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General principles of law

Memorandum by the Secretariat

Contents

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Introduction

1. At its sixty-ninth session, in 2017, the Commission decided to include the topic "General principles of law" in its long-term programme of work.[1] At its seventieth session, in 2018, the Commission included the topic in its current programme of work and appointed Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur.[2] The Special Rapporteur submitted his first report on the topic at the seventy-first session, in 2019.[3] Also at that session, the Commission requested the Secretariat to prepare a memorandum surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for its future work on the topic.[4] The present memorandum has been prepared pursuant to that request.

2. In his first report, the Special Rapporteur outlined the scope of the topic as including: the legal nature of general principles of law as a source of international law; the origins of general principles of law and corresponding categories; the identification of general principles of law; and the functions of general principles of law and their relationship with other sources of international law.[5] It is not within the intended scope of the topic to address the substance of general principles of law.[6] The Special Rapporteur identified the starting point for consideration of the legal nature of general principles of law as Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, including the three elements found in that provision, namely the term "general principles of law", the requirement of "recognition" and the term "civilized nations".[7] Article 38, paragraph 1 (c), replicates Article 38 (3) of the Statute of the Permanent Court of International Justice.[8]

3. The Special Rapporteur considered that the identification of general principles of law was closely related to the meaning of the phrase "recognized by civilized nations" in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, although he noted that the term "civilized nations" was anachronistic and terms such as "recognized by States" or "recognized by the community of nations" were preferable.[9] He also considered that identification related to the origins of general principles of law, in particular whether they were considered to derive from national legal systems or were formed within the international legal system.[10] As he noted, the existence of such principles appeared to have been determined on various bases, such as by having recourse to international materials and by identifying principles underlying other rules of international law. In particular, the recognition by States of those principles seemed to have been evidenced, *inter alia*, in the *travaux préparatoires* of treaties, in treaty provisions, as well as in the recognition expressed in General Assembly resolutions, and in declarations.[11]

4. Furthermore, the Special Rapporteur noted in his first report that, among the possible functions of general principles of law identified, such principles filled gaps

[1] A/72/10, para. 267.
[2] A/73/10, para. 363.
[3] A/CN.4/732.
[4] A/74/10, paras. 207 and 286.
[5] A/CN.4/732, Part One, sect. A.
[6] *Ibid.,* para. 41.
[7] *Ibid.,* paras. 14–20.
[8] Protocol of Signature relating to the Statute of the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations. Geneva, December 16, 1920, League of Nations, *Treaty Series*, vol. 6, No. 170, p. 379.
[9] A/CN.4/732, paras. 21–23 and 184–186.
[10] *Ibid*., paras. 29–33.
[11] *Ibid.,* para. 235.

in conventional and customary international law so as to avoid findings of *non liquet*, that they served as a means to interpret other rules of international law and that they were a tool to reinforce legal reasoning.[12] He referred to the widely held view that general principles of law were a supplementary source of international law in the sense that they served to fill gaps in conventional and customary international law;[13] that they served not only as a direct source of rights and obligations, but as a means to interpret other rules of international law;[14] and that they served as a tool to reinforce legal reasoning.[15] He referred also to the more abstract role sometimes attributed to general principles of law that they informed or underlined the international legal system, or that they reinforced its systemic nature.[16]

5. As the Special Rapporteur noted, both in the practice and in the literature, terminology was not used consistently. He proposed that the Commission use the term "general principles of law" when referring to general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. He emphasized that terms such as "principle", "general principle", "general principle of law", "general principle of international law" and "principle of international law" were often employed indistinctively and without clarification regarding which source of international law such principles belonged to.[17] He underlined that such a lack of clarity in terminology would pose a challenge throughout the work of the Commission on the current topic,[18] and, indeed, it has been a challenge for the Secretariat in preparing the current memorandum. It has been the case in relation to the selection of relevant materials for the survey by the Secretariat, and in the assessment and categorization of this material.

6. For the purpose of identifying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for the Commission's future work on the current topic, a threefold methodology was employed:

(a) A review of treaties published in the League of Nations *Treaty Series* and United Nations *Treaty Series* was conducted.[19] The review was limited to treaties registered with the League of Nations Permanent Secretariat, as well as those registered or filed and recorded with the United Nations Secretariat, from 1 January 1920 up to 31 July 2019;

(b) A review was conducted of arbitral awards rendered from 1 January 1920 that were published in the *Reports of International Arbitral Awards*; The Hague court reports; the case law of the Permanent Court of Arbitration and the *Analyses des sentences rendues par les Tribunaux d'Arbitrage, constitues conformement aux stipulations des Conventions de La Haye de 1899 et 1907 pour le reglement pacifique des conflits internationaux, ainsi que par les juridictions speciales d'arbitrage qui*

[12] *Ibid.,* paras. 24–28.
[13] *Ibid*., para. 25.
[14] *Ibid*., para. 26.
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.,* para. 254.
[18] *Ibid.*
[19] The United Nations *Treaty Series* is a publication produced by the United Nations Secretariat containing all treaties and international agreements registered with the Secretariat pursuant to Article 102 of the Charter of the United Nations or filed and recorded pursuant to the regulations to give effect to Article 102 of the Charter of the United Nations, adopted by the General Assembly in resolution 97 (I) of 14 December 1946, amended most recently in resolution 73/210 of 20 December 2018. The League of Nations *Treaty Series* is a collection of treaties and subsequent treaty actions registered with and published by the League of Nations Secretariat pursuant to Article 18 of the Covenant of the League of Nations.

ont fonctionné en application de l'art. 47 de la Convention de 1907; and arbitral awards under article 21, paragraph 3, of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization (WTO);[20]

(c) A review of the case law of international criminal courts and tribunals of a universal character. The term "universal character" is not to be understood as relating to universal membership of the constitutive instruments of the judicial organs considered, but to the fact that they are open to universal membership, and that the judicial organ in question therefore potentially exercises its jurisdiction *ratione materiae* at the global level.[21] The International Criminal Court has been considered on this basis. Regional courts and tribunals, in contrast, have not. Hybrid criminal courts established by negotiation between the United Nations and the affected State have not been included. The International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, as well as the International Residual Mechanism for Criminal Tribunals ("Mechanism") have been included in view of their establishment as subsidiary organs by decisions of the Security Council – decisions which, in accordance with Article 25 of the Charter of the United Nations, all Member States have agreed to accept and carry out. On this basis, they are regarded as "universal" for the purpose of the present memorandum, regardless of their competence *ratione temporis*, *ratione loci* or *ratione personae*;

7. Searches in each of the above publications and databases using the broadest of the Special Rapporteur's terms, "principle(s)", produced an unmanageably large volume of material that was not feasible for the Secretariat to examine within the time and resources available. The material surveyed is therefore that which resulted from searches in the above publications and databases using the remaining phrases identified by the Special Rapporteur – namely: "general principle(s)", "general principle(s) of law", "principle(s) of law", "general principle(s) of international law", "principle(s) of international law" – and three further terms considered useful by the Secretariat: "Article 38", "Article 38, paragraph 3," and "Article 38, paragraph 1 (c)". Nearly 2,000 pages of potentially relevant references were identified. It has not therefore been possible to present a comprehensive survey of this material, but rather the memorandum sets out examples of the types of information found. The information so identified has been organized according to whether it relates to terminology, the origins of general principles of law, their recognition, transposition and functions or their relationship with other sources of international law. In the sections concerning arbitral awards and the case law of international criminal courts and tribunals of a universal character, applicable sources of law are also considered.

8. The present memorandum takes a broad approach in the sense that the material resulting from the above searches is presented without taking any view on, nor making any exclusions based on, the degree of likelihood (or lack thereof) that any particular reference is indeed a reference to general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice or Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice. As set out at paragraph 5 above, terminology is not used consistently, and is often employed indistinctively and without clarification regarding which source of international law the "principles" in question belong to. In relation to the two origins of general principles of law identified by the Special Rapporteur, for example, inclusion of the word "international" in the terms "general principles of international

[20] Marrakesh Agreement establishing the World Trade Organization, annex 2, United Nations, *Treaty Series*, vol. 1869, No. 31874, p. 3, at pp. 401–420.

[21] The Secretariat adopted the same approach with respect to the definition of "universal character" in its memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law for the topic "Identification of customary international law (see A/CN.4/691).

law" and "principles of international law" may not be determinative of their origin in the international legal system. In the memorandum, therefore, other factors are identified where relevant, such as whether the principles in question arise in a context that is inherently international in nature (such as diplomatic and consular relations between States), or whether they are derived from conventional or customary international law sources.

9. The memorandum first surveys relevant material from treaties registered under Article 18 of the Covenant of the League of Nations and Article 102 of the Charter of the United Nations, covering the period up to 31 July 2019 (sect. I). Registration of an instrument submitted under Article 102 of the Charter of the United Nations or under Article 18 of the Covenant of the League of Nations that is included in the memorandum does not confer on that instrument the status of a treaty or an international agreement if it does not already have that status and does not confer on a party a status that it would not otherwise have. The inclusion in the memorandum of an instrument not registered under Article 18 or Article 102 does not imply a judgment by the Secretariat on the nature of the instrument, the status of a party or any similar matter.

10. The memorandum then surveys the publicly available case law of inter-State arbitral tribunals rendered from 1 January 1920 (sect. II). It does not systematically examine arbitral awards where the parties include international organizations or other non-State entities, nor conciliation proceedings and arbitration proceedings initiated by individuals and corporations. Having said this, a strict limitation of the survey to inter-State arbitral awards would have produced little material of relevance due to the confidentiality of many such proceedings. The Secretariat has therefore interpreted this requirement with flexibility and also included, as appropriate, other relevant material not limited to inter-State arbitral awards. Examples include the award in the *Abyei* arbitration[22] and a certain amount of material relating to claims commissions established by States for claims by individuals.

11. Finally, the memorandum surveys the case law of international criminal courts and tribunals of a universal character, which includes the case law of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court. The decisions of the Mechanism have been considered with those of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as appropriate (sect. III). The search results that were considered focus on trial and appeal judgments on the merits and on sentencing, but as with the arbitral awards above, the Secretariat has also included certain other types of decisions where relevant.

I. Treaties registered with the League of Nations and the United Nations Secretariats (1 January 1920 to 31 July 2019)

12. The relevant provisions in the treaties published in the League of Nations *Treaty Series* surveyed for the purpose of the memorandum are contained mainly in two categories: those that established arbitral commissions or arbitral tribunals and, in some cases, referred disputes to the Permanent Court of Arbitration; and those that established or regulated diplomatic and consular relations among States. Each of the treaties in the former category contained provisions setting out the law applicable by the commission, tribunal or the Permanent Court of Arbitration. The treaties in the

[22] *Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Award of 22 July 2009, *Reports of International Arbitral Awards* (UNRIAA), vol. XXX, pp. 145–416.

latter category established primary rights and obligations among the States parties regulating their diplomatic and consular relations. The remaining relevant provisions in treaties registered with the League of Nations Secretariat were contained in a variety of treaties that, for example, dealt with maritime or transnational transport issues, reciprocal treatment of nationals in the territory of the other parties and confiscation of property. The parties to the majority of the treaties registered with the League of Nations Secretariat were European States, with fewer examples involving States from Africa, Asia, the Americas or the Caribbean. The subject range of treaties registered with the United Nations Secretariat containing relevant provisions is broader, including friendly relations, settlement of disputes, commerce and navigation, economic relations, social security in labour relations, air services, investment, human rights law, humanitarian law, international telecommunications, international organizations, international criminal law, diplomatic and consular law, water law, the law of the sea, and State succession. The geographical range of the parties to these treaties registered with the United Nations Secretariat is also much broader.

A. Terminology

13. Article 38 of the Statute of the International Court of Justice is the successor to Article 38 of the Statute of the Permanent Court of International Justice, which was opened for signature on 16 December 1920. Article 38 of the Statute of the International Court of Justice was formulated in the same terms as the earlier Article 38 apart from the addition of some introductory words and the numbering of the paragraphs and subparagraphs.[23] As highlighted by the Special Rapporteur, Article 38 of the Statute of the Permanent Court of International Justice was not the beginning of the application of principles and rules deriving from sources other than treaties and customary international law.[24] The negotiators of the Statute in 1920 were codifying an already existing body of international law for which there was significant State practice (in the form of treaties) and case law (of international arbitral tribunals).[25] That pre-existing practice and case law used a wide variety of terms to refer to the applicable law.[26] As will be seen in the survey of treaties that follows, Article 38 of the Statute of the Permanent Court of International Justice achieved only partial conformity with the formulation "the general principles of law recognized by civilized nations" in the subsequent treaty practice of States.

[23] Article 38 of the Statute of the Permanent Court of International Justice stated in the chapeau that "[t]he Court shall apply: …", whereas the equivalent paragraph of Article 38 of the Statute of the International Court of Justice states that "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: …".

[24] A/CN.4/732, para. 77.

[25] *Ibid.*, paras. 77–89. See also B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens and Sons Limited, 1953), p. 19, citing the speeches of Descamps, Fernandes, Loder, Hagerup and Phillimore (Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920 with Annexes* (The Hague, Van Langenhuysen Brothers, 1920).

[26] For example, "justice", "equity", "the law of nations", "the principles of justice, "the stipulations of the treaty", "the general principles of justice and equity", or that the case should be decided on the basis of "rules which, in the considered opinion of the Court, should be the rules of international law". See A/CN.4/732, paras. 77–89; the discussion in Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (see footnote 25 above), pp. 6–7; and H. Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (London, Longmans, Green and Co. Ltd., 1927), pp. 60–62.

1. Provisions cross-referencing Article 38 of the Statute of the Permanent Court of International Justice or Article 38 of the Statute of the International Court of Justice

14. Several treaties surveyed for the purpose of the memorandum made general principles of law one of the sources of international law to be applied by an international court or arbitral tribunal by way of a cross reference to Article 38 of the Statute of the Permanent Court of International Justice or Article 38 of the Statute of the International Court of Justice. An example is the 1931 Treaty of Conciliation, Arbitration and Judicial Settlement between Bulgaria and Norway:

> If nothing is laid down in the special agreement as to the rules regarding the substance of the dispute to be followed by the arbitrators, the tribunal shall apply the substantive rules enumerated in Article 38 of the Statute of the Permanent Court of International Justice.[27]

15. In one such treaty, the cross reference to Article 38 was phrased as follows:

> If nothing is laid down in the special agreement or no special agreement has been made, the arbitral tribunal or the Permanent Court of International Justice shall apply the principles of law laid down in particular in Article 38 of the Statute of the Permanent Court of International Justice.[28]

The term "principles of law" for the purpose of this treaty thus appears to have been used to refer to the various sources of international law laid down in Article 38, and the words "in particular" might suggest that the parties envisaged the possibility of "principles of law" arising also outside the terms of Article 38.

16. Similarly, following the establishment of the United Nations, a significant number of treaties continued to specify that arbitral tribunals, if established, were to apply, in the absence of agreement to the contrary, the sources of international law set out in Article 38 of the Statute of the International Court of Justice. The provisions of the Revised General Act for the Pacific Settlement of Disputes, adopted by the General Assembly in 1949, for example, stated that: "If nothing is laid down in the special agreement … the Tribunal shall apply the substantive rules enumerated in Article 38 of the Statute of the International Court of Justice".[29] Articles 74, paragraph 1, and 83, paragraph 1, of the United Nations Convention on the Law of the Sea,[30] relating to the delimitation of the exclusive economic zone and the continental shelf, respectively, of States with opposite or adjacent coasts, are examples of the incorporation of Article 38 of the Statute of the International Court of Justice other than in the context of the establishment of arbitral tribunals.

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[27] Treaty of Conciliation, Arbitration and Judicial Settlement between Bulgaria and Norway (Sofia, 26 November 1931), League of Nations, *Treaty Series,* vol. 134, No. 3081, p. 27, at p. 31, art. 5. For other examples, see General Act (Pacific Settlement of International Disputes) (Geneva, 26 September 1928), *ibid.*, vol. 93, No. 2123, p. 343, at p. 353, art. 18; Pact of Friendship, Conciliation, Arbitration and Judicial Settlement between the Hellenic Republic and the Czechoslovak Republic (Prague, 8 June 1929), *ibid*., vol. 108, No. 2512, p. 255, at p. 269, art. 33; Convention of Conciliation, Judicial Settlement and Arbitration between Italy and Norway (Oslo, 17 June 1929), *ibid*., vol. 105, No. 2410, p. 161, at p. 171, art. 20; Revised General Act for the Pacific Settlement of Disputes (New York, 28 April 1949), United Nations, *Treaty Series*, vol. 71, No. 912, p. 101, at p. 116, art. 28.

[28] Treaty of Conciliation, Arbitration and Judicial Settlement between Luxembourg and Norway (Geneva, 12 February 1932), League of Nations, *Treaty Series*, vol. 142, No. 3277, p. 29, at p. 37, art. 18.

[29] Revised General Act for the Pacific Settlement of International Disputes, art. 18.

[30] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, at pp. 427 and 431.

2. Provisions expressly setting out the sources of international law under Article 38 of the Statute of the Permanent Court of International Justice or Article 38 of the Statute of the International Court of Justice

17. A number of the treaties surveyed for the purpose of the memorandum set out expressly the sources of international law contained in Article 38 of the Statute of the Permanent Court of International Justice or Article 38 of the Statute of the International Court of Justice as the applicable law by an international court or arbitral tribunal, although the five such treaties that were concluded during the era of the League of Nations did so with modifications on the following lines:

> The Tribunal shall base its decision on:
>
> (1) The conventions, whether general or particular, in force between the Parties, and the principles of law arising therefrom;
>
> (2) International custom as evidence of a general practice accepted as law;
>
> (3) The general principles of law recognised by civilised nations;
>
> (4) The precedents laid down in recognised doctrine and legal practice as an auxiliary factor in the establishment of rules of law.
>
> If both parties agree, the Tribunal may, instead of basing its decisions on legal principles, give an award in accordance with considerations of equity.[31]

18. In these treaties, therefore, general principles of law were included among the sources of law applicable by the tribunals established in the same terms as those contained in Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice. The addition of the words "and the principles of law arising therefrom" in the first subparagraph of the provision above was, however, a departure from the provisions of Article 38, paragraph 1, authorizing the tribunals in question to apply "the principles of law" flowing from treaties in force between the parties. These principles of law were thus listed separately from general principles of law under the third subparagraph. The final sentence of this provision enabled the tribunal to decide cases "in accordance with considerations of equity" rather than on the basis of "legal principles", if the parties agreed. These treaties thus distinguished between considerations of equity, on the one hand, and the sources of international law, including general principles of law, on the other.[32]

19. A number of treaties registered with the United Nations Secretariat surveyed for the purpose of the memorandum referred to the full text of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, including, for example, a 1965 arbitration agreement between the United Kingdom of Great Britain and Northern Ireland and Switzerland,[33] a 1973 agreement regarding fisheries between the United

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[31] This example is the Convention of Arbitration and Conciliation between Germany and the Netherlands (The Hague, 20 May 1926), League of Nations, *Treaty Series*, vol. 66, No. 1527, p. 103, at p. 121, art. 4. For the other treaties in similar terms, see Treaty of Conciliation and Arbitration between Poland and Czechoslovakia (Warsaw, 23 April 1925), *ibid*., vol. 48, No. 1171, p. 383, at p. 393, art. 19; Convention of Arbitration and Conciliation between Germany and Sweden (Berlin, 29 August 1924), *ibid*., vol. 42, No. 1036, p. 111, at p. 127, art. 5; Convention of Arbitration and Conciliation between Germany and Estonia (Berlin, 10 August 1925), *ibid*., vol. 63, No. 1484, p. 111, at p. 126, art. 5; Treaty of Arbitration and Conciliation between Germany and Luxembourg (Geneva, 11 September 1929), *ibid*., vol. 118, No. 2715, p. 97, at p. 106, art. V.

[32] For a further example of a treaty provision containing this kind of final clause, see the Convention of Arbitration and Conciliation between Germany and Sweden, art. 5.

[33] Treaty for Conciliation, Judicial Settlement and Arbitration between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation (London, 7 July 1965), United Nations, *Treaty Series*, vol. 605, No. 8765, p. 205, at p. 222, art. 26.

States of America and Poland[34] and the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.[35] The applicable law provisions in two treaties registered with the United Nations Secretariat that established arbitral tribunals set out expressly the content of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, but omitted the word "civilized" from the reference to the general principles of law, so that the relevant part of the provisions refers to "the general principles of law recognized by nations".[36]

3. Provisions referring to "general principles of law"

20. Several of the treaties registered with the League of Nations Secretariat surveyed for the purpose of the memorandum referred to "general principles of law" or "the general principles of law" without either cross-referencing Article 38 or expressly incorporating the content of Article 38 of the Statute of the Permanent Court of International Justice. Many of these provisions also included a reference to "equity". An example is contained in the 1923 bilateral treaty between Hungary and Czechoslovakia concerning the running of Czech trains through Hungary: "This Court shall decide the issue in accordance with the provisions of the present Convention; and general principles of law and equity."[37] A different formulation was used in a 1921 treaty between Germany and Poland and the Free City of Danzig: "The Tribunal shall decide all disputes on the basis of the provisions of this Convention, of the general principles of law, and of equity."[38]

21. The term "general principles of law" was used in a number of treaties registered with the United Nations Secretariat, for example, the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War stated that: "The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence."[39] Some of these treaties

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[34] Agreement between the United States of America and the Polish People's Republic regarding Fisheries in the Western Region of the Middle Atlantic Ocean (Warsaw, 2 June 1973), *ibid*., vol. 916, No. 13076, p. 185, at pp. 193–194, annex I, sect. VII.

[35] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), *ibid*., vol. 213, No. 2889, p. 221, at p. 230, art. 7.

[36] Agreement between the United States of America and the Polish People's Republic regarding Fisheries in the Western Region of the Middle Atlantic Ocean, annex I, sect. VII; Agreement between the United States of America and the Polish People's Republic concerning Fisheries Off the Coasts of the United States (Washington, 1 August 1985), United Nations, *Treaty Series*, vol. 2243, No. 39921, p. 41, annex III, sect. VI.

[37] See Convention between Hungary and Czechoslovakia Regulating the Running of Czechoslovak Trains over the Hungarian Section of the Čata-Lučenec Line (Budapest, 8 March 1923), League of Nations, *Treaty Series*, vol. 48, No. 1167, p. 257, at p. 267, art. 15. A very similar formulation was used in the Treaty between the Republic of Austria and the Kingdom of Hungary for the Regulation of Conditions of Transit and Connections in the Railway Traffic between the Two Countries (Budapest, 30 June 1930), *ibid*., vol. 122, No. 2799, p. 69, at p. 97, art. 20.

[38] Convention between Germany and Poland and the Free City of Danzig concerning Freedom of Transit between East Prussia and the Rest of Germany (Paris, 21 April 1921), *ibid*., vol. 12, No. 308, p. 61, at p. 69, art. 11.

[39] Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 973, p. 287, at p. 330, art. 67. For other examples, see Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, and Special Agreement (with annex) (Washington, 20 August 1964), *ibid.*, vol. 514, No. 7441, p. 25, at p. 62, art. 14; Agreement Concerning Assistance from the United Nations Development Programme to Botswana (Gaborone, 14 May 1975), *ibid.*, vol. 968, No. 14004, p. 117, at p. 125, art. XI, para. 3; Agreement between the Federal Republic of Germany, the Republic of Austria and the Swiss Confederation Regulating the Withdrawal of Water from Lake Constance (with Final Protocol) (Bern, 30 April 1966), *ibid.*, vol. 620, No. 8956, p. 191, at p. 204, art. 11.

included the word “the” before “general principles of law”, but they did not elaborate on which specific principles “the general principles of law”, as thus specified, included. The agreement between the United Nations and the Swiss Confederation concerning the Ariana site in Geneva, for example, stated that the agreement “shall be interpreted in accordance with the general principles of law”.[40] A 1972 treaty between the United States and Mexico states that its provisions “[do] not constitute any precedent, recognition or acceptance affecting the rights of either country [under a 1944 treaty concerning water] and the general principles of law”.[41]

22. The 2001 Agreement on Succession Issues among the States of the former Yugoslavia also contained a reference to general principles of law, as follows: “The successor States shall take such action as may be required by general principles of law and otherwise appropriate to ensure the effective application of the principles set out in this Annex, such as concluding bilateral agreements and notifying their courts and other competent authorities.”[42]

23. There are instances among the treaties surveyed of references to general principles of national law. For example, the 1934 revision of the International Labour Organization Convention concerning Workmen’s Compensation for Occupational Diseases referred to “the general principles of the national legislation” of the member States relating to compensation for industrial accidents.[43] In a 1999 treaty between Sweden and Ukraine concerning measures to combat crime, reference was made to these States’ national general principles of law – each party was entitled to refuse a request from the other if it “is in conflict with its general principles of law or other essential interests”.[44]

4. Provisions referring to “principles of law”

24. A large number of treaties registered with the League of Nations Secretariat surveyed for the purpose of the memorandum referred to “principles of law”.[45] Many of these established arbitral tribunals or provided for reference of disputes to the Permanent Court of Arbitration or the Permanent Court of International Justice, in

[40] Agreement between the United Nations and the Swiss Confederation on the Ariana Site (Bern, 11 June 1946, and New York, 1 July 1946), *ibid.*, vol. 1, No. 7, p. 153, at p. 158, art. 12.

[41] Agreement between the United States of America and Mexico effected by Minute No. 241 of the International Boundary and Water Commission (El Paso, 14 July 1972), *ibid*., vol. 898, No. 12822, p. 151, at p. 154.

[42] Agreement on Succession Issues (with annexes) (Vienna, 29 June 2001), *ibid.*, vol. 2262, No. 40296, p. 251, at p. 294, annex G, art. 4.

[43] International Labour Organization, Convention concerning Workmen’s Compensation for Occupational Diseases (Revised 1934), *ibid.*, vol. 40, No. 624, p. 19, at p. 20, art. 1. See also Belgium and France: General Convention on Social Security; Supplementary Agreement on the System of Social Security Applicable to Frontier and Seasonal Workers; Supplementary Agreement on the Social Security System Applicable to Persons Employed in Mines and Establishments Treated as Mines; Protocol on the Old Age Allowance for Employees and the Temporary Old Age Allowance; Protocol Relating to Unemployment Allowances (Brussels, 17 January 1948), *ibid.*, vol. 36, No. 570, p. 233.

[44] Agreement between the Kingdom of Sweden and Ukraine concerning Cooperation as Regards Measures to Combat Crime (Stockholm, 23 March 1999), *ibid.*, vol. 2313, No. 41312, p. 295, at p. 297.

[45] See, for example, General Treaty of Interamerican Arbitration and Protocol of Progressive Arbitration (Washington, 5 January 1929), League of Nations, *Treaty Series*, vol. 130, No. 2988, p. 135, at p. 142, art. 1; Treaty of Peace, Friendship and Arbitration between the Dominican Republic and the Republic of Haiti (Santo Domingo, 20 February 1929), *ibid.*, vol. 105, No. 2414, p. 215, at p. 224, art. 3.

which the applicable law provision included "the principles of law or equity".[46] An example contained in a 1928 treaty of arbitration between the United States and Finland stated as follows:

> All differences relating to international matters … which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague …. [47]

In other such treaties, the term used by the parties was "the principles of law and equity",[48] and in one such treaty, the phrase "the principles of law and justice" was used.[49]

25. A number of treaties registered with the League of Nations Secretariat containing the phrase "the principles of law" concerned the principles of law arising from treaties in force between the parties, stating that these formed part of the law to be applied by the arbitral tribunal established.[50] In three further such treaties, a clause on the following lines was included:

> If, in a particular case, the legal bases mentioned above are inadequate, the Tribunal shall give an award in accordance with the principles of law which, in

[46] Treaty of Arbitration between the United States of America and Portugal (Washington, 1 March 1929), *ibid.*, vol. 99, No. 2282, p. 375, at p. 377, art. I; Treaty of Arbitration between the United States of America and the Republic of Poland (Washington, 16 August 1928), *ibid.*, vol. 99, No. 2286, p. 409, at p. 411, art. I; Treaty of Arbitration between the United States of America and Hungary (Washington, 26 January 1929), *ibid.*, vol. 96, No. 2200, p. 173, at p. 175, art. I; Arbitration Treaty between Albania and the United States of America (Washington, 22 October 1928), *ibid.*, vol. 92, No. 2089, p. 218, at p. 219, art. I; Treaty of Arbitration between the United States of America and Sweden (Washington, 27 October 1928), *ibid.*, vol. 91, No. 2063, p. 225, at p. 227, art. I; Arbitration Treaty between the United States of America and Norway (Washington, 20 February 1929), *ibid.*, vol. 91, No. 2079, p. 413, at p. 415, art. I; Arbitration Treaty between the United States of America and Czechoslovakia (Washington, 16 August 1928), *ibid.*, vol. 89, No. 2018, p. 225, at p. 227, art. I; Arbitration Treaty between the United States of America and Austria (Washington, 16 August 1928), *ibid.*, vol. 88, No. 1988, p. 95, at p. 97, art. I; Arbitration Treaty between the United States of America and Denmark (Washington, 14 June 1928), *ibid.*, vol. 88, No. 1995, p. 173, at p. 175, art. I; Treaty of Arbitration between the United States of America and Finland (Washington, 7 June 1928), *ibid.*, vol. 87, No. 1958, p. 9, at p. 10, art. I; Arbitration Treaty between the United States of America and China (Washington, 27 June 1930), *ibid.*, vol. 140, No. 3236, p. 183, at p. 184, art. I.

[47] Treaty of Arbitration between the United States of America and Finland, art. I.

[48] Treaty of Arbitration and Conciliation between Denmark and Haiti (Washington, 5 April 1928), League of Nations, *Treaty Series*, vol. 99, No. 2264, p. 19, at p. 23, art. 4; Agreement between the United States of America and Egypt regarding Arbitration of the Claim of George J. Salem (Cairo, 20 January 1931), *ibid*., vol. 142, No. 15B, p. 309, at p. 313, art. 3; Arbitration Convention between the United States of America and Norway concerning the Claim of a Group of Shipowners of Christiania on the Government of the United States (Washington, 30 June 1921), *ibid*., vol. 14, No. 365, p. 19, at p. 23, art. 1; Convention between Denmark and Iceland regarding the Procedure to Be Followed for the Settlement of Disputes (Tingvalla, 27 June 1930), *ibid*., vol. 118, No. 2717, p. 121, at p. 129, art. 2.

[49] Treaty between the Estonian Democratic Republic and Ukrainian Socialist Soviet Republic respecting Future Relations (Moscow, 25 November 1921), *ibid*., vol. 11, No. 294, p. 121, at p. 134, preamble.

[50] See the treaties referred to above in footnote 31.

its opinion, should govern international law. For this purpose, it shall be guided by rulings sanctioned by legal authorities and by jurisprudence.[51]

26. This type of provision thus enabled the tribunals concerned, for the purpose of these treaties, to rely on "principles of law" in cases in which the sources of international law contained in Article 38 of the Statute of the Permanent Court of International Justice, including general principles of law, were "inadequate". The provision is notable for the fact that it placed a subjective authority in the hands of the arbitral tribunal: "the principles of law which, *in its opinion, should govern international law*" (emphasis added).[52]

27. An example of a treaty provision using the phrase "principles of law" in a context involving a substantive right or obligation rather than an applicable law clause for an international court or tribunal is the following between the United States and Mexico: "the recognized principles of law and equity require the immediate payment of just compensation for expropriated properties".[53] Further references to "principles of law" involving primary rights and obligations arose in a treaty between Colombia and Peru concerning the "principles of law which uphold the human dignity, the labour, and the freedom and well-being of their inhabitants",[54] and in a multilateral treaty concerning "the principles of law generally recognised with regard to nationality".[55]

28. The "principles of justice" were referred to in three treaties registered with the League of Nations Secretariat. In two such treaties, the parties agreed that disputes would be settled in accordance with "the principles of justice and equity".[56] These treaties expressly stated, however, that the claims commission established by them

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[51] See Convention of Arbitration and Conciliation between Germany and Estonia, art. 5; Convention of Arbitration and Conciliation between Germany and Sweden, art. 5; Treaty of Arbitration and Conciliation between Germany and Luxembourg, art. V. The provision, as set out in English, is less than an ideal translation from the original German. The text in German reads: "Soweit im einzelnen Falle die vorstehend erwähnten Rechtsgrundlagen Lücken aufweisen, entscheidet das Schiedsgericht nach den Rechtsgrundsätzen, die nach seiner Ansicht die Regel des internationalen Rechtes sein sollten. Es folgt dabei bewährter Lehre und Rechtsprechung." This might be more accurately translated as: "If, in a particular case, the legal bases mentioned above have gaps, the Arbitral Tribunal shall decide, in accordance with the principles of law, which, in its opinion, should constitute the rules of international law. It shall thereby be guided by established teachings and case law."

[52] A formulation on these lines had been among the proposals placed before the Advisory Committee of Jurists in 1920 when preparing Article 38 of the Statute of the Permanent Court of International Justice, in particular by Denmark, the Netherlands, Norway, Sweden and Switzerland, but it was not favoured by the members of the Committee, who wished to avoid a "legislating" role for the judges of the Court. See the discussion in Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (footnote 25 above), at pp. 10–11, footnote 43 in particular.

[53] Exchange of Notes between the United States of America and Mexico Constituting an Agreement concerning Compensation for Expropriated Lands of American Citizens in Mexico (Washington, 9 November 1938, and Mexico City, 12 November 1938), League of Nations, *Treaty Series*, vol. 201, No. 4714, p. 201, at p. 204.

[54] Protocol of Friendship and Cooperation between the Republic of Colombia and the Republic of Peru (Rio de Janeiro, 24 May 1934), *ibid.*, vol. 164, No. 3786, p. 21, at p. 43, art. 17.

[55] Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930), *ibid*., vol. 179, No. 4137, p. 89, at p. 99, art. 1.

[56] Convention between His Britannic Majesty and the President of the United Mexican States for the Settlement of British Pecuniary Claims in Mexico Arising from Loss or Damage from Revolutionary Acts between November 20, 1910, and May 31, 1920 (Mexico, 19 November 1926), *ibid.*, vol. 85, No. 1922, p. 51, at p. 54, art. 2; Convention between His Britannic Majesty and the President of the United Mexican States, Supplementary to the Convention of 19 November 1926, Respecting British Pecuniary Claims in Mexico Owing to Revolutionary Acts (Mexico City, 5 December 1930), *ibid.*, vol. 119, No. 2749, p. 261, at p. 264, art. 2.

was to determine claims on an *ex gratia* basis, rather than to determine the responsibility of Mexico in accordance with the general principles of international law.[57] In a 1923 multilateral treaty, the American States expressed their desire to "strengthen progressively the principles of justice and of mutual respect … in their reciprocal relations".[58]

29. The term "principles of law" was used in a large number of treaties registered with the United Nations Secretariat. Many of these treaties concerned the settlement of disputes between States and established arbitral tribunals for this purpose. A 1962 treaty between Czechoslovakia and Austria, for example, stated that: "The arbitral tribunal shall take its decision on the basis of this Agreement and by application of customary international law and of the generally recognized principles of law."[59] Examples of treaties not containing an applicable law provision for an arbitral tribunal include a 1949 treaty between the Netherlands and Indonesia concerning the transfer of sovereignty, in which the parties agreed to "observe the international treaties and internationally acknowledged principles of law" concerning the exercise of fundamental human rights and freedoms;[60] and the African Charter on Human and Peoples' Rights, which states, in article 61, that:

> The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member States of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.[61]

The 1947 General Agreement on Tariffs and Trade referred to "established principles of law".[62]

5. Provisions referring to "general principles of international law"

30. Provisions referring to "general principles of international law" were contained in a number of treaties registered with the League of Nations Secretariat. Several of those treaties concerned diplomatic and consular relations between States. In a 1923 multilateral treaty of peace, for example, the parties agreed: "in the respective territories, diplomatic and consular representatives will receive, without prejudice to

[57] See article 2 of both Conventions.

[58] Treaty to Avoid or Prevent Conflicts between the American States (Santiago de Chile, 3 May 1923), *ibid.*, vol. 33, No. 831, vol. 33, p. 25, at p. 36.

[59] Agreement between the Czechoslovak Socialist Republic and the Republic of Austria concerning the Regulation of Railway Traffic across the Frontier (Prague, 22 September 1962), United Nations, *Treaty Series*, vol. 495, No. 7244, p. 157, at p. 206, art. 24.

[60] Round-Table Conference Agreement between the Kingdom of the Netherlands and the Republic of Indonesia (The Hague, 2 November 1949), *ibid.*, vol. 69, No. 894, p. 3, at p. 222, Draft Union Statute, appendix, para. 19.

[61] African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), *ibid.*, vol. 1520, No. 26363, p. 217, at p. 257.

[62] General Agreement on Tariffs and Trade (Geneva, 30 October 1947), *ibid.* vol. 55, No. 814, p. 187, at p. 224, art. X.

such agreements as may be concluded in the future, treatment in accordance with the general principles of international law".[63]

31. Similar phrases used in the context of treaties regulating diplomatic and consular relations included "the generally recognised principles of international law",[64] "the general principles of public international law"[65] and "the general principles of ordinary international law".[66] These various phrases were used in a context that is inherently international, that of diplomatic and consular relations, which might be relevant when considering the origin of the principles in question.

32. Other treaty provisions referring to "general principles of international law" in contexts that appear to be inherently international in nature include: the reciprocal treatment of legations between Germany and Afghanistan in a 1926 treaty, which stated that "[the parties' legations] shall enjoy, reciprocally and equally, the diplomatic privileges granted in accordance with the general principles of international law";[67] a 1923 bilateral treaty between Hungary and Czechoslovakia, which referred to "the generally recognised principles of international law" in the context of the confiscation of State property by Czechoslovakia;[68] and a 1927 treaty between Germany and Turkey, which stated that: "Nationals of either contracting party in the territory of the other Party shall be received and treated as regards their person and property in accordance with the general principles of international law."[69] Further examples include: a 1926 treaty between Mexico and the United Kingdom, which stated that "it is the desire of Mexico *ex gratia* fully to compensate the injured parties, and not that her responsibility should be established in conformity with the general principles of International Law";[70] and a 1938 multilateral treaty establishing common rules of neutrality among the States parties, which stated that "[t]he King

[63] Treaty of Peace (Lausanne, 24 July 1923), League of Nations, *Treaty Series*, No. 701, vol. 28, p. 11, at p. 15, art. 1. For other provisions relating to diplomatic or consular relations, see Consular Treaty between the German Reich and the Turkish Republic (Ankara, 28 May 1929), *ibid*., No. 3069, vol. 133, p. 257, p. 285, preamble; Consular Convention between the Kingdom of Italy and the Turkish Republic (Rome, 9 September 1929), *ibid*., vol. 129, No. 2962, p. 195, at p. 205, art. 16; Treaty of Friendship between the Empire of Persia and the Czechoslovak Republic (Teheran, 29 October 1930), *ibid*., vol. 121, No. 2783, p. 53, at p. 55, art. II.

[64] Treaty of Friendship between the German Reich and the Kingdom of Hejaz, Nejd and Dependencies (Cairo, 26 April 1929), *ibid*., vol. 115, No. 2690, p. 265, at p. 269, art. 2.

[65] Treaty of Friendship between Latvia and Turkey (Warsaw, 3 January 1925), *ibid*., vol. 59, No. 1390, p. 81, at p. 83, art. 2; Treaty of Friendship between Hungary and Turkey (Constantinople, 18 December 1923), *ibid*., vol. 43, No. 1062, p. 271, at p. 273, art. 2; Treaty of Friendship between Sweden and Turkey (Angora, 31 May 1924), *ibid*., vol. 38, No. 972, p. 147, at p. 149, art. 2; Treaty of Friendship between the Republic of China and the Turkish Republic (Ankara, 4 April 1934), *ibid*., vol. 153, No. 3515, p. 161, at p. 163, art. 2.

[66] Treaty of Friendship between the Republic of Lithuania and the Persian Empire (Moscow, 13 January 1930), *ibid*., vol. 131, No. 3013, p. 221, at p. 223, art. 2.

[67] Treaty of Friendship between the German Reich and the Kingdom of Afghanistan (Berlin, 3 March 1926), *ibid*., vol. 62, No. 1460, p. 115, at p. 124, art. 2.

[68] Protocol between Hungary and Czechoslovakia regarding the Supplementary Registration of Investments (Claims), in Accordance with the Decrees of the Czechoslovak Republic (Prague, 13 July 1923), *ibid*., vol. 36, No. 902, p. 41, at p. 43, para. 4.

[69] Convention between the German Reich and the Turkish Republic concerning Conditions of Residence and Business (Angora, 12 January 1927), *ibid*., vol. 73, No. 1713, p. 187, at p. 198, art. 2. Similar is the Treaty of Establishment between Egypt and Turkey (Ankara, 7 April 1937), *ibid*., vol. 191, No. 4438, p. 95, at p. 101, art. 9.

[70] Convention between His Britannic Majesty and the President of the United Mexican States for the Settlement of British Pecuniary Claims in Mexico Arising from Loss or Damage from Revolutionary Acts between November 20, 1910, and May 31, 1920, art. 2.

may …, while at the same time observing the general principles of international law, prohibit access to Danish ports".[71]

33. A large number of treaties registered with the United Nations Secretariat refer to "general principles of international law",[72] to "generally accepted principles of international law"[73] or to "general principles of public international law".[74] These mainly arise in applicable law provisions in treaties relating to the settlement of disputes and in treaties regulating diplomatic and consular relations between the parties. A 1949 treaty of friendship between Thailand and the Philippines, for example, referred to the "rights, privileges, exemptions and immunities which are accorded to officers … in accordance with the generally accepted principles of international law and usage".[75] An example not involving the settlement of disputes or diplomatic and consular relations is a 1998 treaty between the Bolivarian Republic of Venezuela and Colombia concerning police cooperation, which bases itself on "the general principles of international law and respect for the equal sovereignty of States".[76]

6. Provisions referring to "principles of international law"

34. Provisions referring to "principles of international law" and variations thereof were the most numerous among the searches carried out in the League of Nations *Treaty Series*. Most of these provisions were contained in treaties relating to diplomatic and consular relations. An example is the 1928 Treaty of Friendship between the Kingdom of Afghanistan and the Republic of Latvia, which stated:

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[71] Declaration between Denmark, Finland, Iceland, Norway and Sweden for the purpose of Establishing Similar Rules of Neutrality (Stockholm, 27 May 1938), League of Nations, *Treaty Series*, No. 4365, vol. 188, p. 293, art. 2, para. 4.

[72] For example, the Agreement between the Republic of Turkey and the Republic of Croatia on Social Security (Zagreb, 12 June 2006), United Nations, *Treaty Series*, vol. 2902, No. 50582, p. 223, which states (p. 267, art. 36, para. 3) that: "The arbitration court shall decide by a majority of votes on the basis of the agreement that exists between the Contracting Parties and on the basis of the general principles of international law."

[73] See the exchange of notes between the United Kingdom and Burma in relation to the Treaty regarding the Recognition of Burmese Independence and Related Matters (London, 17 October 1947), *ibid.*, vol. 70, No. 904, p. 183, at p. 198 ("3. Finally I suggest that, in so far as questions arise which, in the opinion of either Government, do not appropriately fall within the scope of the preceding paragraphs of this letter, these should be discussed by representatives of our two Governments, and decided in accordance with the generally accepted principles of international law and with modern international practice"); Exchange of Notes Constituting an Administrative Agreement between Brazil and Venezuela for the Exchange of Official Correspondence by Air Mail (Supplementary to the Agreement of 3 June 1919) (Caracas, 30 January 1946), *ibid.*, vol. 65, No. 839, p. 107, at pp. 112–113 ("(e) Such pouches shall conform to the conditions set forth in the Agreement of 3 June 1919 referred to above as regards security and inviolability and shall enjoy all other privileges which are granted to official mail in accordance with the generally accepted principles of international law").

[74] Agreement between the United States of America, France, the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Sea Bed (with Schedule and Appendixes) (Washington, 2 September 1982), *ibid.*, vol. 1871, No. 31958, p. 275, at p. 284, appendix 1 ("7. Insofar as any matter is not dealt with by Appendix 2 and other relevant provisions of this Agreement, the arbitrator or arbitrators shall, consistent with Appendix 2, be guided by the general principles of law as recognized by the Parties, which, where the case is presented by a Party or Parties means the general principles of public international law (*lex lata*) as recognized by the Parties").

[75] Treaty of Friendship between the Kingdom of Thailand and the Republic of the Philippines (Washington, 14 June 1949), *ibid.*, vol. 81, No. 1062, p. 53, at p. 56, art. IV.

[76] Agreement on Police Cooperation between the Republic of Venezuela and the Republic of Colombia (Santa Fe de Bogotá, 28 April 1998), *ibid.*, vol. 2409, No. 43479, p. 263, preamble.

> The High Contracting Parties … shall each have the right to send duly accredited diplomatic agents to the other, which agents shall, subject to reciprocity, enjoy in the country in which they reside the rights, privileges, immunities and exemptions accorded to similar foreign agents in conformity with the principles of international law.[77]

35. Variations of this phrase used in the context of diplomatic and consular relations included: "in accordance with the principles of international public law and with international usage;"[78] "the principles and practice of ordinary international law";[79] "the principles and practice of common international law";[80] and "the established principles and practice of international law".[81] The phrase "principles of international law" was also used in a number of treaties registered with the League of Nations Secretariat in the context of respect by States in their territories for the property and person of each other's nationals, for example: "the principles of international law in force between independent Governments shall be respected".[82]

36. A few of the treaties registered with the League of Nations Secretariat surveyed for the purposes of the memorandum referred to "principles of international law" in the context of the reference of disputes to international courts and tribunals, and the applicable law. For example, a 1928 bilateral treaty between Italy and Turkey stated that: "The arbitral award shall be rendered according to the principles of international law."[83] A 1929 treaty between the Dominican Republic and Haiti stated that "disputes … shall not be referred to arbitral decision, save in accordance with the

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[77] Treaty of Friendship between the Kingdom of Afghanistan and the Republic of Latvia (Riga, 16 February 1928), League of Nations, *Treaty Series*, vol. 78, No. 1781, p. 99, at p. 105, art. 2. Other examples include the Treaty of Friendship between Afghanistan and Finland (Helsinki, 17 July 1928), *ibid*., vol. 112, No. 2601, p. 9, at p. 14, art. 2; Treaty of Friendship between Estonia and Turkey (Warsaw, 1 December 1924), *ibid*., vol. 70, No. 1624, p. 77, at p. 79, art. 2; Treaty of Friendship between the Polish Republic and the Kingdom of Afghanistan (Angora, 3 November 1927), *ibid*., vol. 74, No. 1734, p. 83, p. 90, art. II; Treaty of Friendship between Latvia and Turkey, art. 2.

[78] Treaty of Commerce and Navigation between Japan and the Kingdom of the Serbs, Croats and Slovenes (Vienna, 16 November 1923), League of Nations, *Treaty Series*, vol. 42, No. 1035, p. 99, at p. 103, art. IV.

[79] Exchange of Notes between Japan and Persia constituting a Provisional Settlement of the Relations between the Two Countries (Tehran, 30 March 1929), *ibid*., vol. 107, No. 2499, p. 427, at p. 429, preamble. The other treaties are the Treaty of Friendship between the Kingdom of Italy and the Persian Empire (Tehran, 5 September 1929), *ibid*., vol. 141, No. 3264, p. 185, at p. 187, art. 2; Treaty of Friendship between the Empire of Persia and the Swiss Confederation (Bern, 25 April 1934), *ibid*., vol. 159, No. 3666, p. 235, at p. 237, art. 2.

[80] Treaty of Friendship between the Kingdom of Sweden and the Persian Empire (Tehran, 27 May 1929), *ibid*., vol. 105, No. 2420, p. 279, at p. 281, art. II.

[81] Treaty of Friendship between the Republic of Finland and the United States of Mexico (Washington, 2 October 1936), *ibid*., vol. 179, No. 4157, p. 303, at p. 305 and p. 307, arts. 2–3.

[82] Treaty of Friendship and Good Understanding between His Britannic Majesty and His Majesty the King of the Hejaz and of Nejd and its Dependencies (Jeddah, 20 May 1927), *ibid*., vol. 71, No. 1658, p. 131, at p. 154, art. 5. See also the Convention of Ratification between the United States and the Dominican Republic, as contained in the Agreement of Evacuation of June 30, 1922 (Santo Domingo, 12 June 1924), *ibid*., vol. 48, No. 1153, p. 91, at p. 107; Treaty between His Majesty in respect of the United Kingdom and India and His Excellency the President of the Republic of China for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters (with Exchange of Notes and Agreed Minute) (Chungking, 11 January 1943), *ibid*., vol. 205, No. 4826, p. 69, at p. 71, art. 2.

[83] Treaty of Neutrality, Conciliation and Judicial Settlement between the Kingdom of Italy and the Turkish Republic (Rome, 30 May 1928), *ibid*., vol. 95, No. 2172, p. 183, at p. 187, art. 3. See also the Treaty of Friendship between the Kingdom of Italy and the Persian Empire, art. 2.

principles of international law".[84] In several further such treaties, preambular language was included setting out the desire that disputes be settled in accordance with: "the highest principles of public international law"[85] or "the highest principles of international law".[86]

37. In addition to the provisions contained in bilateral treaties referred to above relating to diplomatic and consular relations among States, a number of multilateral treaties registered with the League of Nations Secretariat referred to "principles of international law" in contexts that appear inherently international in nature, which might be relevant when considering the origins of the principles in question: a 1921 multilateral treaty between the United States, the British Empire, France and Japan relating to their island possessions in the Pacific Ocean, which stated that "[t]he controversies to which the second paragraph of Article I refers shall not be taken to embrace questions which according to principles of international law lie exclusively within the domestic jurisdiction of the respective Powers";[87] a 1930 multilateral treaty concerning nationality and statelessness in which the parties stated that "in so far as any point is not covered by any of the provisions of the preceding article, the existing principles and rules of international law shall remain in force";[88] and a 1925 multilateral treaty for the suppression of unlawful traffic in alcoholic liquors, in which the parties stated that: "The limits of the international maritime routes to which the supervision provided in the general Convention shall not extend, but in regard to which the principles of international law relating to freedom of the seas shall apply, shall be as follows: …".[89]

38. Two treaties concerning friendly relations included preambular text expressing the desire that disputes between the parties be settled in accordance with "the

[84] Treaty of Peace, Friendship and Arbitration between the Dominican Republic and the Republic of Haiti (Santo Domingo, 20 February 1929), League of Nations, *Treaty Series*, vol. 105, No. 2414, p. 215, at p. 224, art. 4 (b). For other examples, see also the Treaty of Friendship between the Kingdom of Italy and the Persian Empire, art. 2; Exchange of Notes between Denmark and Czechoslovakia, constituting an Arrangement in Regard to the Exemption of Means of Transport Belonging to Consuls de Carrière, etc., from Requisitioning for Military Purposes (Copenhagen, 20 and 24 July 1925), League of Nations, *Treaty Series*, vol. 37, No. 948, p. 97, at p. 99.

[85] Treaty of Conciliation, Judicial Settlement and Arbitration between Austria and Spain (Vienna, 11 June 1928), *ibid*., vol. 87, No. 1984, p. 393, at p. 395, preamble; Treaty of Conciliation, Judicial Settlement and Arbitration between Bulgaria and Poland (Warsaw, 31 December 1929), *ibid*. vol. 113, No. 2638, p. 89, at p. 91, preamble; Treaty of Conciliation, Judicial Settlement and Arbitration between Spain and Luxembourg (Luxembourg, 21 June 1928), *ibid*., vol. 109, No. 2533, p. 137, at p. 139, preamble; Treaty of Conciliation, Judicial Settlement and Arbitration between Spain and the Czechoslovak Republic (Prague, 16 November 1928), *ibid*., vol. 100, No. 2303, p. 313, at p. 315, preamble.

[86] Treaty of Conciliation, Judicial Settlement and Arbitration between Spain and Finland (Helsinki, 31 May 1928), ibid., vol. 82, No. 1874, p. 229, at p. 231, preamble.

[87] Treaty between the United States of America, the British Empire, France and Japan relating to Their Insular Possessions and Insular Dominions in the Pacific Ocean (Washington, 13 December 1921), *ibid*., vol. 25, No. 607, p. 183, at p. 191, Protocol, para. 2.

[88] Protocol relating to a Certain Case of Statelessness (The Hague, 12 April 1930), *ibid*., vol. 179, No. 4138, p. 115, at p. 119, art. 2.

[89] Convention between Germany, Denmark, Estonia, Finland, Latvia, Lithuania, Norway, Poland and the Free City of Danzig, Sweden and the Union of Socialist Soviet Republics for the Suppression of the Contraband Traffic in Alcoholic Liquors (Helsingfors, 19 August 1925), *ibid.*, vol. 45, No. 1033, p. 183, at p. 184, art. 1.

principles laid down in the Covenant of the League of Nations",[90] although it was not specified whether these were intended to be principles of a legal character.

39. References to "principles of international law" were also among the most numerous in treaties registered with the United Nations Secretariat. Most of these were contained in applicable law provisions of treaties establishing arbitral tribunals.[91] Other similar references include "principles of the law of nations", for example in the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, which states that parties to conflict "remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and-the dictates of the public conscience;"[92] and "principles of public international law", for example in a 1946 treaty between China and Saudi Arabia, in which the parties agreed to establish diplomatic relations "in conformity with the principles of Public International Law".[93]

40. Other treaty references related to "principles of international law" included "the generally recognised principles of international law and practice" in the context of commercial relations,[94] and "the principles and practice of international common law",[95] "internationally acknowledged principles of law",[96] "recognised international principles"[97] and "the principles and practices of ordinary international law".[98]

B. Origins

41. The treaties referred to above in section A, subsections 1 and 2, by cross-referencing the provisions of Article 38 of the Statute of the Permanent Court of International Justice or Article 38 of the Statute of the International Court of Justice, or by setting them out expressly (albeit with modifications in some instances), incorporated the term "the general principles of law recognized by civilized nations" without any further indication as to the origin of those general principles of law, whether derived from national legal systems or formed within the international legal

[90] See, for example, the Pact of Friendship, Conciliation and Judicial Settlement between Greece and the Kingdom of the Serbs, Croats and Slovenes (Belgrade, 27 March 1929), *ibid.*, vol. 108, No. 2509, p. 201, at p. 203, preamble; Pact of Friendship, Conciliation, Arbitration and Judicial Settlement between the Hellenic Republic and the Czechoslovak Republic, preamble.

[91] See, for example, the Treaty of Friendship, Conciliation and Judicial Settlement between the Turkish Republic and the Italian Republic (Rome, 24 March 1950), United Nations, *Treaty Series*, vol. 96, No. 1338, p. 207, at p. 209; Treaty of Friendship between Egypt and Yemen (Alexandria, 27 September 1945), *ibid.*, vol. 9, No. 53, p. 373, at p. 376, art. 2.

[92] Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, *ibid.*, vol. 75, No. 971, p. 85, at p. 120, art. 62.

[93] Treaty of Amity between the Republic of China and the Kingdom of Saudi Arabia (Jeddah, 15 November 1946), *ibid.*, vol. 18, No. 289, p. 197, at p. 204, art. II.

[94] Treaty of Peace and Friendship between the United Kingdom and Nepal (Kathmandu, 30 October 1950), *ibid.*, vol. 97, No. 1346, p. 121, at p. 130, art. IV ("The two Contracting Parties shall maintain and develop mutually advantageous commercial relations appropriate to their long and cordial friendship and in accordance with the generally recognised principles of international law and practice").

[95] Treaty of Friendship between the Kingdom of the Netherlands and the Kingdom of Afghanistan (Istanbul, 26 July 1939), *ibid.*, vol. 32, No. 177, p. 381, at p. 383, art. 2.

[96] Round-Table Conference Agreement between the Kingdom of the Netherlands and the Republic of Indonesia, p. 222.

[97] Treaty of Friendship between the Syrian Republic and Pakistan (Karachi, 29 August 1950), United Nations, *Treaty Series*, vol. 109, No. 1494, p. 95, at p. 100, art. II.

[98] Convention on Conditions of Residence, Trade and Navigation between Persia and Greece (London, 9 January 1931), *ibid.*, vol. 166, No. 497, p. 331, at p. art. 1.

system.[99] As presented above in section A, subsection 2, a number of treaties that established arbitral tribunals did so in terms whereby the applicable law included "the principles of law" arising from treaties in force between the parties.[100] The fact that the "principles of law" in question arose from treaties might suggest that these principles have their origin in the international legal system.

42. As discussed above in section A, subsections 5 and 6, a number of treaty provisions referring to "general principles of international law", or variants thereof, concerned diplomatic and consular relations between States, the treatment of legations of one State party in the territory of the other State party, the reciprocal treatment of the nationals of one State party in the territory of the other State party, confiscation of State property by the other State party, nationality and statelessness, conditions of neutrality among States parties, and the principles of international law relating to freedom of the seas. These treaty provisions, establishing primary rights and obligations among States, arose in contexts that were inherently international in nature, which might be relevant when considering the origins of the principles of international law referred to therein. Similarly, in two further treaties referred to above in section A, subsection 6, the references to "the principles laid down in the Covenant of the League of Nations" are further examples of principles arising in a treaty, which might be an indication of their origin.

43. Provisions in some treaties registered with the United Nations Secretariat relating to mutual legal assistance refer to "the general principles of law of the State of the requested court".[101] An example of a treaty referring to "principles of law" where the context appears to be intrinsically international in nature is the 1949 treaty between the Netherlands and Indonesia concerning the transfer of sovereignty.[102] The "principles of law" referred to in the African Charter on Human and Peoples' Rights are to be determined by reference, as subsidiary means, to "other general or special international conventions, laying down rules expressly recognized by member States of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine", which might be relevant when considering the origin of the principles in question, that is, whether their origin lies in the international legal system, the national legal systems of the member States or both.[103]

44. A number of treaties registered with the United Nations Secretariat referring to "general principles" do so by reference to principles established within the treaty itself or within a series of such treaties dealing with the same subject matter. A number of air services agreements, for example, refer to a general principle of "orderly development" of services between the countries concerned, depending on traffic

[99] As discussed by the Special Rapporteur in his first report (A/CN.4/732, paras. 188–253).

[100] See the treaties referred to in footnote 31 above.

[101] See, for example, the Convention on Legal Assistance in Civil Matters between the Hungarian People's Republic and the Italian Republic (Budapest, 26 May 1977), *ibid.*, vol. 1334, No. 22388, p. 379, at p. 386, art. 8, para. 4.

[102] Round-Table Conference Agreement between the Kingdom of the Netherlands and the Republic of Indonesia, p. 222.

[103] African Charter on Human and Peoples' Rights, art. 61.

requirements and other such considerations.[104] Such principles were drawn from treaties, which might be an indication of their origin. Similar examples of such "general principles" arise in treaties for the promotion and protection of investments,[105] social security agreements,[106] agreements on international labour standards,[107] and agreements concerning transfer of sentenced persons.[108]

C. Recognition

45. The treaties registered with the League of Nations and the United Nations Secretariats surveyed for the purpose of the memorandum do not generally refer expressly to a requirement for the recognition of general principles of law. The treaties referred to above in section A, subsection 1, that cross-referenced Article 38 of the Statute of the Permanent Court of International Justice and those in section A, subsection 2, that expressly set out the content of Article 38 reiterated the requirement that general principles of law be "recognised by civilised nations". Some later treaties registered with the United Nations Secretariat referred to in section A, subsection 2, set out expressly the content of Article 38 of the Statute of the International Court of Justice but omit the word "civilized" from the reference to general principles of law. The relevant provisions thus refer to "the general principles of law recognized by nations".[109]

46. The two treaties referred to above in section A, subsection 5, that include the requirement that the principles of international law in question be "generally

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[104] See, for example, the Agreement between the Royal Hellenic Government and the Syrian Republic relating to Civil Air Services between their Respective Territories (Damascus, 5 July 1949), United Nations, *Treaty Series*, vol. 78, No. 1013, p. 71, at p. 80, annex, para. 2; Agreement between United Kingdom of Great Britain and Northern Ireland and Norway concerning Air Communications to, through and from Great Britain and Norway (with Annex) (London, 31 August 1946), *ibid.*, vol. 6, No. 78, p. 235, at p. 238, art. 1, para. 6; Air Transport Agreement between the United Kingdom and the United States of Brazil (Rio de Janeiro, 31 October 1946), *ibid.*, vol. 11, No. 152, p. 115, at p. 128, annex, art. IV (e).

[105] See, for example, the Agreement between the Kingdom of Spain and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments (Ankara, 15 February 1995), *ibid.*, vol. 2012, No. 34528, p. 223, at p. 249, art. V.

[106] For example, the Agreement between the United Kingdom of Great Britain and Northern Ireland and the French Republic regarding the Reciprocal Application of the Social Security Schemes of France and Northern Ireland (Paris, 28 January 1950), *ibid.*, vol. 97, No. 1349, p. 155, at p. 156 *et seq.*

[107] See the Basic Agreement between the United Nations, Food and Agriculture Organization of the United Nations, the International Civil Aviation Organization, the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization and United Kingdom of Great Britain and Northern Ireland Being the Administering Power of the Territories of Cyrenaica and Tripolitania for the Provision of Technical Assistance (Lake Success, New York, 15 December 1950), *ibid.*, vol. 76, No. 985, p. 121, at p. 132 *et seq.*; Instrument for the Amendment of the Constitution of the International Labour Organization (Montreal, 9 October 1946), *ibid.*, vol. 15, No. 229, p. 35, at p. 116 *et seq.*, art. 41.

[108] See, for example, the Treaty on the Transfer of Sentenced Persons between the Republic of Peru and the Portuguese Republic (Lima, 7 April 2010), *ibid.*, vol. 2915, No. 50752, p. 197, at p. 216, art. 2.

[109] Agreement between the United States of America and the Polish People's Republic regarding Fisheries in the Western Region of the Middle Atlantic Ocean, annex I, sect. VII; Agreement between the United States of America and the Polish People's Republic concerning Fisheries Off the Coasts of the United States, annex III, sect. VI.

recognised"[110] do not give any clarification as to what would amount to general recognition. The treaty in section A, subsection 4, that refers to "the recognized principles of law"[111] also does not give any further information about what recognition requires. In other instances, the treaty reference suggests that the requirement for recognition is that the general principles in question are common to the States parties or organizations in question, for example, "common general principles of law of the members",[112] "the general principles applicable in the respective countries",[113] and "general principles of law recognized by African States".[114]

D. Transposition

47. The treaties surveyed do not include express references to transposition, or transposability, of general principles of law from national legal systems to the international legal system.

E. Functions and relationship with other sources of international law

48. Many of the treaty provisions surveyed for the purpose of the memorandum do not state expressly what the functions of general principals of law are. In a number of treaties, as discussed in section A, the function served by the provisions in question was to establish secondary rules – the applicable law for the settlement of disputes between the parties. Other treaty provisions established primary rights and obligations among the States parties, for example, in relation to their diplomatic and consular relations.

49. Some of the treaties discussed above in section A, subsection 2, setting out expressly the content of Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice as the applicable law before an arbitral tribunal, and in section A, subsection 4, referring to "principles of law", included clauses on the following lines:

> If, in a particular case, the legal bases mentioned above are inadequate, the Tribunal shall give an award in accordance with the principles of law which, in its opinion, should govern international law. For this purpose, it shall be guided by rulings sanctioned by legal authorities and by jurisprudence.[115]

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[110] Treaty of Friendship between the German Reich and the Kingdom of Hejaz, Nejd and Dependencies, art. 2; Protocol between Hungary and Czechoslovakia regarding the Supplementary Registration of Investments (Claims), in Accordance with the Decrees of the Czechoslovak Republic, para. 4. See also Convention on Certain Questions relating to the Conflict of Nationality Laws, art. 1.

[111] Exchange of Notes between the United States of America and Mexico Constituting an Agreement concerning Compensation for Expropriated Lands of American Citizens in Mexico, p. 204.

[112] Agreement for the Establishment of an Arab Organization for the Petroleum Exporting Countries (Beirut, 9 January 1968), United Nations, *Treaty Series*, vol. 681, No. 9707, p. 235, at p. 252, art. 6 (a) ("The contractual liability of the Organization shall be governed by the law of the contract entered into. The liability for tort shall be governed by the common general principles of law of the members").

[113] Agreement between the United States of America and Mexico relating to Reciprocal Trade (Washington, 23 December 1942), *ibid*., vol. 13, No. 81, p. 231, at p. 244, art. XII. See also the Agreement between the United States of America and Paraguay relating to Reciprocal Trade (Asunción, 12 September 1946), *ibid*. vol. 125, No. 1677, p. 179, art. X.

[114] African Charter on Human and Peoples' Rights, art. 61.

[115] See the cases referred to above (see footnote 51 above).

50. Such provisions suggest that the "principles of law" referred to may, in cases in which the other sources of international law are "inadequate", fulfil the kind of supplementary or "gap filling" (avoiding a *non liquet*) role normally associated with general principles of law.[116] It was not specified in the treaties in question what the nature or origin of these "principles of law" was, nor how they related to general principles of law in the sense of Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice. It was also not specified whether these principles of law were to be derived by the tribunal from national legal systems, or from the international legal system, or both. A further such example is a 1930 multilateral treaty concerning nationality and statelessness, in which the parties stated that "in so far as any point is not covered by any of the provisions of the preceding article, the existing principles and rules of international law shall remain in force".[117] This provision therefore gave priority to the provisions of the treaty in question, but in so far as there were any gaps in its provisions, the principles and rules of international law were to apply.

51. A gap filling role was also ascribed to general principles of law in a 1945 treaty between the United Kingdom and China in the context of consular relations, pending the conclusion of treaty relations for this purpose:

> Pending the conclusion of the treaty or treaties referred to in the preceding paragraph, each of the High Contracting Parties agrees that the consular officers of the other will be permitted to exercise their functions as such in accordance with general principles of international law in all ports, cities and places of the former which are or may be open to consular officers of any foreign country.[118]

A similar gap-filling role for general principles of law to regulate diplomatic and consular relations pending the conclusion of a treaty was set out in the 1945 Treaty of Friendship between Egypt and Yemen.[119]

52. An example of the interpretative function of general principles of law was contained in the Agreement between the United Nations and the Swiss Confederation on the Ariana site in Geneva, which provides that the Agreement shall be interpreted in accordance with the general principles of law.[120]

53. A further example is the Agreement between the United Nations and Sierra Leone on the Establishment of a Special Court for Sierra Leone, which contains a provision on pardon and commutation of sentence whereby the President of the Special Court was to determine the matter "on the basis of the interests of justice and the general principles of law".[121]

54. The various treaties surveyed do not provide much information about the relationship between general principles of law and the other sources of international law.

55. By incorporating the provisions of Article 38 of the Statute of the Permanent Court of International Justice, or setting out expressly the provisions of Article 38 (with some modifications), the States concluding the treaties referred to above in

[116] A/CN.4/732, paras. 24–28.

[117] Protocol relating to a Certain Case of Statelessness, art. 2.

[118] Treaty between the Netherlands and China on the Relinquishment of Extra-territorial rights in China and the Regulation of Related Matters, with Exchange of Notes and Agreed Minute (London, 29 May 1945), United Nations, *Treaty Series*, vol. 2, No. 23, p. 307, at p. 316, art. VIII.

[119] Treaty of Friendship between Egypt and Yemen, art. 2.

[120] Art. 12.

[121] Agreement between the United Nations and Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137, at p. 152, art. 23.

section A, subsections 1 and 2, incorporated "the general principles of law recognised by civilised nations" without establishing any hierarchy among the three main sources of international law set out in that Article nor in any other way determining the relationship between general principles of law and the other sources of international law. Similarly, the various treaties referred to above in section A, subsection 3, that used the phrase "the general principles of law" without cross-referencing Article 38 nor setting out expressly the content of Article 38 did not generally establish any order of priority or hierarchy among the applicable sources of law in those treaties.

56. An exception was contained in a 1921 bilateral treaty between Switzerland and Germany:

> The Tribunal shall apply:
>
> Firstly: the conventions in force between the Parties, whether general or special, and the principles of law arising therefrom;
>
> Secondly: international custom as evidence of a general practice accepted as law;
>
> Thirdly: the general principles of law recognised by civilised nations.[122]
>
> This provision set up an express order of priority in which the sources of international law were to be applied. It was one of only two provisions of this nature among the treaties surveyed.[123]

57. Similarly, a 1931 bilateral treaty between Germany and Poland concerning social insurance contained the following provision: "The decisions of the arbitration board respecting disputes shall be given in conformity with the provisions of this Treaty, and if necessary by way of supplement thereto in conformity with the general principles of law and equity."[124] In the context of this treaty, general principles of law were to be applied only if necessary, and by way of supplement to the provisions of the treaty.

58. Finally, the Rome Statute of the International Criminal Court spells out the sources of law applicable to the Court in its article 21 with an order of priority among them.[125] It also draws a distinction between general principles of law derived from national law (article 21, paragraph 1 (c)) and principles of international law (article 21, paragraph 1 (b)). This provision of the Rome Statute and the relevant case law of the International Criminal Court is set out in detail in section (III) of the memorandum.

[122] Treaty of Arbitration and Conciliation between the Swiss Confederation and the German Reich (Bern, 3 December 1921), League of Nations, Treaty Series, vol. 12, No. 320, p. 271, at pp. 283–284, art. 5.

[123] The other was the Convention of Arbitration and Conciliation between Germany and Sweden, art. 5.

[124] Treaty between the German Reich and the Republic of Poland regarding Social Insurance (Berlin, 11 June 1931), League of Nations, *Treaty Series*, vol. 141, No. 3263, p. 91, at p. 173, art. 47, para. 2.

[125] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38511, p. 3, at p. 104, art. 21.

II. Case law of inter-State arbitral tribunals

A. Applicable sources of law and terminology

1. Applicable sources of law

59. As *ad hoc* bodies for the settlement of disputes, arbitral tribunals derive their authority from the underlying treaties and agreements that establish them. As section I of the memorandum has demonstrated, there are a large number and variety of such instruments. Some, for example, are substantive treaties establishing primary rights and obligations, with provision for the settlement of disputes between the parties through arbitration. Others are treaties whose purpose is the settlement of disputes generally between the parties, or special agreements for the settlement of specific disputes, or a combination thereof. These instruments also contain varying provisions concerning the law applicable by the arbitral tribunals so created – provisions which may or may not expressly refer to general principles of law. A variety of terminology is used, and it may not always be clear whether the "principles", "general principles", etc., referred to in the establishing instruments are references to general principles of law in the sense of Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice or Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Furthermore, when arbitral tribunals make reference to general principles of law, they do not generally state expressly whether they are doing so through reliance on the underlying establishing instruments, or because they regard general principles of law as inherently applicable before international tribunals as one of the sources of international law. In this section, for the reasons set out in section I above, the Secretariat has also included, as appropriate, other relevant material not limited to inter-State arbitral awards.

60. The arbitral tribunal considering the delimitation of the Abyei area,[126] for example, was established on the basis of an arbitration agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army.[127] The law applicable by the arbitrators included the Comprehensive Peace Agreement signed by the parties on 9 January 2005, the 2005 Interim National Constitution of Sudan and "general principles of law and practices as the Tribunal may determine to be relevant".[128] In the award, the arbitral tribunal confirmed[129] that its task was to apply these instruments and general principles of law as provided in the Arbitration Agreement, and determined on this basis that the "principles of review [of decision-making] in public international law and national legal systems, insofar as the latter's practices are commonly shared, may be relevant".[130]

61. The *Norwegian shipowners' claims*[131] were considered on the basis of a 1907 general convention for the settlement of international disputes,[132] a 1908 general

[126] *Abyei* arbitration (see footnote 21 above).

[127] On 7 July 2008, the Government of Sudan and the Sudan People's Liberation Movement/Army signed the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting the Abyei Area. This is not a treaty and is not registered with the United Nations, but is referred to in paragraph 1 of the award of the arbitral tribunal (*ibid*.).

[128] *Ibid*., para. 425.

[129] *Ibid*., para. 407.

[130] *Ibid*., para. 401.

[131] *Norwegian shipowners' claims (Norway v. USA)*, Award of 13 October 1922, UNRIAA, vol. I, pp. 307–346.

[132] Convention for the Pacific Settlement of International Disputes (The Hague, 18 October 1907), referred to at p. 309 of the award (*ibid*.).

arbitration convention between these States,[133] and a special arbitration agreement specific to the claims in question.[134] The latter provided that "[t]he tribunal shall examine and decide the aforesaid claims in accordance with the principles of law and equity".[135] On this basis, the tribunal determined that: "The words 'law and equity' used in the special agreement of 1921 … are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State."[136]

62. The *Aguilar-Amory and Royal Bank of Canada claims* were considered on the basis of a 1922 treaty between the United Kingdom and Costa Rica, which provided that the arbitrator shall decide on the claims "taking into consideration existing Agreements [and] the principles of Public and International Law".[137] On this basis, the arbitrator referred to the "principle" that: "Changes in the government or the internal policy of a state do not as a rule affect its position in international law … though the government changes, the nation remains, with rights and obligations unimpaired."[138] In the Agreement establishing a Court of Arbitration for the Purpose of Carrying Out the Delimitation of the Maritime Areas between Canada and France, the Agreement stated: "[r]uling in accordance with the principles and rules of international law applicable in the matter, the Court is requested to carry out the delimitation as between the Parties of the maritime areas".[139] On this basis, the tribunal relied on the "[e]quidistance principle" and the "principle of equal capacity of islands and mainland countries to generate maritime areas".[140]

63. The arbitration in the Rainbow Warrior Affair took place on the basis of two agreements concluded between France and New Zealand on 9 July 1986, together with an exchange of letters of the same date providing for arbitration, and a supplementary agreement of 14 February 1989 concerning the establishment of the arbitral tribunal.[141] The latter agreement provided that: "The decisions of the Tribunal shall be made on the basis of [the above-mentioned agreements] and the applicable rules and principles of international law."[142] The tribunal in this case, however, did not rely on this phrase as a basis to discuss general principles of law, but referred to it as: "The customary source, [which] … comprises two important branches of general international law: the Law of Treaties, codified in the 1969 Vienna Convention, and

[133] Signed on 4 April 1908, referred to at p. 309 of the award (*ibid*.).

[134] Arbitration Convention between the United States of America and Norway concerning the Claim of a Group of Shipowners of Christiania on the Government of the United States of America.

[135] *Ibid*., art. 1.

[136] *Norwegian shipowners' claims* (see footnote 131 above), p. 331.

[137] Convention between the United Kingdom and Costa Rica for the Submission to Arbitration of Certain Claims against Costa Rica (San José, 12 January 1922), League of Nations, *Treaty Series*, vol. 17, No. 432, p. 151, at p. 153–154, art. I.

[138] *Aguilar-Amory and Royal Bank of Canada claims (Great Britain v. Costa Rica)*, Award of 18 October 1923, UNRIAA, vol. I, pp. 369–399, at p. 377.

[139] Agreement establishing a Court of Arbitration for the Purpose of Carrying Out the Delimitation of Maritime Areas between Canada and France (Paris and Toronto, 30 March 1989), United Nations, *Treaty Series*, vol. 1583, No. 27629, p. 25, at p. 27, art. 2.1.

[140] *Delimitation of maritime areas between Canada and France*, Decision of 10 June 1992, UNRIAA, vol. XXI, pp. 265–341, at p. 267.

[141] For the relevant texts, see the *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision of 30 April 1990, UNRIAA, vol. XX, pp. 215–284, at pp. 218–221.

[142] Ibid., p. 219, Supplementary Agreement (New York, 14 February 1989), art. 2.

the Law of State Responsibility, in process of codification by the International Law Commission."[143]

64. An example of an award in which the arbitral tribunal appears to have considered that general principles of law are inherently an applicable source of international law before international tribunals, not necessarily by virtue of the underlying treaty basis, is the case of the *Proceedings pursuant to the OSPAR Convention*. The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) provides that the arbitral tribunal "shall decide according to the rules of international law and, in particular, those of the Convention".[144] The tribunal, after recognizing that its first duty was to apply the Convention, stated that: "An international tribunal, such as this Tribunal, will also apply customary international law and general principles unless and to the extent that the Parties have created a *lex specialis*."[145] Similarly, in the *Ambatielos claim*, the underlying arbitration treaty did not specify the applicability of any source of international law other than the provisions of that treaty.[146] Nevertheless, the commission of arbitration stated that: "It is generally admitted that the principle of extinctive prescription applies to the right to bring an action before an international tribunal. International tribunals have so held in numerous cases …".[147]

65. Arbitral tribunals established in accordance with annex VII of the United Nations Convention on the Law of the Sea are governed by Part XV of the Convention, which provides that: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention."[148] Furthermore, articles 74, paragraph 1, and 83, paragraph 1, of the Convention state that the delimitation of the exclusive economic zone and the continental shelf, respectively, of States with opposite or adjacent coasts "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution". In interpreting these latter provisions, the arbitral tribunal, in *Arbitration between Barbados and the Republic of Trinidad and Tobago*, stated:

> This apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions

[143] Ibid., p. 249. See also Affaire relative à la concession des phares de l'Empire ottoman (Greece, France), Decision of 24/27 July 1956, UNRIAA, vol. XII, pp. 155–269, in which the arbitral tribunal (at p. 189) made reference to a hypothetical general principle of customary law; dissenting opinion of Mr. Gavan Griffith in the Proceedings pursuant to the OSPAR Convention (Ireland – United Kingdom), Decision of 2 July 2003, UNRIAA, vol. XXIII, pp. 59–151, at p. 134, in which he considered that the precautionary principle was "an established customary principle of international law".

[144] Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992), United Nations, *Treaty Series*, vol. 2354, No. 42279, p. 67, at p. 83, art. 32, para. 6 (a).

[145] *Proceedings pursuant to the OSPAR Convention* (see footnote 143 above), p. 87, para. 84. See also *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne)*, Decision of 31 July 1928, UNRIAA, vol. II, pp. 1011–1033, at p. 1016.

[146] Agreement between the United Kingdom and Greece regarding the Submission to Arbitration of the Ambatielos Claim (London, 24 February 1955), art. 2. The relevant text is set out in the *Ambatielos claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award of 6 March 1956, UNRIAA, vol. XII, pp. 83–153, at p. 88.

[147] *Ambatielos claim* (see footnote 146 above), p. 103.

[148] United Nations Convention on the Law of the Sea, art. 293.

that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules.[149]

66. Turning to the variety of terminology used by arbitral tribunals, the following subsections are structured in the same way as subsection A of section I of the memorandum relating to treaties registered with the League of Nations and United Nations Secretariats.

2. Terminology

(a) Awards referring to Article 38 of the Statute of the Permanent Court of International Justice or Article 38 of the Statute of the International Court of Justice, or setting out expressly the content of those provisions

67. Some of the arbitral awards surveyed made reference to general principles of law by way of cross-reference to Article 38 of the Statute of the Permanent Court of International Justice or Article 38 of the Statute of the International Court of Justice, for example in *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique*[150] and *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*.[151] Others referred to general principles of law by setting out expressly the relevant content of these provisions, for example, the *Affaire Goldenberg*[152] and *Loan Agreement between Italy and Costa Rica*.[153] Arbitral tribunals have also recognized the general applicability of general principles of law as a source of international law, such as in *Proceedings pursuant to the OSPAR Convention*, in which the tribunal, after recognizing that its first duty was to apply the Convention, noted that: "An international tribunal, such as this Tribunal, will also apply customary international law and general principles unless and to the extent that the Parties have created a lex *specialis*."[154]

68. Arbitral tribunals established in accordance with annex VII of the United Nations Convention on the Law of the Sea are governed by the provisions of Part XV of the Convention, which provides that: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention." In interpreting this provision, along with the provisions of the Convention on delimitation of maritime zones that refer to Article 38 of the Statute of the International Court of Justice, the arbitral tribunal in *Arbitration between Barbados and the Republic of Trinidad and Tobago* noted that general principles of law played a role in that regard.[155]

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[149] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Decision of 11 April 2006, UNRIAA, vol. XXVII, pp. 147–251, at p. 210, para. 222.

[150] See footnote 145 above.

[151] *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Decision of 14 February 1985, UNRIAA, vol. XIX, pp. 149–196, at p. 164. See also *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*, Decision of 21 October 1994, UNRIAA, vol. XXII, pp. 3–149, Dissenting Opinion of Mr. Reynaldo Galindo Pohl, at p. 98.

[152] *Affaire Goldenberg (Allemagne contre Roumanie)*, Decision of 27 September 1928, UNRIAA, vol. II, pp. 901–910, at p. 909.

[153] *Loan Agreement between Italy and Costa Rica*, Decision of 26 June 1998, UNRIAA, vol. XXV, pp. 21–82, at p. 55.

[154] *Proceedings pursuant to the OSPAR Convention* (see footnote 143 above), p. 87, para. 4. See also *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique* (see footnote 145 above), p. 1016.

[155] *Arbitration between Barbados and the Republic of Trinidad and Tobago* (see footnote 149 above), p. 210, para. 222.

(b) Awards that refer to "general principles of law"[156]

69. Some awards surveyed refer to "general principles of law". In the context of a border dispute between Guatemala and Honduras, for example, the tribunal relied on a treaty provision applicable between the parties that stated that "[p]ossession should only be considered valid so far as it is … in conformity with general principles of law".[157] In a claim on behalf of an individual against Mexico, the Mexican Commissioner determined that to find a Government liable on the strength only of a deposition by the claimant and a single witness "would constitute a disregard for the general principles of Law".[158] In a dispute concerning the amount of compensation payable for the deaths of nationals of the United States in Chile, an arbitrator in his concurring opinion stated that "international tribunals often apply general principles of law and municipal law experiences".[159] In a case concerning the Bank for International Settlements, the tribunal stated that depriving shareholders of their shares "cannot be considered lawful without the payment of compensation. This follows from the rules of general international law protecting private property as well as from general principles of law".[160] In a further award, the commission of arbitration stated that: "According to general fundamental principles of law, a debtor can never invoke conditions brought about by his own illegal actions in order to free himself from an obligation."[161]

(c) Awards that refer to "principles of law"

70. A number of the awards surveyed referred to "principles of law". In one, for example, it was stated that "an international tribunal should … determine the question of responsibility in the light of facts and general, applicable principles of law".[162] In another award, in considering the meaning of the words "in accordance with the principles of law and equity", the tribunal stated that: "The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State."[163] In a further award, the commission of arbitration determined that "a proper disposition of the instant case may be found in principles of law to which proper application may be given in determining the question of international responsibility" and "[t]he Commission must deal with the facts before it and apply to conflicting interests proper principles of law in the absence of concrete

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[156] Occasionally, "general principles" was the term used. For example, in *Affaire Goldenberg*, the arbitrator applied the "principe général qui s'oppose à l'expropriation de la propriété privée des étrangers sans juste indemnité" [general principle that prevents the expropriation of private property of foreign nationals without just compensation], but did not qualify it as being a "general principle of law" (see footnote 152 above, p. 909).

[157] *Honduras borders (Guatemala, Honduras)*, Award of 23 January 1933, UNRIAA, vol. II, pp. 1307–1366, at p. 1323.

[158] *Frederick W. Stacpoole (Great Britain) v. United Mexican States*, Decision of 15 February 1930, UNRIAA, vol. V, pp. 95–99, Dissenting Opinion of the Mexican Commissioner, at p. 99.

[159] *Dispute concerning responsibility for the deaths of Letelier and Moffitt* (United States, Chile), Decision of 11 January 1992, UNRIAA, vol. XXV, pp. 1–19, at p. 16.

[160] *Bank for International Settlements – partial dispute with former private shareholders*, Final Award of 19 September 2003, UNRIAA, vol. XXIII, pp. 153–296, at p. 227, para. 156.

[161] *Case of the Netherlands Steamship* Op ten Noort (*Netherlands, Japan*), Decisions I and II of 16 January 1961, UNRIAA, vol. XIV, pp. 508–552, at p. 518.

[162] George W. Johnson, Arthur P. White, executor, and Martha J. Mcfadden, administratrix (U.S.A.) v. United Mexican States ("Daylight" case), Decision of 15 April 1927, UNRIAA, vol. IV, pp. 164–172, at p. 170.

[163] *Cayuga Indians (Great Britain) v. United States*, Award of 22 January 1926, UNRIAA, vol. VI, pp. 173–190, at p. 183.

rules"[164] In two further awards, the commission of arbitration considered whether there had been an error "in applying the principles of law and the rules of the Commission as established and applied in its previous decisions".[165]

71. A further example of reliance by an arbitral tribunal on a reference to "principles of law" or "principles of international law" in its establishing treaty is the *Island of Palmas case*,[166] in which the arbitration agreement expressed the desire of the parties "to terminate in accordance with the principles of International Law and any applicable treaty provisions the differences which have arisen and now subsist between them with respect to the sovereignty over the Island of Palmas".[167] On this basis, the tribunal referred to a number of relevant "principles", including "this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations";[168] "[t]he principle that continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty";[169] and the principle that "Spain could not transfer more rights than she herself possessed".[170]

(d) Awards that refer to "general principles of international law"

72. The largest number of arbitral awards surveyed referred to "general principles of international law". For example, the tribunal in the *Abyei* arbitration considered that "there is a widely shared understanding that reference to 'general principles of law' within the context of boundary disputes includes general principles of international law".[171] In an award concerning nationality, the conciliation commission stated that: "As the Treaty contains no provisions governing the case of dual nationality, the Commission must turn to the general principles of international law."[172] In an award concerning the coexistence of a Government and an insurrectional movement in one State, the conciliation commission stated that: "It is by an application of the general principles of international law that this condition must be judged and that its effects on the provisions of the Treaty of Peace must be determined."[173] In the *Salem case* in 1932, the tribunal stated that "it should be ascertained whether one of the powers, by bestowing the citizenship against general principles of international law, has interfered with the right of the other power".[174] In the award concerning the Convention for the Protection of the Marine Environment of the North-East Atlantic referred to above, the tribunal stated that: "Although certain provisions of the Aarhus Convention may be recognised as reflecting or

[164] E. *R. Kelley (U.S.A.) v. United Mexican States*, Decision of 8 October 1930, UNRIAA, vol. IV, pp. 608–615, at pp. 609 and 614, respectively.

[165] *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and various underwriters (United States) v. Germany (Sabotage Cases)*, Decision of 15 December 1933, UNRIAA, vol. VIII, pp. 160–190, at p. 164; *Philadelphia-Girard National Bank (United States) v. Germany and Direktion der Disconto Gesellschaft, Impleaded*, Decision of 21 April 1930, UNRIAA, vol. VIII, pp. 69–75, at p. 70.

[166] *Island of Palmas case (Netherlands, USA)*, Award of 4 April 1928, UNRIAA, vol. II, pp. 829–871.

[167] Preamble to the agreement relating to the arbitration of differences respecting sovereignty over the Island of Palmas (or Miangas), signed by the United States and the Netherlands on 23 January 1925, as set out in the *Island of Palmas case* (*ibid*., p. 831).

[168] *Ibid*., p. 838.

[169] *Ibid*., p. 840.

[170] *Ibid*., p. 842.

[171] *Abyei* arbitration (see footnote 21 above), p. 310, para. 430.

[172] *Mergé case*, Decision No. 55 of 10 June 1955, UNRIAA, vol. XIV, pp. 236–248, at p. 241.

[173] *Fubini case*, Decision No. 201 of 12 December 1959, UNRIAA, vol. XIV, pp. 420–434, at p. 428.

[174] *Salem case (Egypt, USA)*, Award of 8 June 1932, UNRIAA, vol. II, pp. 1161–1237, at p. 1184.

codifying customary practice and general principles of international law that are binding on the Parties, the Tribunal has no competence to pronounce on the customary nature of the provisions of the Aarhus Convention."[175]

(e) Awards that refer to "principles of international law"

73. A number of the awards surveyed referred to "principles of international law". In the award mentioned above concerning the coexistence of a Government and an insurrectional movement in one State, for example, the conciliation commission stated that: "The terms of the provisions of the Treaty should be interpreted in their context as a whole, in accordance with good faith and in the light of the principles of international law."[176] In an award under the 1923 Special Claims Convention between the United States and Mexico, the commission of arbitration confirmed "the settlement of claims *ex gratia* and not according to principles of international law".[177] In the *Ambatielos claim*, the commission of arbitration stated that it "cannot agree that a provision such as this has the effect of incorporating the principles of international law in the Anglo-Greek Treaty of 1886 by virtue of the most-favoured-nation clause".[178] In the *Diverted cargoes case*, the arbitrator stated that no principle of international law would have prevented the confiscation of vessels owned by a State: "aucun principe de droit international n'entrave ou ne gêne la liberté pour deux Etats contractants de stipuler une obligation en la monnaie d'un Etat tiers, même en vue de régler une dette n'impliquant de relations juridiques qu'entre eux".[179]

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[175] Proceedings pursuant to the OSPAR Convention (see footnote 143 above), p. 121.

[176] *Fubini case* (see footnote 173 above), p. 425.

[177] *Sarah Ann Gorham* (*U.S.A.) v. United Mexican States*, Decision of 24 October 1930, UNRIAA, vol. IV, pp. 640–645.

[178] *Ambatielos claim* (see footnote 146 above), p. 108.

[179] *Diverted cargoes case (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award of 10 June 1955, UNRIAA, vol. XII, pp. 53–81, at p. 73 [no principle of international law impedes or undermines the freedom that both contracting States have to stipulate an obligation in the currency of a third State, even with a view to settling a debt involving a legal relationship that exists only between them]. See also the *Navigation on the Danube ((Allied Powers: Czechoslovakia, Greece, Romania, Serb-Croat-Slovene Kingdom); Germany, Austria, Hungary and Bulgaria)*, Decision of 2 August 1921, UNRIAA vol. I, pp. 97–212, at p. 108; *Affaire du lac Lanoux (Espagne, France)*, Decision of 16 November 1957, UNRIAA vol. XII, pp. 281–317, at p. 308 ("la régle suivant laquelle les Etats ne peuvent utiliser la force hydraulique des cours d'eau internationaux qu'à la condition d'un accord *préalable* entre les Etats intéressés ne peut être établie ni à titre de coutume, ni encore moins à titre de principe général du droit") [the rule by which States can only use the hydraulic force of international waterways upon prior agreement between the States concerned cannot be established as a custom, and even less as a general principle of law]; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decisions of 30 June 1977 and 14 March 1978, UNRIAA, vol. XVIII, pp. 3–413, at p. 189, para. 101 ("La proportionnalité doit donc être utilisée comme un critère ou un facteur permettant d'établir si certaines situations géographiques produisent des délimitations équitables et non comme un principe général qui constituerait une source indépendante de droits sur des étendues de plateau continental") [Proportionality must therefore be used as a criterion or a factor for establishing whether certain geographic situations produce equitable delimitations and not as a general principle that would constitute an independent source of rights over large areas of the continental shelf]; *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Decision of 31 July 1989, UNRIAA, vol. XX, pp. 119–213, at p. 149, para. 79 ("Pour ce qui a trait au droit non écrit, il n'existe actuellement en droit international positif aucune norme coutumière ni aucun principe général de droit autorisant les Etats qui ont conclu un traité valable concernant une délimitation maritime, ou leurs successeurs, à vérifier ou à réviser son caractère équitable") [With regard to unwritten law, there is presently no customary norm or general principle of law in positive international law authorizing States that have concluded a valid treaty concerning maritime delimitation, or their successors, to verify or review its equitable character].

B. Origins

74. The arbitral awards surveyed did not state expressly whether any general principles of law referred to therein had their origin in national legal systems or were formed in the international legal system. In two of the awards surveyed, references to national legislation or national judicial decisions were made to support the principle in question, but in both cases the references were to just one State. In the *Salem case*, specific note of the Constitution of Egyptian judiciary was made by the tribunal,[180] while in the *Diverted cargoes case*, the arbitrator made a reference to the Civil Code of France.[181]

75. In a large number of awards, the principles in question arose in a context that was inherently international in nature, which might be relevant when considering their origin. In *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, for example, the tribunal stated that: "It is a well established principle of international law that countermeasures may not involve the use of force."[182] The award in a colonial boundary dispute between Germany and Great Britain, which was determined "in conformity with the principles and positive rules of public international law", is a further such example.[183] The arbitration concerning the coexistence of a Government and an insurrectional movement in one State is another such example, in which the conciliation commission stated that: "It is by an application of the general principles of international law that this condition must be judged and that its effects on the provisions of the Treaty of Peace must be determined."[184] The arbitrator in the *Shufeldt claim* quoted a passage stating that "it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subjects".[185] In an arbitration concerning Heathrow Airport user charges, the tribunal referred to "the general principles of international law underlying the local remedies rule".[186] In the *Trail smelter case*, the tribunal referred to "the duty of a State to respect other States and their territory".[187]

76. In a number of other awards, the principles referred to were derived from treaties, or were principles concerning the interpretation of treaties, which might be relevant when considering the question of their origin. This was the case, for example, in the *Diverted cargoes case*,[188] the *United States-United Kingdom arbitration concerning Heathrow Airport user charges*,[189] the case of the *Air Service Agreement*

[180] *Salem case* (see footnote 174 above), p. 1199.
[181] *Diverted cargoes case* (see footnote 179 above), p. 70.
[182] *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award of 17 September 2007, UNRIAA, vol. XXX, pp. 1–144, at p. 126, para. 446.
[183] *Walfish Bay boundary case (Germany, Great Britain)*, Award of 23 May 1911, UNRIAA, vol. XI, pp. 263–308, at p. 294.
[184] Fubini case (see footnote 173 above), p. 428.
[185] *Shufeldt claim (Guatemala, USA)*, Award of 24 July 1930, UNRIAA, vol. II, pp. 1079–1102, at p. 1098.
[186] *United States-United Kingdom arbitration concerning Heathrow Airport user charges*, 30 November 1992–2 May 1994, vol. XXIV, pp. 1–359, at p. 62, para. 6.19.
[187] *Trail smelter case (United States, Canada)*, Decisions of 16 April 1938 and 11 March 1941, UNRIAA, vol. III, pp. 1905–1982, at p. 1963.
[188] *Diverted cargoes case* (see footnote 179 above), at p. 70.
[189] *United States-United Kingdom arbitration concerning Heathrow Airport user charges* (see footnote 186 above), p. 88 ("Condition (v) may be derived in the present context from the general principle that obligations that are accepted under Treaties are to be performed in good faith: it would not be consonant with good faith to encourage a consultation procedure which as a whole resulted in unfairness").

of 27 March 1946 between the United States of America and France,[190] and the *Award in the arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway*.[191]

77. As stated in the introduction to the memorandum, the inclusion of the word "international" in the terminology used in treaties or by arbitral tribunals, such as "general principles of international law" and "principles of international law", does not necessarily mean that the principles in question have their origin in the international legal system. Caution is required in this regard. In a number of cases in which the word "international" has been used by arbitral tribunals, it is not possible to state with any certainty that the principles in question have their origin in the international legal system. In the case concerning the *Boundary dispute between Argentina and Chile*, for example, the court referred to "*res judicata* as a universal and absolute principle of international law".[192]

78. A further example is the *Salem case*, in which the tribunal recognized a "principle of international law" by which the bestowal of citizenship was considered a sovereign act.[193] The arbitrator in *Navigation on the Danube* found that "the principles of international law" indicated that private river vessels confiscated during war were to be returned to the owners who had been in possession and control of them at the time of seizure.[194] A further example is the *Affaire entre l'Allemagne et la Lithuanie*, in which the arbitrator found that the duty to comply with international obligations in good faith was a principle of international law.[195] In the *Affaire Goldenberg*, the arbitrator found that: "Le respect de la propriété privée et des droits acquis des étrangers fait sans conteste partie des principes généraux admis par le droit des gens."[196]

C. Recognition

79. Many of the awards surveyed make no mention of the requirements for recognition of the general principle of law in question. Neither are there many implicit references to recognition, for example referring to a general principle of law as well-established.[197] Those awards that refer by cross-reference to Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice or Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, or expressly set out the content of either of those provisions, thereby incorporate the requirement of

[190] Air *Service Agreement of 27 March 1946 between the United States of America and France*, Decision of 9 December 1978, UNRIAA, vol. XVIII, pp. 417–493, at p. 425.

[191] *Award in the arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, UNRIAA, vol. XXVII, pp. 35–125, at p. 64.

[192] *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy* (see footnote 151 above), p. 24.

[193] *Salem case* (see footnote 174 above), p. 1184.

[194] *Navigation on the Danube* (see footnote 179 above), p. 115.

[195] *Affaire entre l'Allemagne et la Lithuanie concernant la nationalité de diverses personnes (Allemagne contre Lithuanie)*, Decision of 10 August 1937, UNRIAA, vol. III, pp. 1719–1764, at p. 1751 ("En vertu des principes du droit international, un État doit remplir ses obligations internationales *bona fide*. Et en vertu de ce principe, la Lithuanie est tenue de casser une décision rendue par un de ses organes, si cette décision est contraire aux dispositions d'un accord international").

[196] *Affaire Goldenberg* (see footnote 152 above), at p. 909.

[197] For example, *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname* (see footnote 182 above), p. 126. See also *Affaire du lac Lanoux* (see footnote 179 above), p. 305 ("Il ne saurait être allégué que, malgré cet engagement, l'Espagne n'aurait pas une garantie suffisante, car il est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas").

"recognized by civilized nations".[198] In a number of other awards, reference is made to the principle in question having been "generally" or "universally" accepted, for example in the *Ambatielos claim*, the commission of arbitration stated that it was "generally admitted" that the principle of extinctive prescription applied to the right to bring claims before international tribunals.[199] In the *Aguilar-Amory and Royal Bank of Canada claims*, the principle of the continuity of States was found to have "such universal acquiescence as to become well settled international law".[200] In the *Abyei* arbitration, the tribunal considered that "principles … applicable in … national legal systems, insofar as the latter's practices are commonly shared, may be relevant as 'general principles of law and practices'".[201]

80. In some awards, there is reference to recognition of a principle in the legal system of one or both parties to the dispute, which, however, appears to be a means of demonstrating that the principle in question was known to the parties rather than a means of establishing recognition of the principle as such. For example, in the *Island of Palmas case*, the tribunal referred to the principle that a State cannot transfer more property rights than those it possesses as a principle of law expressly recognized by the United States in its diplomatic correspondence with Spain.[202] In the *Salem case*, the tribunal noted that the separation of powers was "a principle which is also adopted in the constitution of the Egyptian judiciary".[203]

81. In a number of cases, significance was placed on acceptance (or rejection) of a principle in prior judicial and arbitral decisions. In the *Arbitration regarding the Chagos Marine Protected Area,* for example, judgments of the Permanent Court of International Justice and the International Court of Justice were cited to support recognition of the principle of estoppel as a general principle of law.[204] Also, in the *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, the tribunal referred to the *Island of Palmas case* to support the existence of a general principle of inter-temporal law.[205] In the *Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, referred to above, the finding of "a well established principle of international law that countermeasures may not involve the use of force" was supported by the fact that the

[198] See, for example, *Loan agreement between Italy and Costa Rica* (see footnote 153 above), p. 55.

[199] *Ambatielos claim* (see footnote 146 above), p. 103.

[200] *Aguilar-Amory and Royal Bank of Canada claims* (see footnote 138 above), p. 377. See also *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy* (see footnote 151 above), p. 24 (describing a principle as "universal and absolute").

[201] *Abyei* arbitration (see footnote 21 above), p. 299, para. 401.

[202] *Island of Palmas case* (see footnote 166 above), p. 842.

[203] *Salem case* (see footnote 174 above), p. 1199. See also *Affaire des frontières Colombo-vénézuéliennes*, Decision of 24 March 1922, UNRIAA, vol. I, pp. 223–298, at p. 248, in which Colombia submitted that the principle of *uti possidetis* was recognized both in the Colombian and Venezuelan Constitutions.

[204] *Award in the arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland*, Award of 18 March 2015, UNRIAA, vol. XXXI, pp. 359–606, at pp. 542–544. In the Yukos arbitration award, the tribunal decided that "unclean hands" was not a general principle of law since no international court or arbitral tribunal had applied such principle. See *Yukos Universal Limited (Isle of Man) and the Russian Federation*, Final Award of 18 July 2014, paras. 1364–1374. All awards in the Yukos arbitration were quashed by The Hague District Court on 20 April 2016 on the basis that the Permanent Court of Arbitration lacked jurisdiction in the matter. The High Court of Appeal of the Netherlands reversed this decision on 18 February 2020, reinstating the arbitral award. The Ministry of Justice of the Russian Federation has stated that the Russian Federation will appeal this decision, see BBC News, "Dutch court backs $50bn Yukos claim against Russia", 18 February 2020. Available at www.bbc.com/news/world-europe-51547011.

[205] *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (see footnote 179 above), p. 141.

principle had been reflected in the Commission's draft articles on responsibility of States for internationally wrongful acts, in the jurisprudence of international judicial bodies and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[206]

82. Arbitral tribunals have also relied on scholarly writings in support of the recognition of general principles of law. In *Loan agreement between Italy and Costa Rica*,[207] *Aguilar-Amory and Royal Bank of Canada claims*,[208] *Arbitration regarding the Chagos Marine Protected Area*,[209] and the *Ambatielos claim*,[210] the tribunals relied on the writings of scholars and, in the latter award, a resolution of the Institute of International Law.

D. Transposition

83. None of the arbitral awards surveyed makes express reference to transposition or transposability of general principles of law from national legal systems to the international legal system. There are some references, however, that note the difference in application of a principle of national law at the international level as opposed to at the municipal level. In the *Argentine-Chile frontier case*, for example, having noted that "estoppel" or "preclusion" is "in international law a principle, which is moreover a principle of substantive law", the court of arbitration stated that "these terms are not to be understood in quite the same sense as they are in municipal law".[211]

84. A further example is the *Island of Palmas case*, in which the tribunal stated that:

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[206] *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname* (see footnote 182 above), p. 126, para. 446.

[207] *Loan agreement between Italy and Costa Rica* (see footnote 153 above), p. 55 (seeking support for the principle of estoppel in Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (see footnote 25 above); A. Martin, *L'Estoppel en droit international public* (Paris, Pedone, 1979); C. Rousseau, *Droit international public* (Paris, Sirey, 1970); S. Rosenne, *Developments in the Law of Treaties 1945–1986* (Cambridge, United Kingdom, Cambridge University Press, 1989).

[208] *Aguilar-Amory and Royal Bank of Canada claims* (see footnote 138 above), p. 377 (quoting the following passage in J. B. Moore, *A Digest of International Law*, vol. I (Washington, D.C., Government Printing Office, 1906): "Changes in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired").

[209] *Arbitration regarding the Chagos Marine Protected Area* (see footnote 204 above), p. 542 (quoting the following passage of A.D. McNair, "The Legality of the Occupation of the Ruhr", *British Year Book of International Law*, vol. 5, No. 17 (1924), p. 17: "that international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold – *allegans contraria non audiendus est*").

[210] *Ambatielos claim* (see footnote 146 above), p. 103 (seeking support for the principle of extinctive prescription in H. Lauterpacht and L. Oppenheim, *International Law*, 7th ed. (New York and London, Longmans, Green and Co. 1948) and J.H. Ralston, *The Law and Procedure of International Tribunals* (Stanford, Stanford University Press, 1926); as well as quoting a passage from a 1925 resolution of the Institute of International Law: "[the determination of the question of a time limit with regard to extinctive prescription is] 'left to the unfettered discretion of the international tribunal which, if it is to accept any argument based on lapse of time, must be able to detect in the facts of the case before it the existence of one of the grounds which are indispensable to cause prescription to operate'").

[211] *Argentine-Chile frontier case*, Award of 9 December 1966, UNRIAA, vol. XVI, pp. 109–182, p. 164. This sentence is not further elaborated on in the award.

> Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.[212]

The tribunal went on to refer to "[t]he principle that continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty".[213]

E. Functions and relationship with other sources of international law

85. Support for the "gap filling" or supplementary role of general principles of law was found in a number of the arbitral awards surveyed. For example, the arbitrator in the colonial boundary dispute between Germany and the United Kingdom referred to the need for the dispute to be determined "in conformity with the principles and positive rules of public international law, and, where they fail, in conformity with the general principles of law".[214] In the *Beagle Channel case*, the court of arbitration stated that "the Court considers it as amounting to an overriding general principle of law that, in the absence of express provision to the contrary, an attribution of territory must *ipso facto* carry with it the waters appurtenant to the territory attributed".[215] Similarly, in the *compromis* for the *Affaire des propriétés religieuses*, it was provided that: "Le Tribunal examinera et règlera les dites réclamations en statuant d'après le droit conventionnel éventuellement applicable et, à défaut, d'après les dispositions et les principes généraux du droit et de l'équité."[216]

86. An example of "general principles" being used as an interpretative tool can be found in the *Affaire de l'île de Timor*: "The general principles for the interpretation of conventions demand that account be taken 'of the actual and mutual intention of the parties without dwelling on inexact expressions or terms which they may possibly have used erroneously'".[217] A further example is the *Fubini case*, concerning the coexistence of a Government and an insurrectional movement in one State, in which the conciliation commission stated that "[i]t is by an application of the general principles of international law that this condition must be judged and that its effects on the provisions of the Treaty of Peace must be determined",[218] and further that: "[t]he terms of the provisions of the Treaty should be interpreted in their context as a whole, in accordance with good faith and in the light of the principles of international law".[219]

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[212] *Island of Palmas case* (see footnote 166 above), p. 839.
[213] *Ibid*., p. 840.
[214] *Walfish Bay boundary case* (see footnote 183 above), p. 294, para. III.
[215] *Dispute between Argentina and Chile concerning the Beagle Channel*, Decision of 18 February 1977, UNRIAA, vol. XXI, pp. 53–264, at p. 145.
[216] The agreement was not registered in accordance with Article 18 of the Covenant of the League of Nations, and therefore reference is made to the text of the *compromis* in *Affaire des propriétés religieuses (France, Royaume-Uni, Espagne contre Portugal)*, Decision of 4 September 1920, UNRIAA, vol. 1, pp. 7–57, at p. 9, art. III.
[217] *Affaire de l'île de Timor (Pay-Bas, Portugal)*, Award of 25 June 1914, UNRIAA, vol. XI, pp. 481–517, p. 507 (unofficial translation).
[218] *Fubini case* (see footnote 173 above), p. 428.
[219] *Ibid*., p. 425.

87. Arbitrators applying article 21, paragraph 3, of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes to determine the "reasonable period of time" needed for implementation of the recommendations and rulings in the dispute settlement in question have developed "general principles" for carrying out this task.[220] Furthermore, arbitrators applying article 21, paragraph 3, have referred to the WTO Appellate Body, which

> has consistently upheld the principle that the provisions in the WTO covered agreements are all provisions of one treaty, the *Marrakesh Agreement Establishing the World Trade Organization* … and that, therefore, they should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously.[221]

88. Some arbitral awards have referred to the function of general principles of law in a broad context, which might be understood as assisting with logic, reasoning and coherence in the application of different sources of international law. In the *Arbitration between Barbados and the Republic of Trinidad and Tobago*, for example, the tribunal, in applying articles 74, paragraph 1, and 83, paragraph 1, of the United Nations Convention on the Law of the Sea concerning the delimitation of the exclusive economic zone and the continental shelf, stated that these provisions allow

> in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and [allow] as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules.[222]

89. The tribunal in the case concerning the Convention for the Protection of the Marine Environment of the North-East Atlantic referred to the interrelationship between general principles of law and the treaty in question, stating that "certain provisions of the Aarhus Convention may be recognised as reflecting or codifying customary practice and general principles of international law that are binding on the Parties".[223] Furthermore, the tribunal, after recognizing that its first duty was to apply the Convention, noted that: "An international tribunal, such as this Tribunal, will also apply customary international law and general principles unless and to the extent that the Parties have created a *lex specialis*."[224]

III. Case law of international criminal courts and tribunals of a universal character

90. In accordance with their respective mandates, the international criminal courts and tribunals of a universal character referred to in this section have made reference to and applied general principles of law in diverse ways. This section looks, first, at the case law of the International Criminal Court, then at that of the International Criminal Tribunal for the Former Yugoslavia and, lastly, at that of the International Criminal Tribunal for Rwanda. The case law of the Mechanism, which was

[220] See, for example, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, ARB-2005-4/21, Award of 20 February 2006, para. 49.

[221] *United States – Certain Country of Origin Labelling (Cool Requirements)*, ARB-2012-1/26, Award of 7 December 2015, para. 110.

[222] *Arbitration between Barbados and the Republic of Trinidad and Tobago* (see footnote 149 above), p. 210, para. 222.

[223] *Proceedings pursuant to the OSPAR Convention* (see footnote 143 above), p. 121, para. 12.

[224] *Ibid*., p. 87. See also *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique* (see footnote 145 above), p. 1016.

established to carry out the residual functions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, is examined together with that of the International Criminal Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda, as appropriate. The applicable international criminal law is determined by the legal instruments that established these tribunals: the Rome Statute of the International Criminal Court adopted by the Rome Conference on 17 July 1998, as subsequently amended; the Statute of the International Criminal Tribunal for the Former Yugoslavia adopted by the Security Council in its resolution 827 (1993) of 25 May 1993, as subsequently amended; the Statute of the International Criminal Tribunal for Rwanda adopted by the Security Council in its resolution 955 (1994) of 8 November 1994, as subsequently amended; and the Statute of the Mechanism adopted by the Security Council in its resolution 1966 (2010) of 22 December 2010.

A. International Criminal Tribunal for the Former Yugoslavia

1. Applicable sources of law and terminology

91. The Statute of the International Criminal Tribunal for the Former Yugoslavia has no overarching provision outlining the applicable sources of international law, or any reference to general principles of law, that would correspond to article 21 of the Rome Statute. Nevertheless, certain foundational instruments of the Tribunal do refer to general principles of law, as detailed below.

92. The Secretary-General's report prepared pursuant to paragraph 2 of Security Council resolution 808 (1993) informed the latter's establishment of the Tribunal. It was endorsed in its entirety by the Security Council.[225] It provides, regarding the establishment of the Tribunal, that: "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 recognized by all nations*."[226] It also provides, specifically with respect to sentencing, that:

> The accused would be eligible for pardon or commutation of sentence in accordance with the laws of the State in which sentence is served. In such an event, the State concerned would notify the International Tribunal, which would decide the matter in accordance with the interests of justice and the general principles of law.[227]

93. Additionally, article 28 of the Tribunal's Statute provides as follows:

> If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.[228]

[225] See S/25704 and Corr.1.
[226] *Ibid*., para. 58 (emphasis added).
[227] *Ibid*., para. 123.
[228] Statute of the International Criminal Tribunal for the Former Yugoslavia, as adopted by the Security Council on 25 May 1993 in its resolution 827 (1993) and subsequently amended by resolutions 1166 (1998), 1329 (2000), 1411 (2002), 1431 (2002), 1481 (2003), 1597 (2005), 1660 (2006), 1837 (2008) and 1877 (2009).

94. The Tribunal's rules of procedure and evidence also refer to general principles of law. Rule 89 provides that:

(a) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence.

(b) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.[229]

95. In addition, the Mechanism's Statute contains a reference to general principles of law similar to article 28 of the Tribunal's Statute above. Article 26 of the Mechanism's Statute (pardon or commutation of sentences) provides as follows:

> If, pursuant to the applicable law of the State in which the person convicted by the ICTY, the ICTR, or the Mechanism is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Mechanism accordingly. There shall only be pardon or commutation of sentence if the President of the Mechanism so decides on the basis of the interests of justice and the general principles of law.[230]

96. The Tribunal and the Mechanism, which performs a number of essential functions previously carried out by the Tribunal and the International Criminal Tribunal for Rwanda, have tended to use variable terms when referring to what might be construed as general principles of law. In referring to general principles of law, on some occasions, the International Criminal Tribunal for the Former Yugoslavia has used the terminology in the sense of Article 38 of the Statute of the International Court of Justice or the terminology provided for in its own Statute or rules of procedure and evidence, while at other times it has slightly modified that terminology.[231]

97. With respect to the Mechanism, decisions of the President on pardon or commutation of sentences often replicate the language in article 26 of the Statute, for example, stating that "there shall only be pardon or commutation of sentence if the President so decides on the basis of the interests of justice and the general principles

[229] Rules of procedure and evidence, as amended on 8 July 2015.

[230] See Security Council resolution 1966 (2010) of 22 December 2010, annex 1 (Statute of the International Residual Mechanism for Criminal Tribunals).

[231] See, for example, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Corrigendum to the Motion on Behalf of Sredoje Lukić Seeking Reconsideration of the Judgment Rendered by the Appeals Chamber on 4 December 2012, 25 June 2013, Appeals Chamber, paras. 24–26; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgment of 31 July 2003, Trial Chamber II, para. 891; *Prosecutor v. Zejnil Delalić et al*., Case No. IT-96-21-T, Judgment of 16 November 1998, Trial Chamber, para. 414; *Prosecutor v. Zejnil Delalić et al*., Case No. IT-96-21, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, 28 May 1997, Trial Chamber, para. 8; *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Appeals Chamber, para. 41; *Prosecutor v. Duško Tadić (Appeal),* Case No. IT-94-1-A, Judgment of 15 July 1999, Appeals Chamber, para. 225 ("the general principles of law recognised by the nations of the world"); *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgment of 14 January 2000, Trial Chamber, para. 540; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgment of 23 January 2014, Appeals Chamber, para. 1643; *Prosecutor v. Zejnil Delalić et al. (Appeal) ("Čelebići case")*, Case No. IT-96-21-A, Judgment of 20 February 2001, Appeals Chamber, para. 583 ("the general principles of law recognised by all nations").

of law".[232] In accordance with article 26, the President of the Mechanism, in the *Galić* case, applied "general principles of law" in deciding early release:

> In addition, [the President] held that relevant international legal and human rights standards strongly suggest that those sentenced to life imprisonment are not barred from being considered for early release. He considered that the interests of justice and general principles of law support providing those serving life sentences with the possibility of early release.
>
> In the present matter and without prejudging other cases, the interests of justice and the principle of legal certainty lead me to consider Galić eligible for early release once he has served a minimum of 30 years of his sentence.[233]

98. In terms of its rules of procedure and evidence, the Tribunal has evoked rule 89, paragraph (B), in several decisions, and the formulation employed is usually similar to that found in the rule. For example, in *Milutinović et al. [now Šainović et al.]*, the Trial Chamber ruled:

> Throughout the trial the Chamber has applied Rule 89 of the Rules, as well as the significant body of jurisprudence upon evidentiary issues that has developed at the Tribunal since its inception. Where *lacunae* existed, the Chamber applied rules of evidence that best favoured a fair determination of the matter before it, consonant with the spirit of the Statute and general principles of law.[234]

99. As for references to general principles of law in the sense of Article 38 of the Statute of the International Court of Justice, for instance, the Tribunal ruled in the *Zejnil Delalić et al.* case that its rule 89, paragraph (B), was similar to Article 38, while noting that the omission of language on recognition by civilized nations made no substantive difference:

> The expression "general principles of law" in Sub-rule 89(B) is similar to the expression in Article 38(1)(c) of the Statute of the International Court of Justice, without the last four words, "recognised by civilised nations", which make no substantive difference. Article 38(1)(c) of the ICJ Statute has been construed to mean rules accepted in the domestic laws of all civilised States. (See *Guggenheim, 94 Hague Recueil (1958, II), 78*). Oppenheim has also expressed the view that "The intention is to authorise the Court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States.[235]

100. "General principles of criminal law" is a term occasionally used by the Tribunal. In the *Erdemović* sentencing judgment, the Trial Chamber used language similar to that of Article 38 of the Statute of the International Court of Justice, when it held that crimes against humanity constituted breaches of "the general principles of criminal law as derived from the criminal law of all civilised nations":

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[232] *Prosecutor v. Sreten Lukić,* Case No. MICT-14-67-ES.4, Decision of the President on the Early Release of Sreten Lukić, 17 September 2019, President of the Mechanism, para. 9; *Prosecutor v. Stanislav Galić,* Case No. MICT-14-83-ES, Decision on the Early Release of Stanislav Galić, 26 June 2019, President of the Mechanism, para. 11.

[233] *Prosecutor v. Stanislav Galić* (see footnote 233 above), paras. 16 and 34 (footnotes omitted).

[234] *Prosecutor v. Milan Milutinović et al. [now Šainović et al.],* Case No. IT-05-87-T, Judgment (vol. 1 of 4) of 26 February 2009, Trial Chamber, para. 35.

[235] *Prosecutor v. Zejnil Delalić et al*., Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference (see footnote 232 above), para. 8. See also, for example: *Prosecutor v. Milan Lukić and Sredoje Lukić* (see footnote 232 above), paras. 24–26; *Prosecutor v. Duško Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (see footnote 232 above), para. 41.

> Generally speaking, crimes against humanity are recognised as very grave crimes which shock the collective conscience. The indictment supporting the charges against the accused at the Nuremberg Trial specified that the crimes against humanity constituted breaches of international conventions, domestic law, and the general principles of criminal law as derived from the criminal law of all civilised nations. The Secretary-General of the United Nations, in his report which proposed the Statute of International Tribunal, considered that "crimes against humanity refer to inhumane acts of *extreme gravity* …. In 1994, the International Law Commission asserted that "the definition of crimes against humanity encompasses inhumane acts of a *very serious character* ….[236]

2. Origins

101. There are many instances in the Tribunal's jurisprudence in which it refers to general principles of law derived from national legal systems. Such references are occasionally accompanied by surveys of national legal systems, the scope and extent of which vary but which often involve a comparison at least among a number of civil law and common law systems.

102. In the *Furundžija* case, the Trial Chamber surveyed various national legal systems to identify a definition of rape. The Trial Chamber determined "that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault".[237] In its examination of the definition of rape in that context, the Trial Chamber looked at national laws and case law relating to rape, especially regarding the *actus reus* element, gender considerations, elements of force, aggravating factors and sentencing.[238] For that purpose, the Trial Chamber referred to: the legal systems of Chile, China, Germany, Japan, Socialist Federal Republic of Yugoslavia, Zambia, Austria, France, Italy, Argentina, Pakistan, India, Uganda, New South Wales, Netherlands, England and Wales, and Bosnia and Herzegovina; a legal treatise on the law of South Africa; and the proposal of the United States to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[239]

103. Additionally, the Trial Chamber determined that from its "survey of national legislation", a common concept of rape could be found in "most legal systems":

> It is apparent from our survey of national legislation that, in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.[240]

104. However, the Trial Chamber also found a discrepancy in national systems regarding the criminalization of forced oral penetration, noting that "some States treat it as sexual assault, while it is categorised as rape in other States". This led the Trial Chamber to then assess principles in international law, stating that: "Faced with this lack of uniformity, it falls to the Trial Chamber to establish whether an appropriate solution can be reached by resorting to the general principles of international criminal

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[236] *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-T, Sentencing Judgment of 29 November 1996, Trial Chamber, para. 27 (footnote omitted).

[237] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber, para. 179.

[238] *Ibid.*, para. 180.

[239] *Ibid.*, para. 180.

[240] *Ibid.*, para. 181.

law or, if such principles are of no avail, to the general principles of international law."[241]

105. The Trial Chamber ultimately identified the existence of "[t]he general principle of respect for human dignity" and relied on it in classifying forced oral penetration as rape:

> The Trial Chamber holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well-being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.[242]

106. In the *Kunarac et al.* case, the Trial Chamber described in summary the process for the identification of general principles of law as it had been done in the *Furundžija* case, calling that process "an examination of national systems generally":

> As observed in the *Furundžija* case, the identification of the relevant international law on the nature of the circumstances in which the defined acts of sexual penetration will constitute rape is assisted, in the absence of customary or conventional international law on the subject, by reference to the general principles of law common to the major national legal systems of the world. The 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, or in the words of the *Furundžija* judgement, "common denominators", in those legal systems which embody the *principles* which must be adopted in the international context.[243]

107. In *Kunarac et al.*, the Trial Chamber also described identification of such principles, in that instance relating to the elements of rape, as involving identifying "the true common denominator which unifies the various systems", whereby in that case "the basic underlying *principle* common to them was that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim":

> As noted above, the Trial Chamber in the *Furundžija* case considered a range of national legal systems for assistance in relation to the elements of rape. In the view of the present Trial Chamber, the legal systems there surveyed, looked at as a whole, indicated that the basic underlying *principle* common to them was

[241] *Ibid.*, para. 182.

[242] *Ibid.*, para. 183.

[243] *Prosecutor v. Dragoljub Kunarac et al*., Case Nos. IT-96-23-T and IT-96-23/1-T, Judgment of 22 February 2001, Trial Chamber, para. 439 (footnotes omitted).

> that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim. The matters identified in the *Furundžija* definition – force, threat of force or coercion – are certainly the relevant considerations in many legal systems but the full range of provisions referred to in that judgement suggest that the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual *autonomy*.[244]

108. After examining the reasoning in *Furundžija* as above, the Trial Chamber in *Kunarac et al.* then pointed to what it called "[t]he basic principle which is truly common to these legal systems" which was "that serious violations of sexual *autonomy* are to be penalized":

> An examination of the above provisions indicates that the factors referred to under the first two headings are matters which result in the will of the victim being overcome or in the victim's submission to the act being non-voluntary. The basic principle which is truly common to these legal systems is that serious violations of sexual autonomy are to be penalised. Sexual *autonomy* is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.[245]

109. Additionally, the Appeals Chamber, in an evidentiary decision in the *Prlić at al.* case, surveyed national legal systems in order to infer "[']the general principles of law' pursuant to Rule 89(B)" with respect to an aspect of cross-examination.[246] In doing so, the Chamber surveyed the case law and legislation from seven jurisdictions, concluding that "domestic legal systems do not provide much guidance" and that "no discernible 'general principle' may be inferred from domestic practice in this area":

> In construing the "spirit of the Statute and the general principles of law" pursuant to Rule 89(B), the Appeals Chamber will also note that, due to the nature of the issue at hand, domestic legal systems do not provide much guidance. In a very broad sense, in systems that allow an accused to testify in his own trial under a solemn declaration – and not merely expressing himself as an accused – a document such as the December 2001 Transcript would be inadmissible because it could not be tested by cross-examination [citing the United States, Canada and England in the footnote]. On the contrary, those systems where declarations gathered in pre-trial stages according to certain procedures may be admitted in writing at trial are also the ones that generally do not allow accused persons to testify as witnesses in their own trials – they may be questioned, not in a manner equivalent to an examination under a solemn declaration [citing France, Austria, Germany and Italy in the footnote]. Thus, no discernible "general principle" may be inferred from domestic practice in this area.[247]

110. The Appeals Chamber in *Halilovic* described the origins of the "general principle" of orality as laying in Roman law and existing also in various forms in common and civil law today:

> The Appellant's second complaint, that the method of introducing the evidence (via tender from the bar table) breached the principle of orality, is misplaced. There is to be sure, a general principle that witnesses before the Tribunal should

[244] *Ibid.*, para. 440.

[245] *Ibid.*, para. 457.

[246] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, Appeals Chamber, para. 50.

[247] *Ibid.*

> give their evidence orally rather than have their statement entered into the record. The principle has its origin in the Roman law requirement that parties before a tribunal make submissions orally rather than in writing, and exists in various forms in common and civil law traditions today. The principle of orality and its complement, the principle of immediacy, act as analogues to common law hearsay rules and are meant to ensure the adversarial nature of criminal trials, and the right of the accused to confront witnesses against him.
>
> However, the principle of orality, as reflected in the Rules, is not an absolute restriction, but instead simply constitutes a preference for the oral introduction of evidence.[248]

111. In another example regarding deriving general principles of law from national systems, the Appeals Chamber in *Tadić*, after finding that there was "no mention in the Tribunal's Statute of its power to deal with contempt"[249] and "no specific customary international law directly applicable to this issue",[250] referred to "general principles of law common to all major legal systems in the world", stating that:

> It is otherwise of assistance to look to the general principles of law common to the major legal systems of the world, as developed and refined (where applicable) in international jurisprudence. Historically, the law of contempt originated as, and has remained, a creature of the common law. The general concept of contempt is said to be unknown to the civil law, but many civil law systems have legislated to provide offences which produce a similar result.[251]

112. The Appeals Chamber then examined various manifestations of the general principle of law in question (the law of contempt) in both common law and civil law jurisdictions:

> Although the law of contempt has now been partially codified in the United Kingdom, power to deal with contempt at common law has essentially remained one which is part of the inherent jurisdiction of the superior courts of record, rather than based upon statute. On the other hand, the analogous control exercised in the civil law systems over conduct which interferes with the administration of justice is based solely upon statute, and the statutory provisions, in general, enact narrow offences dealing with precisely defined conduct where the jurisdiction of the courts has been or would be frustrated by that conduct.[252]

113. In making the latter finding, the Appeals Chamber conducted a survey of different legal systems, elaborating on the treatment of the principle in various countries' criminal codes and laws, as follows:

> For example, the German Penal Code punishes as a principal offender anyone who incites a witness to make a false statement (§§ 26, 153). The Criminal Law of the People's Republic of China punishes anyone who entices a witness to give false testimony (Article 306). The French *Nouveau Code Pénal* punishes those who pressure a witness to give false evidence or to abstain from giving truthful evidence (Article 434-15). More general statutory provisions exist which deal with such things as the control of the hearing (*police de l'audience*), "affronts"

[248] *Prosecutor v. Sefer Halilović (Interlocutory)*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, Appeals Chamber, paras. 16–17.

[249] *Prosecutor v. Duško Tadić (Contempt)*, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000, Appeals Chamber, para. 13.

[250] *Ibid*., para. 14.

[251] *Ibid.*, para. 15 (footnote omitted).

[252] *Ibid.*, para. 17 (footnotes omitted).

> (*outrages*), offences committed during the hearings (for example, *delits d'audience*) and the publication of comments tending to exert pressure (*pression*) on the testimony of witnesses or on the decision of any court. The Russian Criminal Code punishes interference in any form whatsoever with the activities of the court where the purpose is to obstruct the effectuation of justice (Article 294), and also provides more specific offences such as the falsification of evidence (Article 303).[253]

114. The Trial Chamber, in the *Kupreškić et al.* judgment, referred to "general principles of criminal law as they derive from the convergence of the principal penal systems of the world":

> The Trial Chamber holds the view that a satisfactory legal solution to the questions at issue can now be reached. The legal notion of "crimes against humanity" is now firmly embedded in positive international law, its legal contours are neatly drawn and it no longer gives rise to doubts as to its legitimacy; in particular, its application does not raise the issue of retroactive criminal law. 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.[254]

115. In its assessment, the Trial Chamber noted that both national legislation and judicial decisions were relevant materials to examine in carrying out this exercise. The Trial Chamber determined that, when drawing "upon national law to fill possible *lacunae* in the Statute or in customary international law", it may have "to peruse and rely on national legislation or national judicial decisions with a view to determining the emergence of a general principle of criminal law common to all major systems of the world".[255]

116. In addition, in the *Tadić* case, the Trial Chamber examined "principles of criminal procedure in domestic courts" in a number of countries' legislative acts and criminal codes when ruling on a motion requesting protective measures for victims and witnesses:

> Measures to prevent the disclosure of the identities of victims and witnesses to the public are also compatible with principles of criminal procedure in domestic courts. There is a growing acceptance in domestic jurisprudence of the need to protect the identity of victims and witnesses from the public when a special interest is involved. Several common law countries allow for the non-disclosure to the public of identifying information relating to certain victims and witnesses. The United Kingdom prohibits disclosure to the public of identifying information of a complainant in a sexual assault case, including any still or moving pictures, except at the discretion of the court. (The Sexual Offences (Amendment) Act 1976 s. 4.) Canadian legislation guarantees anonymity from the public upon application to the court. (Canadian Criminal Code s. 442(3).) In Queensland, Australia, the Evidence Act (Amendment) 1989 (Queensland) allows additional protection during the testimony of a "special witness" including the exclusion of the public and or the defendant or other named persons from court. (Brief of Professor Chinkin at 4 - 6.) South African law also provides for the non-disclosure for a certain period of time of the identity of a

[253] *Ibid.*, footnote 20.
[254] *Prosecutor v. Zoran Kupreškić et al.* (see footnote 232 above), para. 677.
[255] *Ibid.,* para. 539 (footnote omitted).

> witness in a criminal proceeding if it appears likely that harm will result from the testimony (Criminal Procedure Act of South Africa 51/1977, sec. 153(2)(b)) and has provisions for closing the courtroom during the testimony of victims in cases of sexual assault.[256]

117. In the *Gotovina et al.* case, the Appeals Chamber, referring to the parties "extensive references to national case-law", found "it instructive to have a brief overview of underlying principles with respect to a counsel's duty of loyalty to a former client in national jurisdictions". In this connection, the Appeals Chamber examined the legal systems of the United States, United Kingdom, Bosnia-Herzegovina, and France, as well as the Code of Conduct for European Lawyers and the Croatian Attorney's Code of Ethics.[257]

118. In the *Krstić* appeal judgment, the Appeals Chamber considered "[m]any domestic jurisdictions", as well as international jurisprudence, when pronouncing the principles relating to the *mens rea* required for aiding and abetting:

> Many domestic jurisdictions, both common and civil law, take the same approach with respect to the *mens rea* for aiding and abetting, and often expressly apply it to the prohibition of genocide. Under French law, for example, an aider and abettor need only be aware that he is aiding the principal perpetrator by his contribution, and this general requirement is applied to the specific prohibition of the crime of genocide. German law similarly requires that, in offences mandating a showing of a specific intent (*dolus specialis*), an aider and abettor need not possess the same degree of *mens rea* as the principal perpetrator, but only to be aware of the perpetrator's intent. This general principle is applied to the prohibition of genocide in Section 6 of the German Code of Crimes Against International Law. The criminal law of Switzerland takes the same position, holding that knowledge of another's specific intent is sufficient to convict a defendant for having aided a crime. Among the common law jurisdictions, the criminal law of England follows the same approach, specifying that an aider and abettor need only have knowledge of the principal perpetrator's intent. This general principle again applies to the prohibition of genocide under the domestic English law. The English approach to the *mens rea* requirement in cases of aiding and abetting has been followed in Canada and Australia, and in some jurisdictions in the United States.[258]

119. In addition, there are some references to principles that appear to be drawn from the international legal system. In certain cases, the Chambers have referred to both domestic and international legal systems as the origins of a principle. In the *Čelebići* case, for example, the Appeals Chamber referred to the principle of judicial independence "in domestic and international systems", stating:

> It is beyond question that the principles of judicial independence and impartiality are of a fundamental nature which underpin international as well as national law. They are represented not only in numerous international and regional instruments – including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights – but also in the Statute of the Tribunal itself, which requires by Article 12 that the Chambers be composed of independent judges and by Article 13 that the judges be impartial.

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[256] *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, Trial Chamber, para. 39.

[257] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.2, Decision on Ivan Cermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic, 29 June 2007, Appeals Chamber, paras. 44–47.

[258] *Prosecutor v. Radislav Krstić,* Case No. IT-98-33-A, Judgment of 19 April 2004, Appeals Chamber, para. 141 (footnotes omitted).

> The fundamental importance of the independence of the judiciary has been emphasised in the jurisprudence of the Appeals Chamber. This jurisprudence has also recognised that the principle of judicial independence in domestic and international systems generally demands that those persons or bodies exercising judicial powers do not also exercise powers of the executive or legislative branches of those systems.[259]

120. Furthermore, the Appeals Chamber in that case separately discussed what it called "the fundamental humanitarian principles" underlying international humanitarian law, although not making it clear which source of international law those principles belonged to:

> It is indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles. These principles were codified in common Article 3 to constitute the minimum core applicable to internal conflicts, but are so fundamental that they are regarded as governing both internal and international conflicts. In the words of the ICRC, the purpose of common Article 3 was to "ensur(e) respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself". These rules may thus be considered as the "quintessence" of the humanitarian rules found in the Geneva Conventions as a whole.
>
> It is these very principles that the ICJ considered as giving expression to fundamental standards of humanity applicable in *all* circumstances.[260]

121. In addition, referring to what it termed "fundamental standards" underlying the rules applicable to internal conflicts and their consideration "by all civilised nations", the Appeals Chamber provided that those rules could be applicable to conflicts of an international character as well, drawing on certain international legal instruments:

> Both human rights and humanitarian law … take as their starting point the concern for human dignity, which forms the basis of a list of fundamental minimum standards of humanity. The ICRC Commentary on the Additional Protocols refers to their common ground …. The universal and regional human rights instruments and the Geneva Conventions share a common "core" of fundamental standards …. The object of the fundamental standards appearing in both bodies of law is the protection of the human person from certain heinous acts considered as unacceptable by all civilised nations in all circumstances.[261]

122. In describing international and other judicial precedents in relation to general principles, the Trial Chamber in *Kupreškić* provided that "general principles may

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[259] *Prosecutor v. Zdravko Delalić et al. (Appeal) ("Čelebići case")* (see footnote 232 above), para. 689 (footnotes omitted). See also, for example: *Prosecutor v. Nikola Šainović et al.* (see footnote 232 above), paras. 1643 and 1662; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, Judgment on Allegations of Contempt, 17 December 2008, Trial Chamber I, paras. 23 and 38–39; *Prosecutor v. Jadranko Prlić et al.* (see footnote 247 above), paras. 50–55.

[260] *Prosecutor v. Zdravko Delalić et al. (Appeal) ("Čelebići case")* (see footnote 232 above), paras. 143–144 (footnotes omitted).

[261] *Ibid.*, para. 149 (footnotes omitted).

gradually crystallise through their incorporation and elaboration in a series of judicial decisions delivered by either international or national courts", ruling that:

> The Tribunal's need to draw upon judicial decisions is only to be expected, due to the fact that both substantive and procedural criminal law is still at a rudimentary stage in international law. In particular, there exist relatively few treaty provisions on the matter. By contrast, especially after World War II, a copious amount of case law has developed on international crimes. Again, this is a fully understandable development: it was difficult for international law-makers to reconcile very diverse and often conflicting national traditions in the area of criminal law and procedure by adopting general rules capable of duly taking into account those traditions. By contrast, general principles may gradually crystallise through their incorporation and elaboration in a series of judicial decisions delivered by either international or national courts dealing with specific cases. This being so, it is only logical that international courts should rely heavily on such jurisprudence.[262]

123. The Trial Chamber, in a decision in the *Karadžić et al*. case, also referred to "the general principles of international humanitarian law" as influencing its approach to punishment, "deriv[ing] in particular from the precedents laid down by Nuremberg and Tokyo", as well as "the principle of individual criminal responsibility of persons in positions of authority [that] has been reaffirmed in a number of decisions taken by national courts, and adopted in various national and international legal instruments".[263] The Trial Chamber then used those principles in deliberating on criminal responsibility, stating that "[i]t follows from the above principle that the official capacity of an individual even de facto in a position of authority – whether as military commander, leader, or as one in government – does not exempt him from criminal responsibility and would tend to aggravate it".[264]

3. Recognition

124. At times, the scope and extent of recognition required by the Tribunal has been relatively wide. For instance, the Appeals Chamber in *Tadić* stated that "most, if not all, countries" would need to adopt the same notion for a general principle of law to have adequate recognition:

> in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose.[265]

125. Similarly, in *Šainović et al.*, relating to aiding and abetting liability, the Appeals Chamber adopted a similar "most, if not all, countries" approach in reference to "the doctrine of general principles of law recognised by nations":

> The Appeals Chamber now turns to national law on the elements of aiding and abetting liability. At the outset, the Appeals Chamber recalls that under the doctrine of general principles of law recognised by nations, national legislation and case law may be relied upon as a source of international principles or rules in limited situations. Such reliance, however, is permissible only where it is shown that most, if not all, countries accept and adopt the same approach to the

[262] *Prosecutor v. Zoran Kupreškić et al*. (see footnote 232 above), paras. 537–538.
[263] *Prosecutor v. Radovan Karadžić et al.*, Case No. IT-95-5-D, Decision of 16 May 1995, Trial Chamber, para. 23.
[264] *Ibid.*, para. 24.
[265] *Prosecutor v. Duško Tadić (Appeal)* (see footnote 232 above), para. 225.

> notion at issue. More specifically, it would be necessary to show that the major legal systems of the world take the same approach to that notion.[266]

126. The Appeals Chamber further described recognition of general principles as involving gleaning a common principle "from the major legal systems of the world" following "a review of national law":

> Having conducted a review of national law, the Appeals Chamber considers that this is not the case with respect to the notion of "specific direction". Specifically, in light of the variation among national jurisdictions with respect to aiding and abetting liability, the Appeals Chamber considers that no clear common principle in this respect can be gleaned from the major legal systems of the world. As a common basis, for aiding and abetting liability to arise, national legislation and the jurisprudence of domestic courts require the provision of assistance or support which facilitates the commission of a crime. However, national jurisdictions conceptualise the link between the acts of assistance and the crime in the context of *actus reus* and the required degree of *mens rea* in various different ways in accordance with principles in their respective legal systems.[267]

127. The Appeals Chamber in *Krstić* discussed recognition "in the ICTR and in many national jurisdictions". The Appeals Chamber stated that:

> Regarding the gravity of the crimes alleged, as the Appeals Chamber recently acknowledged in the *Vasiljević* case, aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator. This principle has also been recognized in the ICTR and in many national jurisdictions.[268]

128. Referring to "the majority of jurisdictions", the Appeals Chamber, in *Delić*, evoked general principles of law in the context of lack of previous jurisprudence and the "novelty of the issue" regarding the finality of the trial judgment following the death of an appellant and prior to the issuance of the appeal judgment. It held that

> there is no jurisprudence in this Tribunal which would be directly relevant to the instant matter. Given these circumstances and in view of the novelty of the issue, the Appeals Chamber finds it instructive to provide a brief overview of the relevant provisions and legal precedents in other jurisdictions.[269]

The Appeals Chamber then reviewed both common and civil law systems,[270] finding "no general principle that is consistently followed in the majority of jurisdictions":

> The … overview shows that there is no general principle that is consistently followed in the majority of jurisdictions as to the finality of the trial judgement in the event that the proceedings are terminated following the death of an appellant. For this reason, as well as bearing in mind the specific realities of, and the particular procedures before, this Tribunal, the Appeals Chamber cannot discern any prevalent approach, let alone identify any rules of customary international law, that would be directly applicable to the situation at hand.[271]

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[266] *Prosecutor v. Nikola Šainović et al.* (see footnote 232 above), para. 1643 (footnotes omitted).
[267] *Ibid.*, para. 1644 (footnote omitted).
[268] *Prosecutor v. Radislav Krstić* (see footnote 259 above), para. 268 (footnotes omitted).
[269] *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on the Outcome of the Proceedings, 29 June 2010, Appeals Chamber, para. 10.
[270] *Ibid.*, paras. 11–12.
[271] *Ibid.*, para. 13.

129. In the *Milošević* case, in considering the right to self-representation, the Appeals Chamber referred to recognition by "jurisdictions around the world" and examined both national laws as well as precedents of war crimes tribunals:

> While this right to self-representation is indisputable, jurisdictions around the world recognize that it is not categorically inviolable. In *Faretta* itself, the United States Supreme Court noted that, since "[t]he right of self-representation is not a license to abuse the dignity of the courtroom," a trial judge "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." Recognizing this same basic contingency of the right, England, Scotland, Canada, New Zealand, and Australia have all developed the principle that, in order to protect vulnerable witnesses from trauma, courts may severely restrict the right of defendants to represent themselves in sexual assault trials. Scotland goes so far as to forbid such defendants from conducting any portion of their defenses in person. And while this Appellate Chamber has not previously passed on the question, existing precedent from contemporary war crimes tribunals is unanimous in concluding that the right to self-representation "is a qualified and not an absolute right".[272]

130. At times the Tribunal refers to an approach in its own jurisprudence in terms of its consonance with the general principles of law. This can be illustrated in *Blaškić*, in which the Trial Chamber determined that:

> The Trial Chamber concurs with the views deriving from the Tribunal's case-law, that is, that individuals may be held responsible for their participation in the commission of offences under any of the heads of individual criminal responsibility in Article 7(1) of the Statute. This approach is consonant with the general principles of criminal law and customary international law.[273]

131. The Tribunal has likewise recalled, "as a general principle", its own previous jurisprudence. For example, the Appeals Chamber in *Kupreškić et al.* ruled that:

> The Appeals Chamber bears in mind that in determining whether or not a Trial Chamber's finding was reasonable, it "will not lightly disturb findings of fact by a Trial Chamber." The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in *Kupreškić*, wherein it was stated that:
>
> [p]ursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[274]

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[272] *Prosecutor v. Slobodan Milošević,* Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, Appeals Chamber, para. 12 (footnotes omitted). See also, for example, *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Judgment of 27 January 2014, Appeals Chamber, paras. 17–20; *Prosecutor v. Nikola Šainović et al.* (see footnote 232 above), para. 23; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgment of 19 May 2010, Appeals Chamber, para. 14.

[273] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment of 3 March 2000, Trial Chamber, para. 264 (footnotes omitted).

[274] *Prosecutor v. Tihomir Blaškić (Appeal)*, Case No. IT-95-14-A, Judgment of 29 July 2004, Appeals Chamber, para. 17 (citing *Prosecutor v. Zoran Kupreškić et al. (Appeal),* Case No. IT-95-16-A, Appeal Judgment of 23 October 2001, Appeals Chamber, para. 30) (footnotes omitted).

132. In the *Čelebići* case, the Appeals Chamber acknowledged certain general principles of law "recognised by all legal systems":

> It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the [International Covenant on Civil and Political Rights] should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.[275]

133. In *Kupreškić et al.*, the Appeals Chamber referred to recognition by "[d]omestic criminal law systems from around the world", thereafter examining both common and civil law systems:

> The Appeals Chamber notes, however, that a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction. Domestic criminal law systems from around the world recognise the need to exercise extreme caution before proceeding to convict an accused person based upon the identification evidence of a witness made under difficult circumstances. The principles developed in these jurisdictions acknowledge the frailties of human perceptions and the very serious risk that a miscarriage of justice might result from reliance upon even the most confident witnesses who purport to identify an accused without an adequate opportunity to verify their observations.[276]

134. In terms of international recognition, the Trial Chamber in the *Blagojević* and *Jokić* case referred to "internationally recognised norms and principles on the global level". The Trial Chamber also discussed having to "discern the underlying principles and rationales for punishment", responding, *inter alia*, to "the needs of … the international community":

> As the Tribunal is applying international law, it must also have due regard for the impact of its application of internationally recognised norms and principles on the global level. Thus, a trial chamber must consider its obligations to the individual accused in light of its responsibility to ensure that it is upholding the purposes and principles of international criminal law. This task becomes particularly difficult in relation to punishment. As a cursory review of the history of punishment reveals that the forms of punishment reflect norms and values of a particular society at a given time. This Trial Chamber must discern the underlying principles and rationales for punishment that respond to both the needs of the society of the former Yugoslavia and the international community.[277]

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[275] *Prosecutor v. Zdravko Delalić et al. (Appeal) ("Čelebići case")* (see footnote 232 above), para. 179 (citing the trial judgment) (footnote omitted).

[276] *Prosecutor v. Zoran Kupreškić et al. (Appeal)* (see footnote 275 above), para. 34.

[277] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgment of 17 January 2005, Trial Chamber I, para. 816 (although the judgment also refers to customary international law on many occasions). See also *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgment of 2 December 2003, Trial Chamber, para. 84.

135. Likewise, with regard to international recognition, the Trial Chamber in the *Erdemović* case referred to "the general principle of law internationally recognised by the community of nations whereby the most severe penalties may be imposed for crimes against humanity", in the context of sentencing:

> In conclusion, the Trial Chamber finds that reference to the general practice regarding prison sentences applied by the courts of the former Yugoslavia is, in fact, a reflection of the general principle of law internationally recognised by the community of nations whereby the most severe penalties may be imposed for crimes against humanity. In practice, the reference means that all the accused who committed their crimes on the territory of the former Yugoslavia could expect to be held criminally responsible. No accused can claim that at the time the crimes were perpetrated he was unaware of the criminal nature of his acts and the severity of the penalties sanctioning them. Whenever possible, the International Tribunal will review the relevant legal practices of the former Yugoslavia but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction.[278]

136. The Trial Chamber has also referred to recognition "by the community of nations" in other cases, stating that it "may also, as suggested by the Appeals Chamber, be satisfied that, in the language of the ICCPR, those acts were 'criminal according to the general principles of law recognised by the community of nations'".[279]

137. The Appeals Chamber in *Kordić and Čerkez* referred to recognition "both in the national legal systems and precedents established by international jurisdictions":

> The Prosecution notes that the prior out-of-court statement of this witness was admitted in the *Blaškić* case at the request of the accused. In that case, the Trial Chamber considered "the need for the proper administration of justice and the requirement of a fair trial" and the exceptions to the principle of oral testimony and cross-examination recognized "both in the national legal systems and precedents established by international jurisdictions, including those exceptions relating to the admission of statements of deceased witnesses."[280]

138. In *Blaškić*, the Trial Chamber confirmed that given that the exception to the principle of oral witness testimony was "accepted in the different national and international legal systems", it had to consider that exception, even if exercising discretion on what weight to grant to it:

> [T]he Trial Chamber was confronted with the problem of the admission of the statement of a deceased witness which had been given under oath to the Prosecutor's investigators. The Judges considered this to be clearly one of the exceptions to the principle of oral witness testimony, in particular for cross-examination, accepted in the different national and international legal systems and therefore they admitted the said statement in evidence but reserved the right to give it the appropriate weight when the time came.[281]

139. In *Hartmann*, the Appeals Chamber rejected the appellant's submission "that the Trial Chamber in the present case failed to take notice of [a] binding precedent, which

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[278] *Prosecutor v. Drazen Erdemović* (see footnote 237 above), para. 40.

[279] *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgment of 29 November 2002, para. 199 (footnote omitted, which cited, *inter alia*, article 15, paragraph 2, of the International Covenant on Civil and Political Rights).

[280] *Prosecutor v. Dario Kordić and Mario Čerkez,* Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, Appeals Chamber, para. 14.

[281] *Prosecutor v. Tihomir Blaškić* (see footnote 274 above), para. 36 (footnote omitted).

reflects a general principle of international law".[282] The Appeals Chamber determined that, regarding "the alleged inconsistency of the Trial Judgement with freedom of expression principles recognised by the ECHR", it was not bound by such principles: "The Appeals Chamber is not bound by the findings of regional or international courts and as such is not bound by ECtHR jurisprudence."[283]

140. Sometimes reference is made to international instruments, which enshrine certain principles. In *Blaškić*, the Trial Chamber referred to "the general principles of law", including the right of the accused to be tried without excessive delay as follows:

> CONSIDERING that the Judges, who are the guarantors of individual liberties, must examine the consequences of a period of preventive detention which would appear excessive to them in light of the general principles of law, including the right of the accused to be tried without excessive delay, that is, within a reasonable time period (cf. Article 21.4(c) of the Statute and Article 5.3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms …
>
> …
>
> CONSIDERING, therefore, that the preventive detention of the accused does not exceed the reasonable time period pursuant to international principles and particularly those of the European Convention as interpreted by the Commission and the European Court[.][284]

4. Transposition

141. In the case law surveyed, while there are only a few express mentions of transposition, the question of the transposability of general principles of law to the international legal system is discussed in a wider set of cases.

142. In the *Furundžija* case, the Trial Chamber cautioned against a "mechanical importation" from national law notions when considering general principles of law "common to all the major legal systems of the world", rather urging "account" to be taken of "the specificity of international criminal proceedings when utilising national law notions":

> Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since "international trials exhibit a number of features that differentiate them from national criminal proceedings", account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.[285]

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[282] *Prosecutor v. Florence Hartmann,* Case No. IT-02-54-R77.5-A, Judgment of 19 July 2011, Appeals Chamber, para. 120.

[283] *Ibid.*, para. 159.

[284] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Order Denying A Motion for Provisional Release, 20 December 1996, Trial Chamber I.

[285] *Prosecutor v. Anto Furundžija* (see footnote 238 above), para. 178.

143. Similar caution was urged by the Trial Chamber in *Kupreškić et al.* The Trial Chamber stated that "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".[286]

144. The Trial Chamber also expressly mentioned transposition in the *Blaškić* case. The Trial Chamber stated that the general principles of law relating to national laws "in principle may not be transposed to international criminal law", ruling as follows:

> CONSIDERING that the Trial Chamber will first review the legal argument based on the analysis of Rule 65 of the Rules and on the principles governing preventive detention in light of the facts of the case in point; that it will then review the other arguments invoked by the Defence;
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> …
>
> CONSIDERING that both the letter of this text and the spirit of the Statute of the International Tribunal require that the legal principle is detention of the accused and that release is the exception; that, in fact, the gravity of the crimes being prosecuted by the International Tribunal leaves no place for another interpretation even if it is based on the general principles of law governing the applicable provisions in respect of national laws which in principle may not be transposed to international criminal law[.][287]

145. There are other instances in which the Tribunal does not mention transposition but discusses the applicability of municipal principles at the international level in other terms. For example, the Appeals Chamber in *Tadić* referred to "general principles of law common to all major legal systems in the world, as developed and refined (where applicable) in international jurisprudence".[288] The Appeals Chamber further elaborated on the role of the international court in that exercise of developing and refining general principles of law in international jurisprudence, stating:

> That is not to say that the Tribunal's powers to deal with contempt or conduct interfering with the administration of justice are in every situation the same as those possessed by domestic courts, because its jurisdiction as an international court must take into account its different setting within the basic structure of the international community.[289]

146. The Trial Chamber in *Delalić et al.* determined that the principle *nullum crimen sine lege* on the national and international planes were different "with respect to their application and standards":

> Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States.
>
> It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining balance between the preservation of justice and

[286] *Prosecutor v. Zoran Kupreškić et al.* (see footnote 233 above), para. 677.
[287] *Prosecutor v. Tihomir Blaškić*, Order Denying A Motion for Provisional Release (see footnote 285 above).
[288] *Prosecutor v. Duško Tadić (Contempt)* (see footnote 250 above), para. 15.
[289] *Ibid.*, para. 18.

> fairness towards the accused and taking into account the preservation of world order.[290]

147. Relatedly, the Appeals Chamber in the *Čelebići* case later stated that international law determines the effect of domestic laws on the international plane. It stated that: "It is a settled principle of international law that the effect of domestic laws on the international plane is determined by international law."[291]

148. In *Tadić*, the Trial Chamber suggested that the principle of *jus de non evocando*, even though it appeared in a number of national constitutions, had "no application" with reference to the powers of the Security Council:

> Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers conferred upon it by the Charter of the United Nations.[292]

149. Dealing with the principle that a tribunal must be "established by law", the Appeals Chamber in *Tadić* concluded that, although the principle that a tribunal must be established by law was "a general principle of law", it was not transposable, that is, it did not apply "before an international court" even though it applied "in the context of national legal systems":

> … Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law."[293]

150. The Appeals Chamber specifically rejected the applicability of the principle "in an international law setting" in terms of the separation of powers, due to the different structure of the international division of powers:

> It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" …. There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no

[290] *Prosecutor v. Zejnil Delalić et al*. (see footnote 232 above), paras. 404–405.

[291] *Prosecutor v. Zejnil Delalić et al*. *(Appeal) ("Čelebići case")* (see footnote 232 above), para. 76.

[292] *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction, 10 August 1995, Trial Chamber, para. 37.

[293] *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (see footnote 232 above), para. 42.

> Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.
>
> It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.[294]

151. However, for the same principle that a tribunal must be established by law, as considered in turn in relation to the rule of law, the Appeals Chamber stated that the principle could apply in the context of international law. In doing so, the Appeals Chamber referred also to international instruments and concluded that the Tribunal was, in the sense of the notion of the rule of law, indeed "established in accordance with the rule of law":

> The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.
>
> This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. …
>
> …
>
> This concern about *ad hoc* tribunals that function in such a way as not to afford the individual before them basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation of the phrase "established by law" contained in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. …
>
> An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law.[295]

5. Functions and relationship with other sources of international law

(a) Functions

152. The function of general principles of law in filling lacunae in the absence of other sources of international law to draw upon for resolving a matter was laid out by the Trial Chamber in *Kupreškić at al*. Although in that case concluding that there existed "no general principle of criminal law common to all major legal systems of the world"[296] regarding a change in the legal characterization of facts, the Trial Chamber nevertheless ruled that, in general, a gap in the legal framework of the

[294] *Ibid.*, para. 43.
[295] *Ibid.*, paras. 45–46.
[296] *Prosecutor v. Zoran Kupreškić et al.* (see footnote 233 above), para. 738.

Tribunal could be closed by reference to general principles of law, stating that: "Where necessary, the Trial Chamber shall use such principles to fill any *lacunae* in the Statute of the International Tribunal and in customary law."[297] It further elaborated on the lacuna-filling function of general principles of law by noting that, in that context, general principles could apply both *principaliter* (to decide principal issues), as well as *incidenter tantum* (in relation to the tribunal's incidental jurisdiction):

> Thus, the normative *corpus* to be applied by the Tribunal *principaliter*, i.e. to decide upon the principal issues submitted to it, is international law. True, the Tribunal may be well advised to draw upon national law to fill possible *lacunae* in the Statute or in customary international law. For instance, it may have to peruse and rely on national legislation or national judicial decisions with a view to determining the emergence of a general principle of criminal law common to all major systems of the world. Furthermore, the Tribunal may have to apply national law *incidenter tantum*, i.e. in the exercise of its incidental jurisdiction. For instance, in determining whether Article 2 of the Statute (on grave breaches) is applicable, the Tribunal may have to establish whether one of the acts enumerated there has been perpetrated against a person regarded as "protected" under the Fourth Geneva Convention of 1949. To this end it may have to satisfy itself that the person possessed the nationality of a State other than the enemy belligerent or Occupying Power. Clearly, this enquiry may only be carried out on the basis of the relevant national law of the person concerned. The fact remains, however, that the principal body of law the Tribunal is called upon to apply in order to adjudicate the cases brought before it is international law.[298]

153. In the context of sentencing for crimes against humanity, the Trial Chamber in the *Erdemović* case evoked "general principles of law recognised by all nations" to fill a gap in the law for which the Tribunal's Statute and rules of procedure and evidence provided no further indication as to the details of sentencing:

> Except for the reference to the general practice regarding prison sentences in the courts of the former Yugoslavia, which will be discussed below, and to the penalty of life imprisonment, the Trial Chamber notes that the Statute and the Rules provide no further indication as to the length of imprisonment to which the perpetrators of crimes falling within the International Tribunal's jurisdiction, including crimes against humanity, might be sentenced. In order to review the scale of penalties applicable for crimes against humanity, the Trial Chamber will identify the features which characterise such crimes and the penalties associated with them under international law and national laws, which are expressions of general principles of law recognised by all nations.[299]

154. At times, the Tribunal appears to have used general principles of law as a means to interpret rules or to consider the validity or consistency of rules. In *Kupreškić et al.*, the Trial Chamber used general principles as a tool for ensuring consistency of the notion of persecution with principles of criminal law as follows:

> The Trial Chamber is thus called upon to examine what acts not covered by Article 5 of the Statute of the International Tribunal may be included in the notion of persecution. Plainly, the Trial Chamber must set out a clear-cut notion of persecution, in order to decide whether the crimes charged in this case fall within its ambit. In addition, this notion must be consistent with general principles of criminal law such as the principles of legality and specificity. First, the Trial Chamber will examine what types of acts, aside from the other

[297] *Ibid.*, para. 677.
[298] *Ibid.*, para. 539.
[299] *Prosecutor v. Drazen Erdemović* (see footnote 237 above), para. 26.

> categories of crimes against humanity have been deemed to constitute persecution. Secondly, it will examine whether there are elements underlying these acts which assist in defining persecution.[300]

155. As tools of interpretation, general principles have also functioned to broaden legal notions. In *Furundžija*, the Trial Chamber used the principle of human dignity to interpret the crime of rape broadly, providing that as a concern "the notion that a greater stigma attaches to a conviction for forcible vaginal or anal penetration than to a conviction for forcible oral penetration" was "amply outweighed by the fundamental principle of protecting human dignity, a principle which favours broadening the definition of rape".[301] It also noted that it was not necessary that the jurisdiction of the accused favoured that broader definition, it being "not contrary to the general principle of *nullum crimen sine lege* to charge an accused with forcible oral sex as rape when in some national jurisdictions, including his own, he could only be charged with sexual assault in respect of the same acts".[302]

156. In *Blaškić*, the Trial Chamber referred to general principles of criminal law, *inter alia*, to provide consonance to its approach:

> The Trial Chamber concurs with the views deriving from the Tribunal's case-law, that is, that individuals may be held responsible for their participation in the commission of offences under any of the heads of individual criminal responsibility in Article 7(1) of the Statute. This approach is consonant with the general principles of criminal law and customary international law.[303]

157. Relying on general principles of law, as evoked in article 15 of the International Covenant on Civil and Political Rights, to examine rules concerning punishment, the Trial Chamber in *Erdemović* determined that extremely serious violations of "generally accepted principles of international law" could be punishable as follows:

> paragraph 2 of [article 15 of the International Covenant on Civil and Political Rights] states that "nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations." On this point, the 1949 Netherlands Special Appeals court, seized of a line of defence based on the principle *nulla poena sine lege* in a case relating to a crime against humanity, expressed itself as follows:
>
> "… The principle that no act is punishable [except] in virtue of a legal penal provision which had preceded it, aims at creating a guarantee of legal security and individual liberty. … However, there is nothing absolute in that principle. Its operation may be affected by other principles whose recognition concerns equally important interests of justice. These latter interests do not permit that extremely serious violations of generally accepted principles of international law (the criminal character of which was already established beyond doubt at the time they were committed), should not be considered punishable solely on the ground that a previous threat of punishment was absent".[304]

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[300] *Prosecutor v. Zoran Kupreškić et al.* (see footnote 233 above), para. 609.

[301] *Prosecutor v. Anto Furundžija* (see footnote 238 above), para. 184.

[302] *Ibid*.

[303] *Prosecutor v. Tihomir Blaškić* (see footnote 274 above), para. 264 (footnotes omitted).

[304] *Prosecutor v. Drazen Erdemović* (see footnote 237 above), para. 38 (citing the *Hans Albin Rauter* case at the Special Court of Cassation of the Netherlands, 12 January 1949, in H. Lauterpracht, ed., *Annual Digest and Reports of Public International Law Cases: Year 1949* (London, Butterworth, 1955), pp. 526–548, at p. 543).

158. The Trial Chamber also referred to both national and international law as the source of such general principles of law. It noted that it had conducted a survey of international and national law, with particular attention to the laws of the former Yugoslavia,[305] and determined that there was "a general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems":

> As in international law, the States which included crimes against humanity in their national laws provided that the commission of such crimes would entail the imposition of the most severe penalties permitted in their respective systems. As regards the relevant laws in the former Yugoslavia, which will be examined in detail below, at this point it need only be mentioned that the Criminal Code of the Socialist Federative Republic of Yugoslavia (hereinafter "Criminal Code of the former Yugoslavia") prescribed the harshest penalties for the commission of acts of genocide or war crimes against the civilian population.
>
> The Trial Chamber thus notes that there is a general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems. It thus concludes that there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties when no mitigating circumstances are present.[306]

159. The *Halilović* Appeals Chamber and Trial Chamber applied "the principle underlying [a] Rule",[307] the principle in question being a "general principle that witnesses before the Tribunal should give their evidence orally"[308] and the rule being that a confession created a presumption of voluntariness:

> Further, in light of the evidence raised by the Appellant in relation to the voluntariness of the interview, it was incumbent on the Trial Chamber to fully explore the circumstances surrounding the taking of that interview. While the Trial Chamber itself did not refer to Rule 92 of the Rules it appears that the Trial Chamber was applying the principle underlying that Rule in reaching its decision.[309]

160. In *Deronjić*, a similar "general principle … that underlies criminal law" was identified by the Appeals Chamber, which fed into its interpretation of the nature of individual responsibility:

> The statement … that aggravating circumstances must relate "to the offender himself" is not to be taken as a rule that such circumstances must specifically pertain to the offender's personal characteristics. Rather, it simply reflects the general principle of individual responsibility that underlies criminal law: a person cannot be held responsible for an act unless something he himself has done or failed to do justifies holding him responsible. So, for instance, individuals are not held responsible – either for the purposes of conviction or sentencing – for the unforeseeable acts of others involved in carrying out a plan. Holding an individual responsible for taking advantage of the vulnerability of his victims, on the other hand, falls well within this notion of individual responsibility. Here, not only was the Appellant aware of his victims'

[305] In providing the above conclusion, the Trial Chamber did not cite examples of relevant laws from countries other than the former Yugoslavia.

[306] *Prosecutor v. Drazen Erdemović* (see footnote 237 above), paras. 30–31.

[307] *Prosecutor v. Sefer Halilović (Interlocutory)* (see footnote 249 above), para. 46.

[308] *Ibid.*, para. 16.

[309] *Ibid.*, para. 46 (footnote omitted).

> defencelessness and took advantage of it, but he exacerbated it through Milutin Milošević's statements ….[310]

161. The Trial Chamber in *Krnojelac* viewed the presumption of innocence as contained in the Tribunal's Statute as "embod[ying] a general principle of law". It "applied to the Accused the presumption of innocence stated in Article 21(3) of the Statute, which embodies a general principle of law, so that the Prosecution bears the onus of establishing the guilt of the Accused, and, in accordance with Rule 87(A), the Prosecution must do so beyond reasonable doubt".[311]

162. In the *Čelebići* case, the Appeals Chamber referred to "principles applied in national jurisdictions" as interpretative tools, holding that there was a need for "assistance of national principles only if necessary for guidance in the interpretation of [the Tribunal's] Rules":

> The Appeals Chamber recalls that reference to principles applied in national jurisdictions can be of assistance to both Trial Chambers and the Appeals Chamber in interpreting provisions of the Statute and the Rules. However, Rule 89(A) of the Rules expressly provides that the Chambers "shall not be bound by national rules of evidence." What is of primary importance is that a Trial Chamber "apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law." The Appeals Chamber notes that the Trial Chamber found that implicit in this principle was "the application of national rules of evidence by the Trial Chamber." On the contrary, the Appeals Chamber confirms that rules of evidence as expressly provided in the Rules should be primarily applied, with the assistance of national principles only if necessary for guidance in the interpretation of these Rules.[312]

(b) Relationship with other sources of international law

163. Some of the case law reviewed for the purpose of the present memorandum points to a hierarchy between different sources of international law, but some of the case law also treats the notion of "principles" in a way that could be interpreted to be in reference to sources of international law other than general principles of law, such as customary international law or treaty law.

164. With regard to a possible hierarchy among the sources of international law, the Trial Chamber in *Kupreškić et al.* appeared to enumerate on an order some sources for the definition of persecution, stating that, after drawing upon conventional and customary sources of international law, the Tribunal should draw on different types of general principles (those "of international criminal law", those "of criminal law common to the major legal systems of the world" and those "consonant with the basic requirements of international justice"). The Trial Chamber explained as follows:

> As neither refugee law nor the ILC draft is dispositive of the issue, in resolving matters in dispute on the scope of persecution, the Trial Chamber must of necessity turn to customary international law. Indeed, any time the Statute does not regulate a specific matter, and the *Report of the Secretary-General* does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or

[310] *Prosecutor v. Miroslav Deronjić,* Case No. IT-02-61-A, Judgment on Sentencing Appeal, 20 July 2005, Appeals Chamber, para. 124.

[311] *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment 15 March 2002, Trial Chamber II, para. 66.

[312] *Prosecutor v. Zejnil Delalić et al. (Appeal) ("Celebici case")* (see footnote 232 above), para. 538 (footnotes omitted).

> (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice. It must be assumed that the draftspersons intended the Statute to be based on international law, with the consequence that any possible *lacunae* must be filled by having recourse to that body of law.[313]

165. In *Furundžija*, the Trial Chamber appeared to follow a similar order of sources when discussing the elements of the crime of rape. It started with "international treaty or customary law" and "general principles of international criminal law or … general principles of international law". After these sources had been exhausted to no avail, the Trial Chamber found it was "necessary to look for principles of criminal law common to the major legal systems of the world" to identify "principles … derived, with all due caution, from national laws":

> This Trial Chamber notes that no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (*Bestimmtheitgrundsatz*, also referred to by the maxim "*nullum crimen sine lege stricta*"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.[314]

166. The Trial Chamber in *Kunarac et al.* recalled *Furundžija*, as above:

> The specific elements of the crime of rape, which are neither set out in the Statute nor in international humanitarian law or human rights instruments, were the subject of consideration by the Trial Chamber in the *Furundžija* case. There the Trial Chamber noted that in the International Criminal Tribunal for Rwanda judgement in the *Akayesu* proceedings the Trial Chamber had defined rape as "a physical invasion of a sexual nature, committed under circumstances which are coercive". It then reviewed the various sources of international law and found that it was not possible to discern the elements of the crime of rape from international treaty or customary law, nor from the "general principles of international criminal law or … general principles of international law". It concluded that … it is necessary to look for principles of criminal law common to the major legal systems of the world. …". The Trial Chamber found that, based on its review of the national legislation of a number of states, the *actus reus* of the crime of rape is: ….[315]

167. With respect to customary international law, some references to the term "principles" in the Tribunal's jurisprudence may be in reference not to general principles of law as a source of law but rather to principles that form part of the corpus of customary international law. The 1993 Secretary-General's report, for example, mentions the principle of *nullum crimen sine lege* in the following manner: "the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise".[316] In a similar way, the Trial Chamber in the *Halilović* judgment referred to customary international law principles: "The

[313] *Prosecutor v. Zoran Kupreškić et al.* (see footnote 233 above), para. 591.
[314] *Prosecutor v. Anto Furundžija* (see footnote 238 above), para. 177.
[315] *Prosecutor v. Dragoljub Kunarac et al*. (see footnote 244 above), para. 437 (footnotes omitted).
[316] S/25704 and Corr.1, para. 34.

principle of individual criminal responsibility of commanders for failure to prevent or to punish crimes committed by their subordinates is an established principle of customary international law. Article 7(3) of the Statute is applicable to all acts referred to in Articles 2 to 5 thereof and applies to both international and non-international armed conflicts."[317]

168. In a different instance, the Prosecution distinguished between customary international law and a general principle of international criminal law in a corrigendum to the *Hadžihasanović et al.* case, holding that:

> The notion "customary international law" in the aforementioned phrase constitutes an erratum and should be replaced by the concept "international criminal law". The correct sentence reads as follows:
>
> "The Trial Chamber's identification of the principle's evolution into a general principle of *international criminal law* thereby answered the Appellant's contention." (emphasis added).[318]

169. In *Tadić*, the Appeals Chamber suggested that the material sources required for establishing the existence of a customary international rule or "a general principle" could be similar:

> Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. … In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.[319]

170. However, in that case, it was unclear whether the Chamber referred to identifying customary international law or general principles of law, as it stated:

> State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations.[320]

[317] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Judgment of 16 November 2005, Trial Chamber I, para. 55.

[318] *Prosecutor v. Enver Hadžihasanović et al.,* Case No. IT-01-47-AR72, Corrigendum to the Prosecution's Response to Defence Interlocutory Appeal on Jurisdiction Filed on 9 December 2002, 20 December 2002, Appeals Chamber, para. 5.

[319] *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (see footnote 232 above), para. 99.

[320] *Ibid.*, para. 125.

B. International Criminal Tribunal for Rwanda

1. Applicable sources of law and terminology

171. The Statute of the International Criminal Tribunal for Rwanda largely replicates the relevant language of the Statute of the International Criminal Tribunal for the Former Yugoslavia, similarly providing under article 27 (pardon or commutation of sentences) that the President of the Tribunal may render decisions on sentencing on the basis of "the general principles of law", inter alia:

> If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

172. In addition, as with the International Criminal Tribunal for the Former Yugoslavia, the Statute of the Mechanism contains a reference to general principles of law similar to article 27 of the Statute of the International Criminal Tribunal for Rwanda above. Article 26 of the Mechanism's Statute (pardon or commutation of sentences) provides that: "There shall only be pardon or commutation of sentence if the President of the Mechanism so decides on the basis of the interests of justice and the general principles of law."

173. Many of the cases of the International Criminal Tribunal for Rwanda and the Mechanism in which the "general principles of law" are mentioned are ones in which the corresponding decision includes an explicit reference to the statutory language.[321] At times, however, no further reference is made beyond such a mention to "general principles" or to specific principles.[322] At other times, there is a discussion thereon. For instance, the Tribunal's Trial Chamber elaborated, in *Ntakirutimana*, on the kinds of general principles concerning the assessment of evidence that the Tribunal had developed in its jurisprudence:

> When confronted with evidential questions not otherwise provided for by the Rules, the Chamber applied rules of evidence which in its view best favoured a fair determination of the matter before it and which were consonant with the spirit of the Statute and the general principles of law, as authorised by Rule 89(B). The Chamber has taken account of the case law of the Tribunal which has established general principles concerning the assessment of evidence. For example, the *Akayesu* Judgement contains important statements on, *inter alia*, the probative value of evidence; the use of witness statements; the impact of trauma on the testimony of witnesses; problems of interpretation from Kinyarwanda into French and English; and cultural factors affecting the evidence of witnesses. Subsequent case law of the Tribunal has developed principles relating to evidentiary matters, the most recent authority being the

[321] See, for example, *Prosecutor v. Obed Ruzindana*, Case No. MICT-12-10-ES, Decision of the President on the Early Release of Obed Ruzindana, 13 March 2014, President of the Mechanism, para. 7; *Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-ES, Public Redacted Version of the 26 March 2014 Decision of the President on the Early Release of Gérard Ntakirutimana, 24 April 2014, President of the Mechanism, para. 6; *Prosecutor v. Ferdinand Nahimana*, Case No. MICT-13-37-ES.I, Public Redacted Version of the 22 September 2016 Decision of the President on the Early Release of Ferdinand Nahimana, 5 December 2016, President of the Mechanism, paras. 7 and 10.

[322] See, for example, *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence of 4 September 1998, Trial Chamber I, para. 8.

> Judgement in the case of *Prosecutor v. Ignace Bagilishema*. The Chamber will return to these principles to the extent necessary.[323]

174. In terms of terminology referring to general principles of law, on some occasions, the International Criminal Tribunal for the Former Yugoslavia expressly used the terminology of Article 38 of the Statute of the International Court of Justice. The International Criminal Tribunal for Rwanda in the *Rwamakuba* case referred to "the general principles of law as understood in Article 38 of the ICJ Statute" as part of the Registrar's submission in that case, arguing that orders to financially compensate were under development within the general principles of law and ruling that:

> In the present case, the Registrar disputes the Chamber's power to grant financial compensation to André Rwamakuba for the violation of his right to legal assistance. It submits that orders to financially compensate those whose rights have been violated are only under development within the general principles of law as understood in Article 38 of the ICJ Statute and have not yet been enshrined in UN Charter principles, treaty law, or customary law.[324]

175. The Trial Chamber, however, held in that decision that "it is a fundamental principle of international human rights law, as recalled by the Appeals Chamber, that any violation of a human right entails the provision of an effective remedy".[325] The Trial Chamber also rejected the Registrar's submission, thus implying that the principle of compensation was beyond being under development within general principles of law, providing that: "[t]he Chamber is not persuaded by the Registrar's argument. To begin with, five international human rights instruments expressly refer to a right to compensation or restitution"[326] and "[i]n addition, the Inter-American Court of Human Rights and the European Court of Human Rights are empowered to make awards for financial compensation to victims of human rights violations".[327] Accordingly, the Trial Chamber stated that: "As a result, the Chamber holds the view that it cannot be said that orders to financially compensate those whose rights have been violated are only under development in international law."[328]

2. Origins

176. The Tribunal has referred to the origin of general principles of law as derived from national legal systems and has examined different legal systems to this effect. At the same time, the Tribunal has also drawn upon international law and jurisprudence in the process of identifying general principles of law, sometimes in conjunction with national law.[329]

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[323] *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10 and ICTR-96-17-T, Judgment and Sentence of 21 February 2003, Trial Chamber I, para. 32 (footnotes omitted).

[324] *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, Trial Chamber III, para. 53.

[325] *Ibid*., para. 16.

[326] *Ibid*., para. 54 (footnote omitted) (referring, *inter alia*, to the International Covenant on Civil and Political Rights and the Human Rights Committee).

[327] *Ibid*., para. 55.

[328] *Ibid*., para. 56.

[329] See, for example, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998, Trial Chamber I; *Prosecutor v. Justin Mugenzi and Prosper Mugiraneza*, Decision on Motion for Declaration of Lack of Jurisdiction or, in the Alternative, for Damages, Case No. MICT-14-75, Before a Single Judge of the Mechanism, 23 November 2016; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment of 21 May 1999, Trial Chamber II.

177. The Prosecutor in the *Bagosora and 28 others* case argued that, based on a survey of national legal systems, "a general principle of law" of an inherent right of appeal could be identified:

> The Prosecutor submits that an inherent right of appeal may be founded on the practice of courts in national jurisdictions. It is argued that a survey of national law indicates the existence of a general principle of law that, in the absence of an express provision to the contrary, a right of appeal generally lies from the decisions of a lower court. The Prosecutor cites provisions from the Codes of Criminal Procedure of the civil law jurisdictions of France, Senegal and Germany, where decisions of lower courts dismissing an indictment may always be appealed to a superior court, and the remedies of *mandamus* and *certiorari* in the common law jurisdictions of the United States and the United Kingdom.
>
> In the view of the Prosecutor, the Appeals Chamber may extrapolate an analogue of such rules to find jurisdiction in the instant appeal. The Prosecutor argues that general principles of law may be applied by international courts, citing, *inter alia*, Article 38 of the Statute of the International Court of Justice and the jurisprudence of the ICTY. [330]

178. However, in the above case, the Appeals Chamber concluded that "each of the rules cited by the Prosecutor is based on an explicit statutory provision in the national jurisdiction concerned" and therefore "finds them inapplicable in the instant matter".[331]

179. In *Akayesu*, the Trial Chamber made reference to civil law systems, with special emphasis on the Rwandan legal system, in discussing cumulative criminal charges and identifying a principle allowing multiple convictions:

> The Chamber notes that in Civil Law systems, including that of Rwanda, there exists a principle known as *concours ideal d'infractions* which permits multiple convictions for the same act under certain circumstances. Rwandan law allows multiple convictions in the following circumstances: ….[332]

180. The Trial Chamber provided that, based on national and international law, there was such a principle, which applied in some circumstances:

> On the basis of national and international law and jurisprudence, the Chamber concludes that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did.[333]

181. When discussing the elements of accomplice participation in genocide in *Akayesu*, the Trial Chamber referred to the recognition of forms of accomplice participation in "most criminal Civil Law systems" and examined a number of legal systems to that end: "[a]s regards the physical elements of complicity in genocide (*Actus Reus*), three forms of accomplice participation are recognized in most criminal Civil Law systems …. It should be noted that the Rwandan Penal Code includes two

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[330] *Prosecutor v. Théoneste Bagosora and 28 others*, Case No. ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagosora and 28 Others, 8 June 1998, Appeals Chamber, paras. 46–47 (footnotes omitted).

[331] *Ibid*., para. 48.

[332] *Prosecutor v. Jean-Paul Akayesu* (see footnote 332 above), para. 467 (in para. 465 referring also to the jurisprudence of the French Cour de Cassation).

[333] *Ibid*., para. 468.

other forms of participation …".[334] The footnote omitted from this quotation referred specifically to the Senegalese Penal Code and the New French Penal Code.[335] The Tribunal continued that: "Moreover, as in all criminal Civil law systems, under Common law, notably English law, generally, the accomplice need not even wish that the principal offence be committed."[336]

182. With regard to the crime of conspiracy to commit genocide, the Trial Chamber in *Musema* examined and compared civil and common law systems, determining that:

> The Chamber notes that Common Law systems tend to view "*entente*" or conspiracy as a specific form of criminal participation, punishable in itself. Under Civil Law, conspiracy or "*complot*" derogates from the principle that a person cannot be punished for mere criminal intent ("*résolution criminelle*") or for preparatory acts committed. In Civil Law systems, conspiracy (*complot*) is punishable only where its purpose is to commit certain crimes considered as extremely serious, such as, undermining the security of the State.[337]

183. Following its examination, and finding that "the constitutive elements … are very similar" in both systems, the Trial Chamber defined the notion of conspiracy to commit genocide as follows:

> Civil Law distinguishes two types of *actus reus*, qualifying two "levels" of "*complot*" or conspiracy. …
>
> Under Common Law, the crime of conspiracy is constituted when two or more persons agree to a common objective, the objective being criminal.
>
> The Chamber notes that the constitutive elements of conspiracy, as defined under both systems, are very similar. Based on these elements, the Chamber holds that conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide.[338]

184. The Mechanism, in the *Mugenzi and Mugiraneza* case, referred to both national and international systems when holding that the applicants' "attempt to show that numerous national systems accord a remedy for an acquittal … falls short of establishing a binding norm of customary international law or a general principle of law, which would be indicative that this authority was within the Mechanism's implied powers".[339] It noted that this fact was "underscored by the United Nations Human Rights Committee's general comment to Article 14(6) of the ICCPR: 'no compensation is due if the conviction is set aside upon appeal, i.e., before the judgement becomes final'".[340]

185. In *Bagosora et al.*, the Defence argued for a "general principle" endorsed by the General Assembly regarding detention:

> The Defence denounces what it perceives as an "obviously excessive" standard for provisional release pronounced in Rule 65. General principles dictate that pre-trial detention should be the exception; freedom being the rule. This

[334] *Ibid*., para. 533.
[335] *Ibid*., footnote 106.
[336] *Ibid*., para. 539.
[337] *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgment and Sentence of 27 January 2000, Trial Chamber I, para. 186.
[338] *Ibid.*, paras. 189–191.
[339] *Prosecutor v. Justin Mugenzi and Prosper Mugiranez*a (see footnote 332 above), para. 9 (footnote omitted).
[340] *Ibid*.

> principle, states the Defence[,] was endorsed in the deliberations of the United Nations General Assembly ….[341]

The Defence then argued that "Rule 65 should be construed in its broadest possible sense to bring it into conformity with the principles in the international instruments" and that: "The Tribunal in rendering its decision on this Motion should therefore set aside Rule 65 as contrary to the standards of international law and practice extant in civilised judicial systems."[342] The Trial Chamber, however, rejected this submission, finding that:

> As a practical matter, once the case of Bagosora was joined with the others, the actions of his co-accused will affect the rights of all the co-accused, ensuring the procedural principle of *beneficisum cohaesionis*. … Therefore, Bagosora should not be allowed to enjoy the benefits of joinder without also being required to endure its inconveniences as well.[343]

186. In its judgment in the *Nahimana et al.* case, the Trial Chamber referred mainly to international sources, but it also referred to national jurisprudence, in discussing "central principles … on incitement to discrimination and violence":[344]

> International law protects both the right to be free from discrimination and the right to freedom of expression. The Universal Declaration of Human Rights provides in Article 7 that "All are entitled to equal protection against any discrimination …. Article 19 states: "Everyone has the right to freedom of opinion and expression." Both of these principles are elaborated in international and regional treaties, as is the relation between these two fundamental rights, which in certain contexts may be seen to conflict, requiring some mediation.[345]
>
> A number of central principles emerge from the international jurisprudence on incitement to discrimination and violence that serve as a useful guide to the factors to be considered in defining elements of "direct and public incitement to genocide" as applied to mass media.[346]
>
> The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards. The Chamber notes that the jurisprudence of the United States also accepts the fundamental principles set forth in international law and has recognized in its domestic law that incitement to violence, threats, libel, false advertising, obscenity, and child pornography are among those forms of expression that fall outside the scope of freedom of speech protection.[347]

187. In providing that hate speech violated "the norm of customary international law" prohibiting discrimination, the Trial Chamber in *Nahimana et al.* also referred to "well-established principles of international and domestic law", holding that

> in light of well-established principles of international and domestic law, and the jurisprudence of the *Streicher* case in 1946 and the many European Court and domestic cases since then, that hate speech that expresses ethnic and other forms

[341] *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision of 12 July 2002, Trial Chamber III, para. 7.
[342] *Ibid*., para. 8.
[343] *Ibid*., para. 18.
[344] *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgment of 3 December 2003, Trial Chamber I, para. 1000.
[345] *Ibid*., para. 983.
[346] *Ibid*., para. 1000.
[347] *Ibid*., para. 1010 (footnote omitted).

> of discrimination violates the norm of customary international law prohibiting discrimination. Within this norm of customary law, the prohibition of advocacy of discrimination and incitement to violence is increasingly important as the power of the media to harm is increasingly acknowledged.[348]

188. In *Musema*, the Trial Chamber found that the "case-law regarding the principle of individual criminal responsibility, as articulated notably in the *Akayesu* and *Rutaganda* Judgements, is sufficiently established and is applicable in the instant case", and observed "that the principle of individual criminal responsibility, under Article 6(1), implies that the planning or the preparation of a crime actually must lead to its commission".[349] With respect to the origin of that principle, the Trial Chamber held that:

> The principle enunciating the responsibility of command derives from the principle of individual criminal responsibility as applied by the Nuremberg and Tokyo Tribunals. It was subsequently codified in Article 86 of the Additional Protocol I of 8 June 1977 to the Geneva Conventions of 1949.
>
> …
>
> As to whether the form of individual criminal responsibility referred to under Article 6(3) of the Statute also applies to persons in both military and civilian authority, it is important to note that during the Tokyo Trials, civilian authorities were convicted of war crimes under this principle.[350]

3. Recognition

189. The Tribunal has discussed recognition in relation to general principles of law, although the scope and extent of recognition required has ranged from all nations to a subset thereof, as well as drawing on the international system with regard to recognition, as illustrated below.

190. In the *Akayesu* case, the Trial Chamber evoked "principles recognised in all legal systems of the world" as a partial basis for holding that a witness had a right to cross-examination, stating:

> The Chamber holds that, as a blanket allegation to undermine the credibility of prosecution witnesses, this allegation can carry no weight, for two reasons. … As a matter of principle, it is only fair to a witness, whom the Defence wishes to accuse of lying, to give him or her an opportunity to hear that allegation and to respond to it. This is a rule in Common law, but it is also simply a matter of justice and fairness to victims and witnesses, principles recognised in all legal systems throughout the world.[351]

191. In *Nshogoza*, the Trial Chamber discussed recognition "by international instruments as well as national legislations" and recognition "by modern nations":

> The Defence also alleges that the Rwandan proceedings violate Article 9 of the International Criminal Tribunal for Rwanda Statute (*non bis in idem*), arguing that Mr. Nshogoza faces pending charges for the same allegations now adjudicated. The Chamber recalls that the principle of *non bis in idem* is a long-standing general principle of law applicable in international tribunals and

[348] *Ibid*., para. 1076.

[349] *Prosecutor v. Alfred Musema* (see footnote 340 above), paras. 113 and 115.

[350] *Ibid*., paras. 128 and 132.

[351] *Prosecutor v. Jean-Paul Akayesu* (see footnote 332 above), para. 46 (footnote omitted) (the Trial Chamber cited in this respect A. Keane, The Modern Law of Evidence, 2nd ed. (Oxford, Butterworth, 1989)). See also *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgment of 7 June 2001, Trial Chamber I, paras. 142–143.

> domestic jurisdictions, and recognised as such by international instruments as well as national legislations. However, Article 9 of the ICTR Statute refers to the *non bis in idem* principle specifically in connection to "acts constituting serious violations of international humanitarian law [...], for which he or she has already been tried by the International Tribunal for Rwanda". Mr. Nshogoza was tried and convicted by this Chamber for contempt of the Tribunal. He was not tried and convicted for serious violations of international humanitarian law, as provided for in Article 9. Consequently, the terms of Article 9 do not provide sufficient basis for this Chamber to exercise jurisdiction to order Rwanda to withdraw the charges on the basis of that provision. The Chamber may, of course and in passing, express a general expectation that any judiciary should respect general principles of law recognised by modern nations, notwithstanding the particular language of Article 9. But it would be presumptuous to suppose that Article 9 has given this Chamber a general warrant to issue directives to Rwanda or its judiciary to respect general principles of law.[352]

192. In *Kayishema and Ruzindana*, the Trial Chamber, in discussing the concept of genocide, stated that it "was recognised by the General Assembly of the United Nations as a principle of international law" and referred to its origins in international instruments and jurisprudence generally, while also noting that the crime of genocide was considered part of customary international law, as follows:

> The concept of genocide appeared first in the International Military Tribunal (Nuremberg) Judgement of 30 September and 1 October 1946, referring to the destruction of groups. The prohibition of genocide then was recognised by the General Assembly of the United Nations as a principle of international law. Resolution 260(A)(III) of 9 December 1948, adopting the Draft Genocide Convention, crystallised into international law the prohibition of that crime. The Genocide Convention became widely accepted as an international human rights instrument. Furthermore, the crime of genocide is considered part of international customary law and, moreover, a norm of *jus cogens*.[353]

4. Transposition

193. The Tribunal's case law has not expressly discussed transposition, although it has discussed extending domestically applicable principles to the plane of international law. For instance, the Appeals Chamber considered that the principle of individualization, in the way it manifested in domestic legal systems, was "inapplicable" in a case involving "extraordinarily egregious crimes":

> The principle of individualization requires that each sentence be pronounced on the basis of the individual circumstances of the accused and the gravity of the crime. … Domestic courts in some countries have held that an accused should be given the possibility of release, even if he is sentenced to imprisonment for the remainder of his life. As the German Federal Constitutional Court stated …. The Appeals Chamber considers that, whatever its merits in the context of domestic legal systems, where it may apply "in principle", this view is inapplicable in a case such as this one which involves extraordinarily egregious crimes. For instance, the Trial Chamber took into account the facts that the attack was directed against a place "universally recognized to be a sanctuary, the Compound of the Gikomero Parish Church", and that "many people were

[352] *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Request for Order for Cooperation of the Republic of Rwanda and the United Republic of Tanzania, 28 July 2009, Trial Chamber III, para. 10 (footnotes omitted). See also *Prosecutor v. Ferdinand Nahimana et al.* (see footnote 348 above).

[353] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (see footnote 332 above), para. 88.

massacred". The Appeals Chamber therefore finds that the Appellant's contention that the sentence in the present case was "imposed in a purely perfunctory manner without taking account of the circumstances of the case […]" is without merit.[354]

5. Functions and relationship with other sources of international law

194. The Tribunal's case law does not include extensive discussion regarding the functions of general principles of law and their relationship to other sources of international law.

195. The Trial Chamber, in *Akayesu*, distinguished separate functions for customary international law and general principles in discussing common article 3 as reflecting both customary international law as well as "general principles and norms on internal armed conflict embracing Common Article 3 but having a much greater scope" than their customary international law equivalent:

> It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3. It was also held by the ICTY Trial Chamber in the *Tadić* judgment that Article 3 of the ICTY Statute (Customs of War) … included the regime of protection established under Common Article 3 applicable to armed conflicts not of an international character. This was in line with the view of the ICTY Appeals Chamber stipulating that Common Article 3 beyond doubt formed part of customary international law, and further that there exists a corpus of general principles and norms on internal armed conflict embracing Common Article 3 but having a much greater scope.[355]

C. International Criminal Court

1. Applicable sources of law and terminology

196. General principles of law have a specific place in the jurisprudence of the International Criminal Court because the Rome Statute spells out the sources of law applicable to the Court in its article 21 (applicable law), with an order of priority among them, and in a manner that draws a difference between general principles of law derived from national law (art. 21, para. 1 (c)) and principles of international law (art. 21, para. 1 (b)). Article 21 reads as follows:

> 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.

[354] *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-A, Judgment of 19 September 2005, Appeals Chamber, para. 357 (footnotes omitted).

[355] *Prosecutor v. Jean-Paul Akayesu* (see footnote 332 above), para. 608 (footnotes omitted).

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

197. In addition, Part 3 of the Rome Statute is entitled "General principles of criminal law", providing the following principles under this heading: *nullum crimen sine lege*, *nulla poena sine lege*, non-retroactivity *ratione personae*, individual criminal responsibility, exclusion of jurisdiction over persons under 18, irrelevance of official capacity, responsibility of commanders and other superiors, non-applicability of statute of limitations, mental element, grounds for excluding criminal responsibility, mistake of fact or mistake of law, and superior orders and prescription of law.

198. The terminology used with respect to general principles of law in the case law of the International Criminal Court takes various forms but is often based on the language of article 21 as set out above.[356]

2. Origins

199. The International Criminal Court has on several occasions referred to general principles of law derived from national legal systems of the world, often citing specific legal systems of countries or groups of legal systems and often doing so in reference to the article 21, paragraph 1 (c), of the Rome Statute.[357] The International Criminal Court has also more broadly referred to general principles of national or international law, general principles of international law, general principles of public international law, and established principles of international law, in support of which it has often referred, inter alia, to the jurisprudence of international courts and tribunals.[358]

200. With respect to national legal systems, in the *Muthaura et al.* case, the Pre-Trial Chamber ruled that a survey of five domestic legal systems would be insufficient to derive a general principle of law therefrom "even assuming that there is a *lacuna* in the Statute and the Rules, a general principle of law cannot be extracted on the basis of examining only five national jurisdictions, the practice of which is even

[356] See, for example: *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, 10 February 2006, Pre-Trial Chamber I, para. 42.

[357] See, for example: *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision Revoking the Prohibition of Contact and Communication between Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, 13 March 2008, Pre-Trial Chamber, p. 12; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, Pre-Trial Chamber, paras. 35–42; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, Trial Chamber I, para. 41.

[358] See, for example: *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation, 17 April 2014, Trial Chamber V, paras. 74–87; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 15 OA 16, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, Appeals Chamber, paras. 80–81; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-0I/09-01/11, Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014, Trial Chamber V, para. 15; *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07 A3 A4 A5, Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", 8 March 2018, Appeals Chamber, paras. 144–148 and 178.

inconsistent".[359] The Appeals Chamber in that case also noted that because the Prosecutor did not argue that article 21, paragraph 1 (c), was "applicable in the current circumstances, nor that the case-law presented should be interpreted as founding a general principle of law 'derived by the Court from national laws of legal systems of the world'", case law presented by the Prosecutor was not of assistance.[360]

201. In the *Lubanga* case, the Pre-Trial Chamber considered the practice relating to witness proofing or preparation with reference to article 21, paragraph 1 (c), of the Rome Statute,[361] querying whether a certain component of witness proofing could "be encompassed, pursuant to article 21 (1) (c) of the Statute, by a general principle of law derived by the Court from national laws of the legal systems of the world including, as appropriate, the national laws of the Democratic Republic of the Congo".[362] Noting at the outset "the approach of different national jurisdictions … varies widely", the Pre-Trial Chamber then examined the approach in various jurisdictions, finding that witness proofing

> would be either unethical or unlawful in jurisdictions as different as Brazil, Spain, France, Belgium, Germany, Scotland, Ghana, England and Wales and Australia, to give just a few examples, whereas in other national jurisdictions, particularly in the United States of America, the practice of witness proofing along the lines advanced by the Prosecution is well accepted.[363]
>
> The Chamber finally found that the component of witness proofing was "not embraced by any general principle of law that can be derived from the national laws of the legal systems of the world".[364]

202. In *Lubanga*, also in relation to witness proofing, the Trial Chamber considered that the existence of a principle in two common law systems was likewise insufficient, mentioning additionally that Romano-Germanic systems had not been cited:

> Although this practice [witness proofing] is accepted to an extent in two legal systems, both of which are founded upon common law traditions, this does not provide a sufficient basis for any conclusion that a general principle based on established practice of national legal systems exists. The Trial Chamber notes that the prosecution's submissions with regard to national jurisprudence did not include any citations from the Romano-Germanic legal system.[365]

203. The Appeals Chamber in *Lubanga*, in considering the "principle" of abuse of process in the context of stay proceedings, examined judicial decisions from national courts, but found divergences, and thus concluded that: "The power to stay

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[359] *Prosecutor v. Francis Kirimi Muthaura et al.*, Case No. ICC-01/09-02/11, Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 20 July 2011, Pre-Trial Chamber II, para. 27.

[360] *Prosecutor v. Francis Kirimi Muthaura et al.*, Case No. ICC-01/09-02/11 OA 3, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber II Dated 20 July 2011 Entitled "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence", 10 November 2011, Appeals Chamber, para. 62.

[361] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Practices of Witness Familiarisation and Witness Proofing (see footnote 362 above), paras. 9 and 28.

[362] *Ibid.*, para. 35.

[363] *Ibid.*, para. 36–37 (footnote omitted).

[364] *Ibid.*, para. 42.

[365] *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (see footnote 362 above), para. 41 (footnote omitted).

proceedings for abuse of process … is not generally recognised as an indispensable power of a court of law, an inseverable attribute of the judicial power."[366]

204. The Appeals Chamber in *Situation in the Democratic Republic of the Congo* considered the Prosecutor's submission that a general principle of law could be identified to fill a lacuna in the law regarding the review of a decision ruling out an appeal.[367] In its consideration, the Chamber took note of an array of legal systems presented by the Prosecutor on that, including Romano-Germanic legal systems, common law systems, and Islamic law systems, finding, however, that "nothing in the nature of a general principle of law exists or is universally adopted entailing the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal".[368]

205. The Appeals Chamber has also clarified that applicable national laws with respect to article 21 do not refer to any particular national law. The Court stated that

> while, the Court, in accordance with article 21 (1) (c) of the Statute, can apply (exclusively as a subsidiary source of law) "general principles derived by the Court from national laws of legal systems of the world", no particular national law constitutes part of the applicable law under article 21 of the Statute.[369]

Accordingly, in *Bemba et al.*, the Appeals Chamber, "recalling that the Court can only apply the sources of law enumerated in article 21 of the Statute, … [saw] no merit in Mr Kilolo's attempt to import certain domestic principles providing for a 'crime-fraud exception' to privilege".[370]

206. Similarly, in *Lubanga*, the Pre-Trial Chamber observed that resorting to general principles of law was not the same as being bound by national case law, providing that "under article 21(1)(c) of the Statute, where articles 21(1)(a) and (b) do not apply, it shall apply general principles of law derived by the Court from national laws", but "[h]aving said that, the Chamber considers that the Court is not bound by the decisions of national courts on evidentiary matters".[371]

207. The International Criminal Court has also at times referred to what it has termed "general principles of international law". In one instance, the Trial Chamber described what it called "general principles of international law" as "including those derived from national laws", providing that jurisprudence of the International Court of Justice, *inter alia*, could be considered in identifying such principles. The Trial Chamber ruled as follows:[372]

> … the ICJ was – quite significantly for the purposes of the matter now to be decided by the Trial Chamber – careful to restate the following general principle

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[366] *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 (OA4), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) of the Statute of 3 October 2006, 14 December 2006, Appeals Chamber, para. 35.

[367] *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, Appeals Chamber, paras. 21–27.

[368] *Ibid*., paras. 25–27 and 32.

[369] *Prosecutor v. Jean-Pierre Bemba et al.*, Case No. ICC-01/05-01/13 A A2 A3 A4 A5, Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, Appeals Chamber, para. 291.

[370] *Ibid*., para. 434.

[371] *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, Pre-Trial Chamber, para. 69.

[372] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (see footnote 363 above), paras. 65–67.

> of international law relating to "implied powers" of "international organisations" in general ….
>
> And, in the *Nuclear Tests Cases*, the ICJ directly iterated the principle of implied powers in the context of international courts and tribunals ….
>
> …
>
> … the general principle of international law reiterated in the *Nuclear Tests Cases* and the line of jurisprudence reviewed above had long crystallised as follows. An international institution – particularly an international court – is deemed to have such implied powers as are essential for the exercise of its primary jurisdiction or the performance of its essential duties and functions.
>
> Indeed, that general principle of international law had been recognised as such by classical publicists of the greatest authority – long before the creation of the ICJ.[373]

208. Having completed the exercise of identifying the above "general principle of international law", the Trial Chamber then employed that principle to its reasoning and used it to justify its competence to compel the appearance of witnesses:

> Standing alone, this principle of implied powers, as a general principle of international law, is ample to justify incidental competence in an ICC Trial Chamber to compel the appearance of witnesses. It makes it unnecessary to agonise over the import of any provision of the Rome Statute that does not expressly and clearly exclude the possibility to imply the power.[374]

209. In a decision in the *Situation in Uganda* case, the Pre-Trial Chamber referred to a "well-known and fundamental principle"[375] and "established principle of international law"[376] regarding the competence of judicial bodies, referring to the principle as originating or being contained in the jurisprudence and instruments of international courts and tribunals:

> It is a well-known and fundamental principle that any judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence. Such a power and duty, commonly referred to as "*Kompetenz-Kompetenz*" in German and "*la compétence de la compétence*" in French, is clearly established in article 36, paragraph 6, of the Statute of the International Court of Justice, pursuant to which "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court". This principle was stated on several occasions by the International Court of Justice …
>
> … and was also affirmed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its landmark "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" in the "*Tadic*" case.
>
> …
>
> … It is indeed an established principle of international law that any international organisation "must be deemed to have those powers which, though not expressly provided [...] are conferred upon it by necessary implication as being essential for the performance of its duties". Such principle, stated by the International

[373] *Ibid*., paras. 77–78 and 81–82.

[374] *Ibid*., para. 87.

[375] *Situation in Uganda (Prosecutor v. Joseph Kony and Vincent Otti)*, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, 9 March 2006, para. 22.

[376] *Ibid*., para. 35.

> Court of Justice (ICJ) as early as 1949, is usually referred to as the doctrine of "implied powers", or "inherent powers" and has also been applied by the ICJ to the *organs* of an international organization.[377]

210. The Appeals Chamber in *Katanga* drew on the case law of the European Court of Human Rights in identifying "the general principle that can be drawn from those cases, namely that notice of a legal re-characterisation at a late stage of the proceedings does not, in and of itself, violate the right to a fair trial":

> Internationally recognised human rights do not require a different interpretation of this legal provision. The cases of the ECtHR referred to by the Trial Chamber demonstrate that changes to the legal characterisation of facts may be addressed at late stages of the proceedings, including at the appeals stage, or in review proceedings before the highest domestic courts, without necessarily causing unfairness. …
>
> The Appeals Chamber has had regard to Mr Katanga's arguments in relation to the case-law of the ECtHR, but does not find them to be convincing. None of his arguments undermines the general principle that can be drawn from those cases, namely that notice of a legal re-characterisation at a late stage of the proceedings does not, in and of itself, violate the right to a fair trial.[378]

211. The Trial Chamber has also discussed "general principles of national or international law pursuant to Article 21 of the Statute" in relation to the admission of evidence, also referring to those as "generally accepted legal principles":

> In that light, the Chamber considers that the general rule of admissibility may be simply stated as follows: all *prima facie* relevant evidence is admissible subject to the Chamber's discretion to exclude relevant evidence by operation of the provisions of the Statute or the Rules or by virtue of general principles of national or international law pursuant to Article 21 of the Statute. … Further, … the item must also be seen to have the indicia of reliability, including of authenticity, that are sufficient in the circumstances in accordance with generally accepted legal principles.[379]

212. In *Katanga*, the Appeals Chamber referred to what it called "the general principle of public international law" relating to reparations, in reference to, *inter alia*, the jurisprudence of the Permanent Court of International Justice and the Inter-American Court of Human Rights in identifying that principle:

> Importantly, as noted above under Mr Katanga's first ground of appeal, the purpose of reparations is to repair the harm that was inflicted on the victims. This corresponds to the general principle of public international law that reparations should, where possible, attempt to restore the *status quo ante*. For these reasons, the Appeals Chamber finds that, in principle, the question of whether other individuals may also have contributed to the harm resulting from

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[377] *Ibid*., paras. 22–23 and 35 (footnotes omitted). See also *Request under Regulation 46(3) of the Regulations of the Court*, Case No. ICC-RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, Pre-Trial Chamber, paras. 29–33; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (see footnote 363 above), paras. 83–87, 94 and 104.

[378] *Prosecutor v. Germain Katanga*, Case. No. ICC-01/04-01/07 OA 13, Judgment on the Appeal of Mr Germain Katanga against the Decision of Trial Chamber II of 21 November 2012 Entitled "Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons", 27 March 2013, Appeals Chamber, paras. 93–94 (footnote omitted).

[379] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Prosecution's Request for Admission of Documentary Evidence (see footnote 363 above), para. 15.

the crimes for which the person has been convicted is irrelevant to the convicted person's liability to repair that harm.[380]

3. Recognition

213. In the jurisprudence of the International Criminal Court, as appears from subsection 2 above, the Court has determined that recognition in five national jurisdictions is too narrow to provide the basis for a general principle of law, stating that "a general principle of law cannot be extracted on the basis of examining only five national jurisdictions, the practice of which is even inconsistent."[381]

214. Furthermore, the Appeals Chamber has ruled that consistency in recognition may be important, in the context of an argument raised by the Prosecutor on "the purported existence of a general principle of law establishing a ban for former prosecutors to join the defence immediately after leaving the prosecution", stating that: "Without intending to define in any detail what is required to establish a general principle of law, the Appeals Chamber notes that the practice in the five countries to which the Prosecutor has referred is not consistent. Notably, as the Prosecutor accepts, the practice in one of them (the United Kingdom) appears to be opposite to the one contended for by the Prosecutor."[382]

215. Moreover, the Pre-Trial Chamber has emphasized recognition "in different legal systems", stating that "the Chamber underlines that it is also a principle of law recognised in different legal systems that parties to legal proceedings must comply with judicial decisions" and that "[t]his principle applies to all phases of the proceedings before this Court", citing in the relevant footnote French, Nigerian, United States and Indian legislation and case law, as well as the Statute of the International Court of Justice, the Convention for the Protection of Human Rights and Fundamental Freedoms, the case law of the International Criminal Tribunal for the Former Yugoslavia, and the case law of the Special Tribunal for Lebanon.[383]

216. The Trial Chamber in *Ruto and Sang* referred to recognition in terms of "recognised by civilised nations, recognised as a source of law" ("conducts such as those may also amount to contempt of Court under customary international law or general principles of law recognised by civilised nations, recognised as a source of law applicable before this Court under Article 21 of the Statute").[384]

4. Transposition

217. The International Criminal Court has not expressly referred to the transposability of general principles of law from national legal systems to the

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[380] *Prosecutor v. Germain Katanga*, Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute" (see footnote 363 above), para. 178 (footnote omitted).

[381] *Prosecutor v. Francis Kirimi Muthaura et al.* (see footnote 364 above), para. 27. See also *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (see footnote 362 above), para. 41.

[382] *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09 OA, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber IV of 30 June 2011 entitled "Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence", 11 November 2011, Appeals Chamber, para. 33 (footnote omitted).

[383] *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Case No. ICC-01/13, Decision on the "Application for Judicial Review by the Government of the Union of the Comoros", 15 November 2018, Pre-Trial Chamber I, para. 107 (footnotes omitted).

[384] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Transcript of Trial Hearing, 18 September 2013, lines 13–23.

international legal system. In *Bemba et al.*, the Appeals Chamber referred to the "attempt to import certain domestic principles", "recalling that the Court can only apply the sources of law enumerated in article 21 of the Statute, the Appeals Chamber sees no merit in Mr Kilolo's attempt to import certain domestic principles providing for a 'crime-fraud exception' to privilege".[385]

5. Functions and relationship with other sources of international law

(a) Functions

218. The International Criminal Court has often applied general principles of law as a residual source of international law and a means to fill lacunae in the law.[386] This can be illustrated by the *Katanga* case, in which the Trial Chamber determined that: "the Chamber shall … apply the subsidiary sources of law under article 21(1)(b) and 21(1)(c) of the Statute only where it identifies a lacuna in the provisions of the Statute, the Elements of Crimes and the Rules".[387] The Court has in some cases carried out the exercise of determining whether there existed such a lacuna, ruling in one instance that "the Chamber does not consider that there exists a lacuna in this respect which would need to be filled by reference to subsidiary sources of law referred to in article 21(1)(b) and (c) of the Statute".[388] Similarly, the Trial Chamber in *Katanga* stated that the function of general principles of law was to provide a subsidiary source of law where a lacuna in the Statute existed, since article 21 established "a hierarchy of the sources":

> The Chamber would emphasise that article 21 of the Statute establishes a hierarchy of the sources of applicable law and that, in all its decisions, it must "in the first place" apply the relevant provisions of the Statute. In the light of the established hierarchy, the Chamber shall therefore apply the subsidiary sources of law under article 21(1)(b) and 21(1)(c) of the Statute only where it identifies a lacuna in the provisions of the Statute, the Elements of Crimes and the Rules.
>
> The Chamber considers … that it need not apply the subsidiary sources of law under article 21(1)(b) and 21(1)(c) of the Statute …
>
> Lastly, in accordance with article 21(2) of the Statute, the Chamber may also apply the principles and rules of laws as defined in previous decisions of the pre-trial chambers and trial chambers of the Court, and the judgments of the Appeals Chamber.[389]

219. The Pre-Trial Chamber, in evaluating and rejecting an argument for recourse to the general principles of law in the *Situation in the Republic of Kenya* case, also considered that it could rely on general principles of law if there was a lacuna in the Statute, while finding that the Statute in that case already regulated the issue:

> … the Victims argue that judicial review of a failure to investigate or prosecute is possible under a general principle of law applicable by virtue of

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[385] *Prosecutor v. Jean-Pierre Bemba et al.* (see footnote 374 above), para. 434.

[386] See, for example, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, Trial Chamber III, paras. 69–71; *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision on the "Victims' Request for Review of Prosecution's Decision to Cease Active Investigation", 5 November 2015, Pre-Trial Chamber II, paras. 16–18.

[387] *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 7 March 2014, Trial Chamber II, para. 39 (footnote omitted).

[388] *Situation in the Republic of Kenya* (see footnote 391 above), para. 18.

[389] *Prosecutor v. Germain Katanga* (see footnote 392 above), paras. 39–40 and 42 (footnotes omitted).

> article 21(1)(c) of the Statute and it is also consistent with internationally recognised human rights under article 21(3) of the Statute.
>
> The Chamber recalls that the purpose of article 21 of the Statute is to regulate the sources of law [of] the Court and establishes a hierarchy within those sources of law. Article 21(1)(a) of the Statute explicitly refers to the Statute as the first source of law. Recourse to the subsidiary sources of law referred to in article 21(1)(b) and (c) of the Statute is only possible when, as established by the Appeals Chamber, there is a lacuna in the Statute or the Rules.
>
> The Chamber observes that the Statute, in article 53, regulates in detail the Pre-Trial Chamber's competence to review the Prosecutor's exercise of her powers with respect to investigation and prosecution, as well as the boundaries of the exercise of any such competence. Therefore, the Chamber does not consider that there exists a lacuna in this respect which would need to be filled by reference to subsidiary sources of law referred to in article 21(1)(b) and (c) of the Statute.[390]

220. The International Criminal Court has also evoked "principles of international law" as recognized in the Charter of the International Military Tribunal (Nuremberg Charter) and by the Commission as underlying article 27, paragraph 2, of its Statute, while also making reference to customary international law in that context:

> It is of note that article 27(2) of the Statute is a clear provision in conventional law; but it also reflects the status of customary international law. In this regard, the Appeals Chamber notes, first, article 7 of the Nuremberg Charter of the International Military Tribunal at Nuremberg ….
>
> On 11 December 1946, the UN General Assembly expressly affirmed the "principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal" and directed the newly established International Law Commission to "treat as a matter of primary importance plans for the formulation […] of the principles recognized" therein. The International Law Commission subsequently formulated the Nuremberg Principles ….
>
> The same principle was included in article 3 of the International Law Commission's draft Code of Offences against the Peace and Security of Mankind.[391]

221. The Appeals Chamber has ruled that it does not have the same need to rely on general principles of law as, for example, the International Criminal Tribunal for the Former Yugoslavia. The Appeals Chamber pronounced in the *Lubanga* case that:

> In addition, it is noteworthy that the legal instruments of the ICTY do not contain a provision similar to Regulation 55. For that reason, in the *Kupreškić* Trial Judgment, the judges considered whether this gap in the legal framework of the ICTY could be closed by reference to a general principle of law and concluded that there exists "no general principle of criminal law common to all major legal systems of the world" regarding a change in the legal characterisation of facts. At this Court, the situation is different. The judges of the Court adopted Regulation 55 as part of the Regulations of the Court. Thus, there is no need to rely on general principles of law to determine whether or not legal re-characterisation is permissible.

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[390] *Situation in the Republic of Kenya* (see footnote 391 above), paras. 16–18 (footnote omitted).

[391] *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, Appeals Chamber, paras 103–105 (footnotes omitted).

> The Appeals Chamber is therefore not persuaded by Mr Lubanga Dyilo's argument that Regulation 55 should not be applied because of a purported inconsistency with general principles of international law.[392]

222. The Pre-Trial Chamber has also interpreted article 21, paragraph 1 (b) and (c), of the Rome Statute to be used "if necessary", noting that the "application of these elements is also supported by the applicable principles and rules of international law":

> Considering that the Statute is an international treaty by nature, the Chamber will use the interpretative criteria provided in articles 31 and 32 of the Vienna Convention on the Law of Treaties (in particular the literal the contextual and the teleological criteria) in order to determine the content of the gravity threshold set out in article 17 (1) (d) of the Statute. As provided for in article 21 (1) (b) and (1) (c) of the Statute, the Chamber will also use, if necessary, the "applicable treaties and the principles and rules of international law" and "general principles of law derived by the Court from national laws of legal systems of the world".
>
> The application of these elements is also supported by the applicable principles and rules of international law.[393]

(b) Relationship with other sources of international law

223. Consistent with the Rome Statute, general principles of law have often been presented by the International Criminal Court as constituting subsidiary sources of law where applying the Court's own instruments or treaty law and "the principles and rules of international law" fail to provide a solution.[394] As ruled by the Trial Chamber in *Katanga*:

> Where the founding texts do not specifically resolve a particular issue, the Chamber must refer to treaty or customary humanitarian law and the general principles of law. To this end, the Chamber may, for example, be required to refer to the jurisprudence of the ad hoc tribunals and other courts on the matter.[395]

224. The Trial Chamber's judgment in *Bemba* stated that "principles and rules of international law", according to article 21, paragraph 1 (b), of the Rome Statute, are generally accepted to refer to customary international law:

> Articles 21(1)(b) and 21(1)(c) provide for "subsidiary sources of law', which may be resorted to when there is a *lacuna* in the written law contained in the sources included in Article 21(1)(a). In line with Article 21(1)(b), where appropriate, the Chamber may apply "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict".
>
> "[P]rinciples and rules of international law" are generally accepted to refer to customary international law. Where relevant and appropriate, the Chamber has found assistance, for instance, in the case law of other international courts and

[392] *Prosecutor v. Thomas Lubanga Dyilo* (see footnote 363 above), paras. 80–81 (footnote omitted).
[393] *Prosecutor v. Thomas Lubanga Dyilo* (see footnote 361 above), paras. 42 (footnote omitted) and 55.
[394] The Rome Statute, stating "[f]ailing that, general principles of law …" (art. 21, para. 1 (c)).
[395] *Prosecutor v. Germain Katanga* (see footnote 392 above), para. 47.

tribunals, in particular the International Court of Justice ("ICJ"), in order to identify such principles and rules.[396]

225. The Trial Chamber continued in *Bemba* to state that:

> Failing the availability of primary sources of law listed in Article 21(1)(a) or subsidiary sources listed in Article 21(1)(b), Article 21(1)(c) empowers the Chamber to apply "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".[397]
>
> In addition, the Trial Chamber found that it could apply "principles and rules of law as outlined in previous decisions of this Court" permitting it "to base its decisions on its previous jurisprudence, or on the jurisprudence of other Chambers of this Court".[398]

226. The Appeals Chamber in *Muthaura et al.* confirmed "that general principles of law under article 21 (c) of the Statute are a subsidiary source of law to which resort may be had if the sources of law listed in article 21 (1) (a) and (b) do not regulate the issue at hand; and, finally, that, as expressed by the words 'as appropriate', article 21 (1) (c) of the Statute vests the Court with discretion to derive such general principles also from the national laws of States that would normally exercise jurisdiction over the crime, but does not require the Court to do so", as a result of which the Appeals Chamber was "not obliged to apply Kenyan law" in that case.[399]

227. In the case of *Ruto and Sang*, the Trial Chamber ruled that a general principle of international law was sufficient on its own to justify competence, stating that: "Standing alone, th[e] principle of implied powers, as a general principle of international law, is ample to justify incidental competence in an ICC Trial Chamber to compel the appearance of witnesses." It also stated that there was no need to refer to the Statute: "It makes it unnecessary to agonise over the import of any provision of the Rome Statute that does not expressly and clearly exclude the possibility to imply the power."[400] The Appeals Chamber in that same case, however, considered that recourse to that source would only be had where a lacuna existed:

> [E]xploring the import of the concept of "implied powers" or "customary international criminal procedure" on the question of whether the Trial Chamber is empowered to compel a witness to appear before the Court would be incorrect in circumstances where the Court's legal framework provides for a conclusive legal basis. This is because, as previously held by the Appeals Chamber, pursuant to article 21 (1) of the Statute, recourse to other sources of law is possible only if there is a lacuna …. As explained below, the Appeals Chamber is of the view that there is no lacuna in the interpretation of the issues under

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[396] *Prosecutor v. Jean-Pierre Bemba Gombo* (see footnote 391 above), paras. 69 and 71 (footnotes omitted). In a footnote referring to the International Court of Justice, the Trial Chamber stated: "The particular role of the ICJ in this respect is supported by the fact that Article 38(1)(b) of the ICJ Statute recognizes 'international custom, as evidence of a general practice accepted as law' as one of the primary sources of applicable law."

[397] *Ibid*., para. 73.

[398] *Ibid*., para. 74.

[399] *Prosecutor v. Francis Kirimi Muthaura et al.*, Case No. ICC-01/09-02/11 OA 4, Decision on the "Request to Make Oral Submissions on Jurisdiction under Rule 156(3)", 1 May 2012, Appeals Chamber, para. 11 (footnote omitted).

[400] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation (see footnote 363 above), para. 87.

> appeal. Thus, the Appeals Chamber will not address any further the question ….[401]

228. The *Katanga* Appeals Chamber discussed the *ultra petita* principle as a possible general principle of law, but found that other sources already provided for the matter in question:

> The Appeals Chamber recalls that, pursuant to article 21 (1) (c) of the Statute, the Court may apply "general principles of law derived by the Court from national laws of legal systems of the world". Nevertheless, even if the *ultra petita* principle could be considered such a general principle of law, the same provision requires the Court to apply, in the first place, its own Statute, Rules and Elements of Crimes. Given the Court's framework as set out above, the principle does not apply in reparations proceedings before the Court.[402]

229. In *Katanga and Ngudjolo Chui*, the Pre-Trial Chamber also mentioned victims' right to truth as representing both emerging customary international law, as well as a general principle of law, stating:

> As a result of its recognition by international human rights instruments, and by the jurisprudence of the bodies applying such instruments, as well as by the legislative and jurisprudential practice of States, a number of authors have stated that the victims' right to the truth, understood as the determination of the facts, the identification of the responsible persons and the declaration of their responsibility, is today an emerging customary norm, as well as a general principle of law.[403]

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[401] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11 OA 7 OA 8, Judgment on the Appeals of William Samoei Ruto and Mr Joshua Arap Sang against the Decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation", 9 October 2014, Appeals Chamber, para. 105.

[402] *Prosecutor v. Germain Katanga*, Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute" (see footnote 363 above), para. 148 (footnote omitted).

[403] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, Pre-Trial Chamber I, p. 17, footnote 39.