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ISSUES OF PROOF OF GENERAL PRINCIPLES OF LAW IN INTERNATIONAL ARBITRATION

Michael D. Nolan
*Frédéric Gilles Sourgens**

> Interesting though this discussion of the character of such 'general principles' may be in the theory of international law, it is even more important to know what they in fact represent … .[1]

I. INTRODUCTION

The Statute of the International Court of Justice ("ICJ") defines "the general principles of law recognized by civilized nations" as a source of public international law the Court will apply.[2] As defined in Article 38(1)(c) of the ICJ Statute, general principles of law are the main source of law on questions not fully settled by treaty and custom.[3] Such unsettled areas exist increasingly when public international law intersects with the traditionally "private" sphere, such as can be the case in the context of investment law (which may well import aspects of the law of obligations), international environmental law (which may import standards of delictual or tort liability), and procedural issues in international

* The authors are members of the international law firm of Milbank, Tweed, Hadley & McCloy, L.L.P., in their Washington D.C. office. The article was written in their personal capacity and does not represent the opinions and views of Milbank, Tweed, Hadley & McCloy L.L.P. or its clients.

1 BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 5 (Cambridge University Press 2006) (1953).

2 Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1031, 3 Bevans 1179, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

3 *See, e.g.*, International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128, 148 (July 11) (separate opinion of Judge McNair) (explaining that "[i]nternational law has recruited, and continues to recruit many of its rules and institutions from private systems of law.").

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adjudication.[4] As the interactions between international law and private activity increases, so does the importance of general principles in the resolution of international legal disputes.[5]

Despite the advantages of rendering public international law more flexible and relevant to new international legal problems, the consideration of general principles of law as a co-equal source of international law has led to both theoretical and practical issues of proof. This article outlines the problems of proof of general principles of law, discusses methods to prove a principle "from scratch," and presents "short-cuts" to aid in their proof. As a word of caution, the problems of proof reviewed in this article will differ with each particular case. Thus, this article can only present basic guidelines.

Specifically, this article proceeds through a "Method of Proof": a step-by-step process of proving the existence of a general principle. The Method of Proof incorporates the following steps:

I. Evidentiary Problems to Identify and Assess

Problem 1: Scope of Research

Problem 2: Critical Mass

Problem 3: Compatibility

II. Guidelines for Proving General Principles

Step #1: Identify the Factual Issue Requiring Legal Resolution

Step #2: Identify the Appropriate Legal Systems

Step #3: Assemble a Relevant Sample of Converging Legal Systems

Step #4: Verify if Differences between Legal Systems have a Practical Effect

Step #5: Determine if the Principle can be Transitioned to International Law

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[4] *See generally* CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (2007) (discussing the procedural issues in international adjudication).

[5] *See infra* § IV.A.

III. Short Cuts

1. Rulings of International Tribunals
2. International and Comparative Law Articles and Textbooks
3. Transnational Legal Codification
4. Ruling of Domestic Courts

II. WHAT ARE THE GENERAL PRINCIPLES? — PROVIDING PROOF OF THE ELUSIVE

"General principles of law as recognized by civilized nations" have generated significant debate from the moment of their introduction in the ICJ Statute.[6] Their definition is difficult and, as Bin Cheng indicated, there are many different interpretations of the nature, origin, and applicability of general principles in international law.[7] They are considered, perhaps wrongly, by some commentators not to be a true source of international law.[8]

These doubts regarding the general principles' standing as a source of public international law equal to treaty obligations and customary international law are based on three principal theoretical foundations. First, general principles are perceived by some to lack sufficient grounding in international state practice to qualify as a source of international legal obligations.[9] Second, "general principles of law recognized by civilized nations" are

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[6] *See* CHENG, *supra* note 1, at 1-26.

[7] *See id.* at 2-5.

[8] PATRICK DAILLER, ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 348 (L.G.D.J, 7th ed. 2002) (refuting that general principles are not a source of international law).

[9] *See e.g.*, ULRICH FASTENRATH, LÜCKEN IM VÖLKERRECHT: ZU RECHTSCHARAKTER, QUELLEN, SYSTEMZUSAMMENHANG, METHODENLEHRE UND FUNKTIONEN DES VÖLKERRECHT, 101-02 (1991); *but cf.* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 50 (1991); *see also* Wolfgang Friedmann, *The Use of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 280 (1963) (framing this point in a slightly differently manner, stating that "international judicial institutions, such as the International Court of Justice, depend for their jurisdiction, ***as well as for the acceptability of their decisions and opinions***, upon the consent of states.") (emphasis added).

sometimes confused with "principles of ***international*** law" or "well known principles of law" drawn from purely public international legal sources; principles of *international* law formally belong to customary international law – a distinction which frequently has dogmatic implications only.[10] These first two arguments against challenges to general principles cannot be meaningfully addressed in this article, because they are dogmatic in nature. Therefore, although it is important to be aware of these doctrinal issues in any given case, there is little that can be done to address them by the way in which proof is presented in an international arbitration.

A different problem altogether is the third argument that "general principles of law recognized by civilized nations" are difficult to define in practice. This difficulty has led some commentators to conclude that general principles best serve as secondary authority, or "gap fillers."[11] It is the advocate's responsibility to overcome this preconception in any given case.

Although each case will lead to its own issues the advocate will, in most cases, face three principal problems when attempting to prove a general principle. These are: (1) the appropriate scope of research to establish the principle; (2) the critical mass at which a principle can be argued to exist; and, (3) the appropriateness to import the established rule to the international legal plane. A well thought-out answer to these three issues will go a long way toward proving a general principle of law.

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[10] *See* Prosper Weil, *Le Droit International en quête de son identité: Cours Général de Droit International Public,* 237 RECUEIL DES COURS 9, 149-50 (1992); *but see* SCHACHTER, *supra* note 9, at 51 (stating that "[t]hese maxims and certain maxims of legal interpretation, as for example, *lex specialis derogat generalis*, and 'no one may transfer more than he has', are also regarded as notions intrinsic to the idea of law and legal reasoning. As such they can be (and have been) accepted not as municipal law, but as general postulates of international law, even if not customary law in the specific sense of that concept.").

[11] VLADIMIR DEGAN, SOURCES OF INTERNATIONAL LAW 71-72 (1997).

A. *Problem 1: Scope of Research*

The first problem in defining general principles of law is to limit the number of legal systems to be examined. Traditionally, general principles were drawn from "the relevant principles of the most representative systems of the common-law and the civil-law world."[12] Today, this premise is frequently expanded to all "advanced legal systems of the world."[13] Thus, depending on the circumstances, it may be appropriate to look into *shari'a* law,[14] as well as other legal systems that are not easily categorized as advanced or belonging either to the common-law or civil-law world. This will depend upon the nature of the dispute at issue.[15]

An informal balancing test of four factors helps define the appropriate scope of research. First, research of a principle must be practically feasible. Rather than complicate the research, general principles were intended to facilitate discovery of international legal rules which would be useful in the resolution of a specific dispute.[16] Second, the scope of research must be sufficient to justify a claim of generality from the legal diversity of

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[12] Friedmann, *supra* note 9, at 285; *see, e.g.,* North Sea Continental Shelf (F.R.G. v. Den.), 1969 I.C.J. 3, 132 (Feb. 20) (separate opinion of Judge Ammoun) (noting that the use of the term "civilized" is particularly problematic when stated that "[i]t is important in the first place to observe that the form of words of Article 38, paragraph 1 (c), of the Statute, referring to 'the general principles of law recognized by civilized nations', is inapplicable in the form in which it is set down, since the term 'civilized nations' is incompatible with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law."); *see also* Christopher A. Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law"*, 5 DUKE J. COMP. & INT'L L. 35, 65 (1994).

[13] DEGAN, *supra* note 11, at 70.

[14] Desert Line Projects LLC v. Yemen, 2008 ICSID ARB/05/17, ¶ 207 (Feb. 6, 2008) (referring to Islamic law in establishing a general principle of law).

[15] *See* Friedmann, *supra* note 9, at 285; *see also* DEGAN, *supra* note 12, at 70; *but see* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 354 (separate opinion of Judge Simma) (looking to various civil law jurisdictions, Germany, France and Switzerland to establish a general principle of law).

[16] *See, e.g.,* Hersch Lauterpacht, *Some Observations on the Prohibition of 'Non Liquet' and the Completeness of the Law*, *in* SYMBOLAE VERZIJL 196, 205 (F. M. van Asbeck et al. eds. 1958).

the research set. For example, picking only jurisdictions having adopted a particular civil code would not suffice.[17] Third, all research should consult the leading mature jurisdictions on the issue. Some jurisdictions may be particularly mature due to their exposure to certain issues and, as such, are particularly relevant with regard to some questions and irrelevant with regard to others.[18] Fourth, to the extent that there is a regional nexus to a dispute – as is frequently the case in bilateral treaty disputes – reference to the legal systems of the contracting parties, as well as their state practice, may be appropriate.[19]

B. *Problem 2: Critical Mass*

The second problem is the extent of agreement required between legal systems to establish a general legal principle. Unanimity of the different legal systems examined on a principle is not required.[20]

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[17] *See, e.g.,* Rudolf B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations, Outline of a New Project*, 51 AM. J. INT'L L. 734, 739 (1957); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. Y.B. INT'L L. 82, 105 (1989).

[18] *See, e.g.*, DEGAN, *supra* note 11, at 71-72.

[19] *See* Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 6, 44 (Apr. 12) (stating that specific practice between states dispenses with the need to have regard to customary international law or general principles of law); *see also* DEGAN, *supra* note 11, at 71-72.

[20] *See* DEGAN, *supra* note 11, at 71-72 (discussing this problem in the context of practical adjudication of cases by the International Court, surmising that, where a legal systems of one of the I.C.J. judges contradicts the existence of a principle, it is plausible that "the majority will simply abandon this line of argument and choose some other argument for corroborating its verdict."); *but see* Case concerning Right of Passage over Indian Territory, 1960 I.C.J., at 136 (dissenting opinion of Judge Fernandes) (stating "what has to be determined is whether there is not a reason deeply rooted in the legal consciousness of all peoples for admitting, as a logical and practical necessity, the recognition of a right of passage to one who has a certain legal capacity to exercise in an area to which he cannot have access without using an area reserved for another."); *see also* Schlesinger, *supra* note 17, at 739 (setting a research project looking for "a core of legal ideas which are common to all civilized legal systems"). Professor Schlesinger does account for rising sectarianism in law as a major impediment to the crystallization of a common core of legal principles. *Id.*, at 740-741. In light of this difficulty, a critical-mass approach is pragmatically consistent with

Comparative legal scholarship has confirmed that there exists no complete overlap on any given rule of law, even between related legal systems.[21] Agreement on any given principle of law therefore is always a matter of judgment.[22] The question in proving a general principle as a matter of international law is whether a critical mass of legal systems agrees on the existence of a practical principle of decision.[23] As Judge McNair stated in his separate opinion in *International Status of South West Africa*:

> International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38(1)(c) of the Statute of the Court bears witness that this process is still active, and it will be noted that this article authorizes the Court to "apply … (c) the general principles of law recognized by civilized nations." 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

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Professor Schlesinger's vision, if as an intermediate step. *See id.*, at 742 (focusing on the fact that "willingness to receive the 'general principles' into the national legal order, has found expression in positive norms, both in the civil law and in the common law world"). *see also* RUDOLPH B. SCHLESINGER, HANS W. BAADE, ET AL., COMPARATIVE LAW 34-39 (5th ed. 1988) (stating that a representative sample is sufficient for a core principle).

[21] *See, e.g.*, EWOUD HONDIUS, PRECONTRACTUAL LIABILITY: REPORTS TO THE XIIITH CONGRESS, INTERNATIONAL ACADEMY OF COMPARATIVE LAW, MONTREAL, CANADA, 18-24 AUGUST 1990, at 25 (1991) (discussing the disparate dogmatic approaches taken by civil law jurisdictions to the conceptualization of precontractual liability in tort or contract); *but cf.* KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE *LEX MERCATORIA* 47 (1999) (describing a "'pragmatic' approach in order to look behind the black-letter-law of their respective legal systems and find common general principles of law that underlie provisions of completely different wording and dogmatic qualification."); *see also* Friedmann, *supra* note 10, at 284 (stating that "it is not necessary that the principles should be found to exist in identical form in every system of civilized law.").

[22] *But see* BERGER, *supra* note 21, at 47.

[23] *See id.* at 45-46; *but cf.* Friedmann, *supra* note 10, at 284; *see also* Simma & Alston, *supra* note 17, at 105 (stating that "what is required for the establishment of human rights obligations *qua* general principles is essentially the same kind of convincing evidence of general acceptance and recognition Schachter asks for – and finds – in order to arrive at customary law [customary international law requiring widespread and representative, not universal recognition].").

> fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of "the general principles of law." In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.[24]

For example, as a recent monograph on good faith in European contract law explained, "English law does not recognize a general duty to negotiate nor to perform contracts in good faith. Indeed, in some judicial utterances, this stark if not (to many civil lawyers) startling position represents the very nature of the contractual process."[25] This derogation, even by the original common law jurisdiction, from good faith as a principle does not deprive "good faith" of its status as a "general principle of law as recognized by civilized nations."[26] In the same manner, perceived "outlier" jurisdictions, do not defeat a general principle of law, as such.[27] They, however, must be addressed and explained to the arbitral tribunal to avoid a perception of bias or incompleteness.[28]

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[24] International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128, 148 (July 11) (separate opinion of Judge McNair); *see* Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law*, 30 BRIT. Y.B. INT'L L. 1, 18-19 (1953) (discussing Judge McNair's separate opinion); *see also* Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 66 n.4 (Feb. 5) (separate opinion of Judge Fitzmaurice) (supporting Judge McNair's analysis of general principles).

[25] *See, e.g.,* Reinhard Zimmermann & Simon Whittaker, *Good Faith in European Contract Law: Surveying the Legal Landscape*, *in* GOOD FAITH IN EUROPEAN CONTRACT LAW 39-40 (Reinhard Zimmermann & Simon Whittaker eds. 2008). As set out more fully below, English common law does recognize rules of law that operate similar to and fulfill approximately the function as the principle of good faith in continental European legal systems.

[26] *See, e.g.,* CHENG, *supra* note 1, at 105-62.

[27] *See, e.g.*, Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93, 133 (July 22) (dissenting opinion of Judge Alvarez) (relying only on the Civil Codes of Germany and Switzerland to determine that there is a developing principle in the concept of "abuse of right" and noting that it is a concept that "is relatively new in municipal law."); *see also* Fitzmaurice, *supra* note 24, at 18-19 (discussing *Anglo-Iranian Oil* in context on point); *but see* Emmanuel Gaillard,

In conclusion, proof of a principle requires a pragmatic evaluation of how the relevant legal systems respond to a specific factual problem so as to formulate a "policy" on the basis of which a decision can be rendered.[29] How to prove, in a specific case, that a critical mass of legal systems agrees on such "policy and principles" is discussed in more detail in the next section.

C. *Problem 3: Compatibility*

The third problem of proof is whether the general principle is "appropriate for application on the international level."[30] The question of compatibility should not be viewed in the abstract. Rather, the question of whether a rule can appropriately be transplanted from municipal to international law requires an understanding of the specific international context in which the rule is to be used.[31] For example, the rule one seeks to import may well satisfy the requirements of critical mass, but it may be addressed to a completely different legal problem than the one at bar. Thus, while principles of criminal law could be used in the growing field of international criminal law and international human rights law, as well as other growing fields of public international law, they may be less appropriate in the context of border disputes. Further, international law may already regulate

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Use of General Principles of International Law in International Long-Term Contracts, 27 INT'L BUS. LAW 214, 216 (1999):

> That is not to say, however, that to be recognized as a general principle of law, a rule must find unanimous support in comparative law. Indeed, if such a view were to prevail, it would amount to granting veto power to those legal systems incorporating the most isolated tendencies, when the aim of the transnational rules method is rather to identify generally accepted principles.

[28] *See, e.g.,* Zimmermann & Whittaker, *supra* note 25, at 45-48 (stating that "modern English law is not the hard-hearted Dickensian ogre which this would at first sight lead one to believe, for recourse has been had to 'piecemeal solutions in response to demonstrated problems of unfairness'.").

[29] *See* International Status of South West Africa, 1950 I.C.J., at 148 (separate opinion of Judge McNair).

[30] SCHACHTER, *supra* note 9, at 52.

[31] *See* Friedmann, *supra* note 9, at 284.

a specific area of law and, as such, must be accounted for in importing further international legal rules.

It was on account of these international legal principles that a general principle of the law of trusts was not imported in the *Status of South West Africa* decision. The mandate system in international law was deemed to fulfill a special function in international law that could not easily be equated to a private law relationship simply on account of its unique international legal status.[32]

The question of compatibility will further import other dogmatic objections to general principles, as it may be said that only such principles which demonstrate sufficient state practice to validly infer they were meant to be applied internationally are appropriately incorporated into international law.[33] This argument appears wrong-footed as it would, thought through to its logical conclusion, collapse general principles of law into international custom.[34]

D. *Conclusion: Consider the Facts at Bar*

The pragmatic solution to these key problems of proof of general principles of law is to be guided by the case at bar rather than abstract theory of international law. A principle most clearly exists when it is possible to show that there is fundamental agreement between relevant legal systems as to how a specific legal issue, in the final analysis, should be resolved.[35] To the

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[32] *See* International Status of South West Africa, 1950 I.C.J., at 132 ("The mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object – a sacred trust of civilization. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law.").

[33] *Compare* FASTENRATH, *supra* note 9, at 101-02 (discussing the voluntarist approach to general principles); *with*, SCHACHTER, *supra* note 10, at 50.

[34] *See* Simma & Alston, *supra* note 17, at 82 (discussing the theoretical problems arising out of the close relationship between customary international law and general principles of law in the international human rights context).

[35] *See* SCHLESINGER, BAADE, ET AL., *supra* note 20, at 39:

> In a course on Comparative Law it may be necessary constantly to warn the student against taking for granted that the basic concepts

extent that one can prove such an agreement, one could safely account for relevant outlier jurisdictions.[36] Further, one could explain why the rule appropriately should be applied to the question at issue before a tribunal; *i.e.*, why it is appropriately imported into international law. This of course is an ideal case scenario. In many instances, open questions will remain. In those instances, the fundamental issue in proving a general principle is to illustrate to the arbitral tribunal that the rule invoked makes functional sense as a rule of decision for the case at bar.[37]

III. GUIDELINES FOR PROOF OF GENERAL PRINCIPLES

Having laid out the problems of proof of general principles of law, what follows is meant as guidelines for the process of proof if a principle has to be proved from scratch. In most cases, it is not necessary to prove the principle entirely from scratch, as prior scholarly work has already gone a far way toward establishing the existence of a principle. Nevertheless, as each situation will require an adaptation of the general principle to the specific legal question at bar, it is useful even in those circumstances to work through the steps outlined below.

A. *Step 1: Identify the Factual Issue Requiring Legal Resolution*

The first and most important step is to identify the factual issue requiring legal resolution.[38] The question should be framed

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> and precepts of his own law will be duplicated in other systems. To combat an unperceptive and uncritical attitude toward one's own law is indeed one of the main objectives of Comparative Law, and in pursuing this objective the instructor or casebook author may spend more time dwelling on differences than on similarities. But this should not becloud the fact that in comparing the solutions provided for a given problem under various legal systems, we encounter similarities more often than differences. At least in terms of actual results – as distinguished from the semantics used in reaching and stating such results – the areas of agreement among legal systems are larger than those of disagreements.

[36] *See, e.g.*, Zimmermann & Whittaker, *supra* note 25, at 39-40.

[37] International Status of South West Africa, 1950 I.C.J., at 148 (separate opinion of Judge McNair).

[38] *Compare* BERGER, *supra* note 21, at 45-46 (discussing the differences between a factual approach and a conceptual approach); *with* Friedmann,

in purely factual terms to avoid importing legal preconceptions. It should be framed as closely as possible to the case at bar and stated in clear and specific terms. This will allow the application of the resulting legal rule or general principle to the factual problem and lead to a legal conclusion.[39]

In formulating the factual issue, it is important to remember that the question can be meaningfully refined as research advances. The identification of a general principle is "progressive," in that legal research will show the relevance of factual distinctions to the scenario and thus will narrow or broaden the scope of inquiry.[40] Moreover, in some instances, the factual scenario could be too tightly worded to lead to any meaningful discovery of legal principles in some or all of the relevant legal systems. In such cases, it is possible that the search criteria were too narrowly defined or too much emphasis was placed on facts not typically encountered by the legal systems being studied. Rather than give up, it is therefore prudent to change the factual search criteria to account for such a possibility.

For example, the first step in proving a specific general principle for purposes of the resolution of a discrete dispute should not be to frame a question of whether there is such a thing as a general principle of good faith.[41] Rather, the question should be what are the legal, good faith consequences of an oral statement made by a foreign minister on television? Specifically,

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supra note 9, at 284. Given the particular issues in applying a general principle of law in international law, a factual approach is more apt to deal with issues of whether the principle identified should be applied as a matter of international law to a particular situation on account of its broader international legal context.

[39] *Cf.* Friedmann, *supra* note 9, at 284 (stating that "an examination of these principles means a pragmatic attempt to find from the major legal systems of the world the maximum measure of agreement on the principles ***relevant to the case at hand***.") (emphasis added).

[40] *Cf.* Schlesinger, *supra* note 17, at 751-52.

[41] This question has, of course, great academic merit and has been treated as such for example in CHENG, *supra* note 1, at 105-60 and other similar monographs. It is not, however, a question that will be of assistance in the specific proof of a general principle of law addressing a specific factual scenario.

what legal conclusions result if such statements were intended to solicit a certain response from a specific audience and in fact led to actions by third persons.[42]

Once research has gotten under way, it may be necessary to further refine the question by reference to the type of statement and the kind of response it engendered. It may also be necessary to broaden the search to broadcasted statements generally, rather than only statements broadcasted on television, to find relevant legal rules and general principles applicable to those statements.

Similarly, it would be less helpful to start with an analysis of whether a general principle of equitable servitudes can be established as a matter of international law.[43] Rather, the question should be what rights to passage an enclaved property must be provided by a neighboring state? Does it matter to what end passage is used?

Finally, it may not be helpful to put a research question in terms of whether there is a general principle of delictual or tortious joint-and-several liability.[44] Rather, the question might be how responsibility for internationally wrongful economic damage caused by a series of actions taken by several participants should be attributed to each of the multiple participants in that conflict? Specifically, what legal conclusions should result if it is not practically possible to determine "precisely who did what" in a conflict?[45]

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[42] *Cf.* Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 471 (Dec. 20) (analyzing television statements by French officials, including the French defense minister, that France had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests, from the perspective of good faith in unilateral declarations of states).

[43] *See* Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 6, 136 (Apr. 12) (dissenting opinion of Judge Fernandes) (discussing rights of passage as a general principle of property law).

[44] *See* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 354 (Nov. 6) (separate opinion of Judge Simma).

[45] *Id*.

B. *Step 2: Identify the Appropriate Legal Systems*

After formulating the factual problem to be resolved, one must identify the relevant legal systems to be examined. The balancing test laid out above is a good starting point.[46] The choice of a set of legal systems should be particularly mindful of the specific facts to be resolved. This will allow the research to reflect relevant "specialist" jurisdictions and to find an appropriate geographic mix of legal systems. In identifying such "specialist" jurisdictions, it is appropriate to consult the secondary literature identified below as an initial point of research.[47]

C. *Step 3: Assemble a Relevant Sample of Converging Legal Systems*

Once a set of relevant legal systems has been established, it is important to explore what solutions these legal systems provide to the factual question to be researched.[48] In order to establish what solution the legal systems in question provide, it is generally useful to look to an introductory article or monograph on the legal systems in question.[49] These secondary sources will likely point out the broad organization of the relevant legal system. One can then proceed to consult introductory works in the appropriate sub-branch of the legal system dealing with the factual question; again, by consulting secondary literature in conjunction with the primary literature cited in it.[50]

On the basis of this research, one should arrive at a legal rule that is applicable to the factual question presented and understand how such rule functions in the relevant legal systems. The research should provide enough information to satisfy a three factor test: (a) how is the issue resolved in the relevant legal systems; (b) how does each legal system explain such conclusion

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[46] *See supra* pp. 509-10.

[47] *See infra* § IV.B.

[48] *See, e.g.*, SCHLESINGER, BAADE, ET AL., *supra* note 20, at 39.

[49] *See, e.g.,* INTRODUCTION TO GERMAN LAW (Joachim Zekoll & Matthias Reimann eds. 2005).

[50] *See generally*, Zimmermann & Whittaker, *supra* note 25 (discussing surveying a legal system with introductory works).

internally; and (c) what are the key facts considered in arriving at the respective results.

An overlap between factors (a) and (c) tends to show that the legal systems in question agree as to the existence of a general principle.[51] If there is a further overlap with regard to (b), the principle usually can be explained by direct reference to the rationale used by the different legal systems themselves. Where the legal systems do not agree with regard to (b), it may be necessary to "re-create" the general principle from factor (c).[52] That may be possible by borrowing the principle used in the majority of legal systems.[53] It may also be possible to do so by identifying a level of commonality in "policy" within the relevant legal systems. This policy would indicate whether such legal systems treat a specific fact pattern in a certain way.[54]

This analysis leads to two related questions. First, when is it possible to show a sufficient convergence between legal systems to prove a relevant general principle of law? Second, is the principle accepted by a sufficient number of legal systems to qualify as general? The answer to both questions will depend significantly on the factual background on which the principle is meant to operate.

1. Sufficient Convergence

The existence of a general principle is not a question that needs to be proved in the abstract. Such abstract proof in any event would be difficult as, even in instances in which there is a clear convergence of legal systems on a common principle, this convergence rarely will be perfect. In other instances, there may be agreement on a legal result but a complete disagreement as to how it is achieved.

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[51] SCHLESINGER, BAADE, ET AL., *supra* note 20, at 39.

[52] International Status of South West Africa, Advisory Opinion, 1950 I.C.J. at 148 (July 11) (separate opinion of Judge McNair).

[53] *See* SCHLESINGER, BAADE, ET AL., *supra* note 20, at 34.

[54] *See* International Status of South West Africa, 1950 I.C.J. at 148 (separate opinion of Judge McNair).

To establish whether a relevant common legal principle exists – as opposed to whether it is accepted with sufficient generality – the first question is whether a common principle applies to the fact scenario at hand. If the answer to that question is unclear, one must next examine whether the factual question at hand is answered similarly within at least a sub-set of the examined legal systems.

If, on the other hand, there exists a common relevant principle of law readily discernible from the legal systems analyzed but a divergence exists, the assessment changes. In such a situation, counsel must determine if the divergence affects an issue that is not dispositive to the factual issue at bar as, if such is the case, it can be put aside as practically irrelevant in most cases. Proof can proceed to the question of whether that principle has sufficient support among the analyzed legal systems to be considered "general." If there is only an agreement on a legal result, but a divergence on why it is, it is still possible to prove a common principle. This issue is discussed in the next section.

2. Required Generality

To establish the existence of the requisite generality of the principle, the number of legal systems that agree on a principle or given legal result is important. Where a core group of legal systems agree on a common principle, such principle can be supplemented by legal systems that only agree on the relevant legal outcome. If there is only an agreement on a legal result, but a discrepancy on why this result is reached, it is still possible to prove a common principle. This issue is discussed in step 4, below.

There is, however, no hard and fast rule on how many legal systems make up the required critical mass.[55] A guidepost may

[55] *See* Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93, 133 (July 22) (dissenting opinion of judge Alvarez) (relying for a possible derivation of the principle of "abuse of rights" on only the Civil Codes of Germany and Switzerland and noting that it is a concept "which is relatively new in municipal law"); *but cf.* Fitzmaurice, *supra* note 24, at 53 (discussing *Anglo-Iranian Oil* in context on point); *and* South West Africa (Eth. v. S. Afr.), 1966 I.C.J. 6, 47 (July 18) (denying recognition to a principle of standing on account of *actio popularis* because the *actio popularis* had too little support in municipal legal systems); *and* BRIGITTE STERN, LE PRÉJUDICE DANS LA THÉORIE DE LA

be to consult the rules of customary international law requiring widespread and representative agreement (not complete agreement) on the principle.[56] This guidepost should not be given undue importance, however, as general principles can operate in a manner that fundamentally differs from the manner in which international custom is generated. Rather, if there is a less than complete agreement on a principle of decision in the legal systems analyzed, the next two steps of proof (steps 4 & 5) should be considered more carefully than a simple arithmetic calculation of how many systems favor a principle and how many disfavor it.

D. *Step 4: Assess if the Differences between Legal Systems has a Practical Effect in the Case*

This step is necessary only to the extent that the principle identified in step 3 has been identified "by abstraction," meaning that there was no explicit agreement between all the different legal systems consulted on a common legal rule applicable to the fact scenario identified in step 1, but only between some of them. In this case, it is important to confirm how the "diverging" legal systems – those that do not adopt the principle or legal rationale, as such – would themselves resolve the fact scenario presented at the outset of the analysis. To the extent that there is a divergence in result, – *i.e.,* advanced jurisdictions recognize legal consequences from a certain act, whereas the outlier jurisdictions would not – the practical parameters of this divergence have to be fully understood. Is the failure of the outlier legal system to follow the principle because of a specific fact in dispute in the case at bar? Would the outlier systems come to a conclusion similar to the majority under different conditions? If so, what are they?

Once these questions have been answered, it is possible to proceed with the proof of the general principle even if a relevant

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RESPONSABILITÉ INTERNATIONALE 70-71 (1973) (commenting on the concept of *actio popularis* in the *South West Africa* case).

[56] *See* Simma & Alston, *supra* note 17, at 105. (stating that "what is required for the establishment of human rights obligations *qua* general principles is essentially the same kind of convincing evidence of general acceptance and recognition Schachter asks for – and finds – in order to arrive at customary law [customary international law requiring widespread and representative, not universal recognition.]").

jurisdiction does not recognize the principle at all.[57] In that instance, it is important to note the divergence and to explain why the principle nevertheless commands a critical mass of assent in other legal systems. To the extent that there is significant divergence on a given principle, the considerations laid out in step 5 become relevant. Is the principle identified by research done thus far in fact consistent with existing principles of international law? If so, can it be readily integrated into the larger body of law applicable to the dispute?[58]

E. *Step 5: Determine if the Principle can be Transitioned to International Law*

The effective transition of a general principle from a group of municipal laws to international law requires the principle to be practically relevant to the question of international law at bar.[59] It further requires the principle to fit comfortably with the overall manner in which the factual problem would otherwise be approached as a matter of international law, particularly if no such principle existed.[60] Practically this means that a principle that is directly analogous to the international legal problem is going to be more readily accepted than one that is not.[61] Further, general principles will be more readily accepted in areas of law that are "under-regulated," as opposed to those that already have an established and principled approach to legal problems.

The functional relevance of the principle to the question at bar is facially obvious. Nevertheless, it is important to note that the analogy is not as straight-forward as one might think. Reference

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[57] *See supra* § II.B.

[58] That is not to say that the general principle is "secondary" to existing principles, as such. Rather, the point is that, in the event that there is a split on a principle between a majority of legal systems and a minority not recognizing the principle, such a principle would likely only operate on the international level if international law on point was closer in its approach to similar legal problems to the majority of legal systems.

[59] *See* International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128, 132 (July 11).

[60] *See id.*

[61] *See infra* § IV.A. (discussing principles adopted in jurisprudence).

to rules of municipal or private law, one might argue, is never irrelevant to a purely public legal relationship between sovereigns.[62] Thus, even the most closely analogous situation in the law of tort or delict governing private individuals may be difficult to transition to relationships that govern sovereigns.[63]

In other words, there will always be rhetorically appealing arguments supporting the position that a general principle drawn from municipal or private law is not relevant to the question of international law that counsel is attempting to resolve. One can only hope to overcome this problem by explaining to the arbitral tribunal (or at least to oneself) why the problem encountered in municipal or private law is similar to the problem encountered in the international legal context at bar.[64] Once such specific functional analogy can be explained in plain and simple terms, proof of the relevance of a general principle has taken a large step forward.

It is perhaps also obvious that a principle is only going to find acceptance to the extent that it does not "rock the boat." A principle that would require a radical re-conception of mature concepts in a developed area of public international law is less likely to be accepted than one that effectively justifies a preconception already at work in international law.[65] This

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[62] *See supra* pp. 507-8, 513-14.

[63] *See* Trail Smelter (Can. v. U.S.), 3 R. Int'l Arb. Awards 1905, 1938-39 (1949); 35 AM. J. INT'L L. 684 (1941) (ad-hoc arbitration award reported on Mar. 11, 1941), *available at* http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf; *but cf.* CHENG, *supra* note 1, at 130 (discussing the balancing test utilized by the *Trail Smelter* tribunal in assessing the right of a state to make use of its own territory as compared to its obligation not to allow its territory to be used in a manner that is a harmful nuisance to its neighbors).

[64] *See, e.g.*, Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 66 n.4 (Feb. 5) (separate opinion of Judge Fitzmaurice) (stating that "it is scarcely less important to bear in mind that conditions in the international field are sometimes very different from what they are in the domestic, and that rules which these latter conditions fully justify may be less capable of vindication if strictly applied when transposed on to the international level.").

[65] *See* Fitzmaurice, *supra* note 24, at 222:

> It would seem that paragraph 1 of Article 38 of the Statute, taken as a whole and including therefore head (c), must be regarded as declaratory of an existing legal position and not as involving any

explains why even broadly supported general principles have simply not been able to prevail over the *status quo ante* in certain highly regulated areas of international law.[66] It also explains why such principles are more frequently referred to in the context of "new" areas of public international law in which no such preconceptions have been able to mature.[67] Therefore, as a matter of proof, it is advisable to explain how a proposed principle integrates with existing international legal rules.

IV. "SHORT-CUTS"

Perhaps cynically one might admit that the first short-cut to proving a general principle is the use of Latin. As Oscar Schachter opined, "expressing tautologies in Latin apparently adds to their weight in judicial reasoning."[68] Cynicism aside, however, there are many authoritative sources that help establish general principles of law by means of a short-cut to the steps outlined above.

As the sources discussed here are not themselves "primary" sources of international law, it is important to test their reasoning against the methodological framework set out above. Nevertheless, if a helpful general principle has been recognized in one of the below mentioned sources, the task of proving it will likely be reduced. The advocate would only have to prove that the general principle can be relevantly applied to the factual situation at bar, rather than having to prove the principle from "scratch."

> innovation. The whole paragraph is governed by the preambular passage according to which it is the 'function' of the Court 'to decide *in accordance with international law* such disputes as are submitted to it.' The various heads (a) to (d) which then follow are clearly listed as containing the elements which the Court 'shall apply' in deciding 'in accordance with international law.' As the Statute could not clearly have been intended to legislate *de novo* as to the substantive content of international law, it must be assumed that Article 38 was intended to recite or place on record only those elements which, under existing international law, were already material to any decision purporting to be given 'in accordance with international law'.

[66] *See* International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128, 132 (July 11).

[67] *See infra* § IV.A. (discussing principles adopted in jurisprudence).

[68] SCHACHTER, *supra* note 9, at 54.

A. *Rulings of International Tribunals*

International courts and tribunals have stated a multitude of general principles of law. Early decisions have been aptly summarized in Bin Cheng's GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS.[69] Beyond this, the ICJ has, in a number of cases, touched on general principles, among them: (1) the Effect of Awards of Compensation made by the United Nations Administrative Tribunal case;[70] (2) the South-West Africa – Voting Procedures case;[71] (3) the Norwegian Loans case;[72] (4) the Right of Passage over Indian Territory case;[73] (5) the South West Africa case;[74] (6) the Barcelona Traction case;[75] (7) the North Sea Continental Shelf case;[76] (8) the Application for Review of Judgment No. 158 of the United Nations Administrative

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[69] CHENG, *supra* note 1, at 105-162.

[70] *See* Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 53 (July 13) (discussing *res judicata*).

[71] *See* South West Africa – Voting Procedure, Advisory Opinion, 1955 I.C.J. 67, 99, 100-102, 105 (June 7) (separate opinion of Judge Lauterpacht) (discussing good faith and the frustration of existing international obligations by contrary action in international organs and the principle of *nemo judex in re sua*).

[72] *See* Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 46 (July 6) (separate opinion of Judge Lauterpacht) (stating "in this connection mention may be made of the legal principle generally recognized in municipal law according to which a condition, in a contract or in any other legal instrument, that is contrary to a fundamental principle of judicial organization is invalid.").

[73] *See* Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 6, 136 (Apr. 12) (dissenting opinion of Judge Fernandes) (discussing rights of passage as a general principle of property law).

[74] *See* South West Africa (Eth. v. S. Afr.), 1966 I.C.J. 6, 47 (July 18) (finding that an *actio popularis* cannot be maintained on account of a general principle of international law for want of a critical mass).

[75] *See* Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5) (discussing general principles applicable to corporate law).

[76] *See* North Sea Continental Shelf (F.R.G. v. Den.), 1969 I.C.J. 3, 21 (Feb. 20) (discussing Germany's submission that the attribution of just and equitable shares of natural resources constitutes a general principle).

Tribunal case;[77] (9) the Oil Platforms case;[78] (10) the Gabčíkovo-Nagymaros Project case;[79] and, (11) the Request for Interpretation of the Judgment of 11 June 1998 case.[80]

Recent decisions by arbitral tribunals deciding investor-state disputes have also commented and established the existence of general principles. For example in: (1) Amco Asia Corp. v. Indonesia;[81] (2) Waste Mgmt., Inc. v. Mexico;[82] (3) Canfor Corp. v. United States;[83] (4) Sempra Energy Int'l. v. Argentina;[84] (5) Grand

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[77] *See* Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J. 166, 181 (Feb. 2) (discussing the general principle of a right to be heard in writing in international cases).

[78] *See* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 354 (Nov. 6) (separate opinion of Judge Simma) (discussing state responsibility and joint and several liability in tort).

[79] *See* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 211-12 (Sept. 25) (separate opinion of Judge Fleischhauer) (discussing the principle of *nullus commodum capere de sua injuria propria*).

[80] *See* Request for Interpretation of the Judgment of 11 June 1998, Preliminary Objections, 1999 I.C.J. 31 (Mar. 25) (discussing principles of evidence and procedure).

[81] *See* Amco Asia Corporation et al. v. Indonesia, ICSID ARB/81/1, ¶ 14 (Sept. 25, 1983) (confirming the nature of *pacta sunt servanda* as a general principle); *see* Inceysa Vallisoletane, S.L. v. El Salvador, ICSID (ARB/03) No. 26, ¶ 177 (Aug. 2, 2006) (citing, favorably, the *Amco* decision).

[82] *See* Waste Mgmt., Inc. v. Mexico, ICSID ARB(AF)/00/3, ¶ 39, (June 26, 2002) (confirming the status of *res judicata* as a general principle of law).

[83] *See* Canfor Corp. v United States, NAFTA/UNCITRAL, Order of the Consolidation Tribunal (ICSID), at ¶ 168 (Sept. 7, 2005) ("The Tribunal accepts that, as amply demonstrated by the parties in their post-hearing briefs, estoppel is a recognized general principle of law that has been applied by many international tribunals. Of the essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party.") (citations omitted), *available at* http://www.state.gov/s/l/c7424.htm; *see also* Desert Line Projects LLC v Yemen, 2008 ICSID ARB/05/17, ¶ 207 (Feb. 6, 2008) (confirming, by reference to Islamic law, the acceptance of the principle of estoppel); *see also Pan American Energy LLC et al. v. Argentina*, 2003 ICSID (ARB/03) No. 13, Preliminary Objections, ¶ 159 (July 27, 2006).

River Enterprises Six Nations Ltd et al. v. United States;[85] (6) Phoenix Action Ltd. v. Czech Republic;[86] (7) Merrill & Ring Forestry LP v Canada;[87] and (8) Mobil Corporation et al. v. Venezuela.[88] Similarly, outside of the context of investment disputes, recent arbitral tribunals have held that fair access to justice constitutes a general principle of law.[89]

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[84] *Compare* Sempra Energy International v. Argentine Republic, 2002 ICSID ARB/02/16, Award, ¶ 353, (Sept. 18, 2007) (discussing Argentina's plea of necessity in the context of "a general principle of law devised to prevent a party from taking legal advantage of its own fault"); *and* Enron Corp. et al. v. Argentina, 2001 ICSID ARB/01/3, Award, ¶ 311 (May 15, 2007); *with* Andrea Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 459, 490-91 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds. 2008).

[85] *See* Grand River Enterprises Six Nations Ltd. et al. v. United States, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, ¶ 33 (July 20, 2006) (stating that prescription of claims is a general principle of law), *available at* http://www.state.gov/s/l/c11935.htm.

[86] *See* Phoenix Action Ltd. v. Czech Republic, 2006 ICSID ARB/06/5, Award, ¶ 54 (Apr. 9, 2009) (establishing a principle of non-retroactivity under the ICSID Convention); *but cf.* Société Générale v. Dominican Republic, LCIA No. UN 7927, Decision on Preliminary Objections to Jurisdiction, ¶ 85 (Sept. 19, 2008). *See also* Phoenix Action Ltd., Award, ¶¶ 106-112 (establishing a principle of good faith in the context of an interpretation of the requirements of the concept of a protected "investment" in a bilateral investment treaty).

[87] *See* Merrill & Ring Forestry LP v Canada, NAFTA/UNCITRAL, Award, ¶ 187 (Mar. 31, 2010) (stating:

> The Tribunal must note that general principles of law also have a role to play in this discussion. Even if the Tribunal were to accept Canada's argument to the effect that good faith, the prohibition of arbitrariness, discrimination and other questions raised in this case are not stand-alone obligations under Article 1105(1) or international law, and might not be a part of customary law either, these concepts are to a large extent the expression of general principles of law and hence also a part of international law. ... Good faith and the prohibition of arbitrariness are no doubt an expression of such general principles and no tribunal today could be asked to ignore these basic obligations of international law.)

[88] *See* Mobil Corporation, et al. v. Bolivarian Republic of Venezuela, 2010 ICSID ARB/07/27, Decision on Jurisdiction, ¶ 175 (discussing good faith and abuse of right as a general principle of law).

[89] *See* Dr. Horst Reineccius et al. v. Bank for Int'l Settlements, 23 R. INT'L ARB. AWARDS 252, 291 ¶ 126 (Perm. Ct. Arb. 2003), *available at* http://untreaty.un.org/cod/riaa/cases/vol_XXIII/153-296.pdf.

Relying on the decisions of international courts and tribunals, however, has its dangers. For example, the ICJ noted that such decisions of themselves do not prove the existence of a general principle. This is so because "these specific authorizations in the instruments governing certain other tribunals reflect their particular admissibility procedures, which are not identical with the procedures of the Court in the field of jurisdiction."[90] This caveat is particularly relevant in the context of general principles governing procedural aspects of the process. It is also applicable in the context of general principles governing substantive aspects. However, as the specific context in which the principle is to be used will vary from case-to-case, so will its applicability to the new factual situation.[91]

B. *International and Comparative Law Articles and Textbooks*

Other sources of law, albeit secondary and always persuasive, are articles and textbooks on international and comparative law. These materials discuss in detail the generation of international legal principles from municipal and private law sources. The public international law literature has already been discussed in the context of the development of general principles in public international law above. These articles normally have a methodological focus and otherwise generally focus on explaining current developments in jurisprudence.

A different, useful source for the establishment of general principle is comparative law literature. This literature has matured particularly in the field of civil law and the law of obligations. It is in this sense that it has frequently been adopted in jurisprudence. Given the nature of international commerce, the literature on the commercial and civil legal issues has far outstripped the developments in other areas of law. Sources for English language comparative legal research in international law,

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[90] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 1, 45 (Feb. 26).

[91] *See, e.g.*, Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 53 (Sept. 25) (limiting the applicability of Judge Lauterpacht's separate opinion in the South West Africa case discussed above); *but see id.* at 86-87 (separate opinion of Judge Rezek) (apparently supporting the application of Judge Lauterpacht's separate opinion).

which providing a good starting point are: Schlesinger's, COMPARATIVE LAW;[92] THE OXFORD HANDBOOK ON COMPARATIVE LAW;[93] and monographs such as GOOD FAITH IN EUROPEAN CONTRACT LAW;[94] Berger's, THE CREEPING CODIFICATION OF THE *LEX MERCATORIA;*[95] or TRANSNATIONAL COMMERCIAL LAW: INTERNATIONAL INSTRUMENTS AND COMMENTARY.[96] Ample literature has also developed in the context of administrative and public law.[97]

Although helpful, recourse to learned comparative law treatises and articles is not a direct means of proving a general principle. The most important caveat in applying comparative legal analysis in the public international law arena is the issue of compatibility. As discussed above, the rules of comparative law derived from municipal and private laws must be appropriate for inclusion in public international law.[98] Therefore, it is of particular importance in the instance of a "pure" comparative legal analysis to explain the compatibility problem. The arbitral tribunal must understand how the general principles to be imported into public international law would integrate into the broader public international legal order.

C. *Transnational Legal Codification*

Secondary sources aside, there is an ongoing effort for the codification of transnational law. Some of these attempts have led to international conventions, as was the case for example with the promulgation of the United Nations Convention on Contracts for

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[92] *See* RUDOLPH B. SCHLESINGER, ET AL., COMPARATIVE LAW (2009).

[93] *See* THE OXFORD HANDBOOK OF COMPARATIVE LAW (Matthias Reimann & Reinhard Zimmermann eds. 2008).

[94] *See* GOOD FAITH IN EUROPEAN CONTRACT LAW (Reinhard Zimmermann & Simon Whittaker eds. 2008).

[95] *See* BERGER, *supra* note 21.

[96] *See* ROYSTON GOODE ET AL., TRANSNATIONAL COMMERCIAL LAW: INTERNATIONAL INSTRUMENTS AND COMMENTARY (2004).

[97] *See* HUMAN RIGHTS AND THE PRIVATE SPHERE. A COMPARATIVE ANALYSIS (Jörg Fedkte & Dawn Oliver eds. 2007).

[98] *See supra* § II.C.

the International Sale of Goods.[99] Another case in the field of arbitration itself is the New York Convention.[100] Similarly, the UNCITRAL Model Law on International Commercial Arbitration is the result of significant comparative legal enterprise and effort.[101] Other institutions such as the Hague Conference on Private International Law also contribute to the growing influence of comparative law on the codification of public international law.[102] Further, in the field of criminal regulation, the OECD Anti-Bribery Convention is an additional comparative legal development that has brought to bear a municipal legal approach to an international legal problem.[103]

Beyond these codification efforts led by the United Nations and OECD, a number of other learned publicists and organizations have authored significant proposals. These proposals assert that the principles, along which international commercial law, and particularly the law of obligations, should be recast in the international context. The most successful legal attempts at codification of transnational law are the Lando Principles of

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[99] United Nations Convention on Contracts for the International Sales of Goods – CISG, Apr. 11, 1980, 52 F. Reg. 6262 (Mar. 2, 1987), *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/ CISG.pdf.

[100] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, T.I.A.S. 6997, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

[101] International Commercial Arbitration: Draft Model Law on International Commercial Arbitration, [1985] 16 Y.B. of the UNCITRAL 40 ¶¶ 332-33, U.N. Doc. A/40/17; *see also* Resolution Approving the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law - UNCITRAL, G.A. Res. 40/72, U.N. GAOR, 40th Sess., 112th plen. mtg., 308, U.N. Doc. A/RES/40/72 (Dec. 11, 1985); Resolution Approving the Revised Articles of the Model Law on International Commercial Arbitration, G.A. Res. 61/33, U.N. GAOR, 61th Sess., 64th plen. mtg., U.N. Doc. A/RES/61/33 (Dec. 4, 2006) *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[102] OLE LANDO, KORT INDFØRING I KOMPARATIV RET 194-95 (3rd ed. DJØF Forlag 2009) (discussing the activities of different institutions who are bringing comparative research to light in the international legal arena).

[103] *See* OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 (1998), [i] KAV 5210, *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf.

European Contract Law,[104] and the UNIDROIT Principles.[105] These principles, and similar works, are a ready source of inspiration for general principles of law.

As with learned comparative law treatises and articles, it is important to remember that these various attempts at comparative codification and reform stand in their own specific contexts and must be persuasively incorporated in a larger public international legal context. Thus, while the CISG and the OECD Anti-Bribery Convention are already international law in their respective fields of application, any derivation of principles from them requires a further step to explain how the rules contained therein have crossed the threshold of *lex specialis* governing the international relations of the signatories and become true *lex generalis*. The success of such arguments will be highly context- and fact-dependent.

D. *Rulings of Domestic Courts*

Finally, municipal legal decisions can in many instances be important sources for the derivation of general principles. The use of comparative methodology in the municipal courts have been exhaustively described, analyzed and explained by Sir Basil Markesinis and Jörg Fedke in their article, *The Judge as Comparatist*.[106] The growing use of comparative law specifically in the field of constitutional adjudication may be of particular significance for the shaping of public law, and thus may be of particular interest in the doctrinal growth of public *international* law.[107]

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[104] *See* PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando, Eric Clive, Andre Prum & Reinhard Zimmermann eds. 2003).

[105] *See* Int'l Inst. for the Unif. of Private L. [UNIDROIT], *Principles of International Commercial Contracts* (2004), http://www.unidroit.org/english/principles/contracts/ main.htm.

[106] *See* Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11 (2005).

[107] For instructive, if sometimes controversial, U.S. examples, *see Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (discussed in Rudolf B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations, Outline of a New Project*, 51 Am. J. Int'l L. 734, 744 (1957)); *Palko v. Connecticut*,

Yet, as the source for a possible general principle comes only from one legal system, one should be particularly careful in importing general principles of law from just such an analysis. Thus, in relying on municipal legal decisions, this limitation must be borne in mind. Municipal courts legitimately develop their own municipal law. Comparative law is used by municipal courts in order to better understand the implications of an existing municipal legal order. Comparative law is not, or in any event should not be, used by municipal courts to "make new law," nor is it used to expound on transnational legal principles, as such.

V. CONCLUSION

"General principles of law as recognized by civilized nations" remain challenging to prove. Their demonstration requires comparative legal research to establish an overlap of a critical mass of legal systems on any given principle and an understanding of how such a principle would function within the framework of the public international law rules at issue in a dispute. Attention to the specific problem to be addressed by a general principle will often be key to determining whether a general principle exists and, if it does, whether it can be transposed from comparative law to public international law.

Such a pragmatic approach to general principles of law simplifies the practice of international law in international dispute resolution proceedings by providing a method of proof that avoids many of the theoretical pitfalls which are rife in the literature on general principles of law. These theoretical concerns may not have an immediate impact on the actual proof of any given general principle, if the practitioner focuses on the specific legal problem at hand. Of course, even with these theoretical obstacles removed, there remains a margin of appreciation and judgment applicable on a case-by-case basis. It is the advocate's responsibility to persuade the arbitral tribunal that a specific general principle can be imported into public international law.

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302 U.S. 319 (1937) (discussed in Rudolf B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations, Outline of a New Project*, 51 Am. J. Int'l L. 734, 744 (1957)); *Lawrence v. Texas,* 539 U.S. 558 (2003); *Roper v. Simmons,* 543 U.S. 551 (2005).

MICHAEL D. NOLAN

Michael D. Nolan is a partner in the Washington, D.C. office of Milbank, Tweed, Hadley & McCloy LLP. Mr. Nolan has represented clients or served as arbitrator in arbitrations under AAA, ICC, ICSID, UNCITRAL and other rules and is consistently listed in *Euromoney Guide, Experts in Commercial Arbitration* and *Chambers USA* for international arbitration. Mr. Nolan teaches as an Adjunct Professor at the Georgetown University Law Center. He is a member of the Board of Directors of the American Arbitration Association and of the Panel of ICSID Arbitrators (by appointment of Mongolia). Mr. Nolan is a graduate of Harvard College and of the University of Chicago Law School.

Mr. Nolan can be reached at mnolan@milbank.com.

FREDERIC GILLES SOURGENS

Frédéric G. Sourgens is an associate in the Washington, D.C. office of Milbank, Tweed, Hadley & McCloy and an Adjunct Professor at Georgetown University Law Center. A French-German national, Frédéric has studied and worked in Italy, Norway, the United Kingdom, the United States, and Texas. He has worked as counsel in ICSID, UNCITRAL, ICC and LCIA arbitrations and is actively engaged with the Oxford University Press online database of international investment treaties and decisions, (www.investmentclaims.com).

Mr. Sourgens can be reached at fsourgens@milbank.com.