

# GENERAL PRINCIPLES OF LAW

Lecture by

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## Lecture Outline

- 1** – *Introduction*: Evolution of General Principles of Law as a Source of International
- 2** – *Doctrine*: Disputed Nature of General Principles of Law
- 3** – *Technique*: Making of General Principles of Law
- 4** – *Function*: Role of General Principles of Law
- 5** – *Assessment*: Place of General Principles of Law in Contemporary International Law

# GENERAL PRINCIPLES OF LAW

**1- INTRODUCTION: EVOLUTION OF GENERAL PRINCIPLES OF LAW AS A SOURCE OF INTERNATIONAL LAW**

## The “third” source of international law?



### STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

#### Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

**Basic definition:** Method of law-making based on the importation and transposition into IL of general principles existing in domestic legal systems.

Ex: *res judicata*, proportionality, force majeure

**Broader definition:** Method of international law-making based on the systematization of different legal norms (from different sources: domestic law, treaties, customs...) into a general normative statement

Ex: general principles of treaty interpretation

- I. Origins of General Principles of Law
- II. Development of General Principles of Law

# I. Origins of General Principles of Law

I.1. First arbitral awards

I.2. World Court's Statute and case-law

# I.1. First arbitral awards



## **PERMANENT COURT OF ARBITRATION**

### **RUSSIAN CLAIM FOR INTEREST ON INDEMNITIES (DAMAGES CLAIMED BY RUSSIA FOR DELAY IN PAYMENT OF COMPENSATION OWED TO RUSSIANS INJURED DURING THE WAR OF 1877-1878)**

“All the private legislation of the States forming the European concert admits, as did formerly the Roman law, the obligation to pay at least interest for delayed payments as legal indemnity” (§ 5)

## II.2. The International Court's Statute and case-law

Committee of Jurists







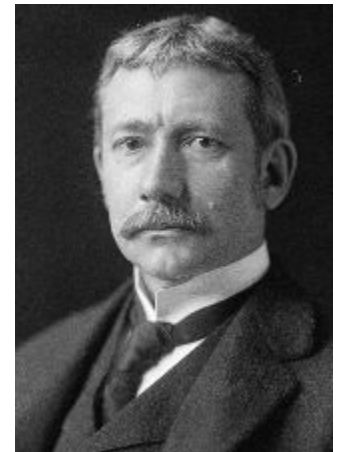
Baron Edouard Descamps  
(Belgium)

“The following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the undermentioned order:

1. conventional international law, whether general or special, being rules expressly adopted by the States;
2. international custom, being practice between nations accepted by them as law;
3. **the rules of international law as recognized by the legal conscience of civilised nations;**
4. international jurisprudence as a means for the application and development of law”

“Nations will submit to positive law, but will not submit to such principles as have not been developed into positive rules supported by an accord between all States.”

When facing a lacuna, the Court shall declare *non liquet*, because the “Court must not have the power to legislate”



Elihu Root (USA)



Lord Phillimore  
(United Kingdom)

New draft:

the Court should apply, as well as treaties and custom, **‘the general principles of law recognised by civilised nations’** and ‘the authority of judicial decisions and the opinions of writers as a means for the application and development of law’.

general principles of law should be understood to be principles ‘accepted by all nations *in foro domestico*’ or ‘maxims of law’

# Permanent Court of International Justice



## PCIJ Statute

### Article 38.

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4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex æquo et bono*, if the parties agree thereto.



# International Court of Justice

## ICJ Statute

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# The International Court's Case-Law

## Ruling out of art. 38 principles



ICJ, 1966, *South West Africa* (Ethiopia v. South Africa) (Liberia v. South Africa)

88. For these reasons the Court, bearing in mind that the rights of the Applicants must be determined by reference to the character of the system said to give rise to them, considers that the “necessity” argument falls to the ground for lack of verisimilitude in the context of the economy and philosophy of that system. Looked at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an “*actio popularis*”, or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the “general principles of law” referred to in Article 38, paragraph 1 (c), of its Statute.



# Principles existing in domestic systems



## **PCIJ, 1928, *Chorzów Factory*:**

“it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation”



## **IJC, 1962, *Temple of Preah Vihear*:**

“It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error”



## **ICJ, 1974, *Nuclear tests*:**

good faith as one of the basic principles governing the creation and performance of legal obligations, whatever their source

# Non-*foro domestico* principles



## ICJ, 1949, *Corfu Channel*

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely : elementary considerations of humanity, even more exacting in peace than in war ; the principle of the freedom of maritime communication ; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

## **II. Development of General Principles of Law as a Source of Law**

**II.1. Generalisation of General Principles of Law as a source of law**

**II.2. General Principles of Law under the scrutiny of ILC**

# II.1. Generalisation of GPL as a source of law

## Inter-states disputes

### Applicable Law

#### *Article 33*

1. The arbitral tribunal shall apply the law chosen by the parties, or in the absence of an agreement, shall decide such disputes in accordance with international law by applying:

- (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) International custom, as evidence of a general practice accepted as law;
- (c) The general principles of law recognized by civilized nations;
- (d) Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the arbitral tribunal to decide a case *ex aequo et bono*, if the parties agree thereto.

PCA Optional Rules  
for Arbitration  
Disputes between  
two States



# International Criminal Law

## Rome Statute of the International Criminal Court

### Article 21 Applicable law

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.

# Investment arbitration

## State Contracts

ICSID, 1984, Amco v. Indonesia

‘the full compensation of prejudice, by awarding to the injured party the damnum emergens and the lucrum cessans is a principle common to the main systems of municipal law, and therefore, a general principle of law which may be considered as a source of international law’

# Commercial Arbitration, Sport Arbitration



CAS 98/2000, AEK Athens & Slavia Prague v. UEFA

The Panel is of the opinion that all sporting institutions, and in particular all international federations, must **abide by general principles of law**. [...] Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, **a set of unwritten legal principles – a sort of *lex mercatoria* for sports disputes, a *lex ludica*** – to which national and international sports federations must conform [...]. Certainly, **general principles of law drawn from a comparative or common denominator reading of various domestic legal systems** and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such *lex ludica*

## II.2. General Principles of Law under the scrutiny of ILC



Marcelo Vázquez-Bermúdez, special rapporteur (Ecuador)

1 – *Introduction*: Evolution of General Principles of Law as a Source of International

**2 – *Doctrine*: Disputed Nature of General Principles of Law**

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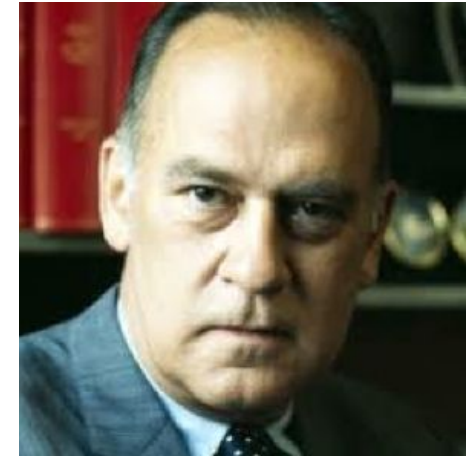
4 – *Function*: Role of General Principles of Law

5 – *Assessment*: Place of General Principles of Law in Contemporary International Law

# GENERAL PRINCIPLES OF LAW

## **2 DOCTRINE: DISPUTED NATURE OF GENERAL PRINCIPLES OF LAW**

# GENERAL PRINCIPLES OF LAW



“You know it when you see it”

US Supreme Court  
Justice Potter Stewart

- I. Isolated approaches on General Principles of Law
- II. Dominant approaches on General Principles of Law

# I. Isolated approaches on GPL

I.1. GPL as a non-source of international law

I.2. GPL as natural law

I.3. GPL as customary law

# I.1. General principles of law as a non-source of international law

Article 38 General Principles of Law “are those **non-normative provisions** common to national legal systems and to international law which, however, have significance for applying norms as prevailing law; they are usually formed in national law (but nothing prevents them from being formed in international law as well) and **entered into international law through treaty or custom**”



Grigori Tunkin  
(USSR)

## Article 38

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## 1.2. General principles of law as natural law



ICJ, 1951, *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the crime of genocide*:

On the **principle of humanity**: “the principles underlying the convention are **principles which are recognised by civilised nations** as binding on States, even without any conventional obligation”



ICJ, 1966, *South West Africa* (Ethiopia v. South Africa) (*Liberia v. South Africa*), **Dissenting Opinion of Judge Tanaka**



As an interpretation of Article 38, paragraph 1 (c), we consider that the concept of human rights and of their protection is included in the general principles mentioned in that Article.

From this kind of source international law could have the foundation of its validity extended beyond the will of States, that is to say, into the sphere of natural law and assume an aspect of its supra-national and supra-positive character.



ICJ, 2010, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), **Separate Opinion of Judge Cançado Trindade**



52. General principles of law emanate, in my perception, from human conscience, from the universal juridical conscience, which I regard as the ultimate material “source” of all law.

# ICJ Statute



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2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

## 1.3. General principles of law as customary law



### **ICJ, 1949, Corfu Channel**

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## II. Dominant approaches on GPL

II. 1. Principles *in foro domestico*

II.2. Principles *in foro domestico* and in international law

III.3. Principles *in foro domestico* and principles of international law

## II.1 . Principles *in foro domestico*



H. Lauterpacht

GPL: “general principles of municipal jurisprudence, in particular private law, in so far as they are applicable to relations of states”



A. Pellet

US Third Restatement on Foreign Relations Law (1987)

“General principles common to systems of national law may be resorted to as an independent source of law. That source of law may be important when there has not been practice by states sufficient to give the particular principle status as customary law and the principle has not been legislated by general international agreement”.

## II.2. Principles *in foro domestico* and in international law



**PCIJ, 1927, *Chorzów Factory*:**

“It is ... a **principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts**, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him”

ICSID, 2012 award, CIRDI, *Occidental Petroleum Corporation v. Ecuador*, n° ARB/06/11: **principle of proportionality**

## II.3. Principles *in foro domestico* and principles of international law

D. Anzilotti: art. 38, § 1, c : “first of all general principles of the international legal order, and, in the second place, principles universally admitted in the legal systems of civilized peoples”



G. Gaja: “inchoate custom that does not require support by state practice”



ICJ, 1951, *Fisheries* (UK v. Norway)

“principle that the belt of territorial waters must follow the general direction of the coast”