituting Proceedings Submitted by Australia, Whaling in the Antarctic (Austl. v. Japan), 2010 I.C.J. Pleadings 1

The ICJ was first confronted with the precautionary principle in its *Nuclear Tests* cases in the 1970s, where counsel for New Zealand had argued that nuclear testing was an activity so inherently harmful to the environment that no amount of precaution could mitigate its effects.⁹⁰ While the Court did not comment on the precautionary principle in its 1974 decision in the case, it did consider the principle when it was asked to re-evaluate its decision in 1995. New Zealand had argued that the precautionary principle was “very widely accepted in contemporary international law”⁹¹ and thus prohibited France from conducting underground nuclear tests. However, the Court dismissed the application without pronouncing on the status of the precautionary principle.⁹²

The ICJ was next confronted with the precautionary principle in the *Gabčíkovo-Nagymaros Project* case.⁹³ The case concerned a dispute over a treaty concluded between the parties to build two series of locks on the Danube. Work began on the projects, but Hungary decided to suspend its work while it conducted several environmental studies.⁹⁴ Hungary eventually decided to abandon the project based on environmental concerns and terminated the treaty.⁹⁵ Slovakia disputed Hungary’s basis for abandoning its performance of a treaty obligation.⁹⁶ In defence of its actions, Hungary argued that the precautionary principle gave rise to an *erga omnes* obligation to prevent transboundary environmental damage and thus justified Hungary’s termination of the treaty.⁹⁷ While accepting that the treaty was worded in a manner that could take into account evolving norms of international environmental law, the Court

(May 31, 2010) (alleging various breaches of Japan’s international obligations under a number of treaties—environmental and otherwise—due to its whaling program. Oral hearings in the case concluded in July of 2013).

⁹⁰ Oral Argument of Professor R.Q. Quentin-Baxter, *Nuclear Tests Case* (Austl. v. Fr.; N.Z. v. Fr.), 1973 I.C.J. Pleadings 108 (vol. II).

⁹¹ Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the *Nuclear Tests* (N.Z. v. Fr.) Case, Order of Sept. 22, 1995, 1995 I.C.J. 290, ¶ 5.

⁹² *Id.* ¶ 65.

⁹³ Case Concerning the *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. 7 (Sept. 25).

⁹⁴ *Id.* ¶¶ 28-33.

⁹⁵ *Id.* ¶ 38.

⁹⁶ *Id.* ¶ 43.

⁹⁷ *Id.* ¶ 97.

still held that Hungary had not validly terminated the treaty.⁹⁸

The ICJ was again confronted with the precautionary principle in its 2010 judgment in the *Case Concerning Pulp Mills on the River Uruguay*.⁹⁹ The case concerned the interpretation of a bilateral treaty between Argentina and Uruguay establishing a regime for the use of the River Uruguay, which formed part of the boundary between the two states.¹⁰⁰ Argentina instituted proceedings in the ICJ, alleging numerous breaches by Uruguay of its procedural and substantive obligations under the bilateral treaty.¹⁰¹ Argentina had argued that the precautionary principle operated to reverse the burden of proof in this situation, requiring Uruguay to prove that it had taken appropriate steps to prevent risks of environmental damage.¹⁰² Without commenting on the validity and applicability of the precautionary principle itself, the Court did not accept Argentina's argument regarding the reversal of the burden of proof.¹⁰³ However, the Court did require Uruguay to utilize environmental impact assessments, which are precautionary in nature.¹⁰⁴

In a strongly-worded separate opinion, Judge Cançado Trindade lamented the inattention paid by the majority to general principles of international environmental law. He traced the principles of environmental law from the time of Plato through to the Rio Declaration, arguing that they are well-established principles of international law itself.¹⁰⁵ He argued that, even though the Court had consistently refused to comment on the legal status of the precautionary principle, this did not mean that the principle does not exist.¹⁰⁶ He noted that both parties had referred to the existence of the precautionary

⁹⁸ *Id.* ¶¶ 111-114.

⁹⁹ *Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.)*, 2010 I.C.J. 14 (Apr. 20, 2010).

¹⁰⁰ *Id.*, ¶¶ 26-27.

¹⁰¹ *Id.* ¶ 47.

¹⁰² *Id.* ¶ 160.

¹⁰³ *Id.* ¶ 164.

¹⁰⁴ See Daniel Kazhdan, *Precautionary Pulp: Pulp Mills and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle* 38 *ECOLOGY L. Q.* 527, 547 (2011).

¹⁰⁵ *Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.)*, 2010 I.C.J. 14, ¶¶ 56-61 (Apr. 20, 2010). (Separate Opinion of Judge Cançado Trindade).

¹⁰⁶ *Id.* at ¶ 68.

principle in their pleadings and both had conceded its application in this case:

[I]t appears significant to me that Uruguay, even though arguing that constitutive elements of the principle at issue were not in its view consubstantiated in the present case, never questioned or denied the existence or material content of the principle concerned. In sum, the *existence* itself of the *principles* of prevention and of precaution, general principles of law proper to International Environmental Law, was admitted and acknowledged by the contending parties themselves, Uruguay and Argentina.¹⁰⁷

He thus identified the precautionary principle as a general principle of international law, not customary international law. He derived it mainly from natural law,¹⁰⁸ but also in international legal instruments.¹⁰⁹ In his view, the precautionary principle as a general principle of international law under Article 38(1)(c) should have been applied by the majority decision in the case in interpreting the obligations of Uruguay under the treaty between the parties.

Other international tribunals have engaged with the precautionary principle in their decisions. A dissenting opinion in the 2003 *Mox Plant Case* referred to the precautionary principle as an established principle of customary international law.¹¹⁰ The case concerned a dispute between the UK and Ireland under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention). Ireland had argued that the UK was required, pursuant to Article 9 of the OSPAR Convention,¹¹¹ to fully dis-

¹⁰⁷ *Id.* at ¶ 112 (emphasis in original).

¹⁰⁸ *See, e.g., id.* at ¶¶ 71-72, 75-89.

¹⁰⁹ *Id.*, at ¶ 73 (identifying it in the Rio Declaration) and ¶¶ 93-95 (identifying it in the Vienna Convention on the Protection of the Ozone Layer, the Montreal Protocol, the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, the OSPAR Convention, the Convention on the Protection of the Marine Environment of the Baltic Sea Area, the Convention on Biological Diversity, the Cartagena Protocol on Biosafety, the Convention on Persistent Organic Pollutants, the UNFCCC, and the Kyoto Protocol).

¹¹⁰ Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (*Ire. v. U.K.*) 28 R.I.A.A. 59, ¶ 73 (OSPAR Convention 2003) (Dissenting Opinion of Garan Griffith Q.C.) [*hereinafter* *Mox Plant Case*].

¹¹¹ *See* Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 2354 U.N.T.S. 67 (entered into force Mar. 25, 1998). Article 9 states:

close the contents of two reports commissioned by the UK government regarding the feasibility and effects of constructing a mixed-oxide fuel (MOX) plant in Cumbria, on the coast of the Irish Sea.¹¹² The Permanent Court of Arbitration, while finding that it had jurisdiction to hear the case, interpreted the terms of the OSPAR Convention to hold that the UK did not have an obligation to disclose the two reports, and thus rejected Ireland's claims.¹¹³

One of the arbitrators, Garan Griffith, dissented on a number of grounds. Notably, he applied the precautionary principle—both as an independent principle of customary international law and as a treaty provision¹¹⁴—to shift the burden of proof to the UK in order to prove that the proposed Mox Plant would not produce future damage to the marine environment.¹¹⁵ In sourcing the precautionary principle, he referred to it as an “established principle of customary international law”,¹¹⁶ while relying on a European Commission report as proof, which referred to the precautionary principle as a “full-fledged and general principle of international law.”¹¹⁷ He referenced the numerous sources that the Commission had relied on, which included international instruments, EU legislation,

1. The Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months.

2. The information referred to in paragraph 1 of this Article is any available information in written,

visual, aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention.

¹¹² Mox Plant Case ¶¶ 41-42.

¹¹³ Mox Plant Case ¶ 185.

¹¹⁴ Article 2(2)(a) of the OSPAR Convention states: “The Contracting Parties shall apply: (a) the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects.”

¹¹⁵ Mox Plant Case ¶ 73.

¹¹⁶ *Id.*

¹¹⁷ *Id.*, n. 46, citing *Communication From the Commission on the Precautionary Principle*, at 11, COM (2000) 1 final (Feb. 2, 2000).

and numerous treaties and reports as evidence for the precautionary principle's status as customary international law.¹¹⁸ Yet the Commission itself had used those sources to conclude that the precautionary principle is a general principle of international law. The existence of the precautionary principle in international law seems to be unquestioned, but, as the *Mox Plant* case demonstrates, there is some confusion as to its source.

The precautionary principle was argued before the WTO Appellate Body as either a general principle or a principle of customary international law in the *EC – Hormones* case, though the Appeal Body chose not to comment on the status of the principle.¹¹⁹ It was also invoked by the parties as a general principle of international law in the *Southern Bluefish Tuna Cases*,¹²⁰ and arguably implicitly endorsed as a general principle in that case.¹²¹ A WTO Panel was confronted with a dispute over the legal status of the precautionary principle in 2006 and, while noting the endorsement of the principle in a number of binding and non-binding international and domestic instruments, refused to comment on its status in international law.¹²² The precautionary principle was rejected as a “general principle of international law” in the 2013 *Indus Waters* arbitration, though the tribunal subsequently clarified that it was referring to the principle's status as customary international law.¹²³

¹¹⁸ *Mox Plant Case* (Dissenting opinion of Garan Griffith Q.C.), 28 R.I.A.A. 59, ¶ 73, n. 46.

¹¹⁹ Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (1998), ¶ 123, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC – Hormones Case*].

¹²⁰ *Southern Bluefish Tuna Cases* (N.Z. v. Japan; Austl. v. Japan), 23 R.I.A.A. 1, 14 ¶ 31 (Arbitral Tribunal 2000).

¹²¹ See *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, Advisory Opinion of Feb. 1, 2011, ¶ 132, available at <http://www.itlos.org/index.php?id=109#c587> (stating that the tribunal had implicitly endorse the precautionary principle in the *Southern Bluefish Tuna Cases*).

¹²² Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, (2006), ¶¶ 7.88-7.89, WT/DS291/R, WT/DS293/R, (Sept. 29, 2006) [hereinafter *EC – Biotech Products*].

¹²³ *Indus Waters Arbitration (India v. Pak.)*, Final Award, ¶ 112 (Perm. Ct. Arb., 2013), available at http://www.pca-cpa.org/showpage.asp?pag_id=1392.

The status of the precautionary principle has thus not been authoritatively decided in the international jurisprudence. The precautionary principle had some origins in domestic law,¹²⁴ but its main formulation has been on the international plane in a number of treaties and declarations.¹²⁵ The domestic approach would thus deny its validity. Nevertheless it has been widely accepted in a number of authoritative international environmental law treaties and from there has increasingly found acceptance in the domestic law of states. It has been put forward by a number of states before international courts and tribunals, indicating that those states perceive it to be a binding principle. It is debatable whether sufficient state practice and *opinio juris* exist to solidify the precautionary principle as a principle of customary international law, given its recent legal status. Although, using the hybrid approach, its widespread recognition by states in international instruments and in their pleadings before international courts and tribunals as a binding principle can classify it as a general principle under Article 38(1)(c). In international environmental law, then, the hybrid approach provides a better explanation for the existence of the precautionary principle as a binding principle.

¹²⁴ See Svitlana Kravchenko et. al., *Principles of International Environmental Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 43, 46 (Shawkat Alam et al eds., 2013) (discussing its early formulation in West German environmental law and implicitly in several American environmental statutes).

¹²⁵ See, e.g., Bergen Ministerial Declaration on Sustainable Development, U.N. Doc. A/CONF.151/PC/10 (1990); Bamako Convention on the Ban of the Import to Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 30, 1991, 2101 U.N.T.S. 242, Art. 4(f) (entered into force Apr. 22, 1998); Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (June 17, 1999), 2331 U.N.T.S. 202 Art. 5(a) (entered into force Aug. 4, 2005); Convention for the Protection on the Marine Environment of the North-East Atlantic (Sept. 22, 1992), 2354 U.N.T.S. 67 Art. 2(2)(a) (entered into force Mar. 25, 1998); UNFCCC, *supra* note 83, Art 3(3); Stockholm Convention on Persistent Organic Pollutants (May 22, 2001), 2256 U.N.T.S. 119, Arts. 1, 8(9) (entered into force May 17, 2004); Rio Declaration, *supra* note 17, Principle 15; United Nations Conference on Environment and Development, Aug. 26 – Sept. 4, 2002, *Agenda 21: A Programme for Action for Sustainable Development*, Annex II, UN Doc A/CONF.151/26 (Vol. II-IV), 311 (Aug. 12, 1992).

B. The Principle of Sustainable Development

The principle of sustainable development has not had the same level of discussion, argument, codification, and clarification as the precautionary principle has, though it is quickly approaching the same level of international consensus that the precautionary principle enjoys. The principle of sustainable development was formally introduced in the 1987 *Report of the World Commission on Environment and Development: Our Common Future*, commonly known as the Brundtland Report.¹²⁶ This report defined sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹²⁷ Sustainable development has subsequently been included in a number of binding and non-binding international instruments and domestic law, and has been increasingly invoked in front of international courts and tribunals.

The ICJ first endorsed the concept of sustainable development in its decision in the *Gabčíkovo-Nagymaros Project* case. The Court stated:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.¹²⁸

In his separate opinion, Vice-President Weeramantry elaborated on this paragraph, discussing sustainable development as more than a mere concept—he viewed it as a “principle with

¹²⁶ WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* (1987).

¹²⁷ *Id.*, at 43.

¹²⁸ *Case Concerning the Gabčíkovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. 7, ¶ 140 (Sept. 25).

normative value” crucial to the disposition of the case.¹²⁹ He noted that both parties to the case had endorsed it as a principle of international law, its main function being to reconcile the principles of economic development with the principle of environmental protection.¹³⁰ He found the principle’s normative authority in its endorsement in multilateral treaties, international declarations, documents of international organizations, regional declarations, state practice,¹³¹ as well as in the practices of cultures and civilizations for millennia.¹³²

The principle of sustainable development has been addressed to a varying extent in other international cases. In his separate opinion in the *Pulp Mills* case, Judge Cançado Trindade cited the principle of sustainable development as a general principle of law.¹³³ It was addressed by the Appellate Body of the WTO in the *US—Shrimp* case as an interpretive principle.¹³⁴ In the *Iron Rhine Arbitration*, the Permanent Court of Arbitration referred to the principle of sustainable development as an “emerging” principle of environmental law.¹³⁵

The principle of sustainable development has also been embodied in a number of multilateral treaties,¹³⁶ non-binding

¹²⁹ Case Concerning the Gabčíkovo-Nagymaros Project (Hung./Slovak.), Judgment, 1997 I.C.J. 7, 88 (Sept. 25) (Separate opinion of Vice-President Weeramantry).

¹³⁰ *Id.* at 89-90.

¹³¹ *Id.* at 93.

¹³² *Id.* at 107-110.

¹³³ *Pulp Mills* (Separate Opinion of Judge Cançado Trindade), *supra* note 14, at ¶¶ 139-147.

¹³⁴ Appellate Body Report, United States—Import Prohibitions of Certain Shrimp and Shrimp Products, WTO Doc WT/DS58/AB/R ¶¶ 129-131 (Oct. 12, 1998) [US—Shrimp Case] (the Appellate Body considered it to be relevant in interpreting the obligations of the parties in conserving natural resources, since the principle was included in the preamble to the WTO Agreement).

¹³⁵ Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, 27 R.I.A.A. 35, ¶¶ 58-59 (Permanent Court of Arbitration, May 24, 2005) [Iron Rhine Arbitration]. Notably the tribunal applied the duty to reconcile environmental protection with economic development—giving rise to the duty to mitigate environmental damage—as a general principle of law. This closely resembles the principle of sustainable development; *see also* CHRISTINA VOIGT, SUSTAINABLE DEVELOPMENT AS A PRINCIPLE OF INTERNATIONAL LAW: RESOLVING CONFLICTS BETWEEN CLIMATE MEASURES AND WTO LAW 176 (2009) [Voigt, Sustainable Development].

¹³⁶ *See, e.g.*, Convention on Biological Diversity, *supra* note 83, Arts 2, 8; Cartagena Protocol, *supra* note 83, Preamble; Convention on Persistent Organic Pollutants, *supra* note 124, Art 7.3; UNFCCC, *supra* note 83, Art 3(4);

instruments,¹³⁷ and in domestic law.¹³⁸ Similar to the precautionary principle, its origins are primarily international; it was not identified nor transposed from domestic legal orders. Being that it has no domestic origin, the domestic approach to general principles would deny its binding force. It is likely not a rule of customary international law because there is no widespread evidence of state practice—and frequent violations of the principle, especially in developing countries. But it has widespread state recognition, even if state practice does not always conform to that recognition. It has been applied in cases resolving international disputes, indicating that it has some binding force.¹³⁹ The hybrid approach to general principles, accepting this widespread state recognition of the principle of sustainable development as a general principle of international law proper, could view it as a general principle of law, applicable as an autonomous source of law under Article 38(1)(c).

C. Summary

Thus, norms of environmental law are quickly emerging with widespread state recognition, even if they are not reflected in state practice. The legal force of these norms depends on whether they can be classified under Article 38(1)(c)—otherwise, under a traditional approach, they do not constitute

North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1992), Preamble; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 3, Preamble (entered into force Jan. 1, 1995).

¹³⁷ See, e.g., United Nations Millennium Declaration, G.A. Res. 55/2, UN Doc A/Res/55/2 (2000), goal 7; the Constitutive Act of the African Union, Jul. 11, 2000, 2158 U.N.T.S. 1 Art 3(j) (entered into force May 26, 2001); and the International Law Association's *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, I.L.A. Res. 3/2002, UN Doc A/57/329. It has been included in a number of World Bank reports: for a large list, see *Sustainable Development Topics and Themes*, WORLD BANK (Oct. 1, 2012), available at [http://web.worldbank.org/WBSITE/EXTERNAL/ TOPICS/EXTSDNET/0,,contentMDK:22180649~menuPK:64885123~pagePK:64885161~piPK:64884432~theSitePK:5929282,00.html](http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSDNET/0,,contentMDK:22180649~menuPK:64885123~pagePK:64885161~piPK:64884432~theSitePK:5929282,00.html). It has also been incorporated in a number of OECD publications: for example, see THE DAC GUIDELINES: STRATEGIES FOR SUSTAINABLE DEVELOPMENT (2001).

¹³⁸ See Voigt, *Sustainable Development*, *supra* note 135, at 23-24 for a list of countries which have incorporated the principle of sustainable development in their domestic legislation: these include Germany, Norway, Australia, Argentina, and New Zealand.

¹³⁹ See the discussion of the Iron Rhine Arbitration, above, *supra* note 135.

a source of law. While the domestic approach to general principles would deny their legal force, the fact that they are frequently raised as legal principles in international jurisprudence and sometimes applied to resolve disputes indicates that both states and tribunals perceive these principles as having legal force. They are not merely soft law norms, which though persuasive, are not binding. Rather, they do have binding force, obligating states to take measures to mitigate risk and to ensure that their economic development will not compromise the environment for future generations.¹⁴⁰

International environmental law has a distinct approach to general principles of law. Even though numerous multilateral treaties govern the area, general principles of law have been developed through soft law instruments on the international level such as the Rio Declaration, and subsequently applied in interstate disputes beyond the provisions of the applicable treaties. They closely resemble principles of customary international law, with the only difference being that general principles retain their normative force even in the absence of state adherence, a possibility which the classic formulation of customary international law denies. The fact that they have autonomous normative force at all indicates that the domestic approach to general principles is not satisfactory in the realm of international environmental law; it cannot explain the existence of these principles. The hybrid approach, which can identify these principles on the international level and classifies them under Article 38(1)(c) as an autonomous, formal source of law, provides a better explanation for their emergence and their use in guiding the behaviour of states and other international actors.

IV. INTERNATIONAL INVESTMENT LAW

In contrast to the use of general principles in international environmental law, international investment law has strictly adhered to the domestic approach when identifying general principles. International investment law is a specialized regime governed by thousands of bilateral investment treaties (BITs)

¹⁴⁰ See Alan Boyle, *supra* note 73, at 134 (discussing how general principles of environmental law derive their authority from the endorsement of states, and influence both the outcome of litigation and the practice of states. As such, they closely resemble *opinio juris*).

that provide for the rights of foreign investors vis-a-vis the host state, and allow those investors to pursue legal action under international law against that host state without needing to utilize the formal channels of diplomatic protection.¹⁴¹ These treaties often include a choice of law provision stating that the relevant rules of international law are applicable in settling disputes under the treaty.¹⁴² This area of law developed quite rapidly in the 1970s and 1980s as a form of public international law through the practice of international arbitration. Because there was little authoritative treaty and custom in the area, arbitrators frequently relied on general principles in resolving disputes during the formative years of international investment law.¹⁴³ While general principles have been used in a number of different contexts, they have been most frequently used in determining the applicability and scope of the fair and equitable treatment standard under international law.

A. *The Fair and Equitable Treatment Standard*

Fair and equitable treatment is a commonly used standard in international investment agreements, requiring states to treat domestic investors both fairly and equitably. While it is incorporated into most investment agreements between states and investors, the substantive content of this standard is defined by public international law, specifically by BITs, general principles, and customary international law.¹⁴⁴ Fair and equitable treatment has given rise to much litigation in the international investment law context because of the way treaty provisions are often framed. For example, Article 1105(1) of NAFTA states:

¹⁴¹ See, e.g., SURYA P. SUBEDI, *INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE* 30-32 (2d ed., 2012) (discussing the development of the ICSID regime as a “silent revolution” in international law).

¹⁴² ROLAND KLÄGER, ‘FAIR AND EQUITABLE TREATMENT’ IN *INTERNATIONAL INVESTMENT LAW* 105 (2011).

¹⁴³ Stephan W. Schill, *General Principles of Law and Investment Law*, in *INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS* 133, 134 (Tarcisio Gazzini & Eric de Brabandere eds., 2012) [Schill, *General Principles*].

¹⁴⁴ See Kläger, *supra* note 142, at 15-20 (discussing the use of various international law sources in determining the nature of the fair and equitable treatment standard).

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.¹⁴⁵

In another example, the Canadian model BIT states at Article 5:

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

2. The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.¹⁴⁶

As these two examples show, states are obligated to accord fair and equitable treatment to investors, without any guidance on what fair and equitable treatment actually means.

BITs are, in a simple sense, inter-state treaties. Thus, Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* is applicable in their interpretation. This Article states: “3. There shall be taken into account, together with the context: [...] (c) any relevant rules of international law applicable in the relations between the parties.”¹⁴⁷

General principles, as rules of international law, are thus automatically applicable to the interpretation of obligations under a BIT or an international investment treaty such as NAFTA unless the treaty specifically states otherwise.

In determining the scope of the fair and equitable treatment standard, international tribunals have had recourse both to general principles of law and to principles of customary international law.¹⁴⁸ However, these tribunals are not particularly careful about articulating the source of international legal rules, which they apply in interpreting the scope of the fair and

¹⁴⁵ North American Free Trade Agreement, *supra* note 136, art. 1105(1).

¹⁴⁶ *Canada 2004 Model BIT*, INVESTMENT TREATY ARBITRATION, available at italaw.com/documents/Canadian2004-FIPA-model-en.pdf.

¹⁴⁷ Vienna Convention on the Law of Treaties, *supra* note 11, Art 31(3)(c).

¹⁴⁸ Roland Kläger terms this link between the fair and equitable treatment standard under investment law and the use of general principles and customary international law as the “gateway” between investment law and general international law, overcoming fragmentation in the international system. See KLÄGER, *supra* note 142, at 94-95.

equitable treatment standard.¹⁴⁹ In the *Mondev International* case, the tribunal stated that the fair and equitable treatment standard embodied in Article 1105 of NAFTA is analogous to fair and equitable treatment in customary international law, with that custom proved by the uniform inclusion of fair and equitable treatment clauses in thousands of bilateral and regional investment treaties.¹⁵⁰ In the *Saluka Investments* case, the tribunal linked the concept of fair and equitable treatment to the domestic concept of legitimate expectations, stating:

The standard of 'fair and equitable treatment' is therefore closely tied to the notion of legitimate expectations, which is the dominant element of that standard. [...] The expectation of foreign investors certainly includes the observation by the host State of such well-established fundamental standards as good faith, due process, and non-discrimination.¹⁵¹

Tribunals have sourced the fair and equitable treatment standard under the principle of good faith in Article 38(1)(c) of the Statute of the ICJ, utilizing a comparative approach to determining the scope of the doctrine of legitimate expectations in domestic systems in order to determine the content of the fair and equitable treatment standard on the international level.¹⁵² Others have interpreted the principles of good faith and the prohibition of arbitrariness as general principles of law applicable under Article 1105(1) of NAFTA.¹⁵³

¹⁴⁹ See, e.g., Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 312 (2008) (surveying 98 decisions of ICSID Tribunals. Despite using international law in interpretation of the fair and equitable treatment standard, no tribunal of the 98 assessed carried out an assessment of whether a rule of customary international law existed, and only eight of those tribunals referred to general principles as a separate source of international law).

¹⁵⁰ *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 117 (Oct. 11, 2002), 42 I.L.M. 85 (2003).

¹⁵¹ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, ¶¶ 302-303 (Perm. Ct. Arb., 2006), available at http://www.pca-cpa.org/showfile.asp?fil_id=105.

¹⁵² *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, ¶¶ 111, 128-132 (Dec. 27, 2010), available at http://italaw.com/documents/TotalvArgentina_DecisionOnLiabilty.pdf.

¹⁵³ See *Merrill & Ring Forestry L.P. v Canada*, Award, (Mar. 31, 2010) ¶ 187 (International Centre for Settlement of Investment Disputes), available at <http://italaw.com/sites/default/files/case-documents/ita0504.pdf>. The tribunal stated:

The Tribunal must note that general principles of law also have a role to play in this discussion. Even if the Tribunal were to accept Canada's

What is notable in the interpretation of fair and equitable treatment by various tribunals is the use of domestic principles of law. The tribunals have generally utilized principles of administrative law—for example, legitimate expectations or due process—in determining the scope of treatment that host states are required to accord to foreign investors. International investors expect treatment in foreign countries to correspond to the treatment they enjoy in their home state. They expect fair and equitable treatment, which is guaranteed in their home state by domestic principles like legitimate expectations or due process. In determining the scope of fair and equitable treatment in foreign states, investors and tribunals apply, by analogy, the principles that guarantee fair and equitable treatment in domestic law. They thus transpose these principles from the domestic level to the international level in order to develop a standard of treatment of private actors in foreign countries, which closely corresponds to the standard of treatment enjoyed in their home states.¹⁵⁴ This is an example of the domestic approach to general principles.

B. Other General Principles

Other principles that are present in international investment law (and sometimes also in other areas, such as international trade law) have been developed in applicable treaties and in the jurisprudence. These include: the principle of full protection and security, most-favoured-nation treatment, the national treatment principle, protection against expropriation, and principles related to the requisite level of compensation for

argument to the effect that good faith, the prohibition of arbitrariness, discrimination and other questions raised in this case are not standalone obligations under Article 1105(1) or international law, and might not be part of customary law either, these concepts are to a large extent the expression of general principles of law and hence also a part of international law. Each question will have to be addressed on its own merits, as some might closely be related to such principles while other issues are not. Good faith and the prohibition of arbitrariness are no doubt an expression of such general principles and no tribunal today could be asked to ignore these basic obligations of international law. The availability of a secure legal environment has a close connection to such principles and transparency, while more recent, appears to be fast approaching that standard.

¹⁵⁴ McLachlan et al, *supra* note 65, at 259.

expropriation.¹⁵⁵ The principle of full protection and security is found in many BITs and NAFTA, requiring the host state to take all measures of precaution necessary to protect the investment of foreigners within its territory,¹⁵⁶ which is generally satisfied by the state exercising due diligence.¹⁵⁷ The most-favoured-nation principle is based on the principle of reciprocity, requiring a host country to treat investors from one foreign country equally to investors from any other foreign country.¹⁵⁸ The national treatment principle prohibits a state from discriminating based on the nationality of the ownership of an investment, essentially requiring that foreign-owned investments receive the same advantages as national-owned investments.¹⁵⁹ The prohibition against expropriation prohibits a state from taking the property of an investor or substantially depriving the investor of the benefits of that property.¹⁶⁰ Finally, most BITs and free trade agreements require states to pay full compensation to investors for any expropriation.¹⁶¹ While many of these principles are embodied in treaties and thus enforceable as treaty provisions, they have also been interpreted as free-standing principles applicable in international investment disputes even where the treaty is silent on their applicability. As such, they are treated as general principles of international law, but their origins are in state-based agreement to their presence in treaties and thus, represent simply a variant on the domestic approach to general principles predominant in this area of law.

¹⁵⁵ The standard for compensation is of course controversial, with a “prompt, adequate, and effective” standard of full compensation flowing from the American Hull formula but with many Latin American states advocating the Calvo doctrine. This Article does not seek to resolve these disputes but simply acknowledges that although the US approach has largely made its way into international investment law through treaties, some measure of debate is ongoing.

¹⁵⁶ Saluka Investments, *supra* note 151, at ¶¶ 483-484.

¹⁵⁷ Noble Ventures v. Romania, ICSID Case No. ARB/01/11, Award, at ¶ 164 (Oct. 12, 2005), available at <http://www.italaw.com/sites/default/files/case-documents/ita0565.pdf>.

¹⁵⁸ Subedi, *supra* note 141, at 68.

¹⁵⁹ Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, at Part IV, ch B, ¶ 11 (UNCITRAL, Aug. 3, 2005).

¹⁶⁰ Subedi, *supra* note 141, at 74-75 (describing both direct and indirect expropriation).

¹⁶¹ *Id.*, at 79.

V. INTERNATIONAL CRIMINAL LAW

A. Introduction

During at least a certain period of its development, particularly during the leading era of the Yugoslavia and Rwanda tribunals,¹⁶² international criminal law drew on general principles relatively frequently.¹⁶³ One prominent scholar of general principles in international criminal law, Fabián O. Raimondo, has actually hinted that international criminal law's use of these principles encouraged their use in other areas in causal terms.¹⁶⁴ Indeed, he goes so far as to say that "[p]rovocatively speaking, general principles of law were a dormant source of international law which was revived in international criminal law because there were legal gaps to fill and imprecise legal rules to interpret."¹⁶⁵ However, that story is too simple for two reasons. First, some of the revived uses in other areas actually preceded the Tribunals' use of general principles.¹⁶⁶ While this Article would not dismiss entirely the idea of an interaction between areas of international law where they have encouraged one another's use of general principles, there is frankly no sim-

¹⁶² See generally WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* (2006) (discussing in general terms the significance of the tribunals and their place within the history of international criminal law). See also, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993) (being the instrument establishing the ICTY) and Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994) (being the instrument establishing the ICTR).

¹⁶³ See generally RAIMONDO, *GENERAL PRINCIPLES* *supra* note 64, at 73; Fabián O. Raimondo, *General Principles of Law, Judicial Creativity, and the Development of International Criminal Law*, in *JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS* (Shane Darcy & Joseph Powderly eds., 2010). Cf. also RAIMONDO, *GENERAL PRINCIPLES*, *id.*, at 94 (noting that where there are clear rules for a particular tribunal in treaty or in its constituting statute, those rules will be *lex specialis* and thus preclude resort to general principles in such circumstances), 158-63 (noting several uses of general principles by the Special Court for Sierra Leone).

¹⁶⁴ RAIMONDO, *GENERAL PRINCIPLES*, *supra* note 64, at 193.

¹⁶⁵ *Id.*

¹⁶⁶ See e.g. Part III, above (discussing articulation of general principles in international environmental law context prior to 1990s).

ple story that, say, international criminal law revived them that is consistent with the evidence.

Indeed, this claim is strengthened by the fact that the concept of “principles” is that much more complex in international criminal law than in other areas of law. Generally speaking, in the criminal law area especially, the term “principles” can refer to norms that have not hardened into rules, as well as to the more technical concept of “general principles of law”.¹⁶⁷ In criminal law contexts, specifically, there has often been thought to be a general part, consisting of principles, quite apart from the technical sense of general principles as a source of law. This general part of criminal law may actually embrace certain of the matters that the Tribunals at least purported to analyze in terms of the more specific general principles analysis. General principles, in the non-technical sense of a common part to the criminal law, are often thought to cover such matters as the presumption of innocence, the rights of the accused, individual criminal responsibility, the responsibility of commanders and superiors, principles of *mens rea*, and defenses.¹⁶⁸

Interestingly enough, some statements from the Tribunals reflect a blurring of these two different ideas of general principles. Consider, for example, the following passage:

General principles of international criminal law, whenever they may be distilled by dint of construction, generalisation or logical inference, may also be relied upon. In addition, it is now clear that to fill possible gaps in international customary and treaty law, international and national criminal courts may draw upon general principles of criminal law as they derive from the convergence of the principal penal systems of the world. Where necessary, the Trial Chamber shall use such principles to fill any *lacunae* in the Statute of the International Tribunal and in customary law. However, it will always be necessary to bear in mind the dangers of wholesale incorporation of principles of national law into the unique system of international criminal law as applied by the International Tribunal.¹⁶⁹

¹⁶⁷ KENNETH S. GALLANT, *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW* 7 (2009).

¹⁶⁸ WILLIAM SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 203-232 (2007).

¹⁶⁹ *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, ¶ 677 (Int'l. Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

The first sentence would actually appear to be referring to “general principles” in (what is for international law purposes) the non-technical sense of the common part to the criminal law, given its references to the use of simple construction or logical inference, while the remainder represents an embrace of general principles in the more technical sense of those with international law status, although the term “general principles” actually appears only in the first sentence. Within the terminology of the other parts of this Article,¹⁷⁰ there may be yet more complex hybridizations going on within international criminal law than within international environmental law. However, further examining these hybridizations and the reasons for them involves further unpacking the use of general principles in this area.

In his study on the use of general principles in the international criminal tribunals, Raimondo has suggested that the tendency to use general principles on a widespread basis in the Tribunals was possible because of the relatively new standing of the field, the limited detail articulated for the operations of these tribunals, the need for compelling legal reasoning when justifying decisions, and the obvious analogies available between domestic and international criminal law problems.¹⁷¹ It is important to set out some of the evidence of this use of general principles in the tribunals, and this Part will begin by doing so, while also referencing some of the methodological uncertainties or even dangers that have been evident with such uses.

With that said, it would be inaccurate to limit the analysis to this claim. The types of methodological uncertainties or dangers that grow gradually in this Part’s analysis of the Tribunals’ use of general principles have arguably motivated some

¹⁷⁰ See *supra* Part II.

¹⁷¹ See RAIMONDO, GENERAL PRINCIPLES, *supra* note 64, at 73-74. *But see also* Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Opinion of Judges McDonald and Vohrah, ¶ 56 (Int'l. Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) (“Paragraph 58 of the Report of the Secretary-General of the United Nations presented on 3 May 1993 expressly directs the International Tribunal to this source of law: ‘The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognised by all nations’, with this passage thus raising the possibility that the judges thought of themselves as applying general principles not in light of any such deep-seated theoretical approaches but just out of following orders).”

caution by various international actors. Thus, this Part also goes on to show some of the ways in which the international legal order in this area, becoming aware of the potential of general principles and their risks, has also sought in the context of the International Criminal Court (ICC) to impose limits on them specific to the needs of the particular domain of international law at issue.¹⁷² One result is that the ICC is thus arguably unlikely to be making similarly extensive use of general principles as the Yugoslavia and Rwanda Tribunals had.¹⁷³ General principles, this Article argues, may have had a historically temporary role in international criminal law, although it is also not possible to exclude a possible new resurgence in their use.

B. General Principles in the International Criminal Tribunals

The very earliest encounter of the international criminal law system with general principles actually might have led observers initially to suspect that general principles would not have much impact in this domain. Immediately following World War II, in the Nuremberg proceedings,¹⁷⁴ the International Military Tribunal (IMT) was confronted with a well known and widely discussed¹⁷⁵ defense argument that any punishment for aggressive war would amount to *ex post facto* retribution.¹⁷⁶ On the defense argument, such *ex post facto* retribution was contrary to general principles of international law

¹⁷² See *infra* Section C.

¹⁷³ *Id.*

¹⁷⁴ See generally, ROBERT WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW (1960) (a classic account of the Nuremberg trials); Bert Röling, *The Nuremberg and the Tokyo Trials in Retrospect*, in A TREATISE IN INTERNATIONAL CRIMINAL LAW 591 (Cherif Bassiouni & Ved Nanda eds., 1973) (similarly offering a leading classic account of Nuremberg trials).

¹⁷⁵ See, e.g., RAIMONDO, GENERAL PRINCIPLES, *supra* note 64, at 78; Kononov v. Latvia, App. No. 36376/04, ¶¶ 13-14 Eur. Ct. Hum. Rts. (2010) (dissenting opinion of Judge Costa joined by Judges Kalaydjieva and Poalelungi) (three judges in European Court of Human Rights Grand Chamber decision implying that Nuremberg did violate *ex post facto* principles and might not be sustainable under current European human rights jurisprudence, thus exemplifying lingering discussion of this aspect of the case in many different contexts).

¹⁷⁶ Judgment of the International Military Tribunal for the Trial of German Major War Criminals 38 (1946).

since a prohibition on *ex post facto* punishment was present throughout different domestic criminal law orders.¹⁷⁷ However, the IMT held that the principle *nullum crimen nulla poena sine lege* “is not a limitation of sovereignty, but is in general a principle of justice”,¹⁷⁸ thus, rejecting any legal status to something arguably meeting the standards of a general principle of law.

With that said, when one looks beyond this well-known example, it is remarkable that at the same time, and indeed in the very same case, the same tribunal was in fact ready to draw upon general principles in some respects. For example, in articulating a legal test under Article 8 of its Charter,¹⁷⁹ concerning superior orders, the IMT suggested that the widespread test in domestic criminal law systems involved not the mere existence of orders but whether moral choice remained possible.¹⁸⁰ In drawing upon this reasoning, whether or not it interpreted generally existing law correctly,¹⁸¹ the IMT drew upon a general principle of law in offering its conclusion and its approach to the test for criminal responsibility in the face of superior orders.¹⁸² It would also appear to have done so with respect to a general principle of personal culpability in criminal law.¹⁸³ So, although the IMT is well known for having rejected a major defense argument grounded in general principles of in-

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 39.

¹⁷⁹ Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

¹⁸⁰ *See* Judgment of the International Military Tribunal for the Trial of German Major War Criminals, *supra* note 176, at 42 (stating that “[t]he provisions of this Article are in conformity with the law of nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.”)

¹⁸¹ *Cf.*, RAIMONDO, GENERAL PRINCIPLES, *supra* note 64, at 79 (“Contrary to the IMT’s view, whether Article 8 conformed with the ten existing general international law is doubtful. Actually, until the Second World War superior orders always excluded the criminal responsibility of the subordinate who acted under those orders; only the superior was criminally responsible.”)

¹⁸² *See id.* at 79 (stating that “the IMT resorted to a general principle of law in order to reach that conclusion”).

¹⁸³ *See id.* at 80-81.

ternational law, its judgment actually stands as a more nuanced example of an early international criminal law tribunal having actually made use of general principles.¹⁸⁴

More recently, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have both made relatively extensive use of general principles.¹⁸⁵ They have also embraced this source of law quite openly, with one decision going so far say as to explain as follows:

[t]he value of these sources is that they may disclose ‘general concepts and legal institutions’ which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject. In considering these national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles.¹⁸⁶

At a simple level, these international criminal law tribunals have identified general principles pertaining to procedural and evidentiary rules,¹⁸⁷ including *res judicata*,¹⁸⁸ *audi alteram partem*,¹⁸⁹ *in dubio pro reo*,¹⁹⁰ and *iuria novit curia*.¹⁹¹ Some

¹⁸⁴ *Cf. id.* at 81-83 (discussing the use of general principles by the Tokyo Tribunal, the International Military Tribunal for the Far East (IMTFE)).

¹⁸⁵ *See e.g. id.* at 86 (noting at least eighteen ICTY judgments making use of general principles) and *passim*.

¹⁸⁶ *Prosecutor v. Kunarac et al.* Case Nos. IT-96-23-T and IT-96-23/1-T, Judgment, ¶ 439 (Int'l. Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

¹⁸⁷ SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 162, at 105-106.

¹⁸⁸ *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), (Mar. 31, 2000) (Declaration of Judge Nieto-Navia).

¹⁸⁹ *Prosecutor v. Jelisić*, Case No. IT-95-10-A0, Judgment, ¶ 4 (Int'l. Crim. Trib. for the Former Yugoslavia, Jul. 5, 2001) (Separate opinion of Judge Nieto-Navia).

¹⁹⁰ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 319 (Sept. 2, 1998) (accepting, in the instance of doubt, the version of facts more favourable to the accused). *See also*, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 416 (Int'l. Crim. Trib. for the Former Yugoslavia, Jul. 31, 2003) (accepting same principle in ICTY). *See also* *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment, ¶¶ 599-604 (Int'l. Crim. Trib. for the

general principles may of course have a different meaning in the international context than might be thought based on any simple transposition of the principle's meaning in the domestic context, as the ICTY found in the instance of guarantees that criminal courts be established by law.¹⁹² Thus, one particular challenge that arises in relation to appropriate transposition from national legal orders to the international sphere may be particularly important in some respects in the context of certain procedural norms.¹⁹³

The Tribunals have also used general principles to identify an inherent power on the part of the tribunal to punish for an offence of contempt.¹⁹⁴ The contempt example has given rise to criticism of the Tribunals, however, as not always being engaged with a consistent test for the abstraction of general principles from national law so much as developing principles that suit the needs of the Tribunal.¹⁹⁵ Such a danger seems particu-

Former Yugoslavia Nov. 16, 1998) (accepting general principle of burden of proof on prosecutor).

¹⁹¹ Kambanda v. Prosecutor, Case No. ICTR-97-23-A, Judgment, ¶¶ 96-98 (Oct. 19, 2000) (holding that arguments of parties do not exhaust what court can consider).

¹⁹² See, e.g., Prosecutor v. Tadić, Case No. IT-94-1-R72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 41-43 (Int'l. Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (differentiating between the widespread national guarantee of courts being established by law and the mechanisms by which an international criminal law tribunal could be appropriately constituted). *But see*, James Crawford, *The Drafting of the Rome Statute, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 129-33 (Philippe Sands ed., 2003) (challenging the problematic dimensions of the appearance that the international tribunal has said that it is subject to a lower standard in this respect than a domestic criminal court).

¹⁹³ See generally RAIMONDO, *GENERAL PRINCIPLES*, *supra* note 64, at 92-93 (suggesting that there may be a need for adaptation of procedural norms); *Cf.* Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 11 (Int'l. Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (Separate opinion of Judge Sidwa) (Judge Sidwa referring to borrowing ideas from national jurisdictions in a flexible manner so as to avoid rigidities of procedures).

¹⁹⁴ See Prosecutor v. Tadic, Case No. IT-94-1-A-AR77, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2001) (contempt of Tribunal punishable based on general principles of law).

¹⁹⁵ See Raimondo, *General Principles of Law, Judicial Creativity, and the Development of International Criminal Law*, *supra* note 163 (noting that civil law systems accept existence of the contempt power only where it has been specifically created by legislation); see James Cockayne, *Commentary, in* 4

larly apt to arise in the context of matters that do somehow affect the procedure of the international tribunal or court at issue.

The Appeals Chamber of the ICTY engaged in a very famous discussion of general principles in the context of its closely divided three-to-two decision on the matter of duress in the *Erdemović* decision.¹⁹⁶ The Appeals Chamber split over whether duress can be a complete defense to offenses of crimes against humanity or war crimes, with the question being related to whether duress can be a complete defense against an offence of killing innocent persons. The case presents a thoughtful engagement with general principles.¹⁹⁷ The majority held that it was not but could, in the circumstances, go only to mitigation of sentence. In rejecting the asserted defense, the joint opinion within the majority of Judges McDonald and Vohrah purported to canvass thirty different national criminal law systems, although presenting their attempt modestly,¹⁹⁸ and to conclude that there was no general principle making duress a complete defense in these circumstances. Judge Li, sharing their opinion on this point, summarized the effects of this survey most succinctly: “National laws and practices of various States on this question are also divergent, so that no general practice of law recognised by civilised nations can be deduced from them.”¹⁹⁹

One of the present Article’s authors has observed tendencies in the decision that “although containing seemingly extensive doctrinal surveys and some normative discussion, could prompt relatively primordial worries about the methodology of modes of generation of norms of international law”.²⁰⁰ Specifici-

ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1999–2000 191, 193 (André Klip & Göran Sluiter eds., 2002) (raising similar concerns).

¹⁹⁶ See *Erdemović*, *supra* note 171.

¹⁹⁷ See *Id.*; Opinion of Judges McDonald and Vohrah, at ¶¶ 56-58 (presenting several of the key considerations on questions of how to use general principles, and engaging with some of the leading decisions to have done so).

¹⁹⁸ *Id.*, at ¶ 57 (“In order to arrive at a general principle relating to duress, we have undertaken a limited survey of the treatment of duress in the world’s legal systems. This survey is necessarily modest in its undertaking and is not a thorough comparative analysis.”)

¹⁹⁹ See *Prosecutor v. Erdemović*, *supra* note 171 at ¶ 3. (Separate and Dissenting Opinion of Judge Li).

²⁰⁰ Dwight Newman, *Theorizing Duress and Necessity in International*

cally, the approach to analyzing national law does not take account of all factors that domestic lawyers would consider, for example, the discussion of Canadian law amounts only to a statutory reference at a time when there were already serious questions about the constitutionality of that statutory provision.²⁰¹ A more complete examination of the national law of all the states involved might yield other surprises—that is simply unknown. The attempt to use around thirty states' criminal law provisions, to generate a general principle, risks depth of research in ways that, at least raise some questions about international criminal law's use of general principles.

Apart from this quibble, however, Judge Cassese prominently dissented in the case on different grounds altogether and held that duress could potentially be a complete defence in the circumstances of the case, subject to further facts to be analyzed in the Trial Chamber.²⁰² The principal reason for reaching this different outcome was, in one sense, that Judge Cassese considered that Judges McDonald and Vohrah were mistaken in concluding that the absence of a special rule on duress in the context of killing innocent persons meant that no rule applied to those circumstances, with Judge Cassese holding that the absence of a special rule would mean simply that the general rule for duress applied.²⁰³ However, his readiness to go this route also involved a refusal to go the route of examining national law in search of a general principle on the matter, at least except in so far as certain national judgments were within the sphere of international criminal law *per se*.

Thus, perhaps somewhat less fully noticed by those expounding the role of general principles in international law,²⁰⁴

Criminal Law, in RETHINKING CRIMINAL LAW THEORY: NEW CANADIAN PERSPECTIVES IN THE PHILOSOPHY OF DOMESTIC, TRANSNATIONAL, AND INTERNATIONAL CRIMINAL LAW 291, 294-95 (François Tanguay-Renaud & James Stribopoulos eds., 2012) (discussing the Tribunal's apparent misinterpretation of constitutionally valid Canadian law on duress).

²⁰¹ See *Id.*

²⁰² See Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, *supra* note 171 at ¶ 50.

²⁰³ See *id.* at ¶ 11.

²⁰⁴ See, e.g., RAIMONDO, GENERAL PRINCIPLES, *supra* note 64 at 100-103 (discussing the *Erdemović* opinion as an example of the use of general principles without even referencing Judge Cassese's dissent in the first instance). But see *id.* at 185-86 (offering brief reference to Judge Cassese's critiques, although tending to minimize them to some extent).

Judge Cassese's significant opinion actually contains a strong critique of the use of general principles in the international criminal law context.²⁰⁵ His opinion may be even more significant than the majority's in some respects in that his substantive outcome on the defence of duress was actually chosen by states in the drafting of the Rome Statute.²⁰⁶ In terms of general principles, at the very outset of his judgment, he hints at the use of general principles being highly problematic in the context of the very different body of international criminal law:

To my mind notions, legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings. The International Tribunal, being an international body based on the law of nations, must first of all look to the object and purpose of the relevant provisions of its Statute and Rules.²⁰⁷

Judge Cassese is actually quite skeptical of the use of national law within international law,²⁰⁸ noting the autonomy of international law even where there have been past connections, saying that the "historical spilling over from one set of legal systems into the law of nations does not detract from these legal systems (those of States on the one side, and international law, on the other) being radically different: their structure is different, their subjects are different, as are their sources and enforcement mechanisms."²⁰⁹ His argument for this claim is in part specific to international criminal law and its unique fusion of adversarial and inquisitorial systems of criminal law, which has now become an entirely different system of criminal law.²¹⁰ The international criminal law system also has a very different

²⁰⁵ See *Prosecutor v. Erdemović*, *supra* note 202 at ¶¶ 1-6.

²⁰⁶ See Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *entered into force* July 1, 2002, art 31(1)(d) [hereinafter Rome Statute]. See SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, *supra* note 168 at 90-91 (suggesting that states entrenched Judge Cassese's opinion); see Newman, *Theorizing Duress and Necessity in International Criminal Law*, *supra* note 200 at 306 (making similar claim).

²⁰⁷ See *Prosecutor v. Erdemović*, *supra* note 171 at ¶ 2 (Separate and Dissenting Opinion of Judge Cassese).

²⁰⁸ *Id.* at ¶ 3 ("Whenever reference to national law is not commanded expressly, or imposed by necessary implication, resort to national legislation is not warranted.")

²⁰⁹ *Id.*

²¹⁰ See *Id.* at ¶ 4.

ability to enforce its judgments, again leading to strong claims of its specificity.²¹¹ He does not ultimately preclude all possible reference to general principles but does indicate that any such use must be carefully tested against the autonomy of the international criminal law system and its unique characteristics,²¹² implicitly in a much more rigorous manner than the majority had. Thus, the ICTY has indeed used general principles in articulating the requirements for a possibly under defined defense. But, its doing so also faced meaningful opposition within the Tribunal itself, as well as other problems that have been noticed in terms of the methodology.²¹³

Finally, the Tribunals have made use of general principles, as well, in the actual application of substantive rules of international criminal law. For example, in the absence of a statutory or customary international law definition of rape and clear indication on whether the offense applied in the instance of forced oral penetration, the ICTY Trial Chamber in *Furundžija* turned to “principles of criminal law common to the major legal systems of the world”, or general principles of international law.²¹⁴ In doing so, however, it also sought to look to the values behind the national legal systems and thus to arrive at a general principle that was different from the technical rules within the national legal systems but that reflected their shared concern for human dignity, thus recognizing the offence as rape.²¹⁵

²¹¹ *Id.* at ¶ 5 (“The philosophy behind all national criminal proceedings, whether they take a common-law or a civil law approach, is unique to those proceedings and stems from the fact that national courts operate in a context where the three fundamental functions (law-making, adjudication and law enforcement) are discharged by central organs partaking of the State’s direct authority over individuals. That logic cannot be simply transposed onto the international level: there, a different logic imposed by the different position and role of courts must perforce inspire and govern international criminal proceedings.”)

²¹² *See Id.* at ¶ 6.

²¹³ *See, e.g., Newman, Theorizing Duress and Necessity in International Criminal Law, supra note 200 at 294-95* (concerning misinterpretations of some of the national law cited). *See generally, RAIMONDO, GENERAL PRINCIPLES, supra note 64 at 181* (discussing general lack of methodology), 182 (discussing tendency to leave out consideration of national laws from Latin America, Africa, and Asia).

²¹⁴ *Prosecutor v. Furundžija, Case No. IT-95-7/1-T, Judgment, ¶ 177* (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

²¹⁵ *See id.* at ¶¶ 183-85. *See also Kunarac, supra note 186 at ¶¶ 438-442* (using general principles to expound upon and expand some aspects of way in which consent requirement stated, considering broader value in national le-

The result, of course, may be commendable, but it does represent a departure from more consistent technical approaches to general principles, again manifesting the complexity of the Tribunals' use of general principles.

The Tribunals did often engage in a sort of comparative law research to come up with their general principles²¹⁶—thus following the “domestic” conception of elsewhere in this Article²¹⁷— even if subject to critiques for occasional inaccuracies²¹⁸ or incompleteness.²¹⁹ However, whether that represents a consistent “domestic” methodology for general principles is open to significant doubt. First, there are just some uncertainties on what was going on in some cases. In some instances, the Tribunal actually seems simply to have swapped language between customary international law and general principles.²²⁰ Second, more general comments on the Tribunal experience have raised some larger questions. Thinking of the Tribunal experience, some scholars have wondered if the use of general principles was meant simply to permit the development of custom via *opinio juris* alone²²¹—although one could arguably more easily make the opposite claim that the cases using general principles have actually looked at state practice alone, although perhaps not in a manner actually different than would normally be part of the customary international law test. Third, some of the cases certainly show judges who precisely eschewed any “domestic” methodology and clearly sought to follow some form of more hybrid methodology.²²² The Tribunal

gal systems of sexual autonomy).

²¹⁶ See generally, RAIMONDO, GENERAL PRINCIPLES, *supra* note 64 at 196.

²¹⁷ See RAIMONDO, GENERAL PRINCIPLES, *supra* note 64 at Part II.

²¹⁸ See *e.g.*, Newman, Theorizing Duress and Necessity in International Criminal Law, *supra* note 200.

²¹⁹ See *e.g.*, Raimondo, General Principles of Law, Judicial Creativity, and the Development of International Criminal Law, *supra* note 161 (discussing instances such as one in which the Tribunal used just one national law so as to demonstrate the purported existence of a general principle); see also RAIMONDO, GENERAL PRINCIPLES, *supra* note 64 at 155, 157, 182, 196 (discussing failure to use national laws of large parts of the world).

²²⁰ See Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶¶ 535-539 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); see also RAIMONDO, GENERAL PRINCIPLES, *supra* note 64 at 99-100.

²²¹ See KAI AMBOS, LA PARTE GENERAL DEL DERECHO PENAL INTERNACIONAL: BASES PARA UNA ELABORACIÓN DOGMÁTICA 35 (2005), in RAIMONDO, GENERAL PRINCIPLES, *supra* note 64, at 167.

²²² See discussion *supra* Part II.

experience is one of mixed methodologies on general principles, perhaps leading to some of the later calls for constraints on general principles in international criminal law.

C. General Principles in Future International Criminal Law: Restraints on the ICC

The Rome Statute²²³ establishing the International Criminal Court (ICC) actually carefully regulates the sources of law to which the ICC may have reference.²²⁴ This careful delimitation of sources arose along with other efforts to limit the discretion of the ICC.²²⁵ In relation to general principles, the ICC is empowered by article 21(1)(c) of the Rome Statute in quite specific terms to use them, but subject to various constraints that become clearer from the full text of article 21(1):

The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.²²⁶

Some have seen article 21(1)(c) as simply a modern statement of the concept of general principles, breaking from the now less acceptable “civilized nations”²²⁷ language in article 38(1)(c) of the Statute of the International Court of Justice.²²⁸

²²³ See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT.

²²⁴ See SCHABAS, *supra* note 168, at 195 (stating that “[t]he Rome Statute creates a special regime as far as sources of law are concerned.”).

²²⁵ *Id.*, at 194 (stating that “[the Rome Statute] seeks to delimit in great detail any possible exercise of judicial discretion.”)

²²⁶ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art 21(1)(c).

²²⁷ See Boas, *supra* note 13, at 105 (suggesting that this language is now obsolete).

²²⁸ See SCHABAS, *supra* note 168, at 102 (stating that “The language [of 38(1)(c)] is archaic, and a more acceptable and contemporary formulation of essentially the same concept appears in article 21(1)(c) of the Rome Statute”).

However, the reality is more complex. First of all, the opening words, “Failing that”, establish general principles as clearly subsidiary to the other sources of the Statute and associated instruments as well as custom concerning the international law of armed conflict.²²⁹ Second, the terminology of article 21(1)(c) of the Rome Statute is arguably not even entirely internally consistent.²³⁰ It both commands the creation of general principles from national laws generally and gives some special authority to the national laws that would normally govern the matter.²³¹ Moreover, some have taken the article as evolutive, since a later reference within article 21(3) to a rule that “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”²³² means that its meaning can shift with future changes in international human rights norms.²³³

Apart from the relationship to national legal systems implied in the general principles context, it bears noting that the ICC’s relationship to national legal systems is more complex and more specifically defined in certain contexts. Aside from the general jurisdictional principles of complementarity that define a certain relation to national legal systems more generally,²³⁴ there are some contexts where the Rome Statute actual-

²²⁹ See also, RAIMONDO, GENERAL PRINCIPLES, *supra* note 64, at 150-51.

²³⁰ See Per Saland, *International Criminal Law Principles, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 189, 215 (Roy Lee ed., 1999) (stating that “[t]here is of course a certain contradiction between the idea of deriving general principles, which indicates that this process could take place before a particular case is adjudicated, and that of looking also to particular national laws of relevance to a certain case; but that price had to be paid in order to reach a compromise.”); See also RAIMONDO, GENERAL PRINCIPLES, *supra* note 64, at 150 (referring to “the peculiar wording employed by the drafters of the Statute.”)

²³¹ *Id.*

²³² ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 21(3).

²³³ See SCHABAS, *supra* note 168, at 198 (same author who stated that the article just restates general principles idea also stating that “the Statute is not locked into the prevailing values at the time of its adoption. International human rights law continues to evolve inexorably, and the reference to it in the Statute is full of promise for innovative interpretation in future years.”).

²³⁴ See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 17(1) (stating that “[h]aving regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, un-

ly textually overrides local approaches.²³⁵ For example, on limitation periods, article 29 states simply as follows: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”²³⁶ This provision actually limits the principle of complementarity in a certain sense in so far as it precludes national legal systems from having certain sorts of limitation periods or at least from seeing those limitation periods have effect.²³⁷

The Rome Statute thus quite specifically defines the relation to national legal systems. And, in any event, article 21 is clearly meant to guide the International Criminal Court rather specifically in terms of its sources. As has been stated by the Pre-Trial Chamber of the ICC, “the rules and practice of other jurisdictions, whether national or international, are not as such ‘applicable law’ before the Court beyond the scope of article 21 of the Statute. More specifically, the law and practice of the ad hoc tribunals, which the Prosecutor refers to, cannot per se form a sufficient basis for importing into the Court’s procedural framework remedies other than those enshrined in the Statute.”²³⁸ Given this sort of analysis, article 21(1)(c) presumably falls to be read relatively strictly. One result could arguably be a narrow reading of general principles recognized by the Statute, especially given its allocation of general principles to a subsidiary position in terms of sources of applicable law.²³⁹

The detail of the Rome Statute generally, along with the existence of more customary international criminal law, as developed by the Tribunals,²⁴⁰ means that significant *lex specialis*

less the State is unwilling or unable genuinely to carry out the investigation or prosecution [...]”).

²³⁵ See SCHABAS, *supra* note 168, at 234.

²³⁶ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 29.

²³⁷ Cf. SCHABAS, note 168, at 234 (“Article 29’s role in the Statute would appear to be part of the complex relationship between national and international judicial systems. It acts as a bar to States who might refuse to surrender offenders on the ground that the offence was time-barred under national legislation. More than that, Article 29 may effect the prohibition on statutory limitation that the international treaties have failed to do.”).

²³⁸ Situation in Uganda, Case No. ICC-02/04-01/05, Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrant of Arrest, Motion for Reconsideration, and Motion for Clarification, ¶ 19 (Oct. 28, 2005).

²³⁹ See also RAIMONDO, GENERAL PRINCIPLES, *supra* note 64, at 150-51 (suggesting that the language of the text implies this subsidiarity).

²⁴⁰ Cf. e.g. Noora Arajärvi, *The Role of the International Criminal Judge*

exists so as to imply that a subsidiary source such as general principles likely should not make a frequent contribution at the ICC.²⁴¹ States have chosen to constrain the ICC's use of general principles, perhaps in part reacting against the experience of the Tribunals' less constrained law-making. On this reading, general principles may have had a historically temporary role within international criminal law, allowing for its rapid development during an era of need but now giving way to other sources of international law.

However, a resurgence in the use of general principles is potentially difficult to block, even with specific textual wording. Even in some of its earliest decisions, there were already several instances in which the ICC in fact went on to use general principles, largely on procedural issues, such as rules on "witness proofing,"²⁴² extraordinary leave to appeal,²⁴³ burden of proof on victim participation and use of circumstantial evidence in such applications,²⁴⁴ and contact and communication between witnesses.²⁴⁵

With that said, some judgments have specifically drawn upon the text of the Statute to discuss reasons for restraint in applying general principles. For example, a recent separate opinion in Trial Chamber I's judgment in the *Lubanga* case

in the Formation of Customary International Law, 1 EUR. J. LEG. ST. No. 2, 2007, at 1 (reviewing general interaction of ICTY and customary international law, including development of customary international law in different ways during different phases of the ICTY's operations); Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT'L L. 334, 336 (2013) (noting role of tribunals in development of customary international law).

²⁴¹ Cf. Raimando, *supra* note 163.

²⁴² Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, ¶¶ 35-37 (Nov. 8, 2006).

²⁴³ See Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Appeals Chamber Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ¶¶ 3, 5, 22 (Jul. 13, 2006).

²⁴⁴ See Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Case No. ICC-02/04-01/05, Pre-Trial Chamber Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ¶¶ 13-15 (Aug. 10, 2007).

²⁴⁵ See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Pre-Trial Chamber Decision Revoking the Prohibition of Contact and Communication Between Germain Katanga and Mathieu Ngudjolo Chui, ¶12 (Mar. 13, 2008).

warns to some extent against the use of general principles.²⁴⁶ Piercing behind an approach to co-perpetration adopted by the Pre-Trial Chamber based on some fragments of ICTY case law, Judge Fulford identified this approach as actually having come into the ICTY directly from German law. Then he wrote:

While Article 21(1)(c) of the Statute permits the Court to draw upon “general principles of law” derived from national legal systems, in my view before taking this step, a Chamber should undertake a careful assessment as to whether the policy considerations underlying the domestic legal doctrine are applicable at this Court, and it should investigate the doctrine’s compatibility with the Rome Statute framework. This applies regardless of whether the domestic and the ICC provisions mirror each other in their formulation. It would be dangerous to apply a national statutory interpretation simply because of similarities of language, given the overall context is likely to be significantly different.²⁴⁷

The statement, part of a decision not to affirm the Pre-Trial Chamber’s approach, is in one sense a statement about caution in transposition of general principles from domestic contexts into the international sphere, with some wise counsel on the possible use of the overall policy frameworks as a way of analyzing when it is and is not appropriate to transpose principles. That analysis sits squarely within what this Article has called the “domestic” methodology, with cautious restraints on its application. However, at the same time, the paragraph is in fact affirming of the use of general principles, with the identified means of restraint being one generated from a type of policy consideration rather than being based directly on the text of Article 21(1)(c) of the Statute, thus actually portending future flexibility even from an instance of current restraint. Even with strong textual restraints, general principles come into use at the ICC, with judges having obviously been drawn to them in particular cases in light of certain needs of the international criminal law system. Their future use may be restrained, or it may not be.

²⁴⁶ See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, Judgment, ¶ 10 (Mar. 14, 2012) (separate opinion of Judge Adrian Fulford).

²⁴⁷ *Id.*

VI. INDIGENOUS RIGHTS

The international law status of Indigenous rights is still developing,²⁴⁸ and Indigenous rights remains seen by many scholars as a relatively exotic area of international law. The General Assembly's 2007 adoption of the Declaration on the Rights of Indigenous Peoples²⁴⁹ is a significant step, but it by no means resolves all questions, and, indeed, there are ongoing debates about to what extent its provisions reflect customary international law.²⁵⁰ When much of the effort in relation to Indigenous rights is to reform past approaches seen as flawed, it would be somewhat surprising if customary international law already corresponded entirely to the sought reforms.

Pertinent case law on Indigenous rights in general international law is similarly relatively limited. There are, to be sure, numerous decisions based on particular treaty norms, most of this case law under ILO Convention No. 169²⁵¹ in various Latin American domestic courts,²⁵² or under that instrument along with the Inter-American human rights instrument²⁵³ in the Inter-American Court of Human Rights.²⁵⁴ There has also been a significant decision under the African Charter on Human and Peoples' Rights²⁵⁵ in the African Com-

²⁴⁸ See e.g., James Anaya, *Indigenous Peoples in International Law* (2d ed., 2004); Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture, and Land* (2007); *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Stephen Allen & Alexandra Xanthaki eds., 2011).

²⁴⁹ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (Sept. 7, 2007).

²⁵⁰ See *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, *supra* note 248 (several chapters addressing this point).

²⁵¹ Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59 (entered into force Sept. 5, 1991).

²⁵² See e.g., Christian Curtis, *Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples*, 10 *Sur-Int'l J. Hum. Rts.* 53 (June 2009) (reviewing various domestic decisions, especially around issues of prior consultation).

²⁵³ See e.g., American Convention on Human Rights, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

²⁵⁴ See generally, Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 *Hum. Rts. L. Rev.* 281, 283-84 (2006) (reviewing some of the developing Indigenous rights jurisprudence in the Inter-American Court).

²⁵⁵ African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3rev.5, 21 I.L.M. 58 (1982) (entered into force

mission on Human Rights.²⁵⁶ Particular United Nations reporting mechanisms have also rendered decisions based on particular international treaties, such as under the Convention on the Elimination of Racial Discrimination.²⁵⁷ But, there have been very few pronouncements on general customary international law on rights of indigenous peoples, although both scholars and international law bodies have argued for such norms of customary international law.²⁵⁸

One case that appeared about to be a leading exception to this proposition was the recent decision of the Inter-American Court of Human Rights in the case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*.²⁵⁹ This case arose from the licensing of oil development in the Sarayaku region without adequate prior consultation with the Indigenous people of the region whom might be affected by the decision—along with other claims such as allegations of uses of force against members of that Indigenous people. The Court began with a more traditional sourcing of rules on consultation in ILO Convention No. 169.²⁶⁰ However, it then began engaging with national law

Oct. 21, 1986).

²⁵⁶ Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council vs. Kenya, African Court for Human and Peoples' Rights, African Comm'n H.P.R., Com. No. 276/2003 (2009) [hereinafter, *Endorois Welfare Council vs. Kenya*].

²⁵⁷ See e.g., U.N. Committee for the Elimination of Racial Discrimination, [CERD], Early Warning and Urgent Action Procedure, Decision 1(68), Introduction, (Mar. 10, 2006) (adjudicating aspects of the Dann claim based on International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR, Supp. No. 14, U.N. Doc. A/6014, at 47 (1966), 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969), *available at* http://www.indianlaw.org/sites/default/files/WS%20CERD%20Decision%202006-03_0.pdf.

²⁵⁸ See e.g., ANAYA, *supra* note 248 (arguing for various customary international law norms); International Law Association, Sofia Conference, *Rights of Indigenous Peoples, Final Report* (2012) *available at* <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>.

²⁵⁹ *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 242 (June 27, 2012) *available at* http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf.

²⁶⁰ *Id.* at ¶ 160 (stating that “[b]ased on all of the above, one of the fundamental guarantees to ensure the participation of indigenous peoples and communities in decisions regarding measures that affect their rights and, in particular, their right to communal property, is precisely the recognition of their right to consultation, which is established in ILO Convention No. 169, and other complementary international instruments.”).

from not only signatory states²⁶¹ but also non-signatory states as well.²⁶² At the end of a paragraph filled with extensive citation to different national legal provisions—a mix of constitutional provisions, legislative provisions, and judicial decisions—the Inter-American Court ends up stating that “[i]n other words, the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law.”²⁶³

This identification of a general principle in the area of Indigenous rights could, on the one hand, have major significance as a precedential approach of sorts that allows for the incorporation of Indigenous rights into international law without the need to meet the strict standards of customary international law—even if some have been working precisely at that.²⁶⁴ The approach used by the Court in the case is, in the terminology of the present Article, a “domestic” methodology, at least on the surface. However, several challenges and complexities seem apt to arise, with this particular decision, as a unique one in this area, permitting a close consideration of them that will help draw together several different themes from this Article.

First, the methodology reflected within the Inter-American Court’s reasoning in *Sarayaku* is surely more hybridized than it first appears. The operative paragraph at the end of which the general principle emerges, almost by surprise, in the last sentences actually begins with two overlapping lists of a dozen treaty signatories that have enacted legislation or had judicial decisions on the obligation of consultation,²⁶⁵ but their national laws are presumably, in many respects, motivated by their treaty obligations. Then, the Court goes on to mention the national laws of only three other states—the not especially widely differing examples of Canada, New Zealand, and the United States—as examples of non-party states that have recognized this obligation of consultation.²⁶⁶ If the methodology were solely founded on the “domestic approach,”²⁶⁷ more evidence would

²⁶¹ *Id.* at ¶ 164.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ See e.g., International Law Association, Sofia Conference, *supra* note 258 (very rigorous analysis of customary international law in this area).

²⁶⁵ Kichwa Indigenous People of Sarayaku, *supra* note 259, at para. 164.

²⁶⁶ *Id.*

²⁶⁷ See *supra* Part II.

surely be appropriate. A more honest interpretation of the approach would see the Inter-American Court as engaged in a hybridized approach to the identification of the general principle at issue.

Second, the passage at issue is a further demonstration of how the domestic methodology faces major challenges in application. With respect, on some of the states referenced, the Court's interpretation of certain elements of national law is more innovative than it presents itself as being.²⁶⁸ Where a Court sees a principle as something that should be within the international order, the temptation of course becomes to utilize national law in ways that can support an argument to turn it into a general principle. But a less than precise application of this methodology threatens the legitimacy of the international law system in so far as it leaves decisions not well supported by the legal materials they cite, which will always leave questions about the legitimacy of the decisions.

Third, the relation between general principles and customary international law remains complex and confusing. If one follows the domestic methodology for general principles and looks essentially at what would otherwise be state practice, without now looking for *opinio juris*, have general principles become a route around the standard methodology for customary international law, and is that a good thing or a bad thing? Such a state of affairs would certainly permit the more rapid development of international law in areas that cannot wait for the usual requirements of customary international law to crystallize. But, on the other side of the ledger, it would also imply a certain textual redundancy in article 38 of the Statute of the

²⁶⁸ Compare *e.g.*, Kichwa Indigenous People of Sarayaku, *supra* note 259 at ¶ 164 (stating that “[o]ther courts of countries that have not ratified ILO Convention No. 169 have also referred to the need to carry out prior consultations with indigenous, native or tribal communities regarding any administrative or legislative measure that directly affects them, as well as on the exploitation of natural resources in their territory. Thus, similar developments in case law are evident in the high courts of countries within the region, such as Canada...”) and DWIGHT G. NEWMAN, THE DUTY TO CONSULT: NEW RELATIONSHIPS WITH ABORIGINAL PEOPLES 30-32 (2009) (leading book on consultation with Indigenous peoples in Canada describing complex position on consultation on legislation, on which there is likely no duty to consult, making the statement in the case possibly technically correct but having tendencies to imply broader application than actually the case.).

International Court of Justice.²⁶⁹ If every customary norm is also a general principle (simply with less evidence needed), then the presence of two separate branches in article 38 is unnecessary and redundant, something ill at odds with normal methods of textual interpretation. Yet, the mixed ways in which methodologies of general principles have developed in different areas of international law does not necessarily make the distinction easy to describe.

VII. IMPLICATIONS

One major claim in this Article has been that different areas of international law have different dominant methodologies for the identification of general principles. For instance, Part III showed that international environmental law clearly follows a hybrid methodology, whereas Part IV showed that international investment law clearly follows a domestic methodology. Such a difference shows at once that the type of contextual consideration undertaken yields important descriptive insights concerning the formation of international law in different areas that may be obscured by a question for a universal, decontextualized account of general principles.

One complex issue that arises from this phenomenon is the question of whether general principles identified in one area, based on one methodology, can properly be used in another. If they cannot, of course, that arguably spells increased fragmentation to international law. But if there are reasons for the methodology in each specialized area, there are arguments against any automatic migration of general principles from one area to another. The possible differences reflect possible specialization of international law, in light of principles that appropriately fit each area of international law. To say that much does not actually encourage fragmentation per se but, rather, a more nuanced understanding of international law in various specialized areas that may still interact in an ultimately non-fragmented way. But, the use of different approaches to principles in different specialized areas is potentially actually necessary to respond to the policy needs of those areas.

Indeed, there is thus the possibility to consider that for-

²⁶⁹ Charter of the United Nations and the Statute of the International Court of Justice, *supra* note 4.

mation of international law should be contextually differentiated.²⁷⁰ Different new, specialized areas of international law do not necessarily regulate simply the relation between states, as had traditional international law that could then come reasonably from voluntarist models. Rather, some areas now regulate the relation of the state to the environment (international environmental law), various financial relations between different actors (international investment law), the conduct of individuals themselves regulated by international law (international criminal law), or the relation of states to collective entities not recognized as states (indigenous rights). If law must be answerable to those whom it regulates, international law in these different areas must actually be answerable in different ways that could well give rise to reasons for contextual differentiation in formation generally but then also in the analysis of general principles.²⁷¹ Just by way of completeness, it bears noting that a generalist tribunal, like the International Court of Justice, could properly follow the methodologies of specific novel areas when considering those areas and its traditional methodologies when considering traditional state-regulative international law.

With that said, if genuine inconsistencies emerge due to the differentiated approaches in different areas of international law, these being beyond merely different approaches in different areas but being approaches that embody contradictions between different areas, the present account does not actually promote that sort of fragmentation. Rather, an appropriate response would be to consider whether there is an inadequate recognition in some areas of the actors to whom each respective area of international law must be answerable for the sake of maintaining its legitimacy. For example, if a general principle developed in international investment law that was inconsistent with principles in areas like human rights law or environmental law, there might be an argument that arises that each of these areas is incompletely understanding the scope of its regulatory impact and thus to whom it ought to be answerable to maintain its legitimacy. In other words, recognition of the contextual differentiation of international law may sometimes recognize appropriate differentiations and may some-

²⁷⁰ *Cf.*, Newman, *supra* note 10.

²⁷¹ *Cf.*, *Id.*

times point to a critique or challenge of incomplete dimensions of international regulatory authority. This account thus points in a set of important directions.

Part V showed particular sensitivities in relation to general principles in the context of international criminal law and dangers in terms of the relation of principles of national law being situated in a different context. While international investment law may, pursuant to Part IV, be quite open to principles coming from a domestic approach, international criminal law has sufficiently different policy considerations at play in terms of regulating different kinds of offences and doing so in a manner that affects international relations that there may be reasons for cautious restraint on the movement of national norms into international criminal law. And there seems little reason to think that international investment law and international criminal law need to work exactly the same when they are specialized systems with specialized practitioners and adjudicators that have very little likelihood of overlap with one another. Whereas some areas may need to demonstrate a reasonable degree of conformity, such as international investment law and law concerning human rights impacts from business, other areas may well develop more distinctively.

Part VI showed a recent use of general principles in the context of indigenous rights and, along with some of the other Parts, it showed challenges in the application of some of the methodologies, particularly purported uses of domestic methodologies when systems of national law are more complicated than on an any simple description. These challenges present reasons for very careful comparative law work in areas of international law that use the domestic methodology either in full or in part. That work is necessary to the reasons of international adjudicative bodies to retain their reputation, as a matter of accuracy and ultimately legitimacy.

This contextually sensitive analysis of general principles has sought to contribute by identifying real contextual differences in the use of general principles, thus offering a more precise account of them than in the existing literature. That more precise account then also enables the asking of further questions on the significance of these contextual differences. The answers to that question are very important, and this Article has presented distinctive views that must enter into the broad-

er conversation on these issues. There must be more discussions of the very significant phenomenon of general principles in international law, and this Article has sought to open that conversation in a new way that can serve as a platform for further discussions in the future based on a sounder foundation in the contextualized nature of general principles.