ANNEX I

GENERAL PRINCIPLES OF LAW

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Introduction

1. Sources are central to the whole system of international law. The International Law Commission has made a remarkable contribution in this sphere, especially on the law of treaties,[1] which led to the 1969 Vienna Convention on the Law of Treaties and other instruments.[2] This contribution has continued more recently with the "Guide to Practice on Reservations to Treaties",[3] the draft articles on the effects of armed conflicts on treaties,[4] and, currently, with its work on "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and on "Provisional application of treaties".

2. The Commission has also been working in the last few years on customary international law, another main source of international law. In 2016 it adopted, on first reading, a set of draft conclusions with commentaries on identification of customary international law. It is expected that the work of the Commission on this topic will be completed, on second reading, in 2018.[5]

3. Within the context of other topics considered by the Commission, references have been made to general principles of law.[6] For instance, under the topic of "*Jus cogens*" within the current agenda of the Commission, general principles of law are being analysed as a source of peremptory norms of general international law.[7]

4. In line with its previous and current work on treaties and on customary international law, it is proposed that the Commission include in its programme of work a topic on the third of the three principal sources of international law, which is contained in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, under the title "General principles of law". The Commission can provide an authoritative clarification on their nature, scope and functions, as well as on the way in which they are to be identified. The final outcome could be a set of conclusions with commentaries. A number of examples of general principles of law would be referred to in the commentaries, but the objective of the topic would not be to catalogue existing general principles of law.

A. Historical development of the concept

5. By the end of the nineteenth century and the beginning of the twentieth century, concepts such as "general principles", "principles of natural justice", "general principles of the law of nations" and "generally recognized principles" had been resorted to in international arbitration on procedural as well as substantive questions when the given treaty provided no clear answer.[8] Conventions

[1] Topics in relation to treaties considered by the Commission: "Law of treaties" (1949–1966); "Reservations to multilateral conventions" (1951); "Extended participation in general multilateral treaties concluded under the auspices of the League of Nations" (1963); "Succession of States in respect of treaties" (1968–1974); "Treaties concluded between States and international organizations or between international organizations" (1970–1982); "Reservations to treaties" (1993–2011); "Effects of armed conflicts on treaties" (2004–2011); "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", formerly "Treaties over time" (2008–present); and "Provisional application of treaties" (2012–present). Information available from the Commission's website: http://legal.un.org/ilc/.

[2] Vienna Convention on the Law of Treaties, of 23 May 1969; Vienna Convention on Succession of States in Respect of Treaties, of 23 August 1978; and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 21 March 1986.

[3] *Yearbook … 2011*, vol. II (Part Two), chap. IV, para. 75, and *ibid*., vol. II (Part Three). The text of the guidelines constituting the Guide to Practice is contained in the annex to General Assembly resolution 68/111 of 16 December 2013.

[4] *Yearbook … 2011*, vol. II (Part Two), paras. 100–101. The articles on the effects of armed conflicts on treaties adopted by the Commission are contained in the annex to General Assembly resolution 66/99 of 9 December 2011.

[5] "Identification of customary international law", formerly "Formation and evidence of customary international law" (2013–present). The Commission had previously considered the topic "Ways and means of making the evidence of customary international law more readily available" (1949–1950). The draft conclusions and commentaries adopted by the Commission on first reading are contained in *Yearbook … 2016*, vol. II (Part Two), paras. 62–63. All of the information on the topic is available from the Commission's website: http://legal.un.org/ilc/.

[6] See, e.g., "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", *Yearbook … 2006*, vol. II (Part Two), chap. XII; "State responsibility", *Yearbook … 2001*, vol. II (Part Two) and corrigendum, chap. IV; "Responsibility of international organizations", *Yearbook … 2011*, vol. II (Part Two), chap. V; "Draft Code of Crimes against the Peace and Security of Mankind", *Yearbook … 1996*, vol. II (Part Two), chap. II; Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook … 1950*, vol. II, document A/1316, p. 374.

[7] See the second report on *jus cogens* by Mr. Dire Tladi, Special Rapporteur (A/CN.4/706), paras. 48–52.

[8] *Arakas (The Georgios)* (1927), Greco-Bulgarian Mixed Arbitral Tribunal, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix*, vol. 7, Paris, Sirey, 1928, p. 37, at pp. 43–45 (on *audiatur et altera pars*); *Turnbull, Manoa Co. Ltd., Orinoco Co. Ltd.* (1903), United States of America–Venezuela Mixed Claims Commission, J. H. Ralston and W. T. S. Doyle, *Venezuelan Arbitrations of 1903…*, Washington, D.C., Government Printing Office, 1904, p. 200, at p. 244 (on *nemo judex in sua propria causa*) (see also UNRIAA, vol. IX (Sales No. 59.V.5), p. 261, at p. 304); *Rio Grande* (1923), F. K. Nielsen, *American and British Claims Arbitration under the Special Agreement concluded between the United States and Great Britain, August 18, 1910*, Washington, D.C., Government Printing Office, 1926, p. 332, at p. 342 (on *competence-competence*) (see also UNRIAA, vol. VI (Sales No. 59.V.5), p. 131, at pp. 135–136); *Valentiner* (1903),

(*Continued on next page.*)

had also referred to "principles of the law of nations", "principles of international law" and "general principles of justice and equity",[9] while the content and nature of these concepts were subject to controversy.

6. In 1920, the "general principles of law recognized by civilized nations" were included in the Statute of the Permanent Court of International Justice as one of the three principal sources of international law to be applied by the Court. Within the Advisory Committee of Jurists, which was entrusted with the drafting of the Statute of the Permanent Court of International Justice, the meaning to be ascribed to, as well as the material content of, general principles of law has been one of the most debated issues.[10] While the positivist position of Elihu Root insisted that judges could only decide in accordance with "recognized rules" and in their absence they "should pronounce *non-liquet*", others opposed that view and proposed language such as "rules of international law as recognised by the legal conscience of civilised nations", "principles of equity", "general principles of law and justice" and "general principles of law and with the consent of the parties, the general principles of justice recognised by civilised nations".[11] The finally adopted language in Article 38 of the Statute, "The Court shall apply […] 3. The general principles of law recognized by civilized nations", was regarded as a compromise between positivists and naturalists.[12]

7. However, doctrinal controversies concerning the nature and origin of this concept persist. Some considered the inclusion of general principles of law as a rejection of the positivistic doctrine, according to which international law consists solely of rules to which States have given their consent,[13] whereas others reject the reasoning of "objective justice" and insisted that general principles of law could only be recognized *in foro domestico* and their function is limited to "filling the gaps" left by treaties and customary international law.[14] Some have identified multiple origins from which general principles of law could be derived, which are not limited to those found in domestic laws.[15] Controversies surrounding the nature of general principles of law were also reflected in the discussions on general principles of law as a source of *jus cogens*.[16]

(*Footnote 8 continued.*)

German-Venezuelan Mixed Claims Commission, Ralston and Doyle, *Venezuelan Arbitrations of 1903* …, p. 562, at p. 564 (on presumption of the validity of acts).

[9] In the 1899 Hague Convention for the Pacific Settlement of International Disputes, article 48 provides that "The Tribunal is authorized to declare its competence in interpreting the *compromis* as well as the other Treaties which may be invoked in the case, and in applying *the principles of international law**"; in the 1907 Hague Convention for the Pacific Settlement of International Disputes, article 73 has language similar to that of article 48 of the 1899 Hague Convention; the "Martens clause" in the 1899 Convention respecting the Laws and Customs of War on Land reads: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of *the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience**"; the "Martens clause" in the 1907 Convention respecting the Laws and Customs of War on Land reads: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of *the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience**"; the 1907 Convention for the Establishment of a Central American Court of Justice provides, in its article XXI: "In deciding points of fact that may be raised before it, the Central American Court of Justice shall be governed by its free judgment, and with respect to points of law, by *the principles of international law**"; and the Convention Relative to the Establishment of an International Prize Court provides, in its article 7: "… In the absence of such provisions, the court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with *the general principles of justice and equity**".

[10] See V. D. Degan, *Sources of International Law*, The Hague, Martinus Nijhoff, 1997, pp. 41–53; A. Pellet, "Article 38", in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford, Oxford University Press, 2006, pp. 677–792.

[11] Permanent Court of International Justice, Advisory Committee of Jurists on the Establishment of a Permanent Court of International Justice, *Procès-Verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes*, The Hague, Van Langenhuysen Brothers, 1920, pp. 306 and 333; League of Nations, *The Records of the First Assembly, Meetings of the Committees, I*, Geneva, 1920, pp. 385 and 403.

[12] *Ibid.*; see also J. Spiropoulos, *Die allgemeinen Rechtsgrundsätze im Völkerrecht*, Verlag des Institut für Internationales Recht an der Universität Kiel, 1928, p. 66; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, Stevens and Sons, 1953, pp. 24–26; Degan (footnote 10 above), pp. 41–53.

[13] J. L. Brierly, *The Law of Nations. An Introduction to the International Law of Peace*, 5th ed., Oxford, Clarendon Press, 1955, p. 63; S. Rosenne, *The Law and Practice of the International Court*, vol. I, Leyden, A.W. Sijthoff, 1965, p. 63.

[14] M. Sørensen, *Les sources du droit international. Étude sur la jurisprudence de la Cour Permanente de Justice Internationale, Copenhagen*, E. Munksgaard, 1946, p. 113; W. Friedmann, *The Changing Structure of International Law*, London, Stevens and Sons, 1964, p. 196; G. Herczegh, *General Principles of Law and the International Legal Order*, Budapest, Akadémiai Kiadó, 1969, pp. 97–100; International Law Association, Study Group on the Use of Domestic Law Principles for the Development of International Law, Working session 2016 (10 August), available from www.ila-hq.org/index.php/study-groups.

[15] O. Schachter, "International law in theory and practice: general course in public international law", *Collected Courses of the Hague Academy of International Law, 1982-V*, vol. 178, pp. 75–82 (according to him, general principles of law could be classified into five categories: (1) principles that exist in the municipal laws of States worldwide, e.g. *res judicata*; (2) principles derived from the specific nature of the international community, e.g. non-intervention and sovereign equality; (3) principles intrinsic to the idea of law, e.g. *lex specialis* and *lex posterior derogat priori*; (4) principles "valid through all kinds of societies in relationships of hierarchy and co-ordination"; (5) principles of justice founded on "the very nature of man as a rational and social being"); Ch. Rousseau, *Principes généraux du droit international public*, vol. I (*Introduction: Sources*), Paris, Pedone, 1944, p. 891 (he maintained that "general principles of law" is not limited only to those of domestic law but comprises likewise general principles of international law); for a similar idea, see also R. Wolfrum, "General international law (principles, rules, and standards)", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. IV, Oxford, Oxford University Press, 2012, pp. 344–368 (online edition: http://opil.ouplaw.com/home/MPIL); B. D. Lepard, *Customary International Law: A New Theory with Practical Applications*, Cambridge, Cambridge University Press, 2010, p. 162 (according to him, general principles of law include general principles of national law, general principles of moral law and general principles of international law).

[16] During the United Nations Conference on the Law of Treaties, Trinidad and Tobago stated that *jus cogens* is "primarily a rule of customary international law", because that delegation considered "not only that [general principles of law] was a most unlikely source of rules of *jus cogens*, but that it would be dangerous to rely on analogies with municipal law in a matter of such fundamental importance" (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), 56th meeting of the Committee of the Whole, 7 May

8. During the discussions dealing with the Statute of the International Court of Justice, it was proposed that "general principles of law recognized by civilized nations" should be followed by the wording "and especially the principles of international law".[17] After a discussion this proposal was modified, and the chapeau of paragraph 1 was finally changed to "The Court, whose function is to decide *in accordance with international law** such disputes as are submitted to it, shall apply:".[18] In this regard, some observed that this change was of no far-reaching consequence, as the application of international law was implicit in the old formulation.[19] But others like Tunkin suggested that "the amendment invalidates the understanding of Article 38, I, *c* that was prevailing in the Commission of Jurists in 1920… It clearly defines that 'general principles of law' are principles of international law".[20] He contended that general principles of law comprise those principles common to national legal systems and to international law: they are legal postulates followed in national legal systems and in international law.[21]

9. Relevant concepts were defined in a more specific manner in international criminal law. According to the Rome Statute of the International Criminal Court, the applicable law of the Court includes "(*a*) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (*b*) In the second place, where appropriate, applicable treaties and the *principles and rules of international law*,* including the established principles of the international law of armed conflict; (*c*) Failing that, *general principles of law derived by the Court from national laws of legal systems of the world**".[22] Within the context of the Rome Statute, according to Pellet, "principles and rules of international law" is limited to customary international law whereas "general principles of law derived by the Court from national laws" corresponds to "general principles of law recognized by civilized nations" under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.[23] A similar order of the application of sources was maintained by the International Tribunal for the Former Yugoslavia, but in some cases, it appeared to view "customary international law", "general principles of international law", "general principles of criminal law common to the major legal systems of the world" and "general principles of law consonant with the basic requirements of international justice" as independent sources.[24]

10. In other areas of international law, references to the concept of general principles of law were also unclear and inconsistent. For instance, the choice of law provisions in the arbitral cases *LIAMCO v. Libya* and *Texaco v. Libya* read: "[t]his Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the *principles of international law**, and in the absence of such common principles then by and in accordance with the *general principles of law as may have been applied by international tribunals**".[25] And it has been observed that the Iran–United States Claims Tribunal has frequently referred to "general principles of international law", leaving doubt as to whether it was indicating customary international law or "general principles of law recognized by civilized nations".[26]

1968, p. 327, paras. 63–64); but the Islamic Republic of Iran stated during the 26th meeting of the Sixth Committee, on 28 October 2016, that general principles of law in the sense of Article 38 of the Statute of the International Court of Justice "were the best normative foundation for norms of *jus cogens*" (A/C.6/71/SR.26, para. 120); it was also expressed by the American Branch of the International Law Association that the customary law-making process may not logically lead to the emergence of peremptory norms of abstention; rather, the law-making process of general principles of law is better suited to meeting the requirements for the formation of *jus cogens*; see Committee on the Formation of Customary International Law, American Branch of the International Law Association, "The role of State practice in the formation of customary and *jus cogens* norms of international law", *Proceedings and Committee Reports of the American Branch of the International Law Association 1987–1988*, p. 123; see also B. Simma and P. Alston, "The sources of human rights law: custom, *jus cogens*, and general principles", *Australian Year Book of International Law*, vol. 12 (1992), p. 104; according to Sir Hersch Lauterpacht, in his first report on the law of treaties, the nullity of a treaty could result from its "inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*). These principles need not necessarily have crystallized in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those *principles of law generally recognized by civilized nations**" (*Yearbook … 1953*, vol. II, document A/CN.4/63, p. 155).

[17] United Nations Conference on International Organization, *Documents*, vol. XIII, p. 167.

[18] *Ibid.*, p. 285.

[19] Degan (footnote 10 above), p. 52; G. Gaja, "General principles of law", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. IV, Oxford, Oxford University Press, 2012, pp. 370–378 (online edition: http://opil.ouplaw.com/home/MPIL).

[20] G. I. Tunkin, " 'General principles of law' in international law", in R. Marcic and others (eds.), *Internationale Festschrift für Alfred Verdross: zum 80. Geburtstag,* Munich, Fink, 1971, p. 525; see also A. A. Cançado Trindade, *The Construction of a Humanized International Law,* Leiden, Brill Nijhoff, 2014, p. 870.

[21] Tunkin, " 'General principles of law'…" (footnote 20 above), p. 526.

[22] Rome Statute of the International Criminal Court, art. 21, para. 1.

[23] A. Pellet, "Applicable law", in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford, Oxford University Press, 2002, pp. 1071–1076.

[24] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber II, International Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, para. 177; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, Trial Chamber II, International Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, vol. II, para. 591 (in this case, the Trial Chamber of the Tribunal held that when the Statute of the Tribunal could not resolve the issue in question, the Tribunal should draw upon "(i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice").

[25] *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, ILM, vol. 20 (1981), p. 1, at p. 33; *Texaco Overseas Petroleum Company v. Government of the Libyan Arab Republic*, 19 January 1977, *ibid*., vol. 17 (1978), p. 3, at p. 14.

[26] See G. Hanessian, "'General principles of law' in the Iran–U.S. Claims Tribunal", *Columbia Journal of Transnational Law*, vol. 27, No. 2 (1989), pp. 309–352, at p. 323, referring to *R. J. Reynolds Tobacco Company v. Government of the Islamic Republic of Iran*, Award No. 145-35-3, 31 July 1984, *Iran–United States Claims Tribunal Reports*, vol. 7, p. 181, at p. 191; *Iranian Customs Administration v. United States*, Award No. 105-B-16-1, 18 January 1984, *ibid*., vol. 5, p. 94, at p. 95; *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran*, order filed 15 December 1982, *ibid*., vol. 1, p. 455, at pp. 457–458; *ARCO Iran, Inc. v. Government of the Islamic Republic of Iran*, Award No. 311-74/76/81/150-3, 14 July 1987, *ibid*., vol. 16, p. 3, at pp. 27–28 (the Tribunal applied "general principles of commercial and international law" for contractual issues).

11. To sum up, given the unresolved doctrinal controversies surrounding this concept, a commonly agreed understanding of general principles of law, as well as its relationship with other related concepts like "general principles of international law" and "fundamental principles", is lacking. In particular, questions remain as to whether they are limited to those recognized *in foro domestico* or could also be derived from an international origin, and whether general principles of law could be generated in an ethical discourse. These questions are reflected in the jurisprudence of international courts and tribunals.

B. Application of general principles of law

12. Despite doctrinal uncertainties, international courts and tribunals have generally recognized general principles of law as an autonomous source of international law and have applied it in practice. Although the Permanent Court of International Justice and the International Court of Justice have been cautious in applying this source in an explicit manner,[27] general principles of law have played a greater role in areas of international law that involve non-State actors, e.g. international criminal law and international investment law.[28]

13. The Permanent Court of International Justice has referred to general principles, explicitly or implicitly, on *ejus est interpretare legem cujus condere*,[29] *nemo judex in re sua*,[30] restitution *in integrum*,[31] estoppel[32] and competence-competence.[33] Examples of the reference to general principles of law by the International Court of Justice include *res judicata*,[34] equality of parties[35] and *pacta sunt servanda*.[36] These are examples of general principles of law that commonly exist in almost all existing legal systems.

14. Furthermore, it appears that the courts did not understand that general principles of law were limited to those derived from domestic law. For instance, the Permanent Court of International Justice has invoked the "principle universally accepted by international tribunals and likewise laid down in many conventions",[37] "a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts"[38] and "a principle of international law, and even a general conception of law".[39] The International Court of Justice has referred to "the principles underlying the [Genocide] Convention" as "principles which are recognized by civilized nations as binding on States".[40] In the *Nicaragua* case, the Court referred to "fundamental general principles of humanitarian law".[41] In the *East Timor* case, the Court referred to the principle of self-determination of peoples as "one of the essential principles of contemporary international law".[42] It has not been clear whether the principles referred to in these cases are general principles within the meaning of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.[43] Additionally, other views on general principles of law have been expressed in dissenting and separate opinions in International Court of Justice cases.[44]

15. International criminal courts and tribunals have made more references to general principles of law. General principles of law could play a decisive role on critical issues.[45] General principles of law have been

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[27] Gaja (footnote 19 above), p. 372.

[28] See N. Wühler, "Application of general principles of law", in A. J. van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, International Council for Commercial Arbitration, Congress Series, No. 7, The Hague, Kluwer Law International, 1996, p. 553.

[29] *Question of Jaworzina*, Advisory Opinion, 6 December 1923, *P.C.I.J., Series B*, No. 8, p. 37.

[30] *Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion, 21 November 1925, *ibid*., No. 12, p. 32.

[31] *Factory at Chorzów* (Jurisdiction), Judgment, 26 July 1927, *P.C.I.J., Series A, No. 9*, p. 30.

[32] *Ibid.*, p. 31; *Legal Status of Eastern Greenland*, 1933, *P.C.I.J., Series A/B*, No. 53, p. 69.

[33] *Interpretation of the Greco-Turkish Agreement of December 1st, 1926*, Advisory Opinion, 28 August 1928, *P.C.I.J., Series B*, No. 16, p. 20.

[34] *Effect of awards of compensation made by the U.N. Administrative Tribunal*, Advisory Opinion of 13 July 1954, *I.C.J. Reports 1954*, p. 47, at p. 53.

[35] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.,* Advisory Opinion of 23 October 1956, *I.C.J. Reports 1956*, p. 77, at p. 85; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1973*, p. 166, at p. 181; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, p. 43, at pp. 89–90, para. 114.

[36] *Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, p. 253, at p. 268.

[37] *The Electricity Company of Sofia and Bulgaria*, 1939, *P.C.I.J., Series A/B*, No. 79, p. 199 (on the principle that the parties to a case must abstain from any measures that may prejudice the execution of the decision to be given and must not take any step that may aggravate the dispute).

[38] *Factory at Chorzów* (Jurisdiction), Judgment, 26 July 1927 (see footnote 31 above), p. 31 (on the obligation of reparation).

[39] *Factory at Chorzów* (Merits), Judgment, 13 September 1928, *P.C.I.J., Series A*, No. 17, p. 29.

[40] *Reservations to the Convention on Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, p. 15, at p. 23.

[41] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, at pp. 113–115 and 129–130, paras. 218, 220 and 255.

[42] *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 90, at p. 102, para. 29.

[43] Some have not seen them as general principles of law, while others have maintained that these principles are covered by Article 38 (1) (*c*) of the Statute of the International Court of Justice. See, e.g., Lepard (footnote 15 above), p. 162; Simma and Alston (footnote 16 above), p. 82; *South West Africa, Second Phase*, Judgment, *I.C.J. Reports 1966*, p. 6, at p. 250, dissenting opinion of Judge Tanaka; T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Oxford University Press, 1989, pp. 97 and 134.

[44] For instance, according to Judge Tanaka in his dissenting opinion in the *South West Africa* case, "…it is undeniable that in Article 38, paragraph 1 (*c*), some natural law elements are inherent. It extends the concept of the source of international law beyond the limit of legal positivism according to which, the States being bound only by their own will, international law is nothing but the law of the consent and auto-limitation of the State. But this viewpoint, we believe, was clearly overruled by Article 38, paragraph 1 (*c*)" (*South West Africa, Second Phase* (footnote 43 above), p. 298); similarly, Judge Cançado Trindade maintained in his separate opinion in the *Pulp Mills* case that "general principles of law, in the light of natural law (preceding historically positive law), touch on the origins and foundations of international law, guide the interpretation and application of its rules, and point towards its universal dimension" (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14, at p. 155, para. 47). And by contending that there is "no reason not to have recourse to general principles of law as recognized in domestic as well as international law" (*ibid*., p. 146, para. 27), he claimed that the principle of prevention and the precautionary principle, which were embodied in international instruments like the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development, are general principles of law.

[45] See F. O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Leiden, Brill Nijhoff, 2008, pp. 77–164.

frequently resorted to on substantive as well as procedural issues. On substantive law, the principle of duress as a mitigating factor in sentencing,[46] the principle of proportionality in sentencing,[47] *nulla poena sine lege*,[48] and the principle that the establishment of criminal culpability requires an analysis of the objective and subjective elements of the crime[49] have been invoked. In terms of procedural rules, principles on the burden of proof,[50] that an accused should not be tried in his absence,[51] and *non bis in idem*[52] have been resorted to.

16. In the field of international investment law, it has been observed that general principles of law played a "prominent role".[53] General principles of law invoked by international investment tribunals include: compensation includes *damnum emergens* and *lucrum cessans*,[54] good faith,[55] *res judicata*,[56] competence-competence,[57] claimant has the burden of proof,[58] unjust enrichment,[59] and parties cannot take legal advantage of their own fault.[60] A decisive role could be played by general principles of law in investment arbitration. For instance, the award in *Klöckner v. Cameroon* was annulled by the *ad hoc* committee for the Tribunal's failure to provide sufficient evidence to support the existence of a general principle.[61] In interpreting the concept of "fair and equitable treatment", investment tribunals have resorted to principles including good faith,[62] due process,[63] proportionality,[64] and others.[65]

17. In the Iran–United States Claims Tribunal, it has been observed that general principles of law were resorted to in order to avoid the choice among the laws of Iran, the United States or a third country.[66] It was also

[46] *Prosecutor v. Erdemović*, joint separate opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, 7 October 1997, Appeals Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1997*, vol. 2, paras. 40 and 55–72.

[47] *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, Trial Chamber I, International Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, vol. 1, para. 796.

[48] *Prosecutor v. Zejnil Delalić et al*., Case No. IT-96-21-T, Judgment, 16 November 1998, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, vol. 2, para. 402.

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

[50] *Ibid.*, paras. 599–604.

[51] *Prosecutor v. Sesay et al.*, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, Case No. SCSL-04-15-T, Trial Chamber, Special Court for Sierra Leone, 12 July 2004, para. 10; available from the Special Court's website: www.rscsl.org /RUF_Trial_Chamber_Decisions.html.

[52] *Prosecutor v. Tadić*, Decision on the Defence Motion on the Principle of *Non Bis in Idem*, Case No. IT-94-1-T, 14 November 1995, Trial Chamber II, International Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. 1, paras. 2–4.

[53] C. H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge, Cambridge University Press, 2001, p. 614; see also T. Gazzini, "General principles of law in the field of foreign investment", *Journal of World Investment and Trade*, vol. 10, No. 1 (February 2009), p. 103; A. McNair, "The general principles of law recognized by civilized nations", *British Year Book of International Law 1957*, vol. 33, p. 15 (it was suggested that general principles of law will prove "fruitful in the application and interpretation of [State] contracts which, though not interstate contracts and therefore not governed by public international law *stricto sensu*, can more effectively be regulated by general principles of law than by the special rules of any single territorial system").

[54] *Amco Asia Corporation and Others v. Indonesia*, ICSID Case No. ARB/81/1, Award of 20 November 1984, ILR, vol. 89 (1992), p. 405, at p. 504.

[55] *Técnicas Medioambientales Tecmed S.A. v. the United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, *ICSID Review. Foreign Investment Law Journal*, vol. 19, No. 1 (2004), p. 158, para. 153; *Canfor Corporation v. United States of America and Terminal Forest Products Ltd. v. United States of America* (consolidated North American Free Trade Agreement/United Nations Commission on International Trade Law), Preliminary Question, 6 June 2006, para. 182; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, para. 297.

[56] *Waste Management Inc. v. United Mexican States (No. 2)*, ICSID Case No. ARB(AF)/00/3 (Jurisdiction), 26 June 2002, *ICSID Reports*, vol. 6 (2004), p. 538, at pp. 559–560, paras. 39 and 43; the Tribunal held that "[t]here is no doubt that *res judicata is a principle of international law**, and even a general principle of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice. Indeed both parties accepted this".

[57] *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award of 21 August 2007, para. 203.

[58] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award of 31 January 2006, *ICSID Reports*, vol. 14 (2009), p. 343, para. 70; the Tribunal held that "[i]t is a well established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim". See also *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of 27 June 1990, ILM, vol. 30 (1991), p. 580, at p. 603, para. 56; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award of 23 September 2003, *ICSID Reports*, vol. 10 (2006), p. 314, para. 110; *International Thunderbird Gaming Corporation v. The United Mexican States*, United Nations Commission on International Trade Law (North American Free Trade Agreement), Award of 26 January 2006, para. 95.

[59] *Sea-Land Service, Inc. v. The Islamic Republic of Iran, Iran–United States Claims Tribunal Reports*, vol. 6, p. 149, at p. 168; the Tribunal held that "[t]he concept of unjust enrichment had its origins in Roman Law […] It is codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals". More recently, in *Saluka Investments BV (The Netherlands) v. the Czech Republic*, United Nations Commission on International Trade Law, Partial Award of 17 March 2006, para. 449; the Tribunal pointed out that "[t]he concept of unjust enrichment is recognised as a *general principle of international law**. It gives one party a right of restitution of anything of value that has been taken or received by the other party without a legal justification".

[60] *Sempra Energy International v. Argentine Republic*, Award of 28 September 2007 (see footnote 55 above), para. 353.

[61] *Klöckner Industrie-Anlagen GmbH and others v. Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, *ICSID Reports*, vol. 2 (1994), p. 95.

[62] *Sempra Energy International v. Argentine Republic*, Award of 28 September 2007 (see footnote 55 above), para. 298.

[63] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, para. 98.

[64] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, *ICSID Reports*, vol. 12 (2007), p. 6, para. 109.

[65] Gazzini (footnote 53 above), p. 118.

[66] *American Bell International, Inc. v. Islamic Republic of Iran*, Award No. 255-48-3, 19 September 1986, *Iran–United States Claims Tribunal Reports*, vol. 12, p. 170; *Questech, Inc. v. The Ministry of National Defence of the Islamic Republic of Iran*, Award No. 191-59-1, 20 September 1985 (applying the general principle of changed circumstances despite a contract clause choosing Iranian law), *ibid*., vol. 9, p. 107; *Aeronutronic Overseas Services, Inc. v. The Government of the Islamic Republic of Iran*, Award No. ITM 44-158-1, 24 August 1984, *ibid*., vol. 7, p. 217; *Gould Marketing, Inc. v. Ministry of Defence of the Islamic Republic of Iran*, Award No. 136-49/50-2, 22 June 1984, *ibid*., vol. 6, p. 272, at p. 274 (a contract for sale of communications equipment provided for application of California law. The Tribunal stated that "American law" contained "the general principle" that where a contract is terminated for frustration "amounts due under the contract are to be proportioned to the extent the contract was performed". The Tribunal also cited English law and noted that "[a] similar rule exists in civil law" (*ibid*., p. 274, footnote 1). The Tribunal also applied "general principles" of bailment law, to require that

(*Continued on next page.*)

observed that the Tribunal has applied "general principles of law" in cases where application of the otherwise governing national law would have resulted in an unfair outcome.[67] Furthermore, the Tribunal did not distinguish its function in public international law and private law, and appeared to have applied "general principles of law" in both of them.[68]

18. Despite a significant number of references to general principles of law in different areas of international law, the methodology of identifying general principles of law remains unclear. There are criticisms that international courts and tribunals applied "general principles" that are not generally recognized.[69] It has also been pointed out that by limiting general principles of law to those generally recognized in worldwide municipal laws, difficulties could arise when a court or a tribunal has to deal with a question where no widely accepted principle could be identified.[70] In this regard, crucial questions remain unresolved, which have caused legal uncertainty and threatened fair administration of justice. Such questions include the criteria to decide whether a principle is "generally recognized", the scope of comparative research when deriving general principles from municipal laws, how to categorize legal families and systems when conducting such analysis, how to select representative national laws and whether and how to adapt such principles to international application when conducting analogies.

C. Scope of the topic and legal questions to be addressed

19. Within the background elaborated above, the Commission could clarify the nature, scope and method of identification of general principles of law as they have been used by States, by international courts and tribunals, and by international organizations and bodies. Without excluding other questions or aspects related to this topic, the Commission could, in particular, analyse:

(*a*) the nature and scope of general principles of law;

(i) scope and terminology with regard to general principles of law, particularly its relationship with concepts such as "general principles of law recognized by civilized nations", "general principles of international law" and "fundamental principles of law";

(ii) the nature and origins of general principles of law;

(iii) general principles of law as an autonomous source independent from treaties and customary international law;

(iv) the functions of general principles of law;

(*b*) the relationship of general principles of law with the other two principal sources of international law, i.e. treaties and customary international law;

(*c*) methods of identification of general principles of law; and

(*d*) other issues.[71]

20. The Commission may refer to a number of examples of general principles of law throughout the consideration of the topic, and may include them in the commentaries to the conclusions that would be adopted.

(a) *The nature and scope of general principles of law*

21. It will be important that the Commission firstly analyse and clarify the definition of "general principles of law", in order to delimit the scope of the topic. It is suggested that "general principles of law recognized by civilized nations" under Article 38 of the Statute of the Permanent Court of International Justice and the Statute of the International Court of Justice should be the main focus of this study, and the definition of "general principles of law" should also be analysed in the light of its relationship with other concepts such as "general principles of international law", "fundamental principles" and "equitable principles".

22. The nature and characteristics of general principles of law could be examined in the light of the historical development of this concept, and explicit as well as implicit references to general principles of law in international legal practice. For instance, the Commission could examine early arbitral decisions and treaties in which general principles of law were recognized as a source of international law, and the context and debates leading up to the inclusion of "general principles of law recognized by civilized nations" in the Statute of the Permanent Court of International Justice and later in the Statute of the International Court of Justice. References to this concept, as well as related concepts, in treaties, jurisprudence of courts and tribunals, domestic legislation and international instruments could also be examined.

23. One related and also important issue is the origin of general principles of law. The Commission should

(*Footnote 66 continued.*)

the claimant make available to the respondent certain equipment held by the claimant for the respondent (*ibid*., p. 279)). See also *Morgan Equipment Company v. The Islamic Republic of Iran*, Award No. 100-280-2, 27 December 1983, *ibid*., vol. 4, p. 272 (the Tribunal rejected claimant's argument that it was entitled to recover under the law of Idaho as a third party beneficiary under certain purchase orders governed by Idaho law); *R. J. Reynolds Tobacco Company v. The Government of Iran*, Award of 31 July 1984 (footnote 26 above).

[67] *CMI International, Inc. v. Ministry of Roads and Transportation and The Islamic Republic of Iran*, Award No. 99-245-2, 27 December 1983, *Iran–United States Claims Tribunal Reports*, vol. 4, p. 263; see also Hanessian (footnote 26 above), pp. 329–330.

[68] Hanessian (footnote 26 above), p. 350.

[69] Raimondo (footnote 45 above), p. 88; see also G. I. Tunkin, *Theory of International Law*, Cambridge, Mass., Harvard University Press, 1974, p. 190 (warning against the desire to use "general principles of law" in order to proclaim principles of certain legal systems to be binding upon all).

[70] M. Akehurst, "Equity and general principles of law", *International and Comparative Law Quarterly*, vol. 25, No. 4 (1976), p. 825.

[71] Such as the possibility that general principles of law may also be a source of particular international law. For instance, it has been observed that the Court of Justice of the European Communities usually confines itself to examining the laws of the member States in order to derive general principles of law for the regional regime. See Akehurst (footnote 70 above), pp. 821 and 823, citing *X v. Council*, 6 December 1972, *European Court Reports 1972*, p. 1205; *Commission v. Council*, 5 June 1973, *European Court Reports 1973*, p. 575, at p. 593; *Werhahn v. Council*, 13 November 1973, *ibid.*, p. 1229, at pp. 1259–1260; *Erich Stauder v. City of Ulm*, 12 November 1969, *European Court Reports 1969*, p. 419, at p. 425.

examine whether general principles of law could only derive from the generality of municipal laws of States, or general principles could also derive from other origins which are recognized by States, such as the international legal system and international relations.

24. The place of general principles of law within the international legal system should also be clarified. Particularly, general principles of law as an autonomous source of international law, and its relationship with treaties as well as customary international law, should be assessed.

25. The functions of general principles of law should also be examined. As mentioned above, the major function of general principles of law has been understood by some scholars as "filling gaps" in international law, when no treaty provision or rule of customary international law could be found.[72] Others have attributed a broader role to general principles of law as informing and underlying the system of international law and providing guidance for the interpretation and application of treaties and customs.[73] The Commission could study how general principles of law, over time, have undertaken different roles and functions contributing to the development of the international legal system, as well as specialized regimes of international law.

26. Particularly, the Commission could also consider the rationale behind, and the essential functions played by, general principles of law when they are applied by international courts and tribunals and international bodies, and when they are resorted to by States in international relations and by national courts in their domestic jurisprudence.

27. A related aspect concerns general principles of law as a source of legal rights and obligations. In particular, the Commission could study the areas in which general principles of law regulate the conduct of the members of the international community by providing substantive and procedural rules (e.g., principles of good faith or *non bis in idem*).

(b) *The relationship of general principles of law with treaties and customary international law*

28. As was reflected in the international jurisprudence referred to above, general principles of law have been recognized as one of the principal sources of international law, and as a source independent from treaties and customary international law. However, general principles of law may interrelate with the other two principal sources of international law: treaties and customary international law. The relationship and interactions of general principles of law and treaties, as well as customary rules, should be studied. For instance, the Commission could study how general principles of law and treaties, as well as customary rules, contribute to each other's creation and development, the possible function of general principles of law in assisting and providing guidance for the application and interpretation of treaties and customary international law, and the possibility of parallel existence of general principles of law with corresponding rules in treaties and customary international law.

(c) *Methods of identification of general principles of law*

29. A question of critical importance is the method of identification of general principles of law. For general principles derived from municipal law common to worldwide legal systems, the Commission should study questions including the criteria for determining the common recognition of a principle in worldwide legal systems; the method for deriving general principles of law; and, e.g., if comparative analysis is needed, the breadth and depth of the comparative research, the categorization of legal families or legal systems in conducting comparative analysis, and whether and how to adapt principles originating from domestic laws to the international legal system. If the study in the above section demonstrates that general principles of law could also derive from the international legal system, as recognized by States, the Commission should also help clarify the criteria and methods to identify general principles of law from these sources, such as treaties, non-binding international instruments, judicial decisions of international courts and tribunals, etc.

(d) *Other issues*

30. It has been observed that although international judicial bodies with general jurisdiction have taken care to derive general principles from worldwide legal systems, regional judicial bodies have occasionally limited their scope of comparative research to domestic laws of their member States.[74] Within this context, the Commission could examine the existence and legal status of such principles of law, and provide clarification and guidance in this regard.

D. Method of work of the Commission on this topic

31. This study will primarily be based on the practice of States, treaties and their drafting histories, other international instruments, judicial decisions of international, regional and national courts and tribunals, and national legislation.

32. The views and analysis of scholars will also be consulted and assessed in the light of international practice.

E. The topic meets the requirements for selection of a new topic

33. The topic "General principles of law" meets the requirements for selection of new topics set by the Commission because it reflects the needs of the international community in relation to the progressive development and codification of international law. In particular, this source

[72] Degan (footnote 10 above), pp. 40–41.

[73] Cançado Trindade (footnote 20 above), p. 870; C. W. Jenks, *The Common Law of Mankind*, London, Stevens and Sons, 1958, p. 106.

[74] See Akehurst (footnote 70 above), pp. 818–825; see also *Procureur de la République v. Association de défense des brûleurs d'huiles usagées,* 7 February 1985, *European Court Reports 1985*, p. 531, at p. 548, para. 9: "the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are *general principles of Community law** of which the Court ensures observance"; *Erich Stauder v. City of Ulm* (footnote 71 above), p. 425, para. 7: "fundamental human rights [are] enshrined in *the general principles of Community law** and protected by the Court".

of international law has been used for more than a century, and continues to be relied upon, but its nature, scope, origins, criteria and methods of identification remain unclear.

34. The Secretariat prepared a working paper in 2016 on possible topics for consideration taking into account the review of the list of topics established in 1996 in the light of subsequent developments.[75] The Secretariat listed the topic "General principles of law" as the first out of six topics. General principles of law would be considered by the Commission for the first time in depth as a source of international law.

[75] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/679/Add.1.

35. Given the abundance of relevant State practice and application of this source of international law by different courts and tribunals, as well as its long history of doctrinal development, the work of the Commission on this topic will be concrete and feasible and could provide clarity and guidance on the understanding, identification and application of this source of law.

36. Based on the foregoing, the conclusions and commentaries envisaged as a result of the consideration of the topic "General principles of law" by the Commission will be useful for States, international organizations, international courts and tribunals, and scholars and practitioners of international law.

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ANNEX II

EVIDENCE BEFORE INTERNATIONAL COURTS AND TRIBUNALS

Aniruddha Rajput

Introduction

1. The present paper proposes the inclusion of the topic "Evidence before international courts and tribunals" in the long-term programme of work of the International Law Commission.

2. Peaceful settlement of disputes is an obligation under Article 2, paragraph 3, of the Charter of the United Nations and also a principle of customary international law.[1] International adjudication is one of the important ways of peaceful settlement of international disputes, as specified in Article 33, paragraph 1, of the Charter. Clarity and certainty of procedures would strengthen the international rule of law.

3. Evidence could play a determinative role in an adjudicative process. According to Sir Gerald Fitzmaurice, the outcome of international litigation may in fact "depend upon the accidents of a largely procedural or formal situation".[2] International courts and tribunals have to apply rules of international law to facts. Proving facts is therefore an essential part of adjudication proceedings: *idem est non probari non esse* (something which is not proven does not exist or is not true).[3] A resolution of a dispute is only possible if the adjudicating body identifies the facts appropriately and then applies legal principles to them.[4] Evidence is the method of proving facts.[5] This topic is limited to evidence of facts.

4. In the past, the resolution of factual controversies infrequently demanded attention and energy of international courts and tribunals. In most cases, facts would be admitted by the parties beforehand and the courts or tribunals would have to simply apply the law. Even where there were factual disputes, they were relatively minor and could be addressed within the framework of legal interpretation, without the need to address factual controversies. The International Court of Justice rarely had to face cases involving complex and disputed facts, such as the *Corfu Channel* case or the *South West Africa* case. In recent times, this situation has changed. The International Court of Justice has had to deal with complex documentary and oral evidence in the *Genocide* cases and grapple with expert evidence in the *Whaling* case. The increasing workload of cases and the nature of cases brought reflect that factually complex and disputed cases would increase in future. Other courts and tribunals, such as the Panels and Appellate Body of the World Trade Organization (WTO) and human rights courts (African Court on Human and Peoples' Rights, European Court of Human Rights and Inter-American Court of Human Rights), have been regularly dealing with complex factual issues.

5. The transformation of the nature of international disputes with the rise in factually complex disputes was highlighted by the President of the International Court of Justice, Judge Higgins, in her address to the International Law Commission at its fifty-eighth session. She said:

> The Court's docket increasingly includes fact-intensive cases in which the Court must carefully examine and weigh the evidence. No longer can it focus solely on legal questions. Such cases have raised a whole swathe of new procedural issues for the Court.[6]

The recognition of this transformation of the judicial function has been noted in the literature as well. In the words of Professor Franck:

> The I.C.J. is a trial court, as well as a court of last resort. It should strive mightily to resolve cases on the facts—credible findings of fact—and avoid to the greatest degree possible the temptation to mitigate shortages of factual evidence, or lack of fact-analysis, by recourse to doctrines of law intended, wittingly or not, to bypass recourse to facts.[7]

A. Need and importance of general rules of evidence

6. The rules of international courts and tribunals and their constitutive instruments do not address evidence in detail. They make only a general reference to evidence in the form of timelines and presentation. They do not contain any reference to the kinds of evidence, presentation,

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[1] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, at p. 145, para. 290.

[2] G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. 2, Cambridge, Grotius, 1986, pp. 575–578, at p. 576.

[3] See *Corfu Channel case*, Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4, at pp. 15–16.

[4] A. Riddell and B. Plant, *Evidence before the International Court of Justice*, London, British Institute of International and Comparative Law, 2009, p. 1.

[5] Ludes and Gilbert have given a general and useful definition of evidence in the following words: " 'Proof'… means any effort that attempts to establish truth or fact; something serving as evidence, a convincing token or argument; the effect of evidence; the establishment of a fact by evidence" (M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals*, The Hague, Kluwer Law International, 1996, p. 22, footnote 61); " 'Proof' is the result or effect of evidence, while 'evidence' is the medium or means by which a fact is proved or disproved" (*Corpus Juris Secundum: A Complete Restatement of the Entire American Law as Developed by All Reported Cases*, vol. 31, F. J. Ludes and H. J. Gilbert (eds.), New York, The American Law Book, 1964, p. 820). See also Riddell and Plant (footnote 4 above), p. 79.

[6] Statement by Judge Rosalyn Higgins, President of the International Court of Justice, at the fifty-eighth session of the International Law Commission, *Yearbook … 2006*, vol. I, p. 214, summary record of the 2899th meeting of the Commission, held on 25 June 2006, para. 24.

[7] T. M. Franck, "Fact-finding in the ICJ", in R. B. Lillich (ed.), *Fact-finding before International Tribunals: Eleventh Sokol Colloquium*, Ardsley-on-Hudson, Transnational, 1992, p. 32.

handling, assessment and conclusions to be drawn from the evidence. Judicial practices of different courts and tribunals have developed rules of evidence that go beyond existing rules of international courts and tribunals. The areas to be covered under this topic (discussed in paragraph 10 below) would fill this void.

7. In the absence of rules of evidence, courts and tribunals have been relying on jurisprudence developed by each other.[8] This practice gives flexibility to the adjudicating body, but introduces uncertainty and inconsistency of the rules that are or would be applied. It would be a part of fair administration of justice that the parties to a dispute are aware, beforehand, which rules would be applied on evidence. Inconsistent application of rules of evidence would inevitably result in inconsistent outcomes although based on the same pieces of evidence.[9] It would facilitate the work of all adjudicating bodies if the Commission would undertake this topic.

8. This topic should be limited to rules of evidence having general application. There is agreement in the literature regarding the rules of evidence that have general application.[10] Furthermore, the parameters applied for the kinds of proceedings to which these rules would apply (see paragraph 12 below) would also guide in maintaining generality of the rules. The test of choice of rules of evidence on the basis of generality would ensure that the flexibility of institutional characteristics of different adjudication bodies is not interfered with. To ensure generality of the outcome of this project and its acceptability, outreach efforts (formal and informal) with international courts and tribunals could be undertaken from the early stages and throughout the progress of this project.

9. In addition to consistency in the adjudicative process, the topic will also contribute towards avoidance of fragmentation in procedural law. If the issue of evidence (which is a matter of procedure) is left unattended, it would result in contradictory practices developing due to the multiplicity of courts and tribunals and factual and technical complexities. A fractured system would result in inconsistent and incoherent decisions and erode the faith and confidence of States in the dispute resolution process.

B. Consideration of the topic by other bodies

10. The Institute of International Law adopted rules of evidence in international adjudication in 2004.[11] The exercise conducted by the Institute of International Law is pivotal and would be helpful in this study. It however has to be kept in mind that since the conclusion of the project, many developments have taken place in different areas of international law on evidence, particularly in the field of trade law, law of the sea and the jurisprudence of regional adjudicating bodies.[12] The International Bar Association (IBA) has developed the IBA Rules of Evidence.[13] They are frequently used in investment treaty arbitration and international commercial arbitration. Although not limited to commercial relationships, in most of the cases where they are applied, they relate to such relationships. The work of the Institute of International Law and IBA would be helpful for this study. However, this would have to be done without forgetting their contexts and peculiarities. The International Law Association has constituted a Committee on the Procedure of International Courts and Tribunals. This Committee is studying rules of procedure generally and evidence is one of the sub-topics considered.[14] Needless to say, the Commission has access to States and thus can confirm the appropriateness and utility of its outcome based on the views of States. The outcome of this study would be an influential contribution of substantial practical value. The need for the Commission to undertake this study has been expressed in the past by other independent expert bodies.[15] This topic is also one of the topics that the Secretariat has put in the list of the six topics that need attention.[16]

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[8] Report of the WTO Appellate Body, *United States–Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted on 23 May 1997, and Corr.1; *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/87/3, Award of 27 June 1990, *ICSID Reports*, vol. 4 (1997), p. 246, at p. 272; *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009, para. 221; C. Brown, *A Common Law of International Adjudication*, Oxford, Oxford University Press, 2007, pp. 35–82.

[9] There are instances of judges' arriving at different conclusions based on the same material. For example, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Uganda made a counterclaim against the Democratic Republic of the Congo (which was Zaire at that time) claiming that it was a victim of military operations carried out by hostile armed groups based in the Democratic Republic of the Congo and tolerated by successive Congolese Governments. The majority concluded that the absence of action by the Government of Zaire was not tantamount to "tolerating" or "acquiescing" in the activities of the rebel groups (at para. 301). Judge Kooijmans, on the other hand, arrived at a different conclusion. He said: "But I have found no evidence in the case file nor in relevant reports that the Government in Kinshasa was not in a position to exercise its authority in the eastern part of the country for the whole of the relevant period and thus was unable to discharge its duty of vigilance before October 1996; the DRC has not even tried to provide such evidence" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at p. 306 (separate opinion of Judge Kooijmans).

[10] S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, vol. III: *Procedure*, The Hague, Martinus Nijhoff, 1997, p. 1201; H. W. A. Thirlway, "Procedural law and the International Court of Justice", in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings*, Cambridge, Cambridge University Press, 1996, pp. 389–405; Brown (footnote 8 above), pp. 83–118; Kazazi (footnote 5 above); C. F. Amerasinghe, *Evidence in International Litigation*, Leiden, Martinus Nijhoff, 2005.

[11] "Principles of evidence in international litigation", *Yearbook of the Institute of International Law*, vol. 70-I (Bruges session, 2003), p. 139 (available from the Institute's website: www.idi-iil.org).

[12] *Ibid*., pp. 156–187; preamble, draft resolution on the "Principles of evidence in international litigation", *ibid.*, pp. 356–357.

[13] "IBA Rules on the Taking of Evidence in International Arbitration", adopted by a resolution of the IBA Council, 29 May 2010.

[14] International Law Association, Committee on the Procedure of International Courts and Tribunals, Committee mandate, p. 1; available from www.ila-hq.org/index.php/committees.

[15] M. R. Anderson and others (eds.), *The International Law Commission and the Future of International Law*, London, British Institute of International and Comparative Law, 1998; V. Lowe, "Future topics and problems of the international legislative process", in *The International Law Commission Fifty Years After: An Evaluation—Proceedings of the Seminar held to commemorate the fiftieth anniversary of the International Law Commission, 21–22 April 1998* (United Nations publication, Sales No. E/F.00.V.3), pp. 122–137, at p. 130.

[16] Long-term programme of work. Review of the list of topics established in 1996 in the light of subsequent developments and Possible topics for consideration taking into account the review of the list of topics established in 1996 in the light of subsequent developments. Working paper prepared by the Secretariat, *Yearbook … 2016*, vol. II (Part One), document A/CN.4/679 and Add.1.

11. In the past, the Commission has focused primarily on substantive issues of international law. The only occasion when the Commission worked on procedure was in 1958, when the Commission prepared Model Rules on Arbitral Procedure.[17] This should not dissuade the Commission from exploring the present topic because the Commission possesses the necessary expertise. In addition to receiving views of States, the Commission could try to seek views of international courts and tribunals that regularly face these challenges. Also, other outreach efforts could be undertaken to get inputs from other professional bodies to enrich the work of the Commission. This would make the outcome of the project generally acceptable, useful and influential.

C. Scope of application of the work

12. In order to keep the project manageable, the following tests may be applied. These tests would ascertain in which proceedings the outcome of this project would apply. The three conditions could be as follows:

(a) *At least one of the parties to the dispute should be a State*

The rules of evidence developed under this topic would apply in disputes where at least one of the parties is a State. This is a broad test to include situations where all or more than one of the parties to the dispute are States. This would cover inter-State disputes or disputes between natural or legal persons and States, and disputes brought before regional and global international courts and tribunals. A wide range of subject matters of dispute within international law would be covered under this test. Proceedings before international courts and tribunals that adjudicate upon individual criminal responsibility would be excluded, as a result of the first test, since States are not parties to proceedings *per se*. Prosecutions of individuals for international crimes before international courts and tribunals should also be kept out of this project because the nature of these proceedings, the standard and quality of proof, the extent of cooperation of States, etc. are distinct. It may not be possible to take account of the nuances of these proceedings while addressing the present topic.

(b) *At least one of the applicable laws should be international law*

In most inter-State disputes, public international law would be the applicable law. In disputes where one of the parties is a State, there is a possibility that other laws in addition to international law would apply. For example, the Iran–United States Claims Tribunal applies a wide range of laws, such as commercial laws, in addition to international law.[18] Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) recognizes that the investment tribunal may apply international law, in addition to domestic law of the State that is party to the dispute.[19] The decisions of these courts and tribunals are based on international law and impact the existing body of international law. Keeping these courts and tribunals within the project would ensure that the chances of fragmentation are avoided. This criterion is necessary to exclude cases where States are parties but public international law is not applied. These are disputes arising out of commercial contracts entered into between States and legal and other persons. In these proceedings domestic law or conflict of laws provisions are applied.

(c) *Dispute resolution through adjudication (before international courts and tribunals)*

In the present form of the project, it would be appropriate to limit the project to disputes resolved through judicial settlement, i.e. resolved through adjudication before international courts and tribunals. It is possible that, based on the generality of the outcome, other bodies such as the Human Rights Committee or the Committee against Torture or commissions of inquiry may use some parts of it. But the project may become unmanageable if the rules of evidence are drafted keeping them in mind at present.

D. Areas to be covered under the present topic

13. At this early stage, only a tentative list of areas to be covered under the present topic is presented. These are the principal areas that have regularly arisen before international courts and tribunals in the past and therefore could be focused upon in the present project.

(a) *Introductory and general provisions*

The introductory provisions could address the background, object and context of the project. General provisions, such as equality of parties, in which situations evidence is necessary, disputed facts, etc. may be studied.

(b) *Production of evidence*

Do the parties have the responsibility to produce evidence? Can the adjudicating body ask for evidence, and in which situations?

(c) *Forms of evidence*

Different forms of evidence that could be presented by the parties and examined by the adjudicating body could be studied. The handling of documentary evidence, oral evidence, expert evidence and site visits (*descente sur les lieux*) could be some of the topics.

(d) *Admissibility*

Are there rules of admissibility of evidence? If so, which rules of admissibility could be applied?

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[17] Model Rules on Arbitral Procedure (with commentary), *Yearbook … 1958*, vol. II, document A/3859, pp. 83–88.

[18] Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) (adopted 19 January 1981), art. V: "The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances", *Iran–United States Claims Tribunal Reports*, vol. 1, p. 11.

[19] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature on 18 March 1965, entered into force on 14 October 1966), art. 42.

(e) *Exceptions to production of evidence*

Can there be exceptions to production of evidence, especially when requested by the other party or by the adjudicating body? Can an adverse inference be drawn in situations where a party to a dispute declines to produce the evidence?

(f) *Burden of proof*

Areas such as onus of proof (*onus probandi incumbit actori*); shifting of burden of proof; standard of burden of proof; the party relying on exceptions should prove those exceptions (*reus in excipiendo fit actor*); and other rules may be studied.

(g) *Presumptions*

Rules such as judicial notice, the judge knows the law (*jura novit curia*) and others could be studied further.

E. Methodology

14. The outcome of the project would predominantly be based on rules developed and applied in judicial practice, State practice and doctrine.[20] The topic has a close affinity to adjudication; hence, reliance on judicial practice is obvious and inevitable. Most of the rules of evidence would draw upon the jurisprudence of various international courts and tribunals. The level of reliance on one in comparison to another would depend on the qualitative and quantitative assessment of the material developed by them in certain areas. State practice has a symbiotic relationship with judicial practice in this area. In most cases, the rules of evidence applied by the courts and tribunals are based upon the arguments presented by the States in the judicial proceedings. States, in turn, have relied upon those rules in their pleadings before international courts and tribunals, thus developing continuity in the use of these rules. Pleadings of States before international courts and tribunals could constitute State practice.[21] With increased activity in adjudication, this area has attracted scholarly writings. There is a sizeable amount of literature on this topic. This would also be considered. It would be inappropriate and controversial to simply pick up some rules from domestic legal systems.[22] An appropriate course would be to use those rules that emanate from domestic legal systems but have been used and applied by international courts and tribunals. International courts and tribunals have been sensitive while making this choice to include rules of evidence originating from different legal systems, and particularly, the civil and common law traditions.

15. Some fundamental theoretical issues have to be kept in mind while working on this topic. These rules would apply to disputes involving sovereign States. These rules and their consequences cannot intrude into sovereignty of States contrary to general international law. Equality of parties in these proceedings is important, thus requiring good faith conduct of judicial proceedings. While taking account of all these theoretical considerations, the ultimate objective of administration of justice as a contributory factor towards the international rule of law cannot be forgotten. Administration of justice needs a special mention because, until now, States enjoyed a great deal of discretion in choosing which and how much evidence to produce; and the international courts and tribunals enjoyed a great deal of discretion in dealing with that evidence. This flexibility may have been helpful in the past, but it consumes a lot of time and resources. The increase in judicial settlement demands streamlining of evidence and procedures for optimal use of time and resources. This is not only in the interest of States that are parties to ongoing disputes but also of those which may wish to bring judicial proceedings in the future. A streamlined set of rules of evidence would increase the faith of States in the administration of justice.

F. The topic satisfies the conditions laid down by the Commission

16. The Commission has applied three tests for the choice of topics: the topic should reflect the needs of States, be sufficiently advanced in stage in terms of State practice and be concrete and feasible.[23] Firstly, this topic is of immense practical utility for States. As has been set out in the preceding paragraphs, there is a significant rise in dispute settlement through adjudication between States or in cases where States are parties. Traditionally, procedural law has been a relatively neglected field in international law, in comparison to substantive law. As noted already, rules of procedure of international courts and tribunals do not address these requirements. There is a need for creating a general set of rules of evidence, which could be used in international adjudication. It will give clarity to States and certainty about the rules of evidence that would be applied in international adjudication. Secondly, the topic is at a sufficiently advanced stage, in terms of both State practice and judicial practice. There is adequate material available that can form the basis of rules. Lastly, the scope of the project as set out in paragraph 13 above and the areas of application set out in paragraph 12 above would

[20] Statute of the International Law Commission (1947) (21 November 1947) (http://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf), art. 15.

[21] I. Brownlie, *Principles of Public International Law*, 7th ed., Oxford, Oxford University Press, 2008, p. 10; M. Akehurst, "Custom as a source of international law", *British Year Book of International Law 1974–1975*, vol. 47, pp. 1–53, at pp. 4–5. Akehurst gives the example of *Mexican Union Railway (Ltd.) (Great Britain) v. United Mexican States*, where the reply by the State was considered as the sole evidence of the rule in question (UNRIAA, vol. V (Sales No. 1952.V.3), pp. 115–129, at pp. 122–124; see also *Minnie Stevens Eschauzier (Great Britain) v. United Mexican States* (*ibid.*, pp. 207–212, at pp. 210–212; *Mergé* (*ibid.*, vol. XIV (Sales No. 65.V.4), pp. 236–248, at pp. 241–242, reproduced in ILR, vol. 22, p. 443, at pp. 449–450); and *re Piracy Jure Gentium* [1934] AC 586, pp. 599–600 (reproduced in ILR, vol. 7, p. 213).

[22] Regarding the caution to be exercised while relying on rules of procedure emanating from municipal law, the tribunal in the *Parker* case stated that: "As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure" (*William A. Parker (USA) v. United Mexican States*, Award of 31 March 1926, UNRIAA, vol. IV (Sales No. 1951.V.1). pp. 35–41, at p. 39). A note of action was articulated by Judge McNair in the *South West Africa* cases in the following words: "The way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules" (*International status of South-West Africa*, Advisory Opinion, *I.C.J. Reports 1950*, p. 128, at p. 148).

[23] *Yearbook … 1997*, vol. II (Part Two), p. 72, para. 238.

ensure that the topic is neither too narrow nor too broad. The areas identified are concrete and feasible.

17. The progress of the project would depend on various factors; however, every effort could be made to cover the topic in three parts: (*a*) introductory provisions and presentation of evidence; (*b*) forms of evidence, admissibility and exceptions; (*c*) burden of proof, presumptions and preamble. Each of these parts could be covered in a separate report.

G. Conclusions

18. Some reflections deserve to be made about the potential outcome of this topic. The General Assembly could note the outcome of this topic and commend it to States and others concerned. There are different alternatives of title for the outcome of the project. They could be "rules", "model rules", "principles", "conclusions" or "guidelines". The decision on the appropriate title could be taken once and as the Commission proceeds with the topic.

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