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Customary International Law And General Principles: Rethinking Their Relationship

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Abstract: In this chapter, I examine the relationship between customary international law and general principles of law. Both are distinct sources of public international law (Art. 38(1)(b) and (c) of the Statute of the International Court of Justice). In a first step, I analyze the different meanings of principles as a “source” of international law. Second, I consider different approaches to principles as a norm type in legal theory. Third, I discuss attempts in international legal doctrine to facilitate conceptual issues by either unifying general principles as a source with the source of customary international law or by equating general principles as a source and as a norm type. Finally, I propose that the delimitation between customary international law and general principles of law as sources of international law should follow the distinction between situations dominated by factual reciprocity (which justify customary norms) and situations where such factual reciprocity is absent (which justify general principles). The jurisgenerative processes leading to the emergence of general principles of international law are processes of changing identities and argumentative self-entrapment.

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1. Introduction

1 Rethinking the relationship between customary international law and general principles of law is like brooding over inequalities with two unknowns. Both customary international law and general principles are still “obscure” categories,¹ and, consequently, the “line of demarcation” between the two is also not very clear.² The vagueness of both concepts is also reflected by the fact that the assertion of either a customary rule or a general principle of law by the International Court of Justice (“ICJ”) is only rarely accompanied by an adequate demonstration of its existence in international law.³ According to the Committee on the Formation of Customary Law of the American Branch of the International Law Association (“ABILA”), one “may posit distinctions between the two,” but it is “difficult to reconcile these distinctions with any consistent usage.”⁴ Therefore, it comes as no surprise that Michael Wood – the International Law Commission’s Special Rapporteur on customary international law – stated in his introductory “First Report on Formation and Evidence of Customary International Law” that “[t]he distinction between customary international law and ‘general principles of law’ is . . . important, but not always clear in the case law or the literature.”⁵

¹ Hilary Charlesworth, “Law-Making and Sources,” in *The Cambridge Companion to International Law*, edited by James Crawford (Cambridge: Cambridge University Press, 2012), 190.

² Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Grotius, 1987), 23. See also Humphrey Waldock, “General Course on Public International Law,” 106 *Recueil des cours* 1-251 (1962), 39. Symptomatically, Judge Sir Humphrey Waldock, in his 1962 General Course at The Hague, considered custom and general principles to be “two kinds” of unwritten law; for him, general principles “have tended to become absorbed into customary law and then to lose their identity as general principles of law.” *Ibid.*

³ For an appraisal, see Rudolf H. Geiger, “Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal,” in Ulrich Fastenrath et al., *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: Oxford University Press, 2011), 673-94, with references; Giorgio Gaja, “General Principles of Law,” in *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum (Oxford: Oxford University Press, 2012), para. 20.

⁴ Committee on the Formation of Customary International Law, American Branch of the International Law Association, “The Role of State Practice in the Formation of Customary and Jus Cogens Norms of International Law,” *Proceedings and Committee Reports of the American Branch of the International Law Association* 102-126 (1987-1988), 111.

⁵ Michael Wood, Special Rapporteur, “First Report on Formation and Evidence of Customary International Law,” U.N. Doc. A/CN.4/663 (2013), para. 36.

- 2 Certainly, there is no point in trying to solve the inequalities of customary international law and general principles with mathematical precision. Nevertheless, I try to expose some landmarks which could help to “demarcate” the line between customary international law and general principles. The chapter is divided into four parts. First, I analyze the different meanings of principles as a “source” of international law. Second, I consider different approaches to principles as a norm type in legal theory. Third, I discuss attempts in international legal doctrine to facilitate conceptual issues by either unifying general principles as a source with the source of customary international law or by equating general principles as a source and as a norm type. I argue, however, that both attempts avoid analyzing general principles as a source of international law.
- 3 Fourth and finally, I propose that the delimitation between customary international law and general principles of law as sources of international law should follow the distinction between situations dominated by factual reciprocity (which justify customary norms) and situations where such factual reciprocity is absent (which justify general principles). Customary international law is best understood as a relatively narrow category based on reciprocal state practice that is supported by *opinio juris*. With regard to general principles of international law, I develop an approach that is based on constructivist approaches in international relations theory. The jurisgenerative processes leading to the emergence of general principles of international law are processes of changing identities and argumentative self-entrapment, as I explore below.

2. Conceptualizing the Relationship between Customary Law and General Principles

- 4 The notion of general principles is indeed “ambivalent”⁶ or “polysemic.”⁷ In particular, the concept of general principles refers to both a source of international law and a particular norm type in terms of legal theory. I discuss each of these in turn.

⁶ See Emmanuelle Jouannet, “L’ambivalence des principes généraux face au caractère étrange et complexe de l’ordre juridique international,” in *L’influence des sources sur l’unité et la fragmentation du droit international*, edited by Rosario Huesa Vinaixa and Karel Wellens (Bruxelles: Bruylant, 2006), 146 (referring to the ambivalent role of general principles with regard to the unity or fragmentation of international law).

2.1. General Principles of Law as a Source of International Law

- 5 Sources of international law can be defined as the “*processes* by which international legal norms are created, modified, and annulled.”⁸ The doctrine of sources of international law determines the particular forms in which international law is created and can be ascertained.⁹ Article 38(1) of the Statute of the ICJ (“Statute”),¹⁰ which literally only identifies the legal norms that the Court “shall apply,” is generally understood to codify the sources of international law.¹¹ Besides “international conventions,” Article 38(1) of the Statute recognizes two sources of unwritten international law: “b. international custom, as evidence of a general practice accepted as law [and] c. the general principles of law recognized by civilized nations.”¹²
- 6 The meaning of general principles of law “recognized by civilized nations” has been contentious since the deliberations of the Advisory Committee of Jurists for the Establishment of a Permanent Court of International Justice (“PCIJ”) in 1921, which drafted the Statute of the PCIJ that in turn became the Statute of the ICJ in 1945.¹³ Today, two views exist on how to interpret the phrase “general principles of law recognized by civilized nations” – one narrow, and the other broader. The narrow view

⁷ See Samantha Besson, “General Principles in International Law – Whose Principles?” in *Les principes en droit européen/Principles in European law*, edited by Samantha Besson and Pascal Pichonnaz (Genève: Schulthess, 2011), 26 (explaining that the concept of principle can refer, for example, “to a legal source, a kind of legal norm, a degree of legal normativity or a quality of legal content”). See also James Crawford, *Brownlie’s Principles of Public International Law* (Oxford: Oxford University Press, 8th ed. 2012), 37 (“The rubric ‘general principles of international law’ may alternately refer to rules of customary international law, to general principles of law as in Article 38(1)(c) [of the Statute of the ICJ], or to certain logical propositions underlying judicial reasoning on the basis of existing international law.”).

⁸ Samantha Besson, “Theorizing the Sources of International Law,” in *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 169-70 (emphasis in original).

⁹ Thomas Skouteris, “The Force of a Doctrine: Art. 38 of the PCIJ Statute and the Sources of International Law,” in *Events: The Force of International Law*, edited by Fleur Johns, Richard Joyce, and Sundhya Pahuja (New York: Routledge, 2011), 70.

¹⁰ ICJ Statute, 26 June 1945, 33 U.N.T.S. 993.

¹¹ Skouteris, “The Force of a Doctrine,” 71; Charlesworth, “Law-Making and Sources,” 189.

¹² ICJ Statute, art. 38(1)(b), (c).

¹³ For an overview of representative positions, see Birgit Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia* (Leiden: Martinus Nijhoff, 2010), 71-80.

holds that such general principles must be recognized in municipal law.¹⁴ In a post-colonial pluralistic world, the formulation of Article 38(1)(c) of the Statute referring to principles recognized “by civilized nations” should not limit the range of relevant municipal legal orders to the national law of specific states. Rather, under a modern interpretation, a majority of nations within each of the main families of laws must adhere to a principle, which shall be taken from domestic legal orders, in order for it to be recognized as a general principle of law under international law.¹⁵

- 7 An alternative broader understanding of general principles of international law distinguishes three categories of principles on the basis of their origin. According to this view, in addition to the above-mentioned principles stemming from domestic law, Article 38(1)(c) of the Statute comprises, secondly, general principles originating in international relations and, thirdly, general principles applicable to all kinds of legal relations. Thus, general principles can either be transferred from national legal orders by qualified methods of comparative law (the first category) or originate in international relations themselves (the second category).¹⁶ The second category, consisting of

¹⁴ For examples of this view, see Michael Akehurst, “The Hierarchy of the Sources of International Law,” 47 *British Year Book of International Law* 273 (1974-1975), 279; Michel Virally, “The Sources of International Law,” in *Manual of Public International Law*, edited by Max Sørensen (London: Kluwer, 1968), 144; Schlütter, *Developments in Customary International Law*, 85; Besson, “General Principles in International Law,” 35-37.

¹⁵ Michael Bogdan, “General Principles of Law and the Problem of Lacunae in the Law of Nations,” 46 *Nordic Journal of International Law* 37 (1977), 46 (submitting that “a legal principle can be deemed to be recognized by civilized nations if it is adhered to by the prevailing number of nations within each of the main families of laws, i.e. the romano-germanic family, the common-law family, the socialist family, the African family, the Moslem family and the family of the laws of the Far East”). For the debate concerning this wording, see Gaja, “General Principles of Law,” para. 2, with further references.

¹⁶ See Hermann Mosler, “Völkerrecht als Rechtsordnung,” 36 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 6 (1976), 41-46 (also mentioning principles of legal logic); Blaine Sloan, “General Assembly Resolutions Revisited (Forty Years Later),” 58 *British Year Book of International Law* 39 (1987), 79-80 (following Mosler); Hermann Mosler, “General Principles of International Law,” in *Encyclopedia of Public International Law*, edited by Rudolf Bernhardt, vol. II (Amsterdam: Elsevier/North Holland, 1995), 511-12. The following scholars distinguish two categories of general principles – (1) principles derived from the law *in foro domestic*, and (2) principles generated on the international plane: Johan G. Lammers, “General Principles of Law Recognized by Civilized Nations,” in *Essays on the Development of the International Legal Order in memory of Haro F. van Panhuys*, edited by Frits Kalshoven, Pieter Jan Kuiper, and Johan G. Lammers (Alphen aan den Rijn: Springer, 1980), 59; M. Cherif Bassiouni, “A Functional Approach to ‘General Principles of International Law,’” 11 *Michigan Journal of International Law* 768 (1990), 772; Wolfgang Weiß, “Allgemeine Rechtsgrundsätze des Völkerrechts,” 39 *Archiv des Völkerrechts* 394 (2001), 398 et seq.; and Niels Petersen, “Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation,” 56 *American University*

principles originating in international relations, is understood to comprise principles inherent in the international legal community and principles generally recognized on the international level.¹⁷

- 8 For the German scholar and international judge Hermann Mosler, principles inherent in the international legal community “follow from the nature of the international community.” He mentions principles concerning diplomatic and consular relations and the sovereign immunity of states as examples.¹⁸ The freedom of maritime communication, by contrast, is not a general principle because it is inherent in the international community, but because it is generally accepted.¹⁹ Despite their possible moral content, these principles are not derived from natural law. Rather, they essentially depend on the clear consent of states.²⁰ Mosler refers to the obligation to act in good faith and to the principle of proportionality as examples of the last category, i.e., principles applicable to all kinds of legal relations.²¹
- 9 The broader view of the scope of general principles of law that includes principles originating in international relations themselves is more defensible. There is no need today to restrict Article 38(1)(c) of the Statute to principles recognized in domestic law.²²

International Law Review 275 (2007), 308.

¹⁷ See Mosler, “General Principles of International Law,” 523; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (Berlin: Duncker & Humblot, 3rd ed., 1984), paras. 606, 639; Bruno Simma and Philip Alston, “The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles,” 12 *Australian Year Book of International Law* 82 (1992), 102.

¹⁸ Mosler, “General Principles of International Law,” 522-23.

¹⁹ On this freedom, see *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949, 1949 I.C.J. Rep. 4, 22.

²⁰ Besson regards it as a “theoretical benefit” of restricting general principles to those stemming from domestic laws that this recourse to municipal law “severs any direct connection between those principles and morality.” Besson, “General Principles in International Law,” 36. However, for an explicitly natural law approach to general principles of law, see *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment of 18 July 1966, Dissenting opinion of Judge Tanaka, 1966 I.C.J. Rep. 6, 298.

²¹ Mosler, “Völkerrecht als Rechtsordnung,” 44-45.

²² According to Bassiouni and Wolfrum, this is the majority view. See Bassiouni, “A Functional Approach,” 772 and Rüdiger Wolfrum, “General International Law (Principles, Rules, and Standards),” in *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum (Oxford: Oxford University Press, 2012), para. 28. See also Dionisio Anzilotti, *Cours de droit international, Premier Volume: Introduction – Théories générales* (Paris: Recueil Sirey, 1929), 117 (“Quant aux principes généraux de droit, dont parle le no. 3 de l'article 38, ce sont avant tout les principes généraux de l'ordre juridique international, et, en

Neither the wording of Article 38(1)(c) of the Statute, its legislative history,²³ nor the object and purpose seem to point in such a direction.²⁴ Admittedly, individual members of the Advisory Committee of Jurists obviously had in mind principles “accepted by all nations *in foro domestico*.”²⁵ Still, there are “no indications whatsoever to be found” in the Procès-Verbaux of the Proceedings of the Committee of Jurists that it was opposed to the idea that the Court would apply also general principles of *international law*.²⁶

- 10 Furthermore, the argument can now also rely on Article 21(1)(b) and (c) of the Statute of the International Criminal Court,²⁷ which clearly distinguishes between general principles derived from international law and those derived from national law.²⁸ Any original limitation of general principles to those developed *in foro domestico* (i.e., within domestic legal orders) was due to the fact that comparing domestic legal systems provided the only way to validate general principles in a reliable way at the time the

second lieu, les principes universellement admis dans les législations des peuples civilisés: une sorte, comme on l'a bien dit, de *novissimum ius gentium* au sens classique, *quasi quo iure omnes gentes utuntur* (§ 1^{er}, *Inst.* I, 1.)”; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, Separate Opinion of Judge Cançado Trindade, 2010 I.C.J. Rep. 135, paras. 48-52. Cançado Trindade distinguishes between general principles of law proper to international law in general, and principles of law proper to some domains of international law. For him, general principles of law emanate from “the universal juridical conscience,” which he regards as “the ultimate material ‘source’ of all law.” According to Cançado Trindade, the “gradual acknowledgment . . . of the principles proper to a domain like that of International Environmental Law” provides a “clear illustration.” By contrast, Simma and Alston note that “the dominant view understands this concept in a narrow sense, as referring to legal principles developed *in foro domestico*.” See Simma and Alston, “The Sources of Human Rights Law,” 102. For a similar view, see Schlütter, *Developments in Customary International Law*, 75; Cheng, *General Principles of Law*, 390.

²³ For the legislative history of Article 38 of the Statute, see Vladimir Duro Degan, *Sources of International Law* (The Hague: Martinus Nijhoff, 1997), 46-53; Ole Spiermann, “‘Who Attempts Too Much Does Nothing Well’: The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice,” 73 *British Year Book of International Law* 187 (2002), 212-18.

²⁴ But see Besson, “General Principles in International Law,” 35-36.

²⁵ Spiermann, “‘Who Attempts Too Much Does Nothing Well,’” 217, with references. See also Maarten Bos, “The Recognized Manifestations of International Law: A New Theory of ‘Sources,’” 20 *German Yearbook of International Law* 9 (1977), 33-42.

²⁶ Lammers, “General Principles of Law,” 66. See generally League of Nations, Advisory Committee of Jurists on the Establishment of a Permanent Court of International Justice, *Procès-Verbaux of the Proceedings of the Committee June 16th—July 24th 1920* (The Hague: Van Langenhuisen Brothers, 1920, repr. 2006).

²⁷ Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, art. 21, para.1, (b) and (c).

²⁸ See Wolfrum, “General International Law,” para. 28.

Statute of the PCIJ was drafted.²⁹ The situation has changed as a result of the creation of countless international organizations and the expansion of international treaty law. Today, we can refer, for example, to the implicit consensus expressed in resolutions of the General Assembly of the United Nations (even if they are not directly binding themselves), to preambles of multilateral treaties, and to other expressions of consent in global transnational society.

- 11 There are at least three implications of the broader view. One is that it might need to be expanded even further. In particular, a fourth category of general principles could be added to the three categories mentioned above, which is closely related to the second category, i.e., general principles originating in international relations. This category of “regime-specific principles” consists of principles set out in one particular treaty regime, such as the common heritage principle or the principle of sustainable development. Such principles could then be transferred from one particular treaty regime to other regimes or issue areas, thus acquiring an independent status.³⁰
- 12 A second implication of the broader view is that general principles would gain greater practical importance in international law. General principles developed from municipal law – the exclusive focus of the narrow view – have not had much impact on the jurisprudence of international courts or tribunals.³¹ In particular, the ICJ has referred to Article 38(1)(c) of the Statute only very rarely.³²

²⁹ See Simma and Alston, “The Sources of Human Rights Law,” 102.

³⁰ See Wolfrum, “General International Law,” para. 29.

³¹ See *ibid.*, para. 125. However, several influential scholars have regarded domestic law as an important means for developing international law. See, e.g., Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (London: Longman, 1927); C. Wilfred Jenks, *The Common Law of Mankind* (New York: F.A. Praeger, 1958), 106; Wolfgang Gaston Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964), 188-210.

³² On this point, see Gaja, “General Principles of Law,” para. 32. Alain Pellet writes that he is aware of only four explicit references to Article 38(1)(c) in the entire case law of the Court since 1922. Remarkably, in each of these cases the Court ruled out the application of Article 38(1)(c). See Alain Pellet, “Article 38,” in *The Statute of the International Court of Justice: A Commentary*, edited by Andreas Zimmermann (Oxford: Oxford University Press, 2nd ed. 2012), para. 253, with references.

- 13 The situation is different for principles derived from international relations or international treaties.³³ Generally, the ICJ has asserted the existence of principles in international law irrespective of their correspondence to principles in municipal laws,³⁴ or has referred to “general international law,” encompassing both customary international law and general principles of law, as a generic category, without specifically referring to general principles of domestic law.³⁵ These general pronouncements imply that the ICJ itself has adopted a broader view of the scope of general principles. For this reason, too, a broader view would have more practical importance because it would be likely to be employed by the ICJ and other international courts.
- 14 A third, and most relevant, implication of a broader understanding of general principles is that it complicates the relationship between general principles and customary international law.³⁶ This relationship appears clear-cut on the basis of narrow conceptions of both customary international law and general principles. The traditional, narrow understanding of customary international law relies on international state

³³ See Wolfrum, “General International Law,” para. 125. Pierre d’Argent has discussed recourse by the ICJ to principles of a customary nature. See Pierre d’Argent, “Les principes généraux à la Cour internationale de Justice,” in *Les principes en droit européen/Principles in European Law*, edited by Samantha Besson and Pascal Pichonnaz (Genève: Schulthess, 2011), 110-17.

³⁴ See Gaja, “General Principles of Law,” para. 32.

³⁵ See, e.g., *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment of 20 February 1969, 1969 I.C.J. Rep. 3, 29, para. 37 (referring to delimitation on an equidistance-special circumstances basis); *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970, 1970 I.C.J. Rep. 3, 32, para. 34 (listing the outlawing of acts of aggression and of genocide, and the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination, as examples of obligations *erga omnes* and clarifying that “[s]ome of the corresponding rights of protection have entered into the body of general international law . . . ; others are conferred by international instruments of a universal or quasi-universal character.”); *ibid.*, 46, para. 87 (“the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law”); *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, 1980 I.C.J. Rep. 3, 31, para. 62 (referring to the inviolability of the premises of a diplomatic mission and other obligations of the Iranian Government).

³⁶ On this point, see Committee on the Formation of Customary International Law, “The Role of State Practice,” 111 (“It is difficult to distinguish ‘general principles’ from ‘international custom’ when both are viewed in their broader senses. . . . One may posit distinctions between the two, but it is difficult to reconcile these distinctions with any consistent usage.”).

practice accompanied by *opinio juris*,³⁷ and the narrow concept of general principles extracts them exclusively from municipal law. Understood in this way, both customary international law and general principles include “a requirement for concrete practice of sorts”³⁸ – either inter-state practice in the case of customary law, or domestic practice in the case of general principles.³⁹ In both cases, the respective narrow view underlines that this practice must be “real.” According to the narrow view of general principles, referring to domestic legislation – the law in the books – alone without considering actual enforcement deficits will therefore not suffice to establish a principle developed *in foro domestico*.⁴⁰

- 15 On this theoretical basis, there might be an overlap of content between general principles and customary law, but conceptually, the normative origins of these two respective unwritten bodies of international law can be distinguished clearly. The drawback of this clear-cut distinction, however, is also evident: Such an understanding reduces the meaning and impact of both customary international law and general principles, at the same time limiting the domains of international judicial institutions and the aspirations of international law scholars who build their arguments on unwritten international law.
- 16 By contrast, the broad view of general principles (as well as customary international law) raises the question of whether unwritten international legal norms that are not supported by solid and actual state practice can legitimately be considered either customary international law or general principles. If there is room for a distinct category

³⁷ See Besson, “General Principles in International Law,” 59 (“Custom requires state practice, and not necessarily state consent.”).

³⁸ Committee on the Formation of Customary International Law, “The Role of State Practice,” 111.

³⁹ On the requirement of practice, see, e.g., Restatement (Third) of the Foreign Relations Law of the United States, vol. 1 (1987), § 102, reporters’ note, para. 7 (“references to ‘general principles of international law’ ordinarily mean principles accepted as customary international law whether or not they derive from principles common to national legal systems”); Committee on the Formation of Customary International Law, “The Role of State Practice,” 111-12 (“there must be some ‘practice’ with respect to these principles, at least to demonstrate that they are ‘recognized’”); Theodor Meron, “International Law in the Age of Human Rights: General Course on Public International Law,” 301 *Recueil des cours* 9 (2003), 393 (quoting the Committee on the Formation of Customary International Law).

⁴⁰ See Meron, “International Law in the Age of Human Rights,” 393, with further references in footnote 1486.

of general principles of law that, like customary international law, originate in international relations themselves and are not adopted from domestic law, both international practice and scholarship are confronted with a considerable methodological uncertainty. There does not seem to exist any agreed upon method for establishing that a certain principle is “accepted” or even “inherent” in the international community.

2.2. Principles as a Norm Type

- 17 In legal theory, much effort has been devoted to defending principles as a distinct norm category. As we will see, some international law scholars have tried to make use of these categorizations. The debate in legal theory has referred to several aspects of legal principles.⁴¹ Notably, principles are distinguished from rules. Scholars have proposed a number of criteria for purposes of making this distinction. For example, legal philosopher Joseph Raz argues that rules prescribe specific acts, whereas principles prescribe highly unspecific actions. According to Raz, the distinction between rules and principles is one of degree and many borderline cases exist.⁴²
- 18 Dworkin, by contrast, logically distinguishes legal rules and legal principles. For Dworkin, rules are applicable in an “all-or-nothing” fashion. Principles, on the other hand, do not prescribe legal consequences that automatically follow when the conditions provided are met. Rather, principles state reasons that point in one direction, but do not necessitate a particular decision. They have a dimension of weight or importance. Consequently, while a rule must be invalid if it conflicts with another rule, a conflict of principles can be resolved by taking into account the relative weight of each principle.⁴³ Other authors treat principles as reasons for the existence of certain rules,⁴⁴

⁴¹ See generally Ralf Poscher, “Insights, Errors and Self-Misconceptions of the Theory of Principles,” 22 *Ratio Juris* 425 (2009), 427-28.

⁴² See, e.g., Joseph Raz, “Legal Principles and the Limits of Law,” 81 *Yale Law Journal* 823 (1972), 838. See also George C. Christie, “The Model of Principles,” 17 *Duke Law Journal* 649 (1968), 669; Graham Hughes, “Rules, Policy and Decision Making,” 77 *Yale Law Journal* 411 (1968), 419.

⁴³ See Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 24-28.

⁴⁴ See Neil MacCormick, “‘Principles’ of Law,” 19 *Juridical Review* 217 (1974), 222.

or distinguish principles, which protect a common or individual good and are therefore value-related, from rules, which are in general conduct-related.⁴⁵ Some authors also point out that, unlike rules, principles have persuasive rather than binding authority.⁴⁶

- 19 Robert Alexy begins with Dworkin's analysis, but argues that the key to the distinction between rules and principles is that principles are optimization requirements. In other words, principles require that "something be realized to the greatest extent possible given the legal and factual possibilities." Rules, by contrast, are always either fulfilled or not. Alexy insists that the distinction is not one of degree, but of quality. In his words, a principle posits an "ideal-ought." Its weight in concrete cases is determined by its background justification as it applies to the given context. It is trumped whenever some competing principle has greater weight in the case at hand. Rules, by contrast, are not necessarily set aside just because their background justifications do not hold up in the context of a particular case.⁴⁷
- 20 Due to this plenitude of diverse and even contrasting concepts of principles and rules, legal theory is, in the words of scholar Armin von Bogdandy, "not very helpful" in the search for a distinct concept of principles.⁴⁸ The baseline of the theoretical debate merely seems to be that principles are less specific than rules. Furthermore, adapting theoretical concepts developed for domestic law to international law obviously causes some difficulties. Apart from the question of whether or not a distinction between principles and rules has inherent merit,⁴⁹ a conceptually ambitious dichotomy of principles

⁴⁵ See Petersen, "Customary Law Without Custom?" 288. However, other authors regard principles as abstract but still conduct-related. See, e.g., Jouannet, "L'ambivalence des principes généraux," 5 ("on prend le principe général comme une norme qui indique un modèle abstrait de comportement").

⁴⁶ See, e.g., Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010), 167.

⁴⁷ Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2002), 47-48, 58-59.

⁴⁸ Armin von Bogdandy, "General Principles of International Public Authority: Sketching a Research Field," 9 *German Law Journal* 1909 (2008), 1910.

⁴⁹ See András Jakab, "Re-Defining Principles as 'Important Rules': A Critique of Robert Alexy," in *On the Nature of Legal Principles*, edited by Martin Borowski (Baden-Baden: Steiner, 2010), 147-51, 159 (asserting that the concept of principles logically distinct from rules can be regarded as "simply superfluous"; according to Jakab, the designation as "principle" underscores importance, but it does not imply anything about logical structure).

and rules was not apparently in the minds of the drafters of Article 38 of the ICJ Statute.⁵⁰ International judicial or arbitral decisions have not elaborated on such a dichotomy either. Rather, international courts and tribunals use the term “principles” in order to denote the general character and fundamental importance of the norm in question.⁵¹

- 21 Scholars of international law generally regard general principles of law as a vague and imprecise notion.⁵² Michael Akehurst, for example, regards general principles of international law as broader principles of international law which are principles of customary law or derived from other sources.⁵³ According to Ian Brownlie’s treatise *Principles of Public International Law*, a “rigid categorization of sources is inappropriate.” Brownlie regards legal principles primarily as “abstractions.”⁵⁴ In the view of the Committee on the Formation of Customary (General) International Law of the ILA, “principles operate at a higher level of generality than rules.”⁵⁵ However, in light of the inevitable semantic indeterminacy of any legal norm, it remains doubtful whether a norm being “general” or “specific” is a sufficiently precise criterion for distinguishing legal principles from legal rules.⁵⁶
- 22 In the field of international law, it seems more promising to analyze whether judicial arguments based on norm-type principles differ from other types of arguments. Turning

⁵⁰ See, e.g., Lord Phillimore, *Procès-Verbaux*, 335 (stating that by “general principles of law” he had intended to mean “maxims of law”).

⁵¹ On this point, see Gaja, “General Principles of Law,” para. 31.

⁵² See Virally, “Le rôle des ‘principes’ dans le développement du droit international,” in *Recueil d’études de droit international: En hommage à Paul Guggenheim*, edited by Pierre Lalive and Jacques Freymond (Genève: Tribune de Genève, 1968), 531.

⁵³ Akehurst, “The Hierarchy of the Sources of International Law,” 279. Akehurst contrasts general principles of international law with general principles of law borrowed from municipal law as mentioned in Article 38 of the Statute. See also Virally, “The Sources of International Law,” 144-45 (referring to “international constitutional law”).

⁵⁴ James Crawford, *Brownlie’s Principles of Public International Law* (Oxford: Oxford University Press, 8th ed. 2012), 37.

⁵⁵ International Law Association, London Conference (2000), Committee on the Formation of Customary (General) International Law, “Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law,” 69, § 2(i), Commentary.

⁵⁶ Martti Koskeniemi, “General Principles: Reflections on Constructivist Thinking in International Law,” 18

away from an assumed ontological distinction between rules and principles therefore implies turning instead to “law in action” and to, in the words of legal scholar Ingo Venzke, the “continuous communicative processes of speaking and using the law.”⁵⁷ From this point of view, principles can be distinguished on the bases of the distinct ways in which they are used in legal argumentation.

- 23 Writing in 1985, Martti Koskenniemi approached the topic of general principles by asking “what do lawyers mean?” when they have recourse to general principles. Koskenniemi distinguishes two views on legal principles in international law. According to the first view, principles bear a distinct normative function (“normative theory constructivism”). According to the second view, principles describe and organize the system of individual norms and are deprived of any independent normative content (“descriptive theory constructivism”). Koskenniemi adds, however, that considering these two views as fundamentally different would be an error: “Constructivist activity in both practice and theory consists in investing the law with evaluative and goal-rational meanings and thus carries normative consequences.”⁵⁸
- 24 Scholars who have analyzed international judicial practice more recently point to several particular functions of principles in international legal argument.⁵⁹ For example, they have noted that principles, in addition to filling in “gaps” in legal rules, guide the interpretation of other international norms. They rationalize, structure, and allocate burdens of justification in legal discourse.⁶⁰ In particular, principles guide the

Oikeustiede-Jurisprudentia 121 (1985), 131.

⁵⁷ Ingo Venzke, “Contemporary Theories and International Law-Making,” in *Research Handbook on the Theory and Practice of International Law-Making*, edited by Catharina Maria Brölmann and Yannik Radi (Cheltenham, U.K.: Elgar, 2014, also available as ACIL Research Paper 2013-23), 3.

⁵⁸ Koskenniemi, “General Principles,” 122, 128.

⁵⁹ For an overview, see Wolfrum, “General International Law,” paras. 56-63 (principles may serve as a tool in the interpretation of positive legal norms; they are mechanisms for the progressive development of international law and serve as a substitute for necessary amendments; they may also serve as mechanisms to bridge different legal regimes and thus counterbalance the fragmentation of international law); Niels Petersen, “Rational Choice or Deliberation? Customary International Law between Coordination and Constitutionalization,” 165 *Journal of Institutional and Theoretical Economics* 71 (2009), 79-82 (principles are supposed to rationalize and to structure the legal discourse, and they have an evolutionary function shaping international relations by guaranteeing progressive compliance).

⁶⁰ See Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer*

interpretation of other norms and make explicit certain value choices and interests. Recourse to principles also serves to cope with the fragmentation of international law by building bridges among different branches of international law.⁶¹ The best example for this function still is the WTO Appellate Body's reference to the principle of sustainable development, which has opened the door to taking into consideration the full substance of what has been subsumed under the principle of sustainable development.⁶² Furthermore, due to their abstractness, principles are open to new developments and can serve an evolutionary function and allow for the progressive development of international law.

2.3. Simplification Strategies

- 25 How then do the international legal source of "general principles of law recognized by civilized nations" and the philosophical norm type of "principles" interrelate? Theoretically, the intersection of principles as a source and as a norm type establishes three categories of general principles of law. The first category comprises those general principles of law that are not "principles" within the meaning of legal theory. This category seems to exist only on the basis of a strict norm-type concept of principles such as that of Alexy, who conceives principles as optimization requirements, ontologically different from rules. The above-mentioned principles concerning diplomatic and consular relations provide a relevant example.
- 26 The second category comprises those general principles of law that are principles in a double sense, that is, that are a source of international law and at the same time a norm type. Arguably, unwritten international human rights norms provide an example of this

idealistischen Völkerrechtslehre (Berlin: Springer, 2012), 670-73.

⁶¹ With regard to the amelioration of fragmentation, see Thomas Kleinlein, "Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law," 12 *German Law Journal* 1141-74 (2011).

⁶² WTO United States—Import Prohibition of Certain Shrimp and Shrimp Products (12 October 1998), WT/DS58/AB/R; see also Wolfrum, "General International Law," para. 63.

category. International human rights qualify as optimization requirements just as domestic fundamental rights in Alexy's theory.⁶³

- 27 The third category of general principles of law comprises those norm-type principles that cannot be related to the source of principles in Article 38(1)(c) of the Statute, but can be based on state practice, in other words, that qualify as customary international legal norms within the meaning of Article 38(1)(b) of the Statute. This category, in turn, is particularly relevant if a narrow understanding of the source of general principles, which exclusively refers to principles developed *in foro domestico*, and a broad understanding of customary international law, is adopted. On this conceptual basis, unwritten international human rights norms would arguably fall into this category.
- 28 For reasons of conceptual clarity, international law scholarship has developed two "simplification strategies" to deal with the different meanings of "principle." The first strategy is simply to unite general principles of law and customary international law into one indistinguishable source of international law. The second strategy is to link the source of general principles to the norm type of principles. I discuss these strategies in the following two sections.

2.3.1. The Strategy of Uniting Customary International Law and General Principles of International Law

- 29 As indicated above, distinguishing general principles from customary international law becomes particularly difficult under broad understandings of customary international law. The so-called "modern" approaches derive custom by a deductive process beginning with general statements of rules rather than particular instances of practice, and abandon the state practice requirement.⁶⁴ In the end, this leads to "customary law without custom."⁶⁵ If the theory of customary international law emphasizes *opinio juris*

⁶³ Kleinlein, *Konstitutionalisierung im Völkerrecht*, 667-68.

⁶⁴ See Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," 95 *American Journal of International Law* 757 (2001), 758.

⁶⁵ Petersen, "Customary Law Without Custom?" 275 (claiming, on the basis of a distinction between legal rules and principles, that state practice is dispensable for establishing legal principles). See also Lepard, *Customary International Law*, 166 (suggesting an identity between many general principles of

over state practice, the barrier between customary international law and general principles originating in international relations themselves becomes “artificial” or even “illusory.”⁶⁶ The normativity of both customary international law and general principles alike depends foremost on a “voluntary element”⁶⁷ either called *opinio juris* or recognition. This coincident voluntary element is already reflected in the wording of Article 38(1) of the Statute, which demands that international custom be “accepted as law” and that general principles be “recognized by civilized nations.”

- 30 Accordingly, many scholars cannot see additional value in distinguishing customary international law and general principles as two sources of international law.⁶⁸ At the least, they regard it as difficult to draw a dividing line between the concepts.⁶⁹ Rather, they merge both sources into one category. On this basis, general principles are, in the words of Jan Klabbers, a “sort of ‘custom lite’”; they are “rules which are perhaps a bit more ‘necessary’ . . . than other rules, and for which therefore there would apply less strict demands on state practice and *opinio juris*.”⁷⁰ Framed like this, an understanding of general principles as a form of customary law resembles the so-called “sliding scale” approach to customary international law, which advocates a more flexible relationship

international law and customary international law).

⁶⁶ Lepard, *Customary International Law*, 163.

⁶⁷ Wolfrum, “General International Law,” para. 54.

⁶⁸ For scholars adopting this view, see Cheng, *General Principles of Law*, 23-24, with references (“international custom or customary international law, understood in a broad sense, may include all that is unwritten in international law, *i.e.*, both custom and general principles of law”); Lord Phillimore, *Procès-Verbaux*, 311 (pointing out that “the rules of international law as recognized by the legal conscience of civilised nations” and “international jurisprudence as a means for the application and development of law” both deal with international custom); Restatement (Third), § 102, reporters’ note, para. 7 (“references to ‘general principles of international law’ ordinarily mean principles accepted as customary international law whether or not they derive from principles common to national legal systems”); Lepard, *Customary International Law*, 166 (“It is, in fact, appropriate to treat a general principle of international law as also a norm of customary international law, so long as states generally believe that it is desirable now or in the near future to recognize the principle as an authoritative legal principle.”).

⁶⁹ See, e.g., Theodor C. van Boven, “Survey of the Positive International Law of Human Rights,” in *The International Dimensions of Human Rights*, edited by Karel Vasak and Philip G. Alston, vol. 1 (Westport, Conn.: Greenwood Press, 1982), 107 (relating to the relationship between customary law and general principles in international human rights law); Degan, *Sources of International Law*, 8; Rein Müllerson, “On the Nature and Scope of Customary International Law,” 2 *Austrian Review of International and European Law* 341 (1997), 354-55.

⁷⁰ Jan Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013), 35.

between state practice and *opinio juris* and, in particular, allows for a strong *opinio juris* to compensate for lack of consistent state practice.⁷¹ Even with regard to general principles developed in municipal law, the distinctiveness of the category has been questioned, because these domestic law principles may easily give rise to customary norms under a broad definition of customary law that focuses on *opinio juris*, which may be evidenced by the appearance of these principles in domestic law.⁷²

- 31 In my view, the merging of customary international law and general principles raises three problems. First, it is difficult to reconcile with Article 38 of the Statute. Article 38(1)(c) of the ICJ Statute would be rendered superfluous if it does not refer to a separate category of norms. Second, this unitary view of custom and principles often implies an understanding of customary international law that is inspired by the English common law. These Anglo-American roots of this approach might hamper its universal acceptance. It is probably not simple coincidence that it was Lord Phillimore, the United Kingdom member of the Advisory Committee of Jurists for the Establishment of a Permanent Court of International Justice, who argued that general principles came within the scope of customary law.⁷³ According to this Anglo-American understanding, customary international law is the product of legal or moral principles or judicial law making case-by-case rather than being created primarily through state practice and

⁷¹ See, e.g., Frederic L. Kirgis, Jr., "Custom on a Sliding Scale," 81 *American Journal of International Law* 146 (1987), 149 (explaining that on a "sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio juris* is required. At the other end of the scale, a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule."); John Tasioulas, "In Defence of Relative Normativity: Communitarian Values and the *Nicaragua* Case," 16 *Oxford Journal of Legal Studies* 85 (1996) (investigating two conceptions of customary international law, the first being of a positivistic variety and drawing on a statist conception of international society, and the second manifesting a natural law orientation and finding its rationale in a communitarian account of that society). Compare Müllerson, "On the Nature and Scope," 352-56; Roberts, "Traditional and Modern Approaches," 770-74.

⁷² See, e.g., Lepard, *Customary International Law*, 165 ("if states believe that certain general principles of national law should create binding or persuasive obligations for all states, now or in the near future, then they may also give rise to customary norms").

⁷³ *Procès-Verbaux*, 295, 311, and 316 (stating that "all the principles of common law are applicable to international affairs"). In this regard, Lepard explicitly refers to Lord Phillimore. See Lepard, *Customary International Law*, 163. See also Bos, "The Recognized Manifestations of International Law," 36. Further, see Waldock, "General Course on Public International Law," chapters 3 and 4, 39-69 (stating that international custom and general principles are "the 'common law' of the international community").

state belief.⁷⁴ Still, the affinity of the unitary view with the common law in itself is certainly not an insurmountable obstacle to adopting this view.⁷⁵

32 However, third, a certain tension arises between the unitary view of custom and principles and actual international judicial practice. For example, the ICJ relatively frequently refers to “principles” or “general principles,” without further clarification of their status.⁷⁶ One explanation for this judicial practice on the part of the ICJ is that it has adopted a narrow definition of customary international law in Article 38(1)(b) of the Statute that requires both *opinio juris* and consistent state practice.⁷⁷ If it finds state practice in support of a norm to be insufficient, the ICJ seems to avoid characterizing the norm as customary international law and instead refers to it as a principle.⁷⁸ This move, however, presupposes a conceptual distinction between customary international law and general principles of law, suggesting that the court is rejecting a merger of customary law and general principles.

2.3.2. The Strategy of Linking the Source to the Norm Type

33 Another approach, proposed by legal scholar Niels Petersen, links the source of general principles to the norm type of principles developed by Robert Alexy, as described above.⁷⁹ Petersen suggests treating these norm-type principles, which Alexy conceives

⁷⁴ Compare Charlesworth, “Law-Making and Sources,” 192 (noting that customary international law is sometimes presented as similar to the “common law”; according to Charlesworth, however, the analogy is imperfect, since customary international law is created primarily through evidence of state practice and state belief, rather than being an apparent product of any legal or moral principle or of judicial lawmaking case-by-case.).

⁷⁵ Consider, for example, the “continental” perspective of Baron Deschamps of Belgium, who, during the drafting of the Statute of the PCIJ, argued that customary law resulted “entirely from the constant expression of the legal convictions and the needs of the nations in their mutual intercourse,” implying an emphasis on *opinio juris* and the flexible evolution of customary norms. See “Speech by Baron Deschamps on the Rules of Law to be Applied,” *Procès-Verbaux*, 322.

⁷⁶ For references, see Pellet, “Article 38,” para. 248.

⁷⁷ See Gaja, “General Principles of Law,” para. 18.

⁷⁸ Jan Wouters and Cedric Ryngaert, “Impact on the Process of the Formation of Customary International Law,” in *The Impact of Human Rights Law on General International Law*, edited by Menno T. Kamminga and Martin Scheinin (Oxford and New York: Oxford University Press, 2009), 111-32.

⁷⁹ Petersen, “Customary Law Without Custom?” 286 (referring to Alexy, *A Theory of Constitutional Rights*, 47-48). Petersen thereby modifies a proposal of Stefan Kadelbach and Thomas Kleinlein. Kadelbach and Kleinlein propose to conceive norms of international constitutional law both as general principles in

as “optimization requirements,” as general principles of law within the meaning of Article 38(1)(c) of the Statute.⁸⁰ Petersen regards rules, by contrast, as legal norms that relate to conduct. He considers legal rules to be part of customary international law and not general principles of law, and believes that they must be determined according to the traditional inductive approach of custom, requiring both *opinio juris* and state practice.⁸¹

- 34 The problem with this proposal is that it utilizes the very narrow concept of principles advocated by Robert Alexy. Aside from all the controversies surrounding Alexy’s concept of principles as optimization requirements,⁸² Petersen’s proposal is of explanatory value only with regard to certain fields of international law, and in particular international human rights, an international right to democracy, and international environmental law. Indeed, certain constitutional principles in international law can be considered simultaneously as general principles in terms of the doctrine of sources and as principles in terms of legal theory.⁸³ Still, it is obvious that not all principles covered by Article 38(1)(c) of the Statute are optimization requirements as narrowly understood by Alexy. They do not coincide necessarily. For example, the principle of good faith cannot be explained satisfactorily as an optimization requirement.⁸⁴ Good faith serves various functions in the interpretation of international treaties and beyond, which cannot be reduced to the structure of optimization requirements.⁸⁵
- 35 The main deficit of both “simplification strategies,” however, is that they cannot explain the specific jurisgenerative processes leading to the formation of general principles.

terms of the doctrine of sources (Article 38(1)(c) of the Statute) and as principles in terms of legal theory. See Stefan Kadelbach and Thomas Kleinlein, “Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht,” 44 *Archiv des Völkerrechts* 235 (2006), 235, 255-65.

⁸⁰ Petersen, “Customary Law Without Custom?” 306-307.

⁸¹ *Ibid.*, 310.

⁸² See, e.g., Jakab, “Re-Defining Principles as ‘Important Rules’.”

⁸³ See Kadelbach and Kleinlein, “Überstaatliches Verfassungsrecht,” 255-65; Kadelbach and Kleinlein, “International Law – a Constitution for Mankind?” 50 *German Yearbook of International Law* 303 (2007), 330-47; Kleinlein, *Konstitutionalisierung im Völkerrecht*, 617-81.

⁸⁴ On the principle of good faith, see Robert Kolb, “Principles as Sources of International Law (With Special Reference to Good Faith),” 53 *Netherlands International Law Review* 1 (2006).

⁸⁵ See Markus Kotzur, “Good Faith (Bona Fide),” in *Max Planck Encyclopedia of Public International Law*, paras. 19-24.

This critique certainly implies a *petitio principii* with regard to the first “simplification strategy”: Proponents of this approach beg the question by uniting customary international law and general principles precisely because they do not regard general principles as an independent source. By contrast, the fundamental proposition of the second “simplification strategy” is that the practice requirement is dispensable with regard to general principles. The reason provided for this dispensability of state practice is simply that principles are not conduct-related, but rather value-related. Depending on one’s understanding of principles, this may be correct. However, such an argument avoids the question why – in the absence of state practice – principles can have any normative force at all, either binding or persuasive. It thus is unable to explain general principles as a “source” of international law. Analyzing general principles as a source, however, is important since their normativity and legitimacy – like the normativity and legitimacy of any norm of international law – depend on the processes by which they are created.⁸⁶

2.4. *Developing a New Approach to the Normativity of General Principles: Changing Identities and Argumentative Self-Entrapment*

- 36 The problems with both strategies described above are consistent with the general weaknesses in the doctrine of sources. Legal scholar Hilary Charlesworth explains these weaknesses well in the following terms:
- 37 Why does this list [in Article 38(1) of the Statute] exercise such sway? Part of the appeal of article 38(1) is that recourse to it allows international lawyers to sidestep complex debates about the function of international law and the relative legitimacies of state consent and claims of justice. It is a pithy mantra that offers a quasi-scientific formula for practitioners of international law, postponing (possibly indefinitely) discussion of the politics of the designated sources. The formal nature of article 38(1)

⁸⁶ On this point, see Besson, “Theorizing the Sources of International Law,” 164, 173-78. D’Argent describes the reluctance of the ICJ to rely on “principles” that are not customary international law. This reluctance may be due to the uncertainty about the processes by which unwritten norms of international law are created beyond customary international law. See d’Argent, “Les principes généraux à la Cour internationale de Justice,” 118-19.

obscures the fact that international law is generated by a multi-layered process of interactions, instruments, pressures and principles.⁸⁷

- 38 In particular, any assertion of a general principle of law that is not derived from the law *in foro domestico*, but arises within the international legal order itself, is in danger of being a tautology. The assertion is tautological to the extent that international law as such cannot be conceived of as a source of international law unless it refers to one of the formally recognized processes of international lawmaking, such as treaty law or state practice accepted as law (in other words, customary international law).⁸⁸ Compared to the traditional doctrine of customary international law, general principles are the weaker limb in this regard.⁸⁹ Requiring both *opinio juris* and state practice, customary international law “at least benefits from some methodological objectivity and wide acceptance of the process.”⁹⁰
- 39 In reality, the jurisprudence of international courts and tribunals, resolutions of international organizations, and policy statements of international conferences all contribute to the recognition of a general principle. This is manifest, for example, in the field of environmental law, and in this context in principles like the principle of good neighbourliness, the principle of sustainable development, and the preventive principle.⁹¹ Accordingly, simply explaining the source of general principles as “judicial law” is an unsatisfactory way to avoid a tautology, which does not explain much. Clearly, a judge does more than merely identify a pre-existing principle, and thereby exercises a jurisgenerative function.⁹²
- 40 To justify and legitimize this jurisgenerative function in relation to an asserted general principle of law, however, a judge will feel that it is not enough to deduce a general

⁸⁷ Charlesworth, “Law-Making and Sources,” 189.

⁸⁸ See Besson, “General Principles in International Law,” 41-42.

⁸⁹ See Waldock, “General Course on Public International Law,” 39-40.

⁹⁰ Meron, “International Law in the Age of Human Rights,” 393-94.

⁹¹ See Wolfrum, “General International Law,” paras. 54-55.

⁹² Besson, “General Principles in International Law,” 42.

principle, but that she needs to refer to some sort of consent or recognition – a voluntary element – that backs the respective general principle. Therefore, it is crucial to pay close attention to the processes to which we refer when we identify a general principle. Arguably, these jurisgenerative processes differ from the formation of customary international law. I now endeavor to develop an account of these processes, stressing the meaning of reciprocity in international law.

2.4.1. The Meaning of Reciprocity

- 41 According to the traditional, narrow understanding of customary international law, the requirement of state practice helps to ensure that customary international law is “workable.” It is, in the words of the ABILA’s Committee on the Formation of Customary International Law, a “guard against the impact of hypocrisy, as well as temporary posturing and other transitory phenomena,”⁹³ and therefore has a stabilizing function. This proposition, however, is only valid if state practice is based on reciprocity.
- 42 As Bruno Simma points out, expectations of reciprocity are the paramount rationale for the emergence of new customary rules. They motivate certain actions and omissions on the part of the actors involved, and may also moderate the claims put forward by a state that initiates a lawmaking process. In many fields, the anticipation of reciprocal concessions and reciprocal restraints may stimulate auto-limitation and thus account for the growth of general and concordant practice eventually accepted as law. States refrain from certain actions because they expect other states to behave accordingly in a similar situation in the future. Expectations of reciprocity also facilitate the acceptance of certain claims by those states that find themselves in a similar situation and are interested, sooner or later, in making the same demands.⁹⁴ Constant interactions, claims, and tolerances as to what sovereign states can do to and with each other should therefore be regarded as the “motor” leading to the formation of customary international law.

⁹³ Committee on the Formation of Customary International Law, “The Role of State Practice,” 112-13.

⁹⁴ See Bruno Simma, “Reciprocity,” in *Max Planck Encyclopedia of Public International Law*, para. 3; see also Bruno Simma, *Das Reziprozitätselement in der Entstehung des Völkergewohnheitsrechts* (München and Salzburg: Fink, 1970).

- 43 Thus, game theory⁹⁵ and rational choice institutionalism,⁹⁶ in which the rational self-interest of actors takes center stage, already explain a great deal about the emergence of norms on the basis of the cooperative strategic interaction of states. It is, however, important to take into account that norms of customary law are not created by reciprocal interaction alone. Their normative force can only be explained when the relevant actors also develop a corresponding *opinio juris*.⁹⁷
- 44 In the absence of expectations of reciprocity, however, reliance on actual state practice will not be able to fulfill the described stabilizing function of customary norms.⁹⁸ There are some issue areas in which states normally lack expectations of reciprocal behavior by other states. For example, the performance of most substantive human rights obligations lacks the necessary element of reciprocity and cross-border state interaction. Human rights obligations do not “run between states,” but operate on the domestic level.⁹⁹ For this reason, Simma and Alston proposed to use general principles as opposed to customary law to ground international human rights law in their intriguing article on “The Sources of Human Rights Law.”¹⁰⁰ The absence of reciprocity also

⁹⁵ On game theory and customary international law, see, e.g., Jack L. Goldsmith and Eric A. Posner, “A Theory of Customary International Law,” 66 *University of Chicago Law Review* 1113 (1999); Edward T. Swaine, “Rational Custom,” 52 *Duke Law Journal* 559 (2002); George Norman and Joel P. Trachtman, “The Customary International Law Game,” 99 *American Journal of International Law* 541 (2005); Andrew T. Guzman, “Saving Customary International Law,” 27 *Michigan Journal of International Law* 115 (2005). For overviews, see Petersen, “Rational Choice or Deliberation?” 72-77; Lepard, *Customary International Law*, 59-73.

⁹⁶ See Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984) (asserting that, after the erosion of American hegemony, international regimes facilitate decentralized cooperation among egoistic actors); Robert Axelrod and Robert O. Keohane, “Achieving Cooperation Under Anarchy: Strategies and Institutions,” in *Cooperation under Anarchy*, edited by Kenneth A. Oye (Princeton: Princeton University Press, 1986), 226 (arguing that a contextual approach to strategy helps to forge the links between game-theoretic arguments and theories about international regimes); Robert O. Keohane, “International Institutions: Two Approaches,” in *International Institutions and State Power*, edited by Robert O. Keohane (Boulder, Colo.: Westview Press, 1989), 158 (contrasting “rationalistic” and “reflective” approaches to international institutions); Robert Axelrod, *The Complexity of Cooperation: Agent-Based Models of Competition and Collaboration* (Princeton: Princeton University Press, 1997) (applying complexity theory and computer modeling).

⁹⁷ See Simma, *Das Reziprozitätselement*, 63-64.

⁹⁸ See Petersen, “Customary Law Without Custom?” 301. See also Kleinlein, *Konstitutionalisierung im Völkerrecht*, 499-508.

⁹⁹ See Simma and Alston, “The Sources of Human Rights Law,” 99.

¹⁰⁰ *Ibid.*, 102-106.

characterizes other issue areas governed by unwritten international law. For example, an international principle that demands state governments be democratically elected, often understood as customary international law, can barely be based on reciprocity. Like human rights, such a principle mainly operates on the domestic plane. Furthermore, structural reciprocity is lacking where an unwritten legal norm protects a community interest or a common good like international peace and security, or where it defines common values.¹⁰¹ In these areas, state practice does not seem to be a reliable requirement for the emergence of unwritten law since, by definition, the meaning of practice actually transcends the inter-state dimension. Furthermore, reciprocity is notoriously absent in the relations between international organizations and their member states. Therefore, a customary law of international organizations also seems to necessitate a specific theoretical underpinning.¹⁰²

- 45 I argue that the conceptual differentiation between customary international law and general principles of law should follow the distinction between situations dominated by factual reciprocity (which justify customary norms) and situations where such factual reciprocity is absent (which justify general principles). On this account of the distinction between customary law and general principles, it is not important to distinguish “principles” from “rules,” or norms *in foro domestico* from norms arising in international relations.
- 46 Admittedly, the opposition between issue areas characterized by reciprocal interaction and those characterized by non-reciprocal action does not create a very clear-cut “line of demarcation.” For example, reciprocity is not entirely absent in the formation of unwritten international human rights law. As Simma and Alston have shown, a *droit de regard*, which entitles the United Nations to respond to gross violations of human rights,

¹⁰¹ For a typology of community interests protected by international law, see Isabel Feichtner, “Community Interest,” in *Max Planck Encyclopedia of Public International Law*, paras. 13-25. See also Niels Petersen, “The Role of Consent and Uncertainty in the Formation of Customary International Law,” in this volume, 4.3 (distinguishing between common goods, coordination problems, and ethical values).

¹⁰² See Cornelia Janik, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards: Eine rechtsquellentheoretische Untersuchung am Beispiel der Vereinten Nationen, der Weltbank und des Internationalen Währungsfonds* (Tübingen: Mohr Siebeck, 2012), 431-88.

can be based on reciprocal state practice. For this argument, Simma and Alston refer to the reactions by target governments to the application of the Economic and Social Council Resolution 1503 procedure on handling complaints of human rights violations: By virtue of their regular participation, target governments also tacitly acknowledge that any alleged gross violations of human rights norms require some response.¹⁰³ The fact that reciprocity can be relatively, though not totally, absent in some cases, however, does not affect the merits of the conceptual distinction between customary international law and general principles. Rather, the content of customary law and general principles will overlap or be closely interwoven in such situations.

- 47 It is also somehow unconventional to draw the line between customary international law and general principles based on the criterion of reciprocity because it is easy to find examples of commonly recognized customary norms that are not based on reciprocity. For the limited purposes of this chapter, it is important to draw attention to the role of reciprocity in the formation of customary international law, and to the consequences of its absence.

2.4.2. A Constructivist Approach to Principles in the Absence of Reciprocity

- 48 Bearing these caveats in mind, turning to general principles in the absence of reciprocal state interaction is appropriate. State practice is not only less likely to be consistent in the absence of reciprocity; it is also not a reliable criterion for establishing normative expectations based on unwritten law if not based on reciprocity. As the Committee on the Formation of Customary International Law of the ABILA has noted, “the concept of a ‘recognized’ general principle seems to conform more closely than the concept of ‘custom’ to the situation where a norm is widely accepted even though widely violated.”¹⁰⁴

¹⁰³ Simma and Alston, “The Sources of Human Rights Law,” 98-99.

¹⁰⁴ Committee on the Formation of Customary International Law, “The Role of State Practice,” 112 (giving prohibitions on the use of force as an example). By contrast, Meron suggests that general principles should also be supported by “practice.” Meron, “International Law in the Age of Human Rights,” 393. See also Paul Guggenheim, *Traité de Droit international public: Avec mention de la pratique internationale et suisse*, vol. 1 (Genève: Georg, 1953), 152 (“les principes généraux du droit reposent soit sur le droit conventionnel, soit sur le droit coutumier”) (“the general principles of law are based either on conventional

- 49 Accordingly, I believe that the generation of general principles can be explained as a distinct process that occurs in the absence of reciprocal state interaction.¹⁰⁵ As already pointed out, it is of course a difficult task to determine in a methodologically sound manner whether a general principle is generally recognized at the international level or is “inherent” in the international legal community.¹⁰⁶ However, I argue that recognition of general principles should be based, above all, on a process of changing identities and of “argumentative self-entrapment”¹⁰⁷ in which states and other international actors are involved.
- 50 My approach to defining general principles and their relationship to customary law is based on “constructivist” approaches in international relations theory. Both sophisticated rational choice theory and moderate social constructivism theorize different modes of social interaction that are necessary to explain significant phenomena.¹⁰⁸ Correspondingly, it becomes possible to refer both to rationalism as the logic behind customary international law and to constructivism as the explanation for the emergence of general principles of law.
- 51 Constructivism points to the constitutive role of ideas instead of pre-defined interests in international relations.¹⁰⁹ Constructivist scholars claim that interests are not simply

[treaty] law or on customary law”).

¹⁰⁵ For a more elaborate version of the argument, see Kleinlein, *Konstitutionalisierung im Völkerrecht*, 636-61 (making special reference to constitutional principles).

¹⁰⁶ See, e.g., Anzilotti, *Cours de droit international*, 117-18 (noting that general principles are “acceptés tacitement dans l’ordre international” (“tacitly accepted in the international order”); with regard to principles that are exclusive to domestic legal orders and not recognized in the international legal order, Anzilotti perceives the international judge as a legislator).

¹⁰⁷ Thomas Risse uses this phrase. See Thomas Risse, “Let’s Argue!’: Communicative Action in World Politics,” 54 *International Organization* 1 (2000), 23.

¹⁰⁸ See *ibid.*, 12.

¹⁰⁹ See Nicholas G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia, S.C.: University of South Carolina Press, 1989) (Onuf actually coined the concept of “constructivism” in international relations); Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989) (arguing that norms influence choices not by being causes for actions, but by providing reasons); Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) (developing a theory of the international system as a social construction).

“given” and then rationally pursued. Rather, a major factor in interest formation by actors, such as states, is the social construction of actors’ identities. Through interaction and communication, actors generate shared knowledge and shared understandings and, accordingly, are socialized. Ends of social interaction are not predetermined, but can be discovered and learned. Socially shared ideas not only become the basis for subsequent interactions and thus regulate behavior, but also constitute the identity of actors. Collective norms and understandings constitute the social identities of actors and also define the basic “rules of the game” in which actors find themselves entrapped in their interactions.¹¹⁰ For example, human rights norms increasingly define a “civilized state” in the modern world. Furthermore, it is difficult to find an international institution that would simply repudiate the demand for an embedding of its activity in the rule of law or in good governance.¹¹¹ Arguably, we can regard these phenomena as an acknowledgement by states and international organizations of general principles of law.

52 Social constructivists emphasize the role of a “logic of appropriateness,” which encompasses two different modes of social action and interaction. On the one hand, actors regularly comply with norms that they have thoroughly internalized and thus take for granted. On the other hand, rule-guided behavior is a conscious process whereby actors figure out the situation in which they act, apply the appropriate norm, or choose among conflicting norms.¹¹² By these processes, international norms are formed and construed in interaction. These norms are continuously evolving.¹¹³

53 Constructivist scholars also have described a norm “life cycle” that consists of a three-stage process. The characteristic mechanism of the first stage, “norm emergence,” is

¹¹⁰ Risse, “Let’s Argue!,” 5.

¹¹¹ With regard to the rule of law and good governance, see von Bogdandy, “General Principles of International Public Authority,” 1926.

¹¹² See James G. March and Johan P. Olsen, “The Institutional Dynamics of International Political Orders,” 52 *International Organization* 943 (1998), 943; Risse, “Let’s Argue!,” 4-6.

¹¹³ See Martha Finnemore, *National Interests in International Society* (Ithaca, N.Y.: Cornell University Press, 1996), 5-7 (drawing on insights from sociological institutionalism to develop a systemic approach to the changing preferences and behavior of states by investigating an international structure not of power, but of meaning and social value).

persuasion by “norm entrepreneurs.” Norm entrepreneurs – individuals, organizational platforms, or social movements – attempt to convince a critical mass of states to embrace new norms. The second stage, a “norm cascade,” involves broad norm acceptance by states and international organizations, and the third stage involves norm internalization.

- 54 The second stage is characterized by a dynamic of imitation as those states that are the vanguard of new norms or “norm leaders” attempt to socialize other states to become “norm followers.” Norm cascades are facilitated by a combination of pressure on states to conform to a new norm, a desire by states to enhance their international legitimacy, and a desire of state leaders to enhance their self-esteem. At the far end of the evolution of a norm cascade, norm internalization occurs; norms acquire a “taken for granted” quality and are no longer a matter of broad public debate.¹¹⁴
- 55 Admittedly, constructivists generally focus on norms as such and do not pay special attention to the distinction between legal and social norms. Nevertheless, I believe their insights help explain the evolution of general principles of law. In particular, I argue that in the absence of reciprocity as a reason for norm generation, the changing identities and argumentative self-entrapment of international actors are the driving forces behind the emergence of general principles.¹¹⁵

2.4.3. Changing Identities and Argumentative Self-Entrapment as the Driving Forces Behind the Emergence of General Principles of Law

- 56 I claim that constructivism can help international lawyers to understand what “recognition” of a general principle on the international plane means in the absence of reciprocity. These norms emerge in discourses that take place in international forums. They are not based on reciprocity, but on ideational factors. Identity changes seem

¹¹⁴ On the norm life cycle, see generally Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” 52 *International Organization* 895 (1998).

¹¹⁵ For a strong account of how international law enables and constrains international politics in different fields, based, *inter alia*, on constructivism, see Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge and New York: Cambridge University Press, 2010).

particularly plausible in cases where reciprocity is relatively absent because the respective norms mostly operate on the domestic level. If unwritten international law is essentially not of an *inter*-state character, but refers to the *internal* situation within the state, it specifies the design of the domestic legal order. Therefore, despite all necessary caveats, this internalization labeled “identity change” seems to be the most reliable basis for normative expectations.

- 57 International discourses among states in international forums which lead to the emergence of unwritten legal norms may be dominated by certain states. These discourses frame the image of a legitimate state government. Other states will not openly resist or openly express opposition in many situations because they might well have an interest in participating in these discourses to be perceived as legitimate actors, rather than staying outside or seeking to undermine the game. They might seek to minimize the impact of their commitments on their domestic orders, but will be careful in order to avoid reputational costs, and may even try to portray themselves as making normative “progress” in order to strengthen their legitimacy. Moreover, states may have an interest in the benefits of coordination and cooperation.
- 58 This change of “identity” is furthered and stabilized by nongovernmental organizations and various actors of civil society that attach themselves to various international institutions and their policies and shape public debates and perceptions. A further factor is the participation of public officials in the various networks and regimes. If we assume that international discourse between states, at least in certain settings, requires a minimal degree of argumentative consistency, states will be entrapped by their own statements. In some cases, states might at first only create an “identity image” to enhance their reputation among other states. In the long run, however, their commitments can lead to a real change of identity. Therefore, even hypocrisy may develop a civilizing force.¹¹⁶ As noted earlier, we might refer to this latter process as “argumentative self-entrapment.”

¹¹⁶ See, e.g., Jon Elster, “Strategic Uses of Argument,” in *Barriers to Conflict Resolution*, edited by Kenneth J. Arrow et al. (New York: Norton, 1995), 250 et seq.

- 59 The processes of identity change and argumentative self-entrapment explain how general principles of law are created. Identity change and argumentative self-entrapment may also explain how non-binding resolutions of international organizations gain normative force as articulating general principles of law. They can also explain how principles developed within a particular area of international law and the principles of a specific treaty regime “spread out” and turn into principles of a more general scope.¹¹⁷
- 60 Compared to solid and reciprocal interstate practice covered by *opinio juris*, these jurisgenerative processes are indeed rather weak. Furthermore, the normative force of argumentative entrapment might also be relevant with regard to the other sources of international law. However, *self*-entrapment is particularly relevant in the absence of reciprocity. These caveats need not be a conceptual drawback of the proposed approach. It still serves to distinguish the normative origin and force of general principles of law from those of customary international law.
- 61 Admittedly, the conditions for the acceptance of general principles on the international plane are still vague and require specification. It will be crucial to analyze the institutional settings in which processes of self-entrapment take place in order to evaluate the legitimacy of the norms that emerge in these processes. Both customary international law and general principles are two-fold concepts that rest on two elements. These are state practice plus *opinio juris* in the case of customary international law, and identity change plus argumentative self-entrapment in the case of general principles. Parallels possibly also exist in the relationship between identity change elements. A lack of consistent state practice in a general setting in which state action is primarily guided by expectations of reciprocity may be compensated by a strong *opinio juris* on the basis of the sliding scale approaches to customary law I described above. Similarly, a lack of authentic identity change – in the case of hypocrites – may be compensated by the principled normative force of argumentative self-entrapment.

¹¹⁷ On the development of general principles of this category, see Wolfrum, “General International Law,” paras. 41-42.

- 62 As pointed out above, scholarly attention should not focus on the processes that I aim to explain on the basis of constructivism in isolation. In addition, it is crucial to analyze what courts do and say. International judicial institutions refer to principles emerging in processes of identity change and argumentative self-entrapment and use them in order to guide their interpretations of other norms and solidify abstract principles in order to find solutions to concrete cases. They thus act as catalysts of these processes. In this regard, principles constitute a mechanism for progressive development of international law in both roles. This discussion of principles has revealed that generality and flexibility are accepted as the least common denominator of general principles. Due to this openness, general principles constitute the basis for new or at least modified international obligations.¹¹⁸
- 63 Constructivism therefore not only explains compliance with existing norms, but also explains the jurisgenerative processes by which legal norms emerge and evolve.¹¹⁹ Application of the law and the emergence of new law are interdependent and intertwined processes. They are particularly interrelated in the case of general, unwritten norms. In this respect, it is plausible to closely link the norm construction process, the “source” of general principles, with the specific use of principles in legal argumentation. The genesis of these principles is accelerated by the fact that international actors need to justify their actions in different contexts in a fragmented international legal system, and by the open or silent interaction between international judicial institutions.

3. Conclusion

- 64 In order to analyze the relationship between customary international law and general principles of law, I have traced the different meanings of principles in international law as a source and as a norm type with particular functions in legal argumentation.

¹¹⁸ See Wolfrum, “General International Law,” para. 125.

¹¹⁹ See Benjamin Herborth, “Verständigung verstehen: Anmerkungen zur ZIB-Debatte,” in *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik*, edited by Peter Niesen and Benjamin Herborth (Frankfurt am Main: Suhrkamp, 2007), 166-67; Tine Hanrieder, “The False Promise of the Better Argument,” 3 *International Theory* 390 (2011), 403.

Drawing a “demarcation line” between customary international law and general principles is not difficult on the basis of narrow concepts of both sources. Many scholars wish to attribute more ambitious functions to each of these sources in international law and therefore develop broader concepts of them. However, distinguishing the two sources then becomes more difficult.

65 I have sought to solve this problem by arguing that customary international law can be distinguished from general principles by looking at the role of reciprocal interactions between states. In particular, reciprocal state interaction justifies customary legal norms. Norms generated in issue areas where reciprocal state interaction is minimal or absent, on the other hand, are best regarded as general principles of law. The limited framework of this chapter has offered the opportunity to elaborate on the distinct processes leading to the emergence of general principles in the absence of reciprocity. Constructivist approaches to international law provide the theoretical basis of my explanation of these processes. However, much more research needs to be done in order to specify the threshold of normativity for norms that develop in these processes and to describe these processes in detail with regard to concrete principles.