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SOME REMARKS ON THE ROLE OF GENERAL PRINCIPLES IN THE INTERPRETATION AND APPLICATION OF INTERNATIONAL CUSTOMARY AND TREATY LAW

Abstract:
This article is devoted to current practices concerning the application of general principles of law in the light of their function in the international legal system. As a means of the application and interpretation of both treaty and customary law, general principles of law perform a crucial function in the system of international law, which is understood as set of interrelated rules and principles – norms. The role played by general principles of law in the international legal order has been discussed by academia for years now. Initially they were used to ensure the completeness of the system of international law. However, at the current stage of development of international law, when many of them have been codified, they are usually invoked by international courts for the interpretation of treaties and customary law and/or the determination of their scope. This means that despite their ongoing codification they do not lose their character as general principles and are still applied by international courts in the process of judicial argumentation and the interpretation of other norms to which they are pertinent. References by international courts to general principles of law perform the all-important function of maintaining the coherence of the international legal order, which is faced with the twin challenges of fragmentation and the proliferation of international courts.

Keywords: general international law, general principles of law, interpretation of international law, sources of international law

INTRODUCTION

In the discussion about the function of general principles of law in international legal order, its systemic nature seems to be of crucial importance. As indicated by the International Law Commission:

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> International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.[1]

In addition to treaties and customary law, general legal principles form part of the international law system and enter into various relations with other norms of the system.[2] Owing to their nature general principles of law perform a specific function.[3] They are rarely applied by international courts and tribunals as a source of legal rights and obligations, but are invoked for the interpretation of treaty and customary law or determination of their scope and, sometimes (which remains outside the scope of this paper), for review of the validity[4] of other norms. Although at the

[1] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of The International Law Commission, A/Cn.4/L.702, 18 July 2006, p. 3.

[2] *See generally* B. Cheng, *General Principles as Applied by International Courts and Tribunals*, Cambridge University Press, Cambridge 2006; M.C. Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 Michigan Journal of International Law 768 (1990); H. Mosler, *General Principles of Law*, in: *Encyclopedia of Public International Law*, vol. II, North-Holland, Amsterdam: 1995, pp. 511-512; G. Gaja, *General Principles of Law*, in: R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (MPEPIL), Oxford University Press, Oxford: 2008; M. Koskenniemi, *General Principles: Reflections on Constructivist Thinking in International Law*, in: M. Koskenniemi (ed.), *Sources of International Law*, Ashgate, Dartmouth: 2000, pp. 359-402; G. Herczegh, *General Principles of International Law and the International Legal Order*, Akadémiai Kiadó, Budapest 1969; G. Tunkin, *"General Principles of Law" in International Law*, in: R. Marcic (ed.), *Internationale Festschrift für Alfred Verdross*, Fink Verlag, München-Salzburg: 1971, pp. 523-532; W. Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57(2) American Journal of International Law 279 (1963), pp. 279–299; F.O. Raimondo, *General Principles of Law in the Decisions of International Courts and Tribunals*, Martinus Nijhoff, Leiden, Boston: 2008; Ch. Voigt, *The Role of General Principles in International Law and Their Relationship to Treaty Law*, 31 Retfaerd Årgang 3 (2008); H. Akehurst, *Equity and General Principles of Law*, 25 International and Comparative Law Review 801 (1976); E. Carpanelli, *General Principles of International Law: Struggling with a Slippery Concept*, in: L. Pineschi (ed.), *General Principles of Law - The Role of the Judiciary*, Springer, Heidelberg, New York, Dordrecht, London: 2015.

[3] As pointed out by members of the International Committee of Jurists (Permanent Court of International Justice Advisory Committee of Jurists, *Procès-verbaux of the proceedings of the Committee*, June 16th – July 24th, 1920, available at: https://bit.ly/2Ie6fzj, accessed 30 June 2018), if international law is something more than the law of consent and the role of the Court is not to become in many cases a "registry for the high-handed acts of the strong against the weak", recognition of general principles of law as part of the applicable law was necessary (*see* especially statements of Baron Descamps on the Rules of Law to be applied (*ibidem*, pp. 323-324) and Statement of M. Fernandes (*ibidem*, pp. 345-346)).

[4] Sometimes the concept of *jus cogens norms* of international law is connected with "fundamental general principles of international law." Such connection was indicated by G.G. Fitzmaurice in the Third Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur, A/CN. 4/115 and Corr. 1. Also, A. Verdross referred to general principles when he indicated the evolution in State practice of non-derogability based on core values of the international community. He indicated that "[n]o juridical order can ... admit treaties between juridical subjects, which are obviously in contradiction to the ethics

current stage of development of international law many general principles have been codified in multilateral agreements or customary law, they do not lose their character as general principles and are still applied by international courts in the process of judicial argumentation and interpretation of these norms or alongside. This is important in particular in the context of their *erga omnes* effect, which, as a rule, is devoid of treaty norms, and which does not have to be a feature of customary norms. References by international courts to general principles of law perform an important function in maintaining the coherence of the international legal order, which is faced with the challenges posed by fragmentation and the proliferation of international courts.

1. GENERAL PRINCIPLES OF LAW AND THEIR POSITION IN THE INTERNATIONAL LEGAL ORDER

The current academic discussion about the general principles of law is based on the assumption that international law constitutes a legal system of a universal nature.[5] As indicated by B. Simma, one of the possible understandings of universality "responds to the question whether international law can be perceived as constituting an organized whole, a coherent legal system, or whether it remains no more than (…) a random collection of norms, or webs of norms, with little interconnection."[6] Although the requirement of unity or coherence of the international legal system is currently challenged by the process of the fragmentation of international law, there is no doubt that the notion that general principles of law are part of general international law may be seen as the main tool for preservation of the systemic nature of the legal order.[7] Special attention is paid to systemic coherence as a precondition of legal certainty and the predictability of law. As will be demonstrated, this function seems to be very predominant in the practice of international courts.

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of a certain community" (A. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 American Journal of International Law 55 (1966), pp. 55-64). However, today's practice and discussion show that the concept itself, as well as relationship between *jus cogens* and other norms of international law, remains unclear (beyond the VCLT). *See* Second report on *jus cogens* by Dire Tladi, Special Rapporteur, A/CN.4/706, 16 March 2017.

[5] Although various authors understand the universality of international law differently, general principles are always included into the system. *See*, *inter alia*, R. Kwiecień, *Państwa jako suwerenni „międzynarodowi prawodawcy" a systemowe cechy prawa międzynarodowego* [States as sovereign international law-makers and systemic features of international law], in: R. Kwiecień (ed.), *Państwo a prawo międzynarodowe jako system prawa*, Wydawnictwo UMCS, Lublin: 2015, pp. 76-80, 83, 89.

[6] B. Simma, *Universality of International Law from the Perspective of a Practitioner*, 20(2) European Journal of International Law 265 (2009), p. 267.

[7] *See e.g.* H. Lauterpacht, *Some Observations on the Prohibition of Non Liquet and the Completeness of the Legal Order*, in: H. Lauterpacht (ed.), *International Law: The Collected Papers of Hersch Lauterpacht*, Cambridge University Press, Cambridge: 1975, pp. 213-237.

The distinction and relationship between general principles and other norms of the system (rules) may be explained in at least two ways.[8] The first is a hierarchical differentiation, which is used to refer the differentiation between fundamental norms and the relative importance of their subject matter. From this point of view, we can talk about fundamental principles of the international legal order, i.e. legal principles immanent to legal logic or certain "natural law" principles. The basis of the distinction between such norms and other norms is the function that principles perform or the social interests for which they stand. If they are fundamental or of particular importance, they should be considered as legal norms. From this point of view, one can talk about fundamental principles of the international legal order like good faith, *pacta sunt servanda,* the rule of law, sovereign equality of States, the non-use of force, etc. The higher hierarchical rank of such principles may be either systemic in nature (general principles as constitutional rules), logical (general principles as those which are logically presupposed by the concept of law itself), or substantive (other norms must bow to certain higher principles).[9] The hierarchical differentiation between rules and principles is strictly connected with the universality and systemic nature of international law, which is further discussed below. Despite the lack of a hierarchy of *sources* of international law, a more specific treaty norm will not always override a "general" principle based on the collision clause *lex specialis derogat legi generali*. In a particular case, a general rule of law may in fact determine the manner in which the treaty norm is to be applied. It may affect the application of treaty norms as a limiting factor. In this context, it thus seems appropriate to state that a particular principle may prevail over a treaty norm (i.e. the treaty norm is inapplicable in a particular case and/or the interpretation of a customary or treaty norm in conformity with a general principle takes precedence over a literal interpretation).[10]

According to the logical distinction, general principles are characterized by a high degree of generality and abstractness and, therefore, they leave discretion to international courts in the final determination of the scope, content and legal consequences as well as the mutual obligations of the parties arising from a treaty and/or customary law in the context of a given case. As G. Fitzmaurice pointed out in 1975, general principles, in contrast to rules, even general rules of law, do not define what the rule is (in the sense

[8] For more about theory of principles of law, *see* R. Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge: 1978; R. Dworkin, *Law's Empire*, Harvard University Press, Cambridge: 1988; H. Avila, *Theory of Legal Principles*, Springer, Dordrecht: 2007; M. Atienza, J.R. Manero, *A Theory of Legal Sentences*, Kluwer Academic Publishers, Dordrecht, Boston, London: 1997; S. Wronkowska, M. Zieliński, Z. Ziembiński, *Zasady prawa: zagadnienia podstawowe* [Principles of law: basic issues], Wydawnictwo Prawnicze, Warszawa: 1974; G. Maroń, *Zasady prawa – pojmowanie i typologie a rola w wykładni prawa i orzecznictwie Trybunalu Konstytucyjnego* [Principles of law – conceptualization and typologies, and the role of the interpretation in the case law of the Contstitutional Court], Wydawnictwo UAM, Poznań: 2011.

[9] O. Elias, Ch. Lin, *"General Principles of Law", "Soft Law" and the Identification of International Law*, 23 Netherlands Yearbook of International Law 4 (1997), p. 6.

[10] Gaja, *supra* note 2, para. 22.

of a warrant or prohibition), but emphasise the scope and meaning of the rule and explain it or provide justification for it. The rule answers the question – what? – while the principle addresses the question – why? In the event of a dispute as to which rule is to apply, the solution will often depend on which principle will be considered as the basis of the norm and which will "prevail" in a particular case.[11]

Thus principles equip a judge with a certain degree of discretion, because they do not determine a specific solution but provide arguments for the adoption of a particular solution. While a conflict between rules can in principle be resolved by introducing an exception clause or recognizing one of the conflicting rules as inapplicable, in the case of principles the adoption of an "all or nothing" approach can lead to a bad result. Under certain circumstances, one principle may give way to another, even though the former is still valid. It should be emphasized that we are not dealing here with a classic case of weighing on a scale, because as Habermas points out in his remarks concerning Dworkin's concept, it would lead to the loss of their deontological importance. Principles are therefore an important element of judges' argumentation, taking a different (i.e. different than rules) place in the logic of the argumentation. While rules always have a component of an "if" that specifies the conditions of application typical for a given situation, principles either apply with a non-specific claim to validity[12] or are limited in their field only by very general conditions, in any case requiring interpretation against the specific background of a case. This means that while in the case of rules the determination of the scope of their norms will in principle belong only to the legislator (in the case of international law, first and foremost States), in case of principles it is the role of the court.

The use of general principles by international courts makes international law more flexible and allows international courts to make decisions that are not only consistent with the existing legal order, but also meet the requirement of rational acceptability in the sense that they enable the development of international law in a manner adequate to the needs of the international community. Thus, general principles of law in many cases are a source of legitimacy for judicial decisions developing international law.

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[11] G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, Collected Courses of the Hague Academy of International Law, vol. 92, Brill-Nijhoff, Leiden, Boston: 1975, p. 8. Similar distinction between rules and principles is also adopted by other authors. *See also* D. W. Greig, *The Underlying Principles of International Humanitarian Law*, 9 Australian Yearbook of International Law 46 (1985), p. 64; V. Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in: M. Byers (ed,), *The Role of Law in International Politics*, Oxford University Press, Oxford: 2000, pp. 207, 213-19; R. Kolb, *Principles as Sources of International Law*, 53(1) Netherlands International Law Review 1 (2006), p. 26.

[12] In contrast to rules which are, according to Dworkin, indefensible, principles as defensible norms have dimension of weight/importance which appears in specific cases.

2. COHERENCE OF THE SYSTEM OF INTERNATIONAL LAW AND GENERAL PRINCIPLES OF LAW

For many years, general principles of law were mainly discussed in terms of gap-filling and avoidance of *non liquet*.[13] However, developments of the end of the 20th century, namely the proliferation of international courts and fragmentation of international law, make the second function – preservation of the coherence of the system – currently appear even more important. International law is a legal system, and there are contextual links between its norms. Despite its specific features, such as its lack of a centralised law-making process, the lack of hierarchy of sources of international law and the lack of a court of universal jurisdiction, the uniform application and coherence of international law is preserved by its structure.

In the context of relationship between general principles and other sources of international law, the principle of good faith, which is the meta-norm of the international law system, deserves special attention. As the International Court of Justice (ICJ) pointed out in the *Nuclear Tests* case, good faith is the principle "governing the creation and implementation of international obligations, regardless of their source."[14] The principle of good faith has been invoked in the recent practice of the ICJ in the context of the obligation to interpret treaties in good faith (Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT));[15] the obligation to execute treaties in good faith (*pacta sunt servanda*),[16] and the obligation of States to negotiate in the event of a dispute.[17] It also plays an important role in the practice of the World Trade Organization (WTO) dispute settlement body,[18] both in the context

[13] Avoidance of *non-liquet* and the distinction between application and creation of law by the World Court was a crucial point of the discussion in the International Commission of Jurists during preparation of draft of the Statute of the Permanent Court of International Justice. *See also* the discussion between Lauterpacht and Stone: Lauterpacht, *supra* note 7, p. 205, and J. Stone, *Non Liquet and the Function of Law in the International Community*, 35 British Yearbook of International Law 124 (1959), pp. 145 et seq.

[14] ICJ, *Nuclear Tests (New Zealand v. France)*, Judgment, 20 December 1974, ICJ Rep. 1974, para. 46.

[15] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, ICJ Rep. 2004, para. 94; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Rep. 2010, para. 146.

[16] ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgement, 25 September 1997, ICJ Rep. 1997, para. 140.

[17] ICJ, *Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction of the Court, Judgement, 21 June 2000, ICJ Rep. 2000, para. 53; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, para. 94.

[18] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 12 October 1998, para. 158; Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/AB/R, adopted 24 July 2001, para. 101; Appellate Body Report, *United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 8 October 2001, para. 81.

of the interpretation of WTO agreements as well as in its specific aspects, such as the prohibition of abuse of rights[19] or the protection of legitimate expectations.[20] Also, the Permanent Court of Arbitration confirmed the role that the principle of good faith plays in the system of international law. In the case of *The Netherlands v. France*, the Court emphasized that it

> fully recognises the fundamental role of good faith and how it dominates the interpretation and application of the entire body of international law, not only the interpretation of treaties. The fundamental rule of *pacta sunt servanda* rests on the principle of good faith.[21]

The general principles of law cement the system of international law, since they often explain the logic and function of legal institutions provided for in customary law. Thus, even if a general principle is reflected in customary or treaty norms, it does not cease to be a general legal principle, binding on all subjects of international law. The current practice surrounding the application of general international law on State responsibility may serve as an example of the use of general principles as an interpretative tool preserving the coherence of general international law. State responsibility was recognized as a general principle of law by the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case,[22] and subsequently confirmed by the ICJ.[23] Customary law developed in this area has been specified in the Report of ILC.[24] The European Court of Human Rights (ECtHR), in its judgment on redress of 12 May 2014 (*Cyprus v. Turkey*),[25] interpreted Article 41 of the Convention for the Protection

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[19] In *US – Shrimp*, the Appellate Body held that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith (…). One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges' on the field covered by [a] treaty obligation, it must be exercised *bona fide*, that is to say, reasonably" (para. 158). *See also* Appellate Body Report, *Brazil Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R, adopted 3 December 2007, para. 224.

[20] *See also* M. Panizzon, *Good faith in the jurisprudence of the WTO: the protection of legitimate expectations, good faith interpretation and fair dispute settlement*, Hart Publishing, Oxford: 2006.

[21] Arbitral Award of 12 March 2004, *The Auditing of Accounts between the Kingdom of the Netherlands and the French Republic Pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine Against Pollution by Chlorides of 3 December 1976 (The Netherlands v. France)*, para. 65.

[22] "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form" (para. 54 of the PCJI *Factory at Chorzów (Germany v. Poland), Claim for Indemnity, Jurisdiction, Judgment*, 26 July 1927, 1927 PCIJ (ser. A) No. 9).

[23] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Rep. 1949, p. 174; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania),* Merits, Judgment, 9 April 1949, ICJ Rep. 1949, p. 23; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, ICJ Rep. 1986, para. 283; *Gabčíkovo-Nagymaros Project*, para. 47.

[24] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) GAOR 56th Session Supp 10, 43.

[25] ECtHR, *Cyprus v. Turkey* (App. No. 25781/94), Grand Chamber, 12 May 2014.

of Human Rights and Fundamental Freedoms (ECHR) in the light of the principle of State responsibility as a general principle of law. The case concerned violations of the rights of Greek Cypriots granted under the ECHR, in the northern part of Cyprus after the Turkish military invasion in 1974. The Grand Chamber of the ECtHR settled the dispute many years earlier, on 10 May 2001, finding Turkey in violation of several provisions of the ECHR.[26] In the subsequent proceeding relating to redress, the Court had first of all to decide whether Article 41 of the ECHR[27] is also applicable to disputes between States. The Court, referring to the judgment of the PCIJ in the *Chorzów factory case*, declared that a breach of obligations is connected with the obligation of compensation in a proper form. According to the ECtHR, despite the specific nature of the Convention, the general logic of Article 41 is not fundamentally different from the design of liability for damages under international law (expressed in the judgment of the ICJ in the *Gabčikovo-Nagymaros* case), according to which "it is a universally recognized rule of international law that an aggrieved State is entitled to compensation from the State that committed the act contrary to international law for damage caused by that State." In these circumstances and bearing in mind that Article 41 is itself a *lex specialis* in relation to the general rules and principles of international law, the Court held that it cannot interpret this provision so restrictively, under the Convention itself, so as to exclude disputes between States from the scope of its application. On the contrary, the ECtHR considered that Article 41 provides for just satisfaction of the "aggrieved party" (*à la partie lésée*), which should be understood as referring to the actual parties to the proceedings before the Court.

A similar approach to the general principle of State responsibility has been adopted by international arbitral tribunals. In the famous award in *Rainbow Warrior*[28] the arbitral tribunal held that the general principles of international law concerning State responsibility are equally applicable in the case of breach of a treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation. The arbitral tribunal admitted that the particular treaty itself might limit or extend the general law of State responsibility, however the existence of circumstances excluding wrongfulness, as well as the questions of appropriate remedies, should be answered in the context and in the light of the customary law on State responsibility.[29]In the *Duzgit*

[26] ECtHR, *Cyprus v. Turkey* (App. No. 25781/94), 10 May 2001.

[27] Article 41 of the ECHR provides that "[i]f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

[28] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, 30 April 1990, Reports of International Arbitral Awards, vol. XX para 75.

[29] *Ibidem*, para. 75.

Integrity[30] case, the Permanent Court of Arbitration emphasized that for the correct interpretation and application of the Convention it is necessary for the Court to refer to foundational or secondary norms of general international law, such as the law of treaties or rules on State responsibility. In case of some broadly worded or general provisions, it may also be necessary to rely on primary rules of international law other than the Convention in order to interpret and apply particular provisions of the Convention.

The above examples manifest the importance of general international law, including its general principles, for preservation of the coherence of the system. The references made to the general principle of State responsibility confirm the existence of a uniform regime of State responsibility under international law, which can be modified by special regimes on the basis of *lex specialis*, but only subject to their compliance with the general regime. The above judgments are not only examples of the application of the principle of harmonization, but also indicate a structural hierarchy in which the general principle of State responsibility prevails. They also indicate the importance of judicial dialogue in the identification of general principles of law. In some cases preservation of the coherence of the international legal system may require reference to the general principles in above-mentioned hierarchical sense, i.e. as norms of special importance for the international community. A classic example of distinguishing legal norms as principles of special importance concerns the rules of humanitarian law applicable to armed conflicts. The ICJ, in its Advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*[31] referred to them as general principles of law of a fundamental nature, which must be observed by all States regardless of whether they ratified the Geneva Conventions of 1907, because they constitute intransgressible principles of international customary law. Despite the fact that these norms have not been recognized by the Tribunal as peremptory norms of international law (*jus cogens*), the Court pointed to the special significance of the norms of humanitarian law, as general principles reflected in customary law, for the system of international law and determination of the scope of other norms of this system, without however granting them a superior position as in the case of *jus cogens*.[32] Consequently, the Court recognized that in light of the applicable international law, it cannot be definitively stated that the threat of the use of force would be legal or illegal under extreme circumstances in which the

[30] Award of the Permanent Court of Arbitration, *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe),* 5 September 2016, paras. 208-209.

[31] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, para. 79.

[32] The Court simply avoided the question of *jus cogens* by limiting interpretation of the questions posed by the General Assembly. The Court found that "[t]he question whether a norm is part of the jus cogens relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter."

very preservation of the existence of a State would be jeopardized. This means that the Tribunal did not exclude a situation in which the right to self-defence would outweigh the principles of humanitarian law. A different position, recognizing the principles of humanitarian law as peremptory norms, was presented by Judge Weeramantry in his dissenting opinion.[33] The reluctance of the ICJ to recognise the *jus cogens* nature of humanitarian law seems, however, to be justified. The reasoning of the Court shows that even fundamental principles, because of their general nature, may come into conflict in specific circumstances, and that the best way to resolve a conflict between them is to attempt balancing.

3. GENERAL PRINCIPLES AS A MEANS OF INTERPRETATION OF TREATY PROVISIONS AND CUSTOMARY LAW

Every application of law requires an act of interpretation, understood as the obvious necessity for a certain form of understanding.[34] The principal task of the judge is therefore to identify the legal meaning of the applicable norm and the scope of its application. There is also no doubt that international law should be interpreted and applied in the light of the basic principles of the system.[35]

The interpretation of other norms in the light of existing international law, including general principles of law, was obvious for international arbitrators from the very beginning.[36] In addition the ICJ indicated, in the case of *The Right of Passage over Indian Territory*, that "it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it."[37] The general rule of interpretation has been included in Article 31 of the VCLT, which not only enables, but indicates an obligation to indirectly apply general principles within the process of interpretation of both treaties and customary law. It requires to take into account in the interpretation of the treaties "all other rules of international law applicable between the parties." Today there is no doubt that Article 31(3)(c) expresses a more general principle of treaty interpretation, namely that of *systemic integration* within the

[33] According to Judge Weeramantry, "[t]he rules of the humanitarian law of war have clearly acquired the status of *jus cogens*, for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect." Dissenting opinion in *Legality of the Threat or Use of Nuclear Weapons*, p. 274.

[34] M. Klatt, *Making the Law Explicit: The Normativity of Legal Argumentation*, Oxford University Press, Oxford: 2008, p. 4.

[35] Bassiouni, *supra* note 2, p. 770.

[36] *See* the examples discussed by W. Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 American Journal of International Law 279 (1963), pp. 287-290.

[37] ICJ, *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary objections, Judgment, 26 November 1957, ICJ Rep. 1957, p. 142.

international legal system.[38] This principle was indicated by the ICJ in the *Oil Platform* case[39] and then emphasized and explained by the ILC in the Report on Fragmentation of International Law. In considering the possible relationships between international norms, the ILC specified two possible situations: relationships of interpretation and relationships of conflict. The former occurs when one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm in, for example, an application, clarification, updating, or modification of the second norm. In such a situation, both norms are applied in conjunction.[40] Systemic integration, as defined by the Commission, governs all treaty interpretation, the other relevant aspects of which are set out in the other paragraphs of Articles 31-32 of the VCLT, which "describe a process of legal reasoning, in which particular elements will have greater or less relevance depending upon the nature of the treaty provisions in the context of interpretation."[41] At the same time "Article 31(3)(c) deals with cases where material sources external to the treaty are relevant to its interpretation. These may include other treaties, customary rules or general principles of law."[42]In some cases, implementation of the postulate of the coherence of international law requires the interpretation of both treaty and customary norms in the light of general principles indirectly, i.e. not as direct sources of international obligations but as ordering rules, indicating the way of application of other norms of the system.

The practice of WTO dispute settlement bodies can serve as an example of the interpretation of treaty provisions in the light of general principles.[43] Interestingly, the Appellate Body in the *US – Gasoline* case referred to the general rule of interpretation as the common standard of customary law, and acknowledged its own commitment to take into account general international law, including general principles of

[38] For more, *see* C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 International & Comparative Law Quarterly 279 (2005), pp. 279-319.

[39] "[U]nder the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Article 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty." (ICJ, *Oil Platforms (Iran v. United States of America)*, Judgment, 6 November 2003, ICJ Rep. 2003, para. 41).

[40] *Fragmentation of International Law*, *supra* note 1, pp. 7-8.

[41] *Ibidem*, p. 14.

[42] *Ibidem*, p. 13.

[43] For more on the interpretation of the WTO Convention *see* G. White, *Treaty Interpretation: The Vienna Convention "Code" as Applied by the World Trade Organization Judiciary*, Australian Yearbook of International Law 319 (1999); J. Cameron, K.R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 International & Comparative Law Quarterly 248 (2001); J. Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 American Journal of International Law 535 (2001).

law.[44] Also the European Court of Human Rights, on the grounds of Article 31(3)(c) of the VCLT, applies general international law as an interpretative means of the provisions of the ECHR as a "living instrument." The Court has repeatedly pointed out that in the application of the Convention it is necessary to take into account the development of international law, and that the Convention cannot be interpreted in a vacuum but should be interpreted in accordance with the general international law of which it is a part.[45] General rules of interpretation are also invoked by the Permanent Court of Arbitration[46] as well as by the Court of Justice of the European Union with respect to international treaties to which the EU is a party.[47]

4. GENERAL PRINCIPLES AND EXTENSIVE INTERPRETATIONS OF OTHER SOURCES OF INTERNATIONAL LAW

The concept of general principles of law is also used by international courts for extension of the application of treaty and customary norms of international law. This is

[44] "The 'general rule of interpretation' set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the *General Agreement* and the other 'covered agreements' of the *Marrakesh Agreement Establishing the World Trade Organization* (the '*WTO Agreement*'). That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law." Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO WT/DS2/AB/R, adopted 9 April 1996, p. 17.

[45] *See* ECtHR, *Al-Adsani v. United Kingdom* (App. No. 5763/97), Grand Chamber, 21 November 2001, para. 55 ("the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (*see*, *mutatis mutandis*, *Loizidou v. Turkey* (merits), judgment of 18 December 1996, Reports 1996-VI, p. 2231, § 43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity"). *See also* ECtHR *Saadi v. UK* (App. No. 13229/03), Grand Chamber, 29 January 2008, para. 62; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* (App. No. 45036/98), Grand Chamber, 30 June 2005, para. 150; *Banković v. Belgium and Other*s (App. No. 52207/99), Grand Chamber, Decision as to the admissibility, 12 December 2001, para. 57.

[46] Award of the Permanent Court of Arbitration of *Iron Rhine (Belgium v. The Netherlands),* 24 May 2005 paras. 58-61, in which the PCA referred to general principles of environmental law for interpretation of applicable convention.

[47] Case C-162/96 *A. Racke GmbH & Co v. Hauptzollamt Mainz* [1998], ECR I-03655, para. 49; Case C-61/94 *Commission v. Germany* [1996], ECR I-03989, para.30; Case C-386/08 *Brita GmbH v. Hauptzollamt Hamburg-Hafen* [2010], ECR I-01289, paras. 39-42; Case C-416/96 *Nour Eddline El-Yassmi v. Secretary of State for the Home Department* [1999], ECR I-1209, para. 47; Case C-268/99 *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie* [2001], ECR I-08615, para. 35.

especially the case with respect to the general principles of international law commonly recognised by all States in their mutual relations[48] – principles that are generally applicable in all matters of the same type appearing in international law.[49] As pointed out by some authors, in many cases it is not easy to distinguish between the general principles as formal sources of international law and customary law.[50] However, such a clear distinction is not made by international courts. On the contrary, in many cases they refer to "general principles of customary international law." It follows that in judicial practice general principles are distinguished not as a formal source (i.e. the legal basis of a judicial decision), but rather as a material source of international law, explaining the content and scope of application of customary or treaty law. However, in some cases the concept of a general principle may be a gate for the creation of customary law.

In its 1949 judgment in the *Corfu Chanel* case, the ICJ considered the issue of Albania's responsibility for damage caused by mine eruptions in its territorial waters. According to the Court, although Albania was not a party to the VIII Hague Convention of 1907, it was obliged during times of peace to inform other States about mines on its territory. This obligation resulted not from the Hague Convention, which applies during war, but from "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."[51] The Court acknowledged the United Kingdom's argument and held that the VIII Hague Convention of 1907 was in essence a confirmation of the general principles of international law applicable to the mutual relations between States.[52]

The nature of the principles of humanitarian law as general principles of law was subsequently confirmed in the ICJ's judgment in the case of *The Military and Paramilitary Activities in and against Nicaragua*,[53] while in its advisory opinion of 1996 in *Legality*

[48] H. Mosler, *The International Society as a Legal Community*, Sijthoff and Noordhoff, Alphen: 1980, pp. 134 et seq.; O. Schachter, *International Law in Theory and International Practice*, Springer, Dordrecht-Boston-London: 1991, p. 51; O. Elias & Ch. Lin, *supra* note 9, p. 28.

[49] Mosler, *supra* note 2, p. 512.

[50] *See* Cheng, *supra* note 3; K. Wolfke, *Some Present Controversies Regarding Customary International Law*, XXVI Netherlands Yearbook of International Law 1 (1993), p. 12.

[51] ICJ, *Corfu Chanel*, p. 22.

[52] The United Kingdom argued as follows: "Since the adoption of the Convention in 1907, States have in their practice treated its provisions as having been received into general international law. Even Germany, who in the wars of 1914-1918 and 1939-1945 was guilty of serious breaches of the Convention, publicly professed to be complying with its provisions. The Allied Powers in both wars held themselves bound by the Convention and throughout observed the provisions relating to notification" (ICJ Pleadings, vol. 1, p. 39).

[53] The Court held that "there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression" (ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Rep. 1986, para. 220).

of the Threat or Use of Nuclear Weapons case, the Court, referring to *Corfu Chanel* case, held that most of the norms of humanitarian law applicable in armed conflicts are of fundamental value for respect for the dignity of a person and "elementary considerations of humanity", and that "the Hague and Geneva Conventions have enjoyed a broad accession. Further, these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[54]

The above-mentioned case-law of the ICJ is also important because it illustrates how the Court identifies the existence and content of general principles of law. It confirms that in contrast to customary law, the requirement of State practice does not apply to general principles of law. It is obvious that directly after the end of World War II, when the decisions in *Corfu Chanel* and *Reservations to the Genocide Convention* were issued by the Court, it was hardly possible to prove a consistent practice. However, at the same time the *opinio juris* and general recognition of the general principles as envisaged in multilateral conventions did not raise any doubts.[55] The creation of customary international law has been confirmed by the Court in subsequent judgments. In *Legality of the Threat or Use of Nuclear Weapons*, the ICJ indicated practice, including not only the earlier jurisprudence of the Court itself but also the case law of the Nuremberg International Military Tribunal and the unanimous approval of the UN Secretary General Secretary's Report introducing the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).[56] On this basis, the Court held that

> the extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community

[54] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, para. 79.

[55] T. Meron refers to the moral value of humanitarian law principles; *see* T. Meron, *International Law in the Age of Human Rights: General Course on Public International Law*, Collected Courses of the Hague Academy of International Law, vol. 301 Brill Nijhoff, Leiden, Boston: 2003, p. 26. Simma and Alston indicate that "[g]eneral principles seem to conform more closely than the concept of custom to the situation where a norm invested with strong inherent authority is widely accepted even though widely violated" (B. Simma and P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 Australian Yearbook of International Law, 82 (1991), p. 102). T.M. Franck went even further, suggesting that the legally binding force of principles is based on "but of course" recognition, which means that a general principle "should be recognized as a legitimate norm when the common sense of the interpretive community (governments, judges, scholars) coalesces around the principle and regards it as applicable" (*see* T.M. Franck, *Non-Treaty Law-Making: When, Where, and How?*, in: R. Wolfrum, V. Röben (eds.), *Developments of International Law in Treaty Making*, Springer, Berlin, Heidelberg: 2005, p. 423). Other authors suggest an "implicit state consensus" behind general principles of law; *see* N. Petersen, *Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23(2) American University International Law Review 275 (2007), pp. 284-286.

[56] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, paras. 80-81.

with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles.

It follows that despite the transformation, as a result of practice, of the general principles of humanitarian law into customary norms, they do not lose their character as general principles of law. Obviously in a situation wherein a treaty, a customary rule, and a general principle of the same content are in force, in the process of applying the law the court will base its judgment on the more detailed norm, usually a treaty or custom. That's why the ICJ in its advisory opinion on the construction of a wall on the territory of Palestine did not use the concept of general principles to prove the applicability of general humanitarian law, but examined whether customary law was applicable to the parties to the procedure.[57] The international criminal courts refer to general humanitarian law as both customary rules and general principles of law.[58] In its *Tadić* judgment on jurisdiction, the ICTY referred to customary international humanitarian law as a reflection of general principles as an argument for interpretation of Article 3 of its Statute as covering violations of humanitarian customary law in both internal and international conflict.[59]

Similarly, in the judgment on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[60] the ICJ referred to the advisory opinion on *the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, according to which "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."[61]

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[57] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 89.

[58] *See e.g.* ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, paras. 183, 148; *Prosecutor v. Zejnil Delalic et al.*, IT-96-21-T, para. 200.

[59] In *Prosecutor v. Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction para. 93-94, the ICTY, referring to the judgment in *Nicaragua*, confirmed that the Geneva Conventions and the "Hague law" "has become a general principle of humanitarian law to which the Convention merely give specific expression." *Tadić* gave rise to the extensive application of humanitarian law by the court. However, in the *Celebici Camp* case, the Trial Chamber of the ICTY, although fully confirming above findings, tried to find practice and prove the existence of customary law. In *Furundžija*, the ICTY Trial Chamber was concerned with the definition of the crime of rape and, in particular, whether forced oral penetration is covered by its constructive elements of the offence. The Chamber found that conventional and customary law did not contain a specific definition of rape and referred to human dignity as derived from general principles of international humanitarian and human rights law and permeated in the corpus of international law as a whole. According to the Chamber, forcible oral penetration was a severe and degrading attack on human dignity, and as violation of a general principle must be classified as rape.

[60] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary objections, Judgment, 11 July 1996, ICJ Rep. 1996.

[61] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep. 1951, para. 23.

5. GENERAL PRINCIPLES AS AN INTERPRETATIVE TOOL IN THE APPLICATION OF OTHER SOURCES OF INTERNATIONAL LAW

It is manifest that courts invoke general principles of law in their argumentation, especially in problematic (hard) cases in which customary or treaty norms raise doubts as to the content of the obligations set out in them. Reference to general principles of law is used not only as a persuasive argument to support the adopted solution, but also to "model" the content and scope of other norms. An example of such a practice can be the case-law of international courts in cases concerning State immunity. The potential conflict between the immunity of a State, as an expression of the general principle of the sovereign equality of states, and the rights of individuals, including the right to an effective remedy in the event of a violation of a *jus cogens* norm, has become one of the most problematic issues in international law in recent years. It is no wonder then that in cases concerning the scope of State immunity, international courts have been extremely careful in building up the legal argumentation of their decisions.

The European Court of Human Rights, in its landmark cases concerning State immunity, has used general principles to justify a restrictive interpretation of the ECHR.[62] Referring to the VCLT, the Court recognized its own obligation under Article 31(3)(c) of the VCLT to interpret Article 6 of the ECHR in harmony with other norms of international law, including customary law on State immunity. What is significant is that the Court made a reservation that measures taken by state-parties to the ECHR which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to courts as embodied in Article 6. The ECtHR then considered customary law in the field of State immunity, and emphasized the important place of the institution of State immunity in the international law system to hold that

> sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

By indicating the close link between immunity and a basic principle of the international legal order, the protection of which is the legitimate aim of restriction of fundamental rights, the ECtHR justified a narrow interpretation of customary norms establishing exceptions to State immunity.[63]

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[62] ECtHR, *Al-Adsani*. *See also* ECtHR, *Fogarty v. the United Kingdom* (App. No. 37112/97), Grand Chamber, 21 November 2001.

[63] *See* ECtHR, *Al-Adsani*, paras. 53-55.

The same approach has been adopted by the ICJ in the case *Jurisdictional Immunities of the State*.[64] The ICJ found that since State immunity is rooted in the principle of sovereign equality of States and the principle of territorial sovereignty, any exception to the immunity of a State represents a departure from the above mentioned principles.[65] The Court's reference to the principles of sovereign equality of States and territorial jurisdiction (as a consequence of the principle of territorial sovereignty) as basic principles of the international legal order played primarily a persuasive role in the Court's argumentation, because the final decision was based on the procedural nature of immunity and the inability of its repeal by a material *jus cogens* norm. This, however, clearly indicates the Court's restraint with respect to the recognition of customary norms that could undermine the nature of international law by interfering with its basic principles. In fact, as commentators have rightly pointed out, this ruling has blocked the progressive development of international law (at least for some time) and preserved the traditional understanding of not only immunity, but also of the basic principles of international law.[66]

CONCLUSIONS

There is no doubt that general principles of law as a means of application and interpretation of treaty and customary law perform a crucial function in the system of international law. In recent decades the role of general principles of law in maintaining the coherence of the system has significantly increased. They complement other sources of international law in various ways. First of all, general principles guide the interpretation of treaties and customary law. Due to their abstract formulation, they open the way for a progressive interpretation and development of international law. They may be the starting point for the evolution of a new rule of customary international law, and they have frequently had an influence on the interpretation of the latter, as in the case of principles of international humanitarian law. However, in some instances general principles may also limit the development of new rules of international law, if such rules might call into question the core of international law, as in the case of exceptions to state immunity.

The fragmentation of international law and proliferation of international courts requires that due attention be played to the preservation of coherence and the unified application of general international law. The inclusion of general principles of law in the

[64] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, Judgment, 3 February 2013, ICJ Rep. 2013.

[65] *Ibidem*, para. 57.

[66] A. Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14(3) European Journal of International Law 529 (2003), p. 529; M. Krajewski, Ch. Singer, *Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, 16 Max Planck Yearbook of United Nations Law 1 (2012), p. 28.

body of (indirectly or directly) applicable international law and the principle of systemic integration are important tools for international courts to maintain a concordance between the treaty regimes within which they adjudicate and the general system of international law. The discussed example of the principle of state responsibility shows that international courts recognise general principles as part of general international law, applicable within treaty regimes which fall within the jurisdiction of these courts. It is also important to note that international courts duly consider the practice of other courts concerning the application of general principles when they determine the content and scope of general principles. This may give rise to the conclusion that general principles contribute to the creation of a body of international constitutional law, understood as set of basic rules and principles of a systemic nature.

General principles may become, and indeed have become, not only the motor of the progressive development of international law, but as applied by international courts they also preserve the systemic nature of international law.