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General Principles of Law and the Interpretation of CIL

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1 Introduction

The interpretation of unwritten norms is fraught with difficulty. Without the settled text of a treaty, interpreters of unwritten norms are without a basic linguistic framework within which they may conduct their search for meaning. In such situations, the boundaries between the existence of a norm and the determination of its content can become blurred. Interpreters may return to the evidence of the norm's existence (such as state practice) in order to determine its content or it may be that interpretation itself is part of the constitutive process of unwritten norms. This confusion is exacerbated by a lack of established methods and procedures for the interpretation of unwritten international law. Customary rules are, of course, a type of unwritten international law. Yet, custom is not alone in this category. There are other, even more nebulous, unwritten norms: general principles of law. While it is commonplace to speak of custom and general principles under the umbrella of 'general international law',[1] it is unclear whether questions of interpretation are to be approached in the same manner for both categories of norms or whether custom and general principles may assist in the interpretation of one another.

My central objective in this chapter is to examine the interactions between these two categories of norms in the context of interpretation.

[1] M Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (2019) 21 ICLR 307, 310–11. For a range of views on the meaning of 'general international law', see G Tunkin, 'Is General International Law Customary International Law Only?' (1993) 4 EJIL 534; C Tomuschat, 'General International Law: A New Source of International Law?' in R Pisillo Mazzeschi and P De Sena, *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018) 185.

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More specifically, I consider whether (and if so to what extent) general principles of law may play a role in the interpretation of customary rules. In approaching this task, I have structured the chapter in three main sections. First, it is necessary to make explicit some assumptions and presumptions about the nature of the norms under examination and the potential relationships between them. To this end, in Section 2 I clarify how I understand general principles of law – that is, as a separate kind of rules distinct from both custom and principles in the true sense of the term. In essence, I view general principles as a distinct category of (mainly secondary) *rules* that come into existence as a result of a dynamic process of assertion and confirmation involving a range of actors, with a particularly prominent role played by courts and tribunals. Further, I briefly sketch how, on the basis of this understanding, I view the potential relationships between general principles of law and customary law. Building on this foundation, I then turn to examine two possible roles for general principles of law in the interpretation of customary rules. In Section 3 I consider whether, as a distinct category of rules, general principles of law may form part of the legal framework relied upon when interpreting international law generally, and custom in particular. Finally, in Section 4 I examine whether it is within the scope of general principles of law to play a part in the systemic interpretation of customary rules, both as the source of the rule on systemic interpretation and as other 'relevant rules' of international law. The core of the argument presented in this chapter is that general principles of law could be the source of many of international law's general rules on interpretation, including those applicable to custom, and that an enhanced reliance on general principles could facilitate further coherence in the interpretation of customary rules.

2 A Theory of General Principles in International Law

Until rather recently, 'general principles of law' had received considerably less academic attention than treaties and custom. The inclusion of general principles of law in the programme of work of the International Law Commission (ILC) has, in no small part, contributed to a significantly heightened interest in the subject.[2] Despite this substantial

[2] For an overview of the ILC's work, see ILC, 'Analytical Guide to the Work of the International Law Commission: General Principles of Law' <https://legal.un.org/ilc/guide/1_15.shtml> accessed 15 March 2022. For an overview of recent literature on general principles, see C Eggett, 'General Principles as Systemic Elements of International Law' (PhD thesis, Maastricht University 2021) ch 1.

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rise in scholarly debate on the topic, it would still be accurate to describe general principles as 'the most enigmatic [of the] sources of international law'.[3] Simply put, there is more disagreement about more aspects of general principles than the other sources. The very nature of these norms, their functions, their creation, and their importance remain unsettled questions. It is, of course, likely that the ILC's work and the body of literature that has followed and to come will help to solidify the foundations of general principles. Yet, at this stage, it remains necessary to explicitly articulate how I understand general principles and their place in international law. This is particularly pressing as my theory of general principles has aspects that contrast with the mainstream (if there is such a thing in this field), including some departures from the positions adopted in the work of the ILC.

In short, I view general principles of law as concrete *rules* of law, distinct from broader, value-laden principles in the strict sense of the term. General principles, in my view, are developed not (solely) from the practice of states or through transposition from domestic law. Instead, they develop (usually incrementally) as the result of a dynamic process of assertion and contestation by a range of international actors: certain 'systemic officials'. Courts and tribunals play a particularly prominent role in the development of general principles, and recourse to this category of rules is typically made where there is the need for a secondary rule not found in the other sources. In the sections that follow, I expand on the idea that general principles are rules, before explaining the processes through which they may be ascertained. In both parts, I endeavour to clarify the key points of distinction and interaction between general principles, on the one hand, and principles *stricto sensu* and customary law, on the other.

2.1 'General Principles of Law' as a Category of Rules

The term 'general principles' is sometimes used in a rhetorical sense to convey the perceived importance or broad and general character of the norm(s) in question. A set of general rules that form the basis of an area

[3] R Kwiecień, 'General Principles of Law: The Gentle Guardians of Systemic Integration of International Law' (2017) 37 PYIL 235, 235. See also M Paparinskis, 'Conclusions: General Principles and the Other Sources of International Law' in M Andenas and others (eds), *General Principles and the Coherence of International Law* (Brill/Nijhoff 2019) 117, 117 (claiming that general principles constitute 'the most peculiar source').

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of law may be described as general principles – a nod to their foundational character. Beyond this rhetorical use, the label may be used to capture a range of types of norms and their functions in the international legal system. For some, general principles are fundamental norms underlying the system as a whole;[4] for others, they are considered of little importance, a class of subsidiary norms[5] or 'inchoate custom'.[6] Further, general principles are occasionally conflated with other notions such equity[7] or *jus cogens* norms.[8] Against this backdrop, it is important to clarify that when I use the term 'general principles of law' I am referring to a distinct category of norms – namely, those referred to in the Article 38(1)(c) of the Statute of the International Court of Justice.[9] These norms are, in my view, a separate type of unwritten *rules*, clearly distinct from both customary law and principles in the true sense of the term. This position is consonant with the both the history of the drafting of Article 38 and the invocation and application of general principles before international courts and tribunals.[10] I take this position on the basis of my understanding of the foundations of the international legal system as a whole and, while it would be impractical to explain this fully here,[11] central to this understanding is the distinction of kind between rules and principles.

Reference to general principles within the meaning of Article 38(1)(c) of the ICJ Statute is distinct from reference to principles in the strict sense of the term. Principles *stricto sensu* are value-based optimisation commands that influence the development and interpretation of rules[12] and can frequently be expressed as 'should' statements. As such, they are

[4] G Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar 2012) 107 (referring to 'foundational principles').

[5] M Bogdan, 'General Principles of Law and the Problem of Lacunae in the Law of Nations' (1977) 46 NJIL 37, 39.

[6] Kwiecień (n 3) 242.

[7] E Milano, 'General Principles *Infra*, *Praeter*, *Contra Legem*? The Role of Equity in Determining Reparation' in M Andenas and others (eds), *General Principles and the Coherence of International Law* (Brill/Nijhoff 2019) 65.

[8] R Kolb, 'General Principles of Law, *Jus Cogens* and the Unity of the International Legal Order' in M Andenas and others(eds), *General Principles and the Coherence of International Law* (Brill/Nijhoff 2019) 60.

[9] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

[10] See generally Eggett (n 2) ch 3, pt 4.

[11] For elaboration, see Eggett (n 2) ch 1.

[12] R Alexy, 'On the Structure of Legal Principles' (2000) 13 Ratio Juris 294, 295; R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 27.

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wholly separate from rules, which issue definitive commands following the fulfilment of one or more conditions.[13] Of course, that general principles and principles *stricto sensu* are distinct does not mean that they operate in isolation. There are meaningful interactions between all categories of norms in the international legal system, with rules (including general principles of law) giving concrete legal expression to principles *stricto sensu*. In turn, principles perform a guiding role in international law, influencing the interpretation and development of the system and the application of its rules. The extent of this interaction between principles and rules may differ depending on the context and norms in question. It may even be that there is a closer relationship between principles and general principles then there is between principles and other categories of rules. It may also be that it is (only) through a general principle of law that a principle *stricto sensu* is granted protection in international law through the imposition of a specific obligation. Nevertheless, such a close relationship would not detract from the existence of the distinction between the two.

If this distinction between general principles and principles *stricto sensu* is accepted, questions arise as to the distinction between general principles and customary law. Both of these are unwritten norms of (predominantly) general application. Yet, once again, it should be made clear that custom in the sense of Article 38(1)(b) of the ICJ Statute refers specifically to a category of unwritten *rules*. So, references to 'customary principles' or 'principles of customary law' are,[14] in my view, references to *principles* in the strict sense of the term and distinct from the customary *rules* that generate specific legal rights and obligations following from the existence of the required state practice and *opinio juris*.[15] While, as with any of the sources of international law,[16] there is scope for overlap, custom and general principles tend to perform distinct functions.

[13] R Dworkin, 'The Model of Rules' (1967) 35 UCLR 14, 25. I elaborate on this understanding of the rules vs principles distinction elsewhere. See Eggett (n 2) ch 3, pt 2. See also, C Eggett, 'The Role of Principles and General Principles in the "Constitutional Processes" of International Law' (2019) 66 NILR 197.

[14] For an example, see *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 [79].

[15] *North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands)* (Merits) [1969] ICJ Rep 3 [60]–[76].

[16] See generally T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011). The ICJ explicitly acknowledged the parallel application of treaty-based and customary rules in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [178].

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Customary rules tend to be primary rules;[17] they impose obligations and grant rights, generally to states, on the basis of their general practice and acceptance that such practice is legally expected. General principles, conversely, are generally secondary rules[18] that arise in the context of dispute settlement and in the absence of an applicable treaty or customary rule.[19] This distinction in function between general principles and custom is linked to the distinctions between the respective means through which these kinds of rules are ascertained. This is further explained in Section 2.2.

2.2 *Ascertainment by 'Systemic Officials': The Centrality of Courts and Tribunals*

Like all rules, general principles must be ascertained on the basis of certain criteria. It is clear that Article 38(1)(c)'s reference to 'civilized nations' is problematic and cannot be maintained. Already in the *North Sea Continental Shelf* case, Judge Ammoun noted that this term is inconsistent with the UN Charter and was introduced as a form of power politics by European colonial powers.[20] Judge Ammoun advocated for a more inclusive approach when referring to domestic systems of law, calling for the term 'civilized' to be dropped and referring to (the far more inclusive) 'universal' support for general principles by 'all . . . nations'.[21] While not expecting *universal* support, the recent work of the ILC seems consonant with Judge Ammoun's basic position, with the current version of Draft Conclusion 2 stating: 'For a general principle of law to exist, it must be generally recognized by [the community of

[17] Primary rules are understood as those that impose obligations, grant rights, or assign a legal status.

[18] Secondary rules are understood as those that regulate the creation, modification, interpretation, and application of other rules.

[19] See generally the norms identified in works such as C Kotuby Jr and L Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017) and B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 1953).

[20] *North Sea Continental Shelf* (n 15) Separate Opinion of Judge Ammoun 133–35. That this term is inappropriate and useless has also been noted in scholarly works. See eg A Pellet, 'Article 38' in A Zimmermann and CJ Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) para 261 (noting that this phrase is 'devoid of any particular meaning').

[21] *North Sea Continental Shelf* (n 15) Separate Opinion of Judge Ammoun 135.

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nations].'[22] The ascertainment of general principles is the focus of the ILC's Second Report,[23] and eight of its fourteen Draft Conclusions are concerned with this topic.[24] In short, and from the starting point of general recognition by the community of nations, the ILC's position on ascertainment is predicated on a distinction between general principles that are derived from domestic systems and those that are formed within the international legal system.[25] From this foundation, the ILC proceeds to elaborate on the processes through which each kind of general principle is formed. For general principles of domestic origin, the ILC adopts a two-step approach requiring '(a) the existence of a principle common to the principal legal systems of the world; and (b) its transposition to the international legal system'.[26] Here, it is clear that the ILC follows the trend of reliance on a comparative approach to domestic systems,[27] with Draft Conclusion 5 explaining that:

> 1. To determine the existence of a principle common to the principal legal systems of the world, a comparative analysis of national legal systems is required.
> 2. The comparative analysis must be wide and representative, including different legal families and regions of the world.
> 3. The comparative analysis includes an assessment of national legislations and decisions of national courts.[28]

On the issue of transposition, the ILC makes reference to the need for a general principle to be compatible with 'fundamental principles of international law' and notes that it must be the case that 'the conditions exist for its adequate application in the international legal system'.[29] In relation to the latter requirement, the ILC explained that this concerns

[22] ILC, 'Second Report on General Principles of Law' (27 April–5 June and 6 July–7 August 2020) UN Doc A/CN.4/741, 58 para 13. In his discussion of this term, the special rapporteur explains its appeal as being due to its consonance with Article 15(2) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[23] ILC, 'Second Report on General Principles of Law' (n 22).

[24] ILC, 'Third Report on General Principles of Law' (18 April–3 June and 4 July–5 August 2022) UN Doc A/CN.4/753, 52–53.

[25] ILC, 'Second Report on General Principles' (n 22) 58 (Draft Conclusion 3).

[26] ibid 58 (Draft Conclusion 4).

[27] See eg J Ellis, 'General Principles and Comparative Law' (2011) 22 EJIL 949; N Jain 'Comparative International Law at the ICTY: The General Principles Experiment' (2015) 109 AJIL 486.

[28] ILC, 'Second Report on General Principles' (n 22) 58 (Draft Conclusion 5).

[29] ibid 58 (Draft Conclusion 6).

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the suitability or appropriateness of a prospective general principle to be applicable in inter-state relations.[30]

When it comes to general principles that are formed within the international legal system, the ILC notes three factors for their ascertainment in Draft Conclusion 7 – namely, that:

> (a) a principle is widely recognized in treaties and other international instruments;
> (b) a principle underlies general rules of conventional or customary international law; or
> (c) a principle is inherent in the basic features and fundamental requirements of the international legal system.[31]

While these appear to be alternative, the special rapporteur notes that these forms of recognition are not mutually exclusive and that they may co-exist as evidence of wide and representative recognition of a general principle by states.[32]

The ILC's account of the ascertainment of general principles is, of course, extremely helpful in exploring this foundational issue. I would, however, question the persistence of the distinction between general principles of domestic law origin and those that develop purely on the international plane.[33] In my view, following from the requirement of general recognition, the focus should be on whether there is sufficient international support for the identification of an international norm.[34] While prevalence in domestic systems may be an important factor in the ascertainment of general principles, the drawing of a distinction between general principles of a domestic origin and international general principles is an oversimplification. All general principles must find the required level of support in international law. The idea of transposition from domestic to international law, while going some way in acknowledging this need, is inadequate. This is for two related reasons. First, the notion that a common core of a norm can be extrapolated from domestic systems to the international legal system is rather artificial. Reference to domestic systems may support the idea that a prospective norm is linked with notions of legal logic, but the act

[30] ibid para 96.
[31] ibid 58 (Draft Conclusion 7).
[32] ibid para 121.
[33] This is frequently asserted in the literature; see eg C Redgwell, 'General Principles of International Law' in S Vogenauer and S Weatherill, *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 9; P Dailler, M Forteau, and A Pellet, *Droit international public* (8th edn, LGDJ 2009) 380.
[34] I explore this in more detail elsewhere; see Eggett (n 2) ch 4.

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of transposition is, in essence, the same as establishing recognition in and consonance with international law. Second, it does not reflect the reality that a norm applicable only in a handful of domestic systems may nevertheless become a general principle if it finds support from other actors, instruments, or norms. In asserting the existence of a prospective general principle, actors can (and do) refer to both domestic and international sources in support of their claim. Put differently, there is a certain overlap between the factors referred to in Draft Conclusions 5 and 7.

As noted by the ILC in its Second Report, there is potential overlap between the evidence used in the ascertainment of general principles and that used for the identification of custom, particularly when it comes to domestic legislation and judicial decisions.[35] In the view of the ILC, the distinction between the methodology used to identify each source is preserved by the need for *opinio juris* for custom and transposition in the case of general principles.[36] In my view, while there is indeed some overlap between these sources, the distinction in ascertainment methodologies boils down to the fact that the centre of gravity for custom is the practice and views of states, while with general principles of law this lies with a broader range of actors, particularly courts and tribunals. States are indeed relevant for general principles, and it may be that a general principle may not form contrary to the will of states, but there is no need to identify a link to the subjective and objective position taken by a majority of states, as is the case with customary law. I acknowledge here that this position is predicated on what may be considered a narrow understanding of the constitutive elements of custom. If it is assumed that there is a more significant role for non-state actors in the creation of custom, then the distinction between the two categories of unwritten rules becomes blurred and it may be more sensible to label all unwritten rules as custom and to equate general principles with principles in the true sense. However, this position is not consonant with the drafting of the PCIJ Statute, the practice of courts and tribunals,[37] or the position of the ILC. It is with this understanding of general principles in mind that the discussion in subsequent sections is developed.

[35] ILC, 'Second Report on General Principles' (n 22) paras 107–12.
[36] ibid paras 110–11.
[37] For an excellent recent overview of the drafting of Article 38(1)(c) and international decisions involving general principles, see I Saunders, *General Principles as a Source of International Law: Article 38(1)(c) of the Statute of the International Court of Justice* (Hart 2021) chs 2–6.

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3 General Principles as Part of the Interpretative Architecture of International Law

It has been argued that international law on interpretation has a 'treaty focus',[38] meaning that 'international legal interpretative doctrine remains firmly rooted in the law of treaties, even as scholars push for a wider lens'.[39] Explaining this position, Duncan Hollis refers to the challenges present in the ascertainment of unwritten sources, which results in the central position of treaties, specifically the rules contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) of 1969,[40] in the body of norms that guide the interpretation of international law.[41] Indeed, it is clear that the VCLT rules are core elements in the interpretative architecture of international law, with both judicial decisions[42] and academics[43] asserting that they form part of customary international law. On the basis of the aforementioned understanding of general principles and customary law, it is arguable that such assertions are not commonly supported by reference to the required state practice and *opinio juris*. That being said, this is largely a question of semantics, as I would not question that these rules are part of general international law. Yet, from this starting point, two issues arise in relation to the interpretation of customary international law. First, whether the general international law equivalents of the VCLT rules apply to unwritten rules (in the same way as they do to treaties) and, second, whether there are other norms at play in the interpretation of international law.

Precisely mapping this interpretative infrastructure is a challenging task, particularly in the case of unwritten rules, where the lines between law ascertainment and content determination (interpretation) may appear

[38] DB Hollis, 'Sources in Interpretation Theories: An Interdependent Relationship' in S Besson and J d'Aspremont, *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 429.

[39] ibid 430.

[40] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[41] Hollis (n 38) 432.

[42] See eg *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43 [109]–[110]; *Restrictions on Imports of Tuna- United States*, GATT Dispute Settlement Panel Report (1994) 33 ILM 839, 892; *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53 [70].

[43] See eg G Hernández, *International Law* (2nd edn, Oxford University Press 2022) 196; J Crawford, *Brownlie's Principles of Public International Law* (9th edn, Cambridge University Press 2019) 366.

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difficult to draw.[44] Nevertheless, as a preliminary matter, it should be made clear that interpretation of customary rules is not only possible, but necessary.[45] While there are key differences between the interpretation of written and unwritten rules, the content of all rules will be expressed in written form of one kind or another. Naturally, the processes of ascertainment of unwritten rules may themselves involve interpretation of some kind, but this does not change the fact that the content of the rules will be subject to interpretation once they have been ascertained.[46] Put differently, the criteria for the existence of a customary rules are distinct from the rules as such.[47] The interpretation of custom should thus be viewed as 'the act of determining/construing the content of customary rules the existence of which is unchallenged'.[48]

My central argument in this section is that general principles of law could play a key role when considering these questions in the context of interpreting customary rules. If, as asserted, general principles are a distinct category of (predominantly) secondary rules, they could serve as a basis for international law's general rules of interpretation, in particular in the case of interpreting unwritten rules such as those of customary international law. Before expanding on this claim further, it is necessary to consider the normative composition of the interpretative architecture of international law. In seeking to describe this legal framework, authors and judges have deployed a range of terms to denote differences in the nature, function, and origin of norms that aid the process of interpretation.

3.1 Maxims, Methods, Principles, and Rules of Interpretation

The body of international law concerned with interpretation is normatively heterogenous. In other words, the task of interpreting an

[44] P Merkouris, 'Interpreting Customary International Law: You'll Never Walk Alone' in P Merkouris, D Peat, and N Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022) 348.

[45] For a contrary view, see eg A Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 JIDS 31, 36.

[46] See generally P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 ICLR 126.

[47] This argument is elaborated upon in M Fortuna, 'Different Strings of the Same Harp: Interpretation of Customary International Rules, Their Identification and Treaty Interpretation' in P Merkouris, D Peat, and N Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022) 399–401. See also O Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 EJIL 235, 245–46.

[48] Fortuna (n 47) 404.

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international legal rule is not regulated by rules alone;[49] the process of interpretation is 'highly context-specific'.[50] It may even be argued that there is such a high degree of discretion for interpreters that there is but a marginal role for norms that guide this process.[51] The reality of this discretion does not, it is argued, remove the relevance of norms of interpretation. There are norms that regulate the approach taken by interpreters, but it can be very difficult to determine the existence and content of these norms. This difficulty is reflected in the terms used to explain approaches to and limits of interpretation in international law. For example, reference has been made to 'rules',[52] 'principles',[53] 'methods',[54] and 'maxims'[55] of interpretation. The intended content of such labels may differ depending on the user, but an essential distinction for present purposes is that between concrete (definitive) *rules* of interpretation and other norms and notions that may provide (non-definitive) guidance for those engaging in the task of interpretation. Specific rules on interpretation may regulate the basic steps that must be taken by, or impose certain obligations on, the interpreter in specific situations. For example, it may be a rule that the first port of call must always be the text itself or that certain methods can be used only if others fail.[56] Other norms – certain maxims or principles of interpretation – may simply provide general guidance or relevant factors for the process of

[49] P Merkouris and D Peat, 'Final Report on the Interpretative Practice of the PCIJ/ICJ' (International Law Association, 79th Biennial Conference, Kyoto, 2020) 1 (making the same point in relation to the practice of the PCIJ/ICJ).

[50] D Peat, *Comparative Reasoning in International Courts and Tribunals* (Cambridge University Press 2019) 18.

[51] ibid 19 (referring to, inter alia, H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 BYBIL 48.

[52] A Bianchi, D Peat, and M Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) pt IV (referring also to 'strategies' in pt V); A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) pt IV (referring also to 'methods' as part of the 'regime' of interpretation). See also the language used in VCLT (n 40) art 39.

[53] C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279; J Klingler, Y Parkhomenko, and C Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2019).

[54] O Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* (Brill 2020); N Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (Routledge 2014).

[55] Merkouris and Peat (n 49) 7–15; F Macagno, D Walton, and G Sartor, 'Pragmatic Maxims and Presumptions in Legal Interpretation' (2017) 37 Law Philos 69.

[56] Such is the case with the rules contained in VCLT (n 40) arts 31 and 32.

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interpretation while not mandating a specific course of action for the interpreter. A potential example of such a norm is the notion of *per analogiam* interpretation.[57] While the relevance and scope of this notion in international law are unsettled,[58] it would seem that this would merely be a tool to be used at the discretion of the interpreter to aid in their task.

The precise scope of a prospective norm of interpretation is not always clear and there may be overlap between different notions. Yet, as explained, the initial task when mapping this legal framework should be a distinction between rules of interpretation and other, non-definitive, norms. Indeed, in my view, the legal framework for the interpretation of international law consists of a collection of rules and principles. It seems, however, that this framework is not clearly and comprehensively defined. There are a number of prospective or candidate norms that may – or may not (yet) – be part of international law. These candidate norms are commonly linked to basic notions of legal logic and their existence in a range of domestic law systems, and may be expressed in the form of certain Latin maxims.[59] The connections with notions of legal logic and domestic law suggest a role for general principles of law in the development of this interpretative framework. As explained above, general principles in the sense of Article 38(1)(c) of the ICJ Statute are frequently explained with reference to basic ideas of legal law and a comparative examination of domestic systems. Yet, the exact role of general principles will, once again, depend on the position taken on the nature of this category of norms. According to my understanding of general principles as a distinct category of *rules*, only accepted norms that impose concrete obligations on the interpreter can be considered as general principles of law in the sense of Article 38(1)(c) of the ICJ Statute. Other general, non-definitive, norms that may be found in domestic systems do not fall within this category. However, it may be that they are accepted principles *stricto sensu* providing first-order and non-definitive reasons to reach a particular result without specifically requiring this. To reiterate, the position taken here is not aimed at minimising the potential impact of such principles, which may effectively facilitate a pragmatic approach to interpretation in international law.

[57] Interpretation by analogy: the notion that recourse may be had to the interpretation of rules in other contexts as inspiration for the case at hand.

[58] Merkouris and Peat (n 49) 14 (explaining that, while the ICJ has used methodology that resembles *per analogiam*, it has not elaborated on this notion).

[59] For a good overview of the appearance of such maxims in the decisions of the PCIJ and ICJ, see Merkouris and Peat (n 49) 7–15.

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3.2 *General Principles as Rules of Interpretation (of Custom)*

It is clear that there are such things as *rules* of interpretation in international law. This much is evident from the VCLT of 1969. Typically seen as embodying the 'general rule' on interpretation,[60] Article 31 of the VCLT of 1969 imposes obligations on interpreters to take into account certain factors and circumstances surrounding the language, background, and broader context of the rule in question. These rules impose obligations of conduct on interpreters, yet there is certainly room to place the emphasis on different factors and circumstances. Within the general rule of Article 31(1) of the VCLT of 1969, for example, it is generally considered that there is no hierarchy of elements and that the different aspects listed – good faith, ordinary meaning, context, and object and purpose – should be considered as part of a single process.[61] The rules in the VCLT are, of course, treaty rules. If there are more generally applicable rules of interpretation, they will have to be based on another source of international law: either custom or general principles of law. Indeed, the mainstream position is that any general rules on the interpretation of international law are grounded in custom. This is true for the general international law equivalents of the VCLT rules, which have been held as part of customary law.[62] In Sections 3.2.1 and 3.2.2 it is argued that general principles of law will frequently be a more appropriate basis for such generally applicable rules of interpretation.

3.2.1 The Case for General Principles as a Source of Rules of Interpretation

As a preliminary point, it should be noted that rules of international law may be based on multiple sources of law. That is to say, similar or identical rules emanating from different sources – treaties, custom, or general principles – may exist and apply in parallel.[63] Therefore, rules of interpretation that are present in one source – say, a treaty such as the

[60] M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill/Nijhoff 2009) 423, 435.

[61] ibid 435–36.

[62] See eg *Maritime Dispute (Peru v Chile)* (Judgment) [2014] ICJ Rep 3 [57]; *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Judgment) [1994] ICJ Rep 6 [41]; *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objections) [1996] ICJ Rep 182 [23]. For a detailed examination of this, see M Fitzmaurice and P Merkouris, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (Cambridge University Press 2020) 147–58.

[63] See generally T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011). The ICJ explicitly acknowledged the parallel application

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VCLT of 1969 – may also exist as custom and/or general principle of law. In many instances, then, the presence of a norm of general international law (custom or general principle) may be irrelevant where there is a treaty rule applicable to the party in question.

It is clear that there are rules of interpretation beyond the specific context of the VCLT of 1969, even if it is merely the case that the VCLT rules have general international law equivalents. Indeed, the rules reflected in the VCLT have been deemed to apply both to treaties that pre-date their codification in the Vienna Convention[64] and to other sources of law,[65] thereby necessitating their existence in general international law. A rule found in the VCLT of 1969 has a different scope of application from an identical customary rule or general principle. Not only could such a rule apply to all treaties; it could also apply to rules emanating from the other sources of law, in particular customary rules.[66] There is, therefore, a need to determine whether such unwritten rules exist. As mentioned, it is most commonly asserted that the application of these rules beyond the context of the VCLT is due to the parallel existence of these rules as custom. This position is consonant with the broader trend to equate all unwritten rules of international law as customary. Given that customary international law is a clearer concept (or at least, less unclear) than general principles, this is unsurprising. Indeed, this claim may, in many circumstances, have merit; customary law has clearly been instrumental in the development of the international legal system. Yet, such arguments should be examined more closely, as there are significant implications for automatic (over-)reliance on custom as a vehicle for such rules. While there may be general rules of international law that fulfil the requirements of customary law, it should not be assumed, as is frequently the case, that all general international law rules are grounded in custom. As Sir Robert Jennings observed, 'most of

of treaty-based and customary rules in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [178].

[64] See eg *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) (2004) ICJ Rep 279 [100]; *Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045 [18]; *Dispute Regarding Navigation and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2000] ICJ Rep 237 [47].

[65] This aspect is less settled but seems perfectly logical. Most prominently, the rule on systemic interpretation as contained in Article 31(3)(c) of the VCLT is argued to be applicable to customary rules. See eg P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill/Nijhoff 2015) ch 4; Fortuna (n 47) 411.

[66] In the case of a general customary rule of interpretation, this would of course be subject to any modification to its scope of application as a result of persistent objection. See *Anglo-Norwegian Fisheries (United Kingdom v Norway)* (Judgment) [1951] ICJ Rep 116, 131.

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what we perversely persist in calling customary international law is not only *not* customary law; it does not even faintly resemble customary law'.[67]

The process for the determination of custom has traditionally centred on the fulfilment of two elements: widespread and consistent state practice and the accompanying belief by states that such conduct is legally required (*opinio juris*).[68] The formation of custom has received renewed attention in the recent work of the International Law Commission (ILC), which sought to provide further guidance on the identification of customary rules.[69] While acknowledging the broader context in which these two elements must be assessed,[70] the ILC reaffirmed the focus on the two elements of custom and the centrality of states to the formation of customary rules.[71] While the ILC specified the need for 'systematic and rigorous analysis' of state practice and *opinio juris* in assessing the formation of a customary rule, it has been widely noted that this is seldom the case in reality, with courts simply asserting the existence of a customary rule with little or no evidence.[72] This is, of course, unsatisfactory. The existence of all international legal rules is premised on the fulfilment of conditions of validity and the fulfilment of these conditions must be supported by evidence. For customary rules, this evidence is found in the actions and views of states. This evidence may be assessed by courts and tribunals, but the focus is on what states are doing and claiming. Yet, many rules of interpretation – like many other secondary rules – have developed in international law through the decisions of international courts and tribunals, as it is predominantly these actors that are faced with the task of interpretation. In many instances, it would not be accurate to say that these rules have fulfilled the requirements of

[67] See eg R Jennings, 'The Identification of International Law' in B Cheng (ed), *International Law: Teaching and Practice* (Stevens & Sons 1982) 5.

[68] *North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3 [60]–[76].

[69] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10.

[70] See eg ibid, Draft Conclusion 3 and the accompanying commentary, 126–27 (referring to the 'context' and 'underlying principles' of a rule).

[71] See eg ibid, Draft Conclusion 4 and the accompanying commentary, 130–32 (explaining that 'States play a pre-eminent role in the formation of customary international law, and it is principally their practice that has to be examined in identifying it'; noting also a limited role played by the practice of international organisations in certain circumstances).

[72] S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) EJIL 417, 434–40; C Ryngaert and D Hora Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 NILR 1, 1–2.

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custom. The rules have developed out of necessity, with reference to domestic law and the broader context and features of the international legal system. It may be argued that the assertion of such norms by states before international courts and tribunals is sufficient to demonstrate their customary status. At best, the assertions of states may be seen as evidence of *opinio juris*, but it is rarely the case that the practice of states supports the existence of such norms. The actor relevant in the act of interpretation is, typically, a judicial body. Questions of interpretation come before international courts and tribunals, which, in the absence of established norms, search for and confirm the existence of rules governing the process of international adjudication. In determining the existence and content of such rules of interpretation, as with many other secondary rules in international law, courts and tribunals have not limited themselves to an assessment of the elements of customary law but have had recourse to a broader range of factors, including domestic law and principles *stricto sensu*.[73]

3.2.2 Candidates for General Principles of Interpretation

As mentioned, some of the general rules of interpretation of international law – whether based in custom or general principles – will also be treaty rules contained in the VCLT. In the context of the law of treaties and on the basis of the jurisprudence of the ICJ, Sir Gerald Fitzmaurice compiled a list of six principles of interpretation.[74] These were:[75] (1) the principle of actuality (textuality); (2) the principle of natural and ordinary meaning; (3) the principle of integration;[76] (4) the principle of effectiveness; (5) the principle of subsequent practice; and (6) the principle of contemporaneity. These principles set out a general process for the interpretation of international rules, which was later taken up in the drafting of the VCLT of 1969. Indeed, many of the notions identified by Fitzmaurice and later included in the VCLT have a long history in the decisions of international courts and tribunals,[77] as well as established pedigree as basic elements of

[73] See generally Kotuby and Sobota (n 19).

[74] ILC, 'Fifth Report on the Law of Treaties' (1966) UN Doc A/CN.4/183 and Add.1–4, 220.

[75] For a discussion, see M Fitzmaurice, 'The Practical Working of the Law of Treaties' in M Evans, *International Law* (5th edn, Oxford University Press 2018) 138, 152–53 (explaining that the three final principles 'take effect subject to' the first three principles).

[76] That treaties are to be interpreted as a whole and as part of their overall context. This is not to be confused with 'systemic integration' (interpretation) in the sense discussed in Section 4.

[77] H Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence Volume II* (Oxford University Press 2013) pt 2, ch 2.

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legal logic in domestic systems. Some of these principles may be more difficult to apply in the context of the interpretation of customary rules. For example, it may be more difficult to apply the principle of integration to a rule not based in a specific and authoritative text. Further, there are inherent difficulties that arise in assessing subsequent practice in the context of customary rules, as questions may arise as to whether such practice is part of the formation of new rules or the interpretation of existing rules. Nevertheless, on the basis of the historical background to these principles and their subsequent acceptance in the VCLT and judicial decisions, it seems convincing that they form part of general international law and so could be used as an approach to the interpretation of customary rules. Yet, as described above, it should not merely be assumed that these general rules are customary, as their acceptance has not been a clear result of the actions and views of states but of judicial bodies striving for a framework of secondary rules to aid in the task of interpretation in the absence of an applicable treaty rule.

In addition to, or perhaps as part of, the basic rules reflected in the VCLT of 1969, it may be possible to argue for the existence of other rules of interpretation grounded in general principles. A clear candidate includes the uncontroversial proposition that an interpretation of a rule cannot contradict a *jus cogens* norm.[78] Indeed, this interpretation rule is logical given the nature and role of *jus cogens* norms and the consequences of their violation. This was advanced by the Islamic Republic of Iran in the *Oil Platforms* case, where it was argued that:

> Under Article 53 of the Vienna Convention ... a provision of a treaty which conflicts with a norm of *jus cogens* is void ... That is to say, the treaty as a whole is void. These rigorous provisions must in turn generate a stringent principle of interpretation, so that any provision of a treaty is to be interpreted, if at all possible, so as not to conflict with such a rule.[79]

While not specifically endorsing the rule of interpretation as formulated by Iran, the ICJ explained that it was required to interpret the treaty rule

[78] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, Joint Declaration of Judges Shi and Koroma [2]; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, Separate Opinion of Judge Bedjaoui [6].

[79] *Oil Platforms (Islamic Republic of Iran v United States of America)* Reply and Defence to Counter-Claim, Islamic Republic of Iran, vol I (10 March 1999) 164–65 <www.icj-cij.org/sites/default/files/case-related/90/8630.pdf> accessed 1 April 2022.

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in question (Article XX of the Treaty of Amity[80]) in conformity with the rules on the use of force.[81] The existence of such a rule has been recently confirmed by the ILC in the context of its work on *jus cogens*.[82]

There are other candidates for rules of interpretation that should be classified as general principles of law. Whether these prospective norms are to be considered as general principles of law or principles *stricto sensu* will depend on their precise scope and content. Take, for example, the collection of 'maxims'/'cannons' of interpretation in the practice of the PCIJ and ICJ, as identified by Merkouris and Peat.[83] The scope for notions such as *in dubio mitius*,[84] *effet utile*,[85] and *per analogiam*[86] to constitute general principles of law will very much depend on their precise context in the international legal system. It is beyond the scope of this chapter to consider these notions/norms in detail, but what is critical is whether courts and tribunals elucidate clear conditions for their application and whether this involves the imposition of obligations on the interpreter. There is considerable practice in support of such norms, and so it seems that there is potential for the development of rules in the form of general principles here. That being said, depending on the precise content of the norm, it may be that these norms amount to principles *stricto sensu*. For example, the 'principle of effectiveness' is clearly viewed as part of international law and as being of relevance to the interpretation of international rules.[87] Its

[80] Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran (adopted 15 August 1955, entered into force 16 June 1957) 284 UNTS 93.

[81] *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161 [40]–[41]. The rule prohibiting the use of force is mentioned by the ILC in its illustrative list of *jus cogens* norms: ILC, 'Fourth Report on Peremptory Norms of General International Law (*jus cogens*) by Dire Tladi, Special Rapporteur' (2019) UN Doc A/CN.4/727 para 60.

[82] ILC, 'Fifth Report on Peremptory Norms of General International Law (*jus cogens*)' (2022) UN Doc A/CN.4/747, Conclusion 20.

[83] Merkouris and Peat (n 49) 7–15.

[84] Essentially, the idea of restrictive interpretation. See eg *Free Zones of Upper Savoy and District of Gex (France v Switzerland)* (Merits) [1932] PCIJ Ser A/B No 46, 12 (declaring that 'in case of doubt, a limitation of sovereignty must be construed restrictively').

[85] The interpretation adopted should be the one that gives effect to a rule, as opposed to an interpretation that renders the rule meaningless and ineffective, or, put differently, the idea that a rule should be given its 'proper effects'. See *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (Judgment) [2014] ICJ Rep 226, Separate Opinion of Judge Cançado Trindade [54].

[86] Interpretation by analogy. The notion that recourse may be had to the interpretation of rules in other contexts as inspiration for the case at hand.

[87] See eg GI Hernández, 'Effectiveness' in J d'Aspremont and S Singh, *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 237; O Hathaway,

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precise content, however, is less clear. It may, for example, not require an interpreter to strive to assign the greatest possible effectiveness to a rule, but instead merely to seek to avoid an interpretation that avoids depriving a rule of any effects altogether.[88] In this sense, it may be seen to underlie the general rules of interpretation set out in Article 31 of the VCLT of 1969.[89] Whether such norms are considered general principles of law will depend on courts and tribunals continuing to deliberate on them.

4 General Principles, Custom, and Systemic Interpretation[90]

A particularly prominent tool in the interpretation of unwritten rules is the notion of systemic integration. More precisely, against the background of broader principles of coherence and consistency in the international legal system,[91] there is a specific *rule* of systemic interpretation. This rule requires that interpreters take into account 'any relevant rules of international law applicable in the relations between the parties'.[92] The central objective of this rule of interpretation is coherence and consistency in the international legal system. The development of general principles of law, too, has links to such notions. This final section explores the interaction between this rule of systemic interpretation and general principles in international law. Once general principles are understood to be rules, two issues arise with regard to systemic interpretation: first, whether this rule on systemic interpretation can itself be considered a general principle and, second, whether and how the interpretation of customary rules occurs in light of general principles as 'relevant rules of international law'.

4.1 Systemic Interpretation as a General Principle of Law

The idea that international rules should be interpreted coherently and consistently with the normative environment in which they exist is inherently attractive. Such coherence is linked to the idea of international

L Johnson, and F Ní Aoláin, 'An Introduction: Effectiveness in International Law' (2014) 108 ASIL Proc 1 and the other contributions to this annual meeting.

88 Merkouris and Peat (n 49) 10, referring to G Fitzmaurice, '*Vae victis* or Woe to the Negotiators: Your Treaty or Our "Interpretation" of It?' (1971) 65 AJIL 358.

89 *Whaling in the Antarctic*, Separate Opinion of Judge Cançado Trindade (n 85) [54].

90 For the purposes of this chapter, the terms 'systemic interpretation' and 'systemic integration' are used interchangeably.

91 Merkouris, *Article 31(3)(c) VCLT* (n 65) 2; McLachlan (n 53) 279.

92 Reflected in VCLT art 31(3)(c).

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law as a legal system, and the imposition of an obligation on interpreters to respect and facilitate this systemic coherence is a logical foundation of the international legal order.[93] McLachlan has claimed that systemic integration has the status of a 'constitutional norm' in international law.[94] It is clear that the obligation to systemically interpret international rules has a strong pedigree in the international legal system, perhaps as an 'unconscious part of the interpretation process'.[95] While undoubtedly part of international law beyond the VCLT of 1969, it may be questioned whether the rule on systemic interpretation is customary, as is the standard claim, or whether it is better conceived of as a general principle of law. It is clear that this norm is a *rule* of international law, more specifically one that imposes an obligation of conduct on interpreters to 'take into account' certain factors. Further, it should be noted that this rule has a long history in the decisions of courts and tribunals,[96] including by the ICJ in *Oil Platforms*.[97] The prominence of courts and tribunals in the development of this international rule, together with its close relationship with principles *stricto sensu* (such as coherence[98]), suggest its characterisation as a general principle as opposed to a customary rule.

4.2 General Principles as 'Relevant Rules of International Law'

Already in the *Georges Pinson* case reference was made to the need to interpret rules in accordance with 'general principles of international law'.[99] If general principles of law are rules, they are rules of general

[93] For an overview of the systemic nature of international law, see Eggett (n 2). ch 2. See also R Higgins, *Problems and Processes: International law and How We Use It* (Clarendon Press 1995) 1, 8 (arguing that international law is more accurately understood as a normative system and process rather than a set of rules.

[94] McLachlan (n 53) 280. While this view illustrates the perceived importance of this norm, reference to 'constitutional' elements in international law should be treated with caution. On constitutional analogies in international law generally, see L Helfer, 'Constitutional Analogies in the International Legal System' (2003) 37 LLALR 193.

[95] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682 para 414.

[96] Oft-cited early examples of decisions in which systemic interpretation was used by arbitral tribunals include *Georges Pinson Case (France/United Mexican States)* Award of 13 April 1928, UNRIAA, vol V, 422; *Différend concernant l'accord Tardieu-Jaspar (Belgium/France)* Award of 1 March 1937, UNRIAA, vol III, 1713.

[97] *Oil Platforms* (n 81) [40].

[98] See generally the contributions in M Andenas and others (eds), *General Principles and the Coherence of International Law* (Brill/Nijhoff 2019).

[99] *Georges Pinson Case* (n 96) 422.

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application.[100] It therefore seems they could frequently play a role as 'relevant rules of international law applicable in relations between the parties'. However, two clarifications should be made here. Firstly, frequent recourse to something labelled as a '(general) principle' may not be reference to a general principle in the sense of Article 38(1)(c) of the ICJ Statute. Instead, this may be a reference to principles *stricto sensu*.[101] For example, reference may be made to 'general principles' such as 'sovereignty'[102] or 'humanity'[103] when approaching the interpretation of rules. These, of course, play a key role in interpretation as they help determine the meaning of rules to which they are related, but this practice is not part of the obligation to consider other applicable *rules*.[104] Second, it should be emphasised that there is a need to identify *relevant* rules for the purposes of systemic interpretation. This would cover rules that exist in parallel in multiple sources, but it may also cover rules that deal with similar subject matter or adopt similar wording.[105] It will be recalled that general principles, partly due to the process of their ascertainment, tend to be secondary rules that emerge in the absence of any treaty or customary rules. As such, the scope for parallel or overlapping rules may be more limited than in the case of interpretation in the light of treaties or custom, which tend to concern primary rules.

There are examples in which courts and tribunals seem to have interpreted rules against the backdrop of general principles. For example, in *Golder* v. *United Kingdom*, the European Court of Human Rights referred explicitly to Article 38(1)(c) of the ICJ Statute, concluding that there was a general principle of law regarding access to civil courts when interpreting Article 6 of the European Convention on Human Rights.[106] Similarly, in *Furundžija* the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia was tasked with determining the

[100] Eggett (n 2) 158–63.

[101] Indeed, it has been argued that, as relevant principles *stricto sensu* (as understood in this chapter), Article 38(1)(c) of the ICJ Statute could be part of the process of interpretation. See eg I Saunders *General Principles as a Source of International Law: Article 38(1)(c) of the Statute of the International Court of Justice* (Hart 2021) 212–13.

[102] *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections) [2018] ICJ Rep 1 [57].

[103] For an overview in the context of the law of armed conflict, see MN Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50(4) VJIL 795.

[104] Villiger (n 60) 433.

[105] See eg *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections) [2017] ICJ Rep 3 [91].

[106] *Golder v United Kingdom*, App no 4451/70 (ECtHR, 21 February 1975) 213.

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scope of the offence of rape in its statute. The chamber conducted a review of domestic approaches to this question and made reference to the principle (*stricto sensu*) of human dignity.[107] It should be noted that in such cases there may be a need to identify a prospective general principle before it can be used in the systemic interpretation of a treaty or customary rule. As mentioned at the outset, general principles of law have received comparatively little attention in international law. There is, therefore, significant unrealised potential for their use as a tool for the development of new rules. In some fields, this potential may also include scope for the development of new *primary* rules of international law.[108] For example, there are several unwritten primary rules in international environmental law that seemed to originate not in the practice of states but in the reasoning of courts and tribunals. These include the obligation to prevent transboundary harm[109] and the obligation to notify other states in the event of such harm.[110] It may be expected that the renewed interest in general principles in scholarship and by the ILC may lead to a greater role played by these norms in the development of new international rules. If this is the case, the scope for general principles to influence the systemic interpretation of customary rules would be further enhanced.

5 Concluding Remarks

This chapter has explored the interface between two developing fields at the very foundations of international law: the nature of general principles of law and the interpretation of customary rules. Central to the ongoing discussion on the nature, function, and place of general principles in the international legal system is the question of the interaction between general principles and other international legal norms. Questions of interpretation are a prominent area of such interaction, and, assuming general principles to be secondary rules of international law, there is significant potential for the development of general principles of interpretation. For the most part, the discussions sketched in this chapter may appear to amount to an exercise in (inconsequential) labelling. Yet, when approaching a task as challenging as that of mapping the interpretative

[107] *Prosecutor v Furundžija* (Judgment) ICTY-95-17/1 (10 December 1998) [182]–[184].
[108] Eggett (n 2) 163–68.
[109] *Trail Smelter Arbitration (United States v Canada)* [1941] 3 UNRIAA 1905, 1965; *Corfu Channel (United Kingdom v Albania)* (Judgment) [1949] ICJ Rep 4, 22.
[110] *Blockade of Portendic (Great Britain v France)* [1843] 42 BFSP 1377.

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architecture of custom, the labels used matter. As important as customary rules are, it is inaccurate to use 'customary international law' as shorthand for any and all norms beyond treaties. There are clear distinctions to be drawn between the different categories of rules and principles that constitute 'general international law'. This exploration of the role of general principles in the interpretation of custom illustrates the normative heterogeneity of general international law, providing a foundation for further examination of the precise contours of the structures that govern the interpretation of unwritten rules and other systemic questions of international law.

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