Netherlands International Law Review (2019) 66:197–217
https://doi.org/10.1007/s40802-019-00139-1

ARTICLE

The Role of Principles and General Principles in the 'Constitutional Processes' of International Law

Craig Eggett[1]

Published online: 26 August 2019

Abstract

The fundamental elements of the international legal system remain subject to debate. Constitutionalism is merely the latest instalment of this continuing conversation on the very nature of international law. In this context certain foundational aspects may be labelled as the system's 'constitutional processes'. The primary argument presented in this article is that principles and 'general principles of law', two frequently overlooked categories of norms, are particularly useful tools for the enhancement of these constitutional processes. While often conflated, principles and general principles are distinct, performing different roles in the architecture of the international legal system. Renewed attention and debate on the norms beyond treaties and custom is critical for the enhancement of international law's systemic features. Two broad examples are given in support of this claim. First, general principles of law have the potential to add substance to the notion of an *international community* and the role of this community in the creation of international norms. Second, the legal framework for the judicial settlement of international disputes can be rendered more robust through the use of principles and general principles of law. While attempting to redesign or reconceptualise the system, constitutionalists have failed to actually engage with the system. Yet, the popularity of the constitutionalism debate presents an opportunity to re-examine the system's constituent norms and consider their potential to strengthen international law's constitutional processes.

Keywords Article 38(1)(c) ICJ Statute · General principles of law · Rules and principles · International legal system · International community · Constitutional processes

✉ Craig Eggett
craig.eggett@maastrichtuniversity.nl

[1] Maastricht University, Maastricht, The Netherlands

1 Introduction

At its core, the debate on the constitutionalisation of international law is nothing new. In search of systemic coherence, international lawyers have had recourse to the language and concepts of domestic constitutional law, but the discussion continues to be one on the very *nature* of the international legal system. Approaching international law from a constitutionalist perspective and seeking to affix constitutional labels to the international system is not *per se* a problem, yet it does not facilitate significant change. The driving force behind any real change in international law will be a renewed discussion on the actual functions of international law's systemic elements, in particular the different norms of which the system is composed. There is one category of norms that continues to be overlooked: 'general principles of law' as contained in Article 38(1)(c) of the Statute of the International Court of Justice.[1] General principles remain underexplored in comparison to treaties and customary law, with a great variety of meanings and functions ascribed to them. To some they are 'foundational principles'[2] of the international legal system as a whole. For others they may exist as 'soft law',[3] as inchoate custom,[4] or primarily perform a gap-filling function.[5] The terminology of *general principles* perpetuates this lack of clarity, as does the distinct absence of any coherent methodology or explanation of the nature of these norms by international actors.[6] Given the level of confusion, it is unsurprising that constitutionalist accounts have not fully engaged with general principles. It is the goal of this article to use the momentum of the constitutionalisation debate to reignite the discussion on the nature and function of general principles of law. In turn, it will become clear that there is significant potential for these norms to serve as a tool to advance the goals of constitutionalism and augment international law's systemic features.

In pursuing this purpose this contribution progresses in three main parts. First, in Sect. 2 there is an exploration of the different facets of the constitutionalisation debate. In 'taking stock' of the constitutionalism debate, it is argued that constitutional approaches have not directly facilitated a great deal of change in international law, but are merely the continuation of discussions on the nature of the international legal system. This discussion serves to highlight the dimensions and objectives of constitutionalist accounts, and in doing so demonstrates that the essence of such accounts is the enhancement of international law's systemic elements and coherence:

[1] Statute of the International Court of Justice (1945) 3 Bevans 1179, 59 Stat 1055, TS No 993 (hereinafter 'ICJ Statute'). Although strictly speaking an applicable law provision, it is generally accepted that Art. 38(1) possesses 'elementary authority' on the matter of international law's sources: Hernández (2014), p. 31.

[2] Boas (2012), p. 107.

[3] Biddulph and Newman (2014), p. 291.

[4] Elias and Lim (1997), pp. 35–37.

[5] Raimondo (2007), p. 193.

[6] The International Law Commission could soon become an exception, as it has decided to include general principles in its programme of work: Report of the International Law Commission on the Seventieth Session, 2018, UN A/73/10, p. 299.

its 'constitutional processes'. Second, Sect. 3 revisits 'general principles of law' from the perspective of the distinction between rules and principles. This conceptual clarity is essential if there are to be any real shift in the nature of the international legal system and its 'constitutional processes'. Here it is asserted that the norms embodied in Article 38(1)(c) ICJ Statute are in fact *rules*, and should be clearly distinguished from *principles* in the true sense. Third, Sects. 4 and 5 provide examples of the role that principles and general principles can play in the enhancement of the 'constitutional processes' of the international legal system. Section 4 deals with the scope for general principles to function as a source of law for the *international community*. Then, Sect. 5 examines the scope to strengthen the mechanics of the international judicial settlement of disputes on the back of an improved understanding of principles and general principles. This analysis shows that re-examining the issues surrounding these underexplored norms can serve to establish or reinforce key constitutional elements of the modern (and developing) international legal system.

2 The 'Constitutional Processes' of the International Legal System

It is first necessary to identify international law's 'constitutional processes' as the object of inquiry. To that end, this section begins with some brief clarifications on the terminology to be employed. It then identifies the different strands of constitutionalist approaches to international law. Finally, it is argued that the various aspects of constitutionalist accounts are, at their core, nothing new. Constitutionalism is a continuation of the debate on the very concept of international law. More specifically it is a discussion on the scope for international law to function as a legal system, and on the nature of this legal system.

2.1 Constitutions, Constitutionalisation, and Constitutionalism

Firstly, the term '*constitution*' can be understood as the set of principles and procedures used to keep the exercise of political power in check.[7] A constitution determines the powers of the actors within the system it governs, and regulates the exercise of these powers. Philip Allott has asserted that it is through a constitution that 'society finds the means to establish itself as a structure and to organise itself as a system'.[8] A distinction is typically drawn between the formal and material constitution[9]; the formal written document on the one hand, and the broader functional concept on the other.[10] A constitution is more than the formal written text, and a full understanding of a society's constitutional architecture requires examination of other norms and values, as well as the actual interpretation and application of the formal

[7] Wiener et al. (2012), p. 4.
[8] Allott (1990), p. 255.
[9] Kelsen (1945), pp. 124–125.
[10] Arato (2012), p. 635.

constitution in practice.[11] Secondly, '*constitutionalisation*' refers to the 'continuing *process* of the emergence, creation, and identification of constitution-like elements in the international legal order'.[12] Finally, the term '*constitutionalism*' refers to the intellectual movement that seeks to examine the constitutionalisation of international law[13]; it is an 'academic artefact'[14] and has developed into its own interdisciplinary research field.[15]

2.2 The Dimensions of International Constitutionalism

Constitutionalist accounts of international law take many forms.[16] It has been noted that there are four main aspects or dimensions of constitutionalism.[17] The first can be identified as *social* constitutionalism, which views the aim of constitutionalisation as the protection and regulation of the various social interactions between international actors. Advocates of social constitutionalism place great emphasis on the participation of the individual in the international legal order,[18] and the protection of individual rights.[19] Secondly, *institutional* constitutionalism argues for the placing of limitations on the power in institutions, both global and domestic.[20] Jan Klabbers has remarked that constitutionalism concerns the regulation of the activities of international organisations,[21] and Anne Peters has explored the potential constitutional framework offered by specific international organisations.[22] Within this dimension of constitutionalism it has been argued that the domestic constitutions of states no longer form complete legal orders, and that any constitutionalisation of international law is accompanied by a 'deconstitutionalisation' of domestic orders.[23] Thirdly, *normative* constitutionalism is focused on the development of or enhanced role for hierarchically superior norms.[24] Erika de Wet has argued that there exists an international value system of norms with 'strong ethical underpinnings' such as human

[11] Ibid.
[12] Peters (2006), p. 582 (emphasis added).
[13] Peters (2017).
[14] Weiler (1999), p. 223.
[15] Wiener et al. (2012), p. 6.
[16] Peters (2017), p. 1 ('the debate on constitutionalisation suffers from [a] great variety of meanings'); Crawford (2014) (referring to the 'dizzying variety of often incompatible […] contradictory [and] vague ways' in which constitutionalisation is defined).
[17] Deplano (2013), pp. 75–76; Schwöbel (2011), p. 13.
[18] Digglemann and Altwicker (2008) (referring to the proliferation of actors, in particular the increased role of the individual as the 'horizontal differentiation' of international law).
[19] Schilling (2005). See also Digglemann and Altwicker (2008), p. 625 (identifying a trend of the 'humanization' or 'moralization' of international law).
[20] Deplano (2013), p. 75.
[21] Klabbers (2004), p. 32.
[22] Peters (2017), pp. 4-9 (providing the United Nations, European Union and World Trade Organisation as examples of 'sectoral constitutionalisation'). See also, Digglemann and Altwicker (2008), p. 627 (referring to the trend of the emergence of 'partial or parallel constitutions', such as the European Convention on Human Rights).
[23] Schwöbel (2011), p. 60.
[24] De Wet (2006).

rights rules, and has attached particular significance to *jus cogens* norms and the concept of obligations *erga omnes*.[25] Similarly, for Tomuschat there exists a core of norms that apply beyond the will of states.[26] Such accounts are linked to claims of the apparent decline of the Westphalian world order exclusively based on the consent of and regulating interactions between sovereign states.[27] In its place, the argument goes, is a system in which the individual has more rights and obligations,[28] and where the *raison d'être* of the international order is the protection of the interests of humanity and human dignity[29] as opposed to the preservation of state sovereignty.[30] Finally, *analogical* constitutionalism is concerned with the transposition of domestic constitutional law structures to the international plane.[31] A prominent example is Bardo Fassbender's claim that the UN Charter[32] functions as the written and formal constitution of the international community.[33] There have been similar attempts to draw analogies between the constitutional framework of the European Union (EU) and international law,[34] as the EU's system may be regarded as the most advanced model of a constitutional order beyond the state.[35]

2.3 'Constitutional Processes': Old Wine in New Bottles?

As Jean d'Aspremont has remarked, these debates on the constitutionalisation of international law are merely the continuation of a more fundamental discussion on the nature and concept of international law.[36] In the *Concept of Law*, Herbert Hart categorised international law as a simple form of social structure consisting of solely primary rules and therefore not meeting the conditions to be classified as a legal system.[37] Each of the abovementioned aspects of constitutionalism, albeit in different ways, attempts to refute Hart's claim; constitutionalism seeks to develop or reformulate the basic structures and identity of international law as a *legal system*. An international legal system, like any legal system, will be comprised of certain principles and values on the one hand, and legal structures that function in the furtherance of these values on the other. In a similar sense, de Wet has argued that the international constitutional order is comprised of an international community, together with an

[25] Ibid.
[26] Tomuschat (1993), p. 211.
[27] D'Aspremont (2016); Peters (2012); ibid., p. 120.
[28] Peters (2012), pp. 121–122.
[29] Kumm et al. (2014), p. 3; Peters (2009).
[30] For a view that the nation-state remains an essential feature of the international legal system, see Wessel (2018).
[31] Schilling (2005). For a critique of this view see Helfer (2003).
[32] Charter of the United Nations, 24 October 1945, 1 UNTS XVI (hereinafter 'UN Charter').
[33] Fassbender (2016); Fassbender (2009).
[34] Walker (2003), p. 32.
[35] Deplano (2013), p. 76.
[36] D'Aspremont (2016), p. 1.
[37] Hart (2012), p. 214.

international value system and structures for its enforcement.[38] Others have noted certain fundamental norms and organising principles that form the basis of the system.[39] From the discussion above, there are recurring issues that can be said to form the 'constitutional processes' of the international legal system; fundamental systemic elements that dictate the overall nature and direction of the system, as well as setting out basic rules that govern its operation. The identity and role of the system's participants, the creation of legal rules, and the nature of enforcement mechanisms are examples of such processes.

3 Rules and Principles in the International Legal System

If international law's constitutional processes are to be identified, developed, and refined, there must be clarity as to the nature and functions of the system's norms. Put differently, international lawyers cannot facilitate a shift in the foundations of the international legal system unless these foundations have been accurately identified and engaged with. The distinction between rules and principles is central to understanding these normative foundations. The elaboration of a distinction between rules and principles in a legal system has been a central conceptual apparatus for many legal theorists.[40] This section will revisit the distinction between rules and principles in international law, and in doing so asserts three main claims: (1) there is a logical conceptual distinction between these two categories of norms; (2) this distinction has been adopted in the international legal system; and (3) 'general principles of law' in the sense of Article 38(1)(c) ICJ Statute were designed to be and in fact function as *rules*.

3.1 The Fundamental Distinction between Rules and Principles

Legal systems are composed of a number of different norms. While the scope of the term 'norm' may vary depending on its context, it may be generally defined as 'a standard of performance, a measurement scale […] used to predict […] and diagnose performance contrary to expectations'.[41] It may be the case that in legal contexts the term norm is equated to the term 'rule',[42] but for present purposes the term norm is used in a broader sense in line with the definition above, and so includes (at least) rules and principles. These two types of norms are of a fundamentally different nature, as are the functions they perform. Firstly, there is a significant difference in the *formation* of rules and principles, and the consequence of conflict. The

[38] De Wet (2006), p. 51.
[39] Wiener et al. (2012); Peters (2017).
[40] The distinction rose to prominence in the work of Ronald Dworkin. See, for example, Dworkin (1977).
[41] Boer (2009).
[42] Moore (1978), p. 45.

existence of a rule is grounded in the fulfilment of criteria set out in other rules.[43] That is to say, rules are either valid or not; only when the formal procedural conditions for its creation are met does a rule come into existence as part of the system.[44] Conversely, it is not important that principles are enacted through certain procedures and subject to certain conditions, instead it is a dimension of weight that is characteristic of principles.[45] Robert Alexy has spoken of the 'construction' of principles from certain constitutional rights and on the basis of a proportionality assessment.[46] This fundamental difference becomes more apparent in situations of conflict. When rules collide, either one is deemed invalid or a valid exception is created.[47] In situations where principles are in conflict, the competing principles are balanced against one another. An overridden principle is not deemed to be invalid, and may itself prevail in a different situation.[48] In other words, conflicts of rules are solved in the *validity* domain, whilst competition between principles is resolved on the basis of their *value* in a given situation.[49]

Secondly, rules and principles are *structurally* different. Rules are composed of conditions, upon the fulfilment of which a legal consequence follows. Ronald Dworkin remarked that rules apply in an 'all or nothing fashion'[50]; either the conditions of the rule are satisfied, and the consequence takes effect, or they are not and the rule contributes nothing to the situation. It is this feature that led Alexy to label rules as 'definitive commands', and thus distinguishing them from principles as 'optimisation commands'.[51] Principles, then, do not provide necessary and sufficient reasons for a consequence to follow in the same way as rules, instead providing *prima facie* arguments, or 'first-order reasons'[52] for reaching a certain conclusion.[53] As such, they are 'should' statements that require a goal to be 'realised to the greatest extent possible in the circumstances'.[54]

Finally, there are clear *functional* differences between rules and principles. The various functions of rules can be seen in the well-known distinction between primary and secondary rules.[55] Primary rules impose duties, grant rights, or create

[43] Kelsen (1982), p. 65.

[44] This is the notion of the systemic validity of rules which Kelsen termed the *Stufenbau der Rechtsordnung*. Translations of the term *Stufenbau* typically include some derivation of 'hierarchy'. See, for example: Moore (1978), p. 234 where 'normative hierarchy' is used; ibid., p. 69, which uses 'hierarchical structure of superior and subordinate norms'. Kammerhofer explains that *Stufenbau* is an obsolete word meaning 'step-pyramid', and refers to the designation of the *Stufenbau nach der rechtlichen Bedingtheit*: the hierarchy of legal conditionality: see Kammerhofer (2017), pp. 345–347.

[45] Alexy (2014).

[46] Alexy (2012).

[47] This is what Alexy has termed 'subsumption': Alexy (2012), pp. 466–467.

[48] Brasil (2001), pp. 70–71; Verheij et al. (1998), p. 4.

[49] Brasil (2001), p. 68.

[50] Dworkin (1967), p. 25.

[51] Alexy (2000).

[52] Raz (1999), p. 187.

[53] Lopes (2017), p. 474.

[54] Alexy (1985), p. 47.

[55] Hart (2012), pp. 99, 214. See also the distinction drawn between regulative and constitutive rules: Linderfalk (2009), p. 59; Peczenik (2008), p. 277.

legal or institutional facts.[56] Secondary rules are 'rules about rules'[57]; they govern the creation, modification, and extinction of other rules, as well as determining (the consequences of) their violation.[58] Principles, on the other hand, have two related functions within a legal system. First, they act as the impetus for the creation of rules. Put differently, rules can be enacted to further the values or objectives embodied in principles.[59] Second, principles are crucial in the process of legal reasoning. As aptly stated by Sir Gerald Fitzmaurice, '[a] rule answers the question "what": a principle […] the question "why"'.[60] As such, the reasons espoused by principles can assisting in the interpretation and application of rules to a given problem.[61]

3.2 International Law's Acceptance of this Distinction

In international law, the ICJ seems to approach the task of labelling the norms it uses with some degree of levity. In *Gulf of Maine*,[62] the Court stated that 'the association of the terms "rules" and "principles" is no more than the dual expression to convey one and the same idea'.[63] Similarly, in *Gabčíkovo-Nagymaros* reference was made to the '*concept* of sustainable development', with no further explanation given as to the nature of this norm.[64] Notwithstanding this terminological ambiguity, the existence and functioning of the distinction is apparent in the reasoning of international courts and tribunals. In *Kupreškić*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that Articles 57 and 58 of the First Additional Protocol to the Geneva Conventions[65] were to be interpreted narrowly in light of the 'principle of humanity' and 'dictates of public conscience'.[66] In *Border and Transborder Armed Actions*,[67] the ICJ referred to *Nuclear Tests* in reaffirming that the principle of good faith was 'one of the basic principles governing the creation and performance of legal obligations'.[68] Yet, it was held that this principle is

[56] Such as membership of an international organisation: Treaty on European Union (Consolidated Version), Treaty of Maastricht (1992) [2002] OJ C 325/5, Art. 49; Statute of the Council of Europe (1949) 1 ETS, Art. 3.

[57] Reinold and Zürn (2014), p. 236.

[58] Hart (2012), pp. 94–99.

[59] Beckett (2001), p. 650.

[60] Fitzmaurice (1957).

[61] Lowe has labelled norms that perform this kind of function as 'interstitial', see Lowe (2005), p. 21.

[62] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)* (Judgment), ICJ Reports 1984, p. 246.

[63] Ibid., para. 79.

[64] *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (Merits, Judgment), ICJ Reports 1997, p. 7, paras. 76–80.

[65] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

[66] *Kupreškić et al.* (Judgment) IT-95-16-T (14 January 2000), para. 525.

[67] *Border and Transborder Armed Actions (Nicaragua v. Honduras)* (Jurisdiction and Admissibility, Judgment), ICJ Reports 1988, p. 69.

[68] Ibid., para. 94, referring to *Nuclear Tests (Australia v. France)* (Jurisdiction and Admissibility, Judgment), ICJ Reports 1974, p. 253, para. 46.

'*not in itself* a source of obligation where none would otherwise exist'.[69] The recent decision in *Immunities and Criminal Proceedings*[70] more explicitly confirms the existence of a distinction between rules and principles in international law, as well as the relationship between these two categories. In upholding France's preliminary objection, the Court held that Article 4 of the Palermo Convention's reference to 'the principles of sovereign equality' does not include the obligations conferred by the customary rules of state immunity.[71] This conclusion was reached despite the acknowledgment that 'the rules of State immunity *derive from the principle* of sovereign equality of States'.[72]

Revisiting and embracing this distinction between rules and principles will significantly contribute to the debate on international law's constitutional processes. This distinction centres on the very nature and functions of a legal system's constituent norms, and their interactions with one another. In both international law general, and the constitutionalism debate specifically, there is frequently a failure to rigorously assess the nature of the norms in question. This is particularly the case with general principles of law, which despite their name function as international legal *rules*.

3.3 General Principles of Law as Rules

To speak of a *source* of law is to speak of the criteria and processes for the ascertainment of legal *rules*,[73] and it is rules that are constitutive of legal systems.[74] That Article 38(1)(c) ICJ Statute is one of the established sources of international law is uncontroversial.[75] In the deliberations of the Advisory Committee of the Permanent Court of International Justice (PCIJ), it was clear that the rationale for the introduction of general principles of law was to preclude situations of *non liquet*,[76] that is, to avoid a situation in which there was no applicable legal *rule* to a given dispute. Subsequently, it has become clear that the invocation and application of norms under the moniker or in the spirit of 'general principles of law' has frequently been the invocation and application of *rules*.

On occasion, the invocation or application of a 'general principle of law' has been the invocation or application of a *primary* rule. For example, in its first contentious case, *Corfu Channel*, the Court found that the United Kingdom (UK) was

[69] Ibid. (emphasis added).

[70] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (Preliminary Objections, Judgment), ICJ Reports 2018, p. 1.

[71] Ibid., para. 94.

[72] Ibid., para. 93, referring to *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* (Judgment), ICJ Reports 2012, p. 123, para. 57 (emphasis added).

[73] Besson and d'Aspremont (2017), p. 2.

[74] Hart (2012), pp. 99, 214 (claiming that the presence of secondary rules is a 'necessary and sufficient condition' for the existence of a legal system).

[75] Bonafé and Palchetti (2016), pp. 165-168; Redgwell (2017), p. 5.

[76] Permanent Court of International Justice: Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (16 June–24 July 1920), pp. 306, 322–325.

unable to rely on the 1907 Hague Convention XIII[77] as it was applicable only in times of war. Instead, it upheld the UK's claim on the basis of a number of 'general and well-recognized principles': 'elementary considerations of humanity […] the principle of freedom of maritime communication; and every State's *obligation* not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[78] Consequently, the Court found a number of obligations incumbent upon and violated by Albania as a result of its placing of mines in its waters. Similarly, in *Right of Passage* Portugal asserted that its right to pass through Indian territory (a primary rule) was rooted in general principles of law, 'which have their own binding force'.[79] Further, in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights* the Court referred to a 'generally recognized principle of procedural law' in finding that a Malaysian court had violated its *obligation* to rule on issues of immunity *in limine litis*.[80]

More frequently, however, general principles of law are *secondary* rules. In *Avena and Other Mexican Nationals*,[81] Mexico argued for existence of a rule that excludes the evidence that is obtained in violation of due process, asserting that the 'exclusionary rule is a general principle of law under Article 38(1)(c) [of the ICJ Statute]'.[82] Further, in *LaGrand*[83] the Court found that provisional measures enacted under Article 41 of the ICJ Statute were binding on the basis of a 'principle' recognised by the PCIJ[84] that 'parties to a case *must* abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given'.[85] Moreover, in *Klöckner v. Cameroon* the original award was annulled due to the failure of the tribunal to provide sufficient evidence for the existence of a general principle.[86] Finally, in *Effect of Awards* it was concluded that there existed 'a well-established and generally recognized principle of law, [that] a judgment rendered by […] a judicial body is *res judicata*'.[87] The status

[77] Convention Relative to the Laying of Automatic Submarine Contact Mines (18 October 1907, entered into force 26 January 1910) 36 Stat 2332.

[78] *Corfu Channel (United Kingdom v. Albania)* (Merits, Judgment), ICJ Reports 1949, p. 4, at p. 22 (emphasis added).

[79] *Right of Passage over Indian Territory (Portugal v. India)* (Merits, Judgement), ICJ Reports 1960, p. 6 and the corresponding Memorial of Portugal, para. 52 ('*ayant par lui-même force obligatoire*').

[80] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights* (Advisory Opinion), ICJ Reports 1999, p. 62, para. 63.

[81] *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Jurisdiction and Admissibility, Judgment), ICJ Reports 2004, p. 12.

[82] Ibid., para. 127; Memorial of Mexico, paras. 374 et seq. (reference is made to an array of domestic systems, as well as to the jurisprudence of the ICTY).

[83] *LaGrand (Germany v. United States of America)* (Jurisdiction and Admissibility, Judgment), ICJ Reports 2001, p. 466.

[84] In, for example, *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)* (Request for Interim Measures, Order), PCIJ Rep Series AIB No. 79 199.

[85] *LaGrand* (n. 83), para. 103 (emphasis added).

[86] *Klöckner Industrie-Anlagen GmbH and others v. Cameroon*, ICSID Case No ARB/81/2 (Decision on Annulment, 3 May 1985).

[87] *Effect of Awards of Compensation made by the UN Administrative Tribunal* (Advisory Opinion), ICJ Reports 1954, p. 47, at p. 53.

of *res judicata* as a general principle of law within the meaning of Article 38(1)(c) ICJ Statute is undisputed.[88]

General principles have an inherent gap-filling function, most commonly deployed to identify basic procedural rules where treaties and custom fail to provide answers. Both manner in which this is done and the resulting rules can contribute to the main goals of global constitutionalism. Each of the following sections examines the scope for principles and general principles to establish or enhance some of the constitutional processes of the international legal system.

4 General Principles as the Law of the 'International Community'

The mode of creation of general principles of law is one of the issues where the lack of clarity in comparison with treaties and customary rules becomes very clear. For treaties, the rules of the Vienna Convention on the Law of Treaties[89] set out the formal procedures for signature and ratification,[90] and provide for certain conditions of validity.[91] For the ascertainment of customary rules, the ICJ has built a body of case law stating and clarifying the well-known elements of state practice and *opinio juris*.[92] There is as yet no such guidance for the ascertainment of general principles of law. Seeking to establish the criteria for the ascertainment of general principles can contribute the establishment of constitutional features in at least two ways. First, there is scope to rely on the concept of the 'international community' as a basis for the recognition of general principles. Increased clarity as to international law-making processes enhances its systemic coherence. Second, greater reliance on this source could allow for the creation of rules that are not exclusively dependent on the consent of states, and so seek to serve the interests of the community as opposed to solely those of states.

[88] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits, Judgment), ICJ Reports 2007, p. 43, para. 116; *Waste Management Inc. v. United Mexican States (Number 2)*, ICSID Case No ARB(AF)/00/3 (Decision on Mexico's Preliminary Objections concerning the Provisions Proceedings, 26 June 2002), para. 39 (asserting that there is 'no doubt that *res judicata* is a […] general principle of law within the meaning of Article 38(1)(c) [ICJ Statute]'); Cheng (1953), p. 336 ('there seems little, if indeed any question as to *res judicata* being a general principle of law'); Kotuby and Sobota (2017), p. 197 (claiming that *res judicata* is viewed as the 'least controversial' general principle).

[89] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, 8 ILM 679, entered into force 27 January 1980 (hereinafter 'VCLT 1969').

[90] Arts. 7–18 VCLT 1969.

[91] Arts. 48–53, 64 VCLT 1969.

[92] See for example, *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)* (Judgment), ICJ Reports 1969, p. 3, paras. 60 et seq.; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), ICJ Reports 1986, p. 14, paras. 183–186; *Anglo-Norwegian Fisheries (United Kingdom v. Norway)* (Judgment), ICJ Reports 1951, p. 116.

4.1 Identifying the 'International Community'

Article 38(1)(c) ICJ Statute provides little assistance on the issue of the ascertainment of general principles. The text itself refers to such norms being 'recognized by civilized nations', and it is clear that such terminology is no longer relevant and appropriate, if it ever was.[93] In an attempt to modernise this provision and establish clear conditions for the creation of general principles it is suggested that this requirement be revisited, and that doing so will contribute to the constitutionalisation debate.

In the PCIJ Advisory Committee, it was suggested that general principles were to be drawn from rules identified '*in foro domestico*'.[94] Similarly, some have argued that while the state practice required for custom is that *among* states, evidence for general principles is to be found *within* states.[95] Although recourse to domestic approaches certainly forms part of the determination of general principles, this cannot be the end of the story. As described by Lord McNair in *South West Africa*, such rules of domestic rules are not transposed '"lock, stock and barrel", ready-made and fully equipped' into international law.[96] Therefore, instead of the mechanical transposition of a domestic rule into international law, it is necessary to establish whether there is acceptance of an *international* rule.[97] Such an approach would seem to be in line with the conception of general principle used in Article 21(1)(c) of the Rome Statute, which permits the use of domestic rules provided that they are 'not inconsistent […] with international law'.[98]

To say that general principles of law must be accepted by the 'international community' meets the requirement of identifying an *international* rule. Yet, the question remains as to the precise nature and content of the 'international community'. At present there is a distinct lack of clarity and coherence as to its substance.[99] Gleider Hernández has remarked that the invocation of the 'international community' is merely a 'rhetorical technique'[100] and that its use by the ICJ has been 'purely ornamental'.[101] In order to add some precision to the meaning of the term 'international community' there are two related issues to be addressed: its membership and its underlying values or interests. It may be that the international community

[93] Pellet (2012), para. 261 (explaining that this wording is generally considered to be 'devoid of any particular meaning'); Gaja (2013), para. 2; *North Sea Continental Shelf* (n. 92), Separate Opinion of Judge Ammoun, p. 132 (claiming that 'the term "civilized nations" is incompatible with the relevant provisions of the United Nations Charter').

[94] *Procès-Verbaux* (n. 76), p. 335 *per* Lord Phillimore.

[95] Kotuby and Sobota (2017), pp. 9, 29–34.

[96] *International Status of South West Africa* (Advisory Opinion), ICJ Reports 1950, p. 128, at p. 148.

[97] Kotuby and Sobota (2017), pp. 27–29; Redgwell (2017), p. 9 (claiming that it is a 'widely accepted view […] that general principles may be derived not only from municipal law but also from international law').

[98] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3, Art. 21(1)(c).

[99] Cassese (2008), pp. lix, lxxvii.

[100] Hernández (2014), p. 199.

[101] Ibid., p. 207.

remains exclusively composed of states,[102] but such a conception would seem to be at odds with the current state of the international society. It remains possible to conceive of states as the *primary* actors in the international legal system,[103] while also acknowledging that the participants in international society and the values and interests taken into account by international law are broader than the nation-state. For 'recognition by the international community' two steps are to be followed. First, a common legal approach to an issue is identified on the basis of a comparative analysis of domestic systems. Second, there is an examination of evidence for an *international* manifestation of the rule. This could be done by taking into account the views or interests of certain actors, such as certain international organisations or non-governmental organisations,[104] and by examining the compatibility of a particular rule with the underlying principles of the international legal system. This approach grants non-state actors a greater role in the law-making process, both in terms of a consideration of their views as evidence for rule-creation and the prominent role assigned to (international) courts and tribunals in the actual determination of general principles. Reliance on recognition of the international community as the basis for the creation of general principles has potential implications beyond this context. The explicit recognition of a non-state actor participation in this framework could contribute towards eroding the distinction between 'subjects' and 'objects' in international law,[105] and towards an alternative understanding of *participants*.

Further, recognition of and by the international community implies the recognition of values and interests that go beyond the individual interests of states that are safeguarded by bilateral legal relationships. As Sir Hersch Lauterpacht put it, the will of international society (the *voluntas civitatis maximae*) could become the driving force for law-creation in international law.[106] There are certain values and objectives that underpin the international legal system, such as the maintenance of international peace and security, and the protection of fundamental rights.[107] Such values are not in and of themselves international legal norms, but can be embodied in principles such as sovereignty[108] and humanity.[109] As discussed above, these principles in turn influence the creation and application of legal rules, including general principles. The determination of general principles requires the ascertainment of an *international* rule, and the underlying values and principles of the international community could play a key role in this regard. That is to say, a prospective general

[102] Higgins (1963), p. 11 (where it was claimed that the 'international community' is strictly a 'community of nations'); McCorquodale (2006), p. 253 (claiming that the position that states are the only participants in the international community is the 'dominant legal doctrine').

[103] Wessel (2018).

[104] The International Committee of the Red Cross (ICRC) in the field of humanitarian law would be an obvious example.

[105] McCorquodale (2006), p. 253 (referring to the distinction as a 'legal fiction'); Higgins (1994), p. 59 (claiming that the notion of 'subjects' and 'objects' is an 'intellectual prison' with 'no functional purpose').

[106] Lauterpacht (1933), p. 341.

[107] UN Charter, Preamble, Art. 1.

[108] *Immunities and Criminal Proceedings* (n. 70), para. 94.

[109] *Kupreškić et al.* (n. 66), para. 525.

principle is more likely to be deemed to be recognised by the international community if it is consistent with (or indeed furthers) the underlying principles and values of the system. There is of course much work to be done here; the membership of the international community and its underlying values may be in a relationship of mutual influence, and may evolve over time. As such, their role in international law-making may also develop. Yet, a first crucial step would be to recognise that such a community exists and that it has clear potential to play a role in the constitutional processes of international law.

4.2 A Source of Community Rules?

A related issue is whether this conception of general principles as based on recognition of the international community can lead to the proliferation of rules that are not directly predicated on the consent of states; the public elements of *public* international law.[110] In this regard it is common to discuss the concept of *jus cogens* norms as a mechanism for the imposition of public law or community values on states.[111] The scope for general principles to serve as a source of rules with the character of *jus cogens* was explored in the most recent ILC report on the topic.[112] Despite some debate,[113] it was widely acknowledged that general principles could achieve this status.[114] Such a conclusion was based on the determination that reference to 'general international law' in Article 53 VCLT[115] includes general principles in the sense of Article 38(1)(c) ICJ Statute.[116] However, it seems unlikely that general principles will make much of a contribution here. The requirement of state acceptance of the peremptory character of a norm in Article 53 VCLT suggests that it is customary law that will serve as the driving force behind any enhanced role for *jus cogens*.[117]

Nevertheless, there may still be scope for principles and general principles to contribute to the development of a *public* dimension of international law. First, Simma and Alston famously explored the potential of general principles to function as a source of human rights rules,[118] and the same could be true for rules of international humanitarian law. The ICJ's reference to 'fundamental principles' of human rights

[110] Von Bogdandy et al. (2017).

[111] De Wet (2006); Cassese (2012), pp. 161, 170; Kleinlein (2017); International Law Commission, Second Report on *jus cogens* by Dire Tladi, Sixty-Ninth Session, 1 May–2 June and 3 July–4 August 2017, A/CN.4/706, para. 63.

[112] Ibid.

[113] Ibid., para. 50.

[114] Ibid., para. 49; such a finding was reflected in draft conclusion 5.3 ('General principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice can also serve as the basis for *jus cogens* norms of international law').

[115] VCLT 1969, Art. 53 ('A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law […]').

[116] Second Report on *jus cogens* (n. 111), para. 52.

[117] Ibid., para. 43 (claiming that '[t]he most obvious manifestation of general international law is customary international law […]').

[118] Simma and Alston (1988).

in *Tehran Hostages*,[119] and 'general principles of humanitarian law' in *Nicaragua*[120] seems to suggest an openness to such an approach.[121] Second, a more pronounced role for principles may lead to an increased role for the invocation of responsibility for violations of obligations *erga omnes*. In *Barcelona Traction* the Court held that there are certain obligations owed by a state 'to the international community as a whole' and that 'in view of the importance of the rights involved, all states have an interest in their protection'.[122] This concept of obligations *erga omnes* as a mechanism for the enforcement of certain substantively important obligations later became part of ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[123] Despite the existence of this mechanism, there is no consensus as to which obligations have this *erga omnes* character. After explaining the nature of the concept in *Barcelona Traction* the ICJ did shed some light on this by listing prohibitions of aggression, genocide, slavery, and racial discrimination as examples of such obligations.[124] Some further clarity came in the *East Timor* case,[125] as well as the advisory opinions on the *Wall*[126] and *Chagos*,[127] where the Court identified certain *erga omnes* obligations related to self-determination.[128] Further, there have been numerous academic attempts to broaden this category of obligations into other areas, such as human rights, the protection of the environment, and development law.[129] Principles, as embodying the underlying values and interests of the international community, could play a role in identifying those obligations that are substantively important enough to generate *erga omnes* standing.

5 Strengthening International Judicial Settlement of Disputes

A greater role for principles and general principles could also give rise to more robust and effective mechanisms of international dispute settlement. It has been claimed that no community can exist 'without being able to discern an all-embracing judicial function safeguarding an even operation of the law within such

[119] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgment), ICJ Reports 1980, p. 3, para. 91.

[120] *Nicaragua* (n. 92), para. 113.

[121] Simma and Alston (1988), p. 106.

[122] *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* (Judgment), ICJ Reports 1970, p. 1, para. 33.

[123] Articles on Responsibility of States for Internationally Wrongful Acts, 2 *Yearbook of the International Law Commission* (2001), p. 26.

[124] *Barcelona Traction* (n. 122), para. 34.

[125] *East Timor (Portugal v. Australia)* (Judgment), ICJ Reports 1995, p. 90, para. 29.

[126] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), ICJ Reports 2004, p. 136, para. 156.

[127] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion), ICJ Reports 2019, p. 1, para. 180.

[128] For further discussion on the nature of this obligation as discussed in *Chagos*, see Eggett and Thin (2019).

[129] For a selection of such attempts see: Kleinlein (2017); Ragazzi (2000), pp. 132-163.

community'.[130] The lack of compulsory judicial settlement of disputes in international law is well-documented,[131] and there are indeed situations in which the weaknesses of the international judicial system are exposed. Principles and general principles could serve to strengthen this system in two main respects: (1) clarifying the international judicial function and improving quality of legal reasoning, and (2) enhancing the procedural framework governing international judicial proceedings.

5.1 The International Judicial Function and Legal Reasoning

An oft-cited function of general principles is the filling of legal gaps where treaties and custom have no answers.[132] Embracing this function requires not only the abovementioned clarity on the identification of general principles, but reconsideration of the possibility and scope of judicial law-making. Lauterpacht asserted that the completeness of international law is an *a priori* principle of the international legal system,[133] and that the international judiciary has a role in filling any gaps in the law with recourse to, *inter alia*, general principles of law.[134] This principle of completeness, together with more inclusive participation and the erosion of the absolute dominance of state sovereignty, could lead to a greater role for the judiciary in a true international *legal system*. Yet, central to the success of this proposition is a more reasoned and transparent approach to the determination of general principles, as well as customary rules.[135] The international community recognition approach to the ascertainment of general principles is, in essence, an argumentative process; what Martti Koskenniemi has labelled the 'constructivist thinking of legal argumentation'.[136] This requires 'constructive activity from the judge who must provide a set of arguments in light of which the decision seems coherent with [international law's] goals and values'.[137] Charles Kotuby and Luke Sobota have labelled this the 'Darwinian'[138] aspect of the formation of general principles; depending on the strength of reasoning employed and evidence for their existence, some of these rules will 'shine as bright beacons' while others 'will flicker and die near instant deaths'.[139]

The principle of effectiveness may also serve as a tool for achieving a more robust international judicial function. Salvatore Zappalà has claimed that this principle has

[130] Oeter (2006), pp. 587–588.
[131] Hart (2012), p. 214.
[132] Raimondo (2007), p. 193; Pellet (2012), para. 851; Lammers (1980), p. 66; Lauterpacht (1933), p. 123.
[133] Lauterpacht (1933), pp. 68–72.
[134] Ibid., pp. 119–131, in particular 123–127 on general principles.
[135] For an overview of the issues and challenge that arise in the ascertainment of customary rules see Crawford (2014), pp. 56–85.
[136] Koskenniemi (2000), pp. 359, 361.
[137] Ibid.
[138] Kotuby and Sobota (2017), p. 29.
[139] Paulsson (2010), p. 718.

served as 'a cornerstone of international law',[140] and it seems to have some support in the case law of the ICJ. In one of the *Fisheries Jurisdiction* cases the Court was faced with a question on the interpretation of a reservation to a treaty; it held that in such cases the interpretation that gives effect to the object and purpose of the reservation is to be adopted.[141] Recourse to the principle of effectiveness has been made in the recent discussion on the immunity of heads of state before the International Criminal Court (ICC). Dapo Akande and Talita de Souza Dias have argued that Article 27(2) Rome Statute would be deprived of its effectiveness if the immunity of heads of state precluded their arrest by other states pursuant to an arrest warrant.[142] It seems that such an argument is consistent with the interpretation of the ICC itself in its decision on South Africa's failure to arrest Omar Al-Bashir, where it was held that the object and purpose of Article 27 Rome Statute would be 'reduced to a purely theoretical concept' if immunities remained intact in such situations.[143]

5.2 Enhancing International Procedural Law

It is clear that many of the candidates for 'general principles of law' are secondary rules of adjudication or enforcement; what may be understood as procedural rules. This becomes clear upon an examination of Cheng's 'Draft Code of General Principles' annexed to his seminal work on the topic.[144] Indeed, of the sixteen norms listed only Article 1's reference to 'good faith' is not clearly a procedural rule of adjudication or enforcement. The main reason for the prominence of general principles' (potential) role in this area is the frequent absence of applicable treaties or customary rules. International courts and tribunals have regularly had to determine for themselves certain rules governing the conduct of proceedings before them. For example, in *Tadić* the ICTY found that there exists a 'well-known principle of *Kompetenz-Kompetenz*' that formed part of a court's 'incidental or inherent jurisdiction'.[145] The situation is similar in relation to rules on evidence, with the ICJ considering the admission of evidence in several cases. In *Corfu Channel*, it was held that the characteristics of interstate litigation as between two sovereign entities allowed for the admission of circumstantial evidence.[146] Similarly, in *Nicaragua* the Court found that it has broad discretion to decide on the admission of evidence subject to 'general principles of judicial procedure [that] necessarily govern the determination of what can be regarded as proved'.[147] The issue of lawyer-client privilege is another

[140] Zappalà (2012), p. 105.

[141] *Fisheries Jurisdiction (Spain v. Canada)* (Jurisdiction), ICJ Reports 1998, p. 432, paras. 43, 66.

[142] Akande and de Souza Dias (2018).

[143] *Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*, ICC-02/05-01/09 (Pre-Trial Chamber II, International Criminal Court), para. 75.

[144] Cheng (1953), pp. 397–399.

[145] *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1, 2 October 1995 (International Criminal Tribunal for the former Yugoslavia), para. 18.

[146] *Corfu Channel* (n. 78), pp. 17–18.

[147] *Nicaragua* (n. 92), para. 60.

procedural matter that has been addressed by international courts and tribunals. In *Bangura et al.*, the Special Court for Sierra Leone found the existence of a general principle that communications between a lawyer and client are covered by privilege, with the exception where the communication concerns criminal or fraudulent conduct.[148]

Despite this tendency, there remain gaps in how courts and tribunals deal with such questions. The ICJ's reference to 'general principles of judicial procedure' in *Nicaragua* was not followed by any explanation of what these principles actually are. There are also issues arising as to the precise contours of such rules. For example, in *Questions Relating to the Seizure and Detention of Certain Documents and Data*[149] Timor-Leste asserted that legal professional privilege was a general principle of law, and argued that Australia's seizure of documents and data violated this rule.[150] In response, Australia asserted that even if such a general principle existed its scope on the international plane was to be construed narrowly so as to not cover all types of communication, and that there existed certain exceptions to this general rule.[151] The Court did not address this question directly, and instead relied on the 'principle of sovereign equality' to conclude that there was a 'plausible right to protection' of the documents in question.[152] Such examples demonstrate an acceptance of the role of courts in identifying rules beyond treaties and custom, yet there is still a need for clarity on how exactly such rules are identified and may develop over time.

6 Concluding Remarks

Constitutionalism is the latest instalment in a continuing conversation on the nature of international law. In seeking to portray or develop a more sophisticated and coherent international legal system, constitutionalists have attempted to attach familiar labels to the system's fundamental processes. Yet, such labelling has done little to facilitate a shift in the way international law is viewed and functions. A major reason for this is that the nature and functioning of international law's basic elements remain underexplored. This holds particularly true for two categories of norms: principles and general principles. Overlooking or conflating the system's normative foundations has limited the extent to which global constitutionalism has precipitated real change in international law. Put differently, while attempting to redesign or reconceptualise the system, constitutionalist have failed to actually engage with the system. However, the popularity of the constitutionalism debate

[148] *Decision on the Prosecutor's Request for Subpoenas, Prosecutor v. Bangura, Kargbo, Kanu and Kamara*, Case No SCSL-2011-02-T, T Ch II, 28 June 2012 (Special Court of Sierra Leone). For a critique of this decision's approach to general principles, see Eggett (2018).

[149] *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v. Australia)* (Provisional Measures, Order of 3 March 2014), ICJ Reports 2014, p. 147.

[150] Memorial of the Democratic Republic of Timor-Leste (28 April 2014), paras. 6.2–6.14.

[151] Counter Memorial of Australia (28 July 2014), paras. 4.19–4.47.

[152] *Seizure and Detention of Certain Documents* (n. 149), para. 27.

presents an opportunity to re-examine these norms and consider their potential to strengthen the system's 'constitutional processes'. Substantiating the concept of the 'international community', and bolstering the legal framework for the judicial settlement of disputes are two examples of this potential. These developments would more accurately account for the range and nature of international actors, and the ability of international law to meet contemporary challenges as a true *legal system*. It is hoped that the continued momentum of international constitutionalism would allow for further discussion on the nature of the international legal system's basic elements and opportunities for the use of principles and general principles as tools for its advancement.

References

Akande D, de Souza Dias T (2018) Does the ICC Statute remove immunities of state officials in national proceedings? Some observations from the drafting history of Article 27(2) of the Rome Statute. EJIL: Talk! (12 November 2018). https://www.ejiltalk.org/does-the-icc-statute-remove-immunities-of-state-officials-in-national-proceedings-some-observations-from-the-drafting-history-of-article-272-of-the-rome-statute/. Accessed 1 August 2019

Alexy R (1985) A theory of constitutional rights. Oxford University Press, Oxford

Alexy R (2000) On the structure of legal principles. Ratio Juris 13:294–304

Alexy R (2012) The construction of constitutional rights. Rev Fr Droit Const 91:465–477

Alexy R (2014) Formal principles: some replies to critics. Int J Const Law 12:511–524

Allott P (1990) Eunomia: a new order for a new world. Oxford University Press, Oxford

Arato J (2012) Constitutionality and constitutionalism beyond the state: two perspectives on the material constitution of the United Nations. Int J Const Law 10:627–659

Beckett J (2001) Behind relative normativity: rules and process as prerequisites of law. Eur J Int Law 12:627–650

Besson S, d'Aspremont J (2017) The sources of international law: an introduction. In: Besson S, d'Aspremont J (eds) The Oxford handbook on the sources of international law. Oxford University Press, Oxford, pp 1–39

Biddulph M, Newman D (2014) A contextualized account of general principles of international law. Pace Int Law Rev 26:286–344

Boas G (2012) Public international law: contemporary principles and perspectives. Edward Elgar, Cheltenham

Boer A (2009) Legal theory, sources of law, and the semantic web. Conference paper: legal theory, sources of law, and the semantic web

Bonafé B, Palchetti P (2016) Relying on general principles in international law. In: Brölmann C, Radi Y (eds) Research handbook on the theory and practice of international lawmaking. Edward Elgar, Cheltenham, pp 160–176

Brasil SM (2001) Rules and principles in legal reasoning: a study of vagueness and collisions in artificial intelligence and law. Inform Commun Technol Law 10:67–77

Cassese A (2008) The human dimension of international law. Oxford University Press, Oxford

Cassese A (2012) For an enhanced role of jus cogens. In: Cassese A (ed) Realizing utopia: the future of international law. Oxford University Press, Oxford, pp 158–171

Cheng B (1953) General principles of law as applied by international courts and tribunals. Stevens & Sons, London

Crawford J (2014) Chance, order, change: the course of international law. Hague Academy of International Law, The Hague
d'Aspremont J (2016) International legal constitutionalism, legal forms, and the need for vilains. ACIL Research Paper 2016-15
de Wet E (2006) The international constitutional order. Int Comp Law Q 55:51–76
Deplano R (2013) Fragmentation and constitutionalisation of international law: a theoretical inquiry. Eur J Leg Stud 6:67–89
Digglemann O, Altwicker T (2008) Is there something like a constitution of international law? A critical analysis of the debate on world constitutionalism. Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 68:623–650
Dworkin R (1967) The model of rules. Univ Chic Law Rev 35:14–46
Dworkin R (1977) Taking rights seriously. Harvard University Press, Cambridge
Eggett C (2018) Commentary on the Decision on the Prosecutor's Request for Subpoenas, Prosecutor v Bangura, Kargbo, Kanu and Kamara, Case No. SCSL-2011-02-T, T. Ch. II, 28 June 2012. In: Klip A, Freeland S (eds) Annotated leading cases of international criminal tribunals: Special Court for Sierra Leone 2012–2015, vol 51. Intersentia, Antwerp, pp 15–20
Eggett C, Thin S (2019) Clarification and conflation: obligations erga omnes in the Chagos Opinion. EJIL:Talk! (21 May 2019). https://www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/. Accessed 2 August 2019
Elias O, Lim C (1997) General principles of law, soft law and the identification of international law. Neth Yearb Int Law 28:3–49
Fassbender B (2009) The United Nations Charter as the constitution of the international community. Martinus Nijhoff, Leiden
Fassbender B (2016) International constitutional law: written or unwritten? Chin J Int Law 15:489–515
Fitzmaurice G (1957) The principles of international law considered from the standpoint of the rule of law. Recueil des Cours 92:1–227
Gaja G (2013) General principles of law. In: Wolfrum R (ed) Max Planck encyclopedia of public international law. Oxford University Press, Oxford, pp 370–378
Hart H (2012) The concept of law, 3rd edn. Oxford University Press, Oxford
Helfer L (2003) Constitutional analogies in the international legal system. Loyola Los Angel Law Rev 37:193–237
Hernández G (2014) The International Court of Justice and the judicial function. Oxford University Press, Oxford
Higgins R (1963) The development of international law through the political organs of the United Nations. Oxford University Press, London
Higgins R (1994) Problems and process: international law and how we use it. Oxford University Press, Oxford
Kammerhofer J (2017) Sources in legal-positivist theories: the pure theory's structural analysis of the law. In: Besson S, d'Aspremont J (eds) The Oxford handbook on the sources of international law. Oxford University Press, Oxford, pp 343–364
Kelsen H (1945) General theory of law and state. Harvard University Press, Cambridge
Kelsen H (1982) The concept of the legal order. Am J Jurisprud 27:64–84
Klabbers J (2004) Constitutionalism lite. Int Org Law Rev 1:31–58
Kleinlein T (2017) Jus cogens re-examined: value formalism in international law. Eur J Int Law 28:295–315
Koskenniemi M (2000) General principles: reflections on constructivist thinking in international law. In: Koskenniemi M (ed) Sources of international law. Ashgate Publishing, Aldershot, pp 359–399
Kotuby C Jr, Sobota L (2017) General principles of law and international due process. Oxford University Press, New York
Kumm M et al (2014) How large is the world of global constitutionalism? Glob Const 3:1–8
Lammers J (1980) General principles of law recognized by civilized nations. In: van Panhuys HF (ed) Essays on the development of the international legal order. Martinus Nijhoff, Alphen aan den Rijn, pp 53–75
Lauterpacht H (1933) The function of law in the international community. Clarendon Press, Oxford
Linderfalk U (2009) State responsibility and the primary-secondary rules terminology—the role of language for an understanding of the international legal system. Nordic J Int Law 78:53–72
Lopes PM (2017) The syntax of principles: genericity as a logical distinction between rules and principles. Ratio Juris 30:471–490

Lowe V (2005) Sustainable development and unsustainable arguments. In: Boyle A, Freestone D (eds) International law and sustainable development: past achievements and future challenges. Oxford University Press, Oxford, pp 19–37
McCorquodale R (2006) International community and state sovereignty: an uneasy symbiotic relationship. In: Warbrick C, Tierney S (eds) Towards an 'international legal community'? The sovereignty of states and the sovereignty of international law. British Institute of International and Comparative Law, London, pp 241–265
Moore R (1978) Legal norms and legal science: a critical study of Kelsen's pure theory of law. University Press of Hawaii, Honolulu
Oeter S (2006) The international legal order and its judicial function. In: Dupuy P-M et al (eds) Common values in international law: essays in honour of Christian Tomuschat. NP Engel Verlag, Kehl, pp 583–599
Paulsson J (2010) The role of precedent in investment arbitration. In: Yannaca-Small K (ed) Arbitration under investment agreements. Oxford University Press, New York, pp 699–718
Peczenik A (2008) On law and reason, 2nd edn. Springer, Heidelberg
Pellet A (2012) Article 38. In: Zimmermann A et al (eds) The Satute of the International Court of Justice: a commentary, 2nd edn. Oxford University Press, Oxford, pp 677–792
Peters A (2006) Compensatory constitutionalism: the function and potential of fundamental international norms and structures. Leiden J Int Law 19:579–610
Peters A (2009) Humanity as the A and Ω of Sovereignty. Eur J Int Law 20:513–545
Peters A (2012) Are we moving towards the constitutionalization of the world community. In: Cassese A (ed) Realizing utopia. Oxford University Press, Oxford, pp 118–135
Peters A (2017) Constitutionalisation. MPIL Research Paper Series No 2017-08
Ragazzi M (2000) The concept of international obligations erga omnes. Clarendon Press, Oxford
Raimondo F (2007) General principles of law in the decisions of international criminal courts and tribunals. Martinus Nijhoff, Leiden
Raz J (1999) Practical reason and norms, 3rd edn. Oxford University Press, Oxford
Redgwell C (2017) General principles of international law. In: Vogenauer S, Weatherill S (eds) General principles of law: European and comparative perspectives. Hart, Oxford, pp 5–20
Reinold T, Zürn M (2014) Rules about rules' and the endogenous dynamics of international law: dissonance reduction as a mechanism of secondary rule-making. Glob Const 3:236–273
Schilling T (2005) On the constitutionalization of general international law. Jean Monnet Working Paper 06/05
Schwöbel C (2011) Global constitutionalism in international legal perspective. Martinus Nijhoff, Leiden
Simma B, Alston P (1988) The sources of human rights law: custom, jus cogens, and general principles. Austr Yearb Int Law 12:82–108
Tomuschat C (1993) Obligations arising for states without or against their will. Recueil des Cours 241:195–374
Verheij B, Hage J, van den Herik HJ (1998) An integrated view on rules and principles. Artif Intell Law 6:3–26
von Bogdandy A, Goldmann M, Venzke I (2017) From public international to international public law: translating world public opinion into international public authority. Eur J Int Law 28:115–145
Walker N (2003) Postnational constitutionalism and the problem of translation. In: Weiler J, Wind M (eds) European constitutionalism beyond the state. Cambridge University Press, Cambridge, pp 27–54
Weiler J (1999) The Constitution of Europe: 'Do the new clothes have an Emperor?' and other essays on European integration. Cambridge University Press, Cambridge
Wessel R (2018) The legal function of the nation-state in the era of globalisation and technology: an agenda for research on the resilience of the international structure. Conference Paper: Taking Stock of Constitutionalism
Wiener A et al (2012) Global constitutionalism: human rights, democracy and the rule of law (editorial). Glob Const 1:1–15
Zappalà S (2012) Can legality trump effectiveness in today's international law? In: Cassese A (ed) Realizing utopia: the future of international law. Oxford University Press, Oxford, pp 105–117