

THE TWO-STEP METHODOLOGY FOR THE IDENTIFICATION OF GENERAL PRINCIPLES OF LAW

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Abstract The two-step methodology for the identification of general principles of law deriving from domestic legal systems, consisting of a comparative analysis followed by a transposability test, seems accepted as the undisputed methodology in the current work of the International Law Commission on the topic. This article examines whether this two-step approach finds reflection in the practice of and before the PCIJ/ICJ and in international legal scholarship. The analysis finds that judicial practice does not entirely follow these two steps, but the method is widely upheld in doctrinal writing. The article argues that the decision to codify this two-step methodology can be viewed as progressive development by the Commission, and may signify the crystallization of this method of identification of general principles of law.

Keywords: general principles of law, International Law Commission, Draft Conclusions, International Court of Justice, two-step methodology.

I. INTRODUCTION

When the International Law Commission (ILC, ‘Commission’) decided to include the topic ‘General Principles of Law’ (GPL, or ‘general principles’) in its programme of work, it noted the many ‘unresolved doctrinal controversies surrounding this concept’,¹ including its origins and functions.² Indeed, in the current work of the Commission, few question concerning this source are not subject to contention, notably including the two-step analysis for the identification of a general principle deriving from national legal systems (for simplicity, ‘domestic GPL’).³

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¹ ILC, ‘Report of the International Law Commission on the Work of its 69th session’ (1 May–2 June and 3 July–4 August 2017) UN Doc A/72/10 (‘2017 Report’) 228, para 11. This manuscript was finalized on June 2022, and therefore does not take into account discussions and developments subsequent to this date. ² *ibid.*

³ Other points of agreement that are largely uncontested are the assumption that general principles under art 38(1)(c) of the Statute of the International Court of Justice (ICJ) derive from national legal systems and the gap-filling function of this source of international law. Whether they can also be ‘formed within the international legal system’ remains an aspect of significant controversy, as illustrated by the lengthy debates during the Commission’s 2021 session (ILC,

The two-step methodology for the identification of principles deriving from municipal law involves, first, a comparative analysis to determine whether a GPL deriving from domestic legal systems is widely recognized by the international community. Second, it requires assessing whether the principle in question is ‘transposable’ to the international legal order. The Special Rapporteur for the topic has noted that ‘both in practice and in the literature, a two-step analysis was followed to identify GPL’.⁴ The Special Rapporteur’s Second Report (hereinafter, ‘Second Report’),⁵ presented in 2020 and discussed in 2021, implies that there is no alternative method to ascertain the existence and content of a GPL deriving from domestic legal systems.

Although in debates in the Commission regarding the two-step methodology this did not raise controversy,⁶ this approach cannot be inferred directly from Article 38(1)(c). The provision’s wording mandates neither a comparative survey nor the subsequent ascertainment of whether the general principle in question is ‘transposable’ to international law. Similarly, the discussions during the *travaux préparatoires* did not foresee the use of such a process to ascertain GPL.⁷ Given the absence of an express textual indication in Article 38(1)(c) that predetermines the methodology to be used to ascertain GPL, this article challenges whether this methodology is as undisputed as the current works of the ILC seem to imply.

The Second Report, in particular its Draft Conclusions 4, 5 and 6, sets forth the methodology for the identification of domestic GPL as a source of international law. These draft conclusions are used here as a framework to assess the Commission’s approach to the topic. At the time of writing, while Draft Conclusions 4 and 5 have been provisionally adopted, the Commission has not yet addressed Draft Conclusion 6.⁸ Thus, the methodology as laid out in the Report is still embryonic. While these Draft Conclusions may still change, they are taken here as a point of departure for the analysis since, as mentioned, the two-step methodology seems to be widely accepted by the Commission.

The Commission makes abundant reference to the practice of and before international courts and tribunals, particularly the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ).⁹

⁴ ‘Report of the International Law Commission on the Work of its 72nd session’ (26 April–4 June and 5 July–6 August 2021) UN Doc A/76/10 (‘2021 Report’) 152, paras 178–179.

⁵ *ibid* 152, para 183.

⁶ ILC, ‘Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur’ (9 April 2020) UN Doc A/CN.4/741 (‘Second Report’) 4.

⁷ After the 2021 debates in the Commission, the Special Rapporteur noted that ‘there was consensus regarding an analysis in two steps’ (ILC, ‘2021 Report’ (n 3) 159, para 228).

⁸ PCIJ, ‘Advisory Committee of Jurists – Procès-Verbaux of the Proceedings of the Committee’ (16 June–24 July 1920) (The Hague 1920) 310ff (‘Procès-Verbaux’).

⁹ ILC, ‘2021 Report’ (n 3) 151, para 172. This manuscript was finalized in June 2022, and therefore does not take into account discussions and developments subsequent to this date.

¹⁰ L Boisson de Chazournes ‘The International Law Commission in a Mirror—Forms, Impact and Authority’ in UN, *Seventy Years of the International Law Commission: Drawing a Balance for*

Resort to the World Court's (ie the PCIJ and the ICJ) jurisprudence on this topic is unsurprising,¹⁰ given that this source of international law was conceived of as a 'precaution' to be at the disposal of judges in the case of *non liquet*.¹¹ Having this in mind, and taking Article 38(1)(c) of the ICJ Statute as a departure point,¹² this article addresses the question by reviewing the practice of and before the PCIJ and the ICJ. Section II reviews the relevant practice of the World Court and States' submissions and considers such practice in the light of the two-step methodology put forward by the Second Report. More specifically, it explores the evolution and trends in the resort to this source of law by the Court.

The second category of material most referred to by the Report is international scholarship.¹³ Accordingly, Section III examines how international scholarship has viewed the methodology used to ascertain GPL in the past century and to what extent it reflects the trends found in the approach to this source by the ICJ. On the basis of the analysis developed in Sections II and III, the article then considers the possible implications arising from the ILC's codification of this methodology.

II. THE PCIJ/ICJ AND THE METHODOLOGY FOR THE IDENTIFICATION OF GENERAL PRINCIPLES OF LAW

Article 38 of the ICJ Statute was inherited from the PCIJ. Paragraph (1)(c) was subject to much discussion within the Advisory Committee of Jurists, responsible for drafting the PCIJ Statute. In addition to treaties and international custom, general principles of law had been proposed by Baron Descamps (the president of the Committee) to address the potential insufficiency of the two 'main' sources—ie, to avoid the case of *non liquet*.

the Future (Brill 2021) 149. It is telling that Conclusion 13 (Decisions of courts and tribunals) of the Commission's 2018 Draft conclusions on identification of customary international law determines that 'Decisions of international courts and tribunals, in particular of the *International Court of Justice*, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules' (ILC, 'Report of the International Law Commission on the Work of its 70th Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 149). Significant also the role of PCIJ/ICJ pronouncements in the codification of the law of State responsibility by the ILC (see, eg, C Tams, 'The Development of International Law by the International Court of Justice' (2018) 2 Gaetano Morelli Lectures Series 76ff).

¹⁰ As stated in the First Report, focus on 'litigation-related practice' is explained by 'the simple reason that it is more readily available than other materials' (ILC, 'First report on general principles of law by Marcelo Vázquez-Bermúdez', Special Rapporteur (5 April 2019) UN Doc A/CN.4/732 ('First Report') para 126). In his first report, Special Rapporteur considered that his work would be 'based primarily on the practice of States' (ibid 35). The two reports indeed refer extensively to States' pleadings before international courts, but rely just as often on the decisions of international adjudicative bodies.

¹¹ H Thirlway, *The Sources of International Law* (2nd edn, OUP 2019) 11 ('Sources').

¹² The Commission's work on the topic also takes this provision as the 'starting point . . . in light of State practice and jurisprudence' (ILC, '2021 Report' (n 3) para 175).

¹³ Setting the groundwork for the study on the topic, the First Report often departs from a position that is 'generally accepted' in the literature (see, eg, ILC, 'First Report' (n 10) para 167 and fn 298).

The discussions on the inclusion of GPL as a source of international law in the PCIJ Statute centred on the need to strike a balance between the possibility of *non liquet* and the need to restrain judicial activism. The debate features opposing views from Baron Descamps and Mr Root, reflecting a tension between natural and positive law approaches to GPL. While a natural law conception derives sources from their ‘inherent morality and justice’, prioritizing ‘type over methodology’, a positive law approach grounds the general principle’s existence and validity in the process by which that source is derived.¹⁴

On the one hand, Root considered that States would not accept the jurisdiction of a Court that did not decide solely according to positive, consent-based rules. Conversely, Descamps believed that general principles would represent the ‘concerns of fundamental law of justice and injustice deeply engraved on the heart of every human being’,¹⁵ and that ‘[t]hat was the law which could not be disregarded by a judge’.¹⁶ As described by Saunders, Descamps viewed GPL as ‘divorced from municipal law and instead tied to some higher “public conscience” ...’.¹⁷ Descamps grounded his conception for this third international law source on a natural law approach.¹⁸ The current wording of Article 38 reflects the outcome of these debates, and a compromise between the diverging views.

In contrast with a natural law approach, it seems now widely accepted that GPL must be ascertained through a positivist methodology. More specifically, a two-step analysis must be followed.¹⁹ Draft Conclusion 4 of the Second Report, provisionally adopted by the ILC Drafting Committee in 2021, states:

Draft Conclusion 4

Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

¹⁴ I Saunders, *General Principles as a Source of International Law: Art 38(1)(c) of the Statute of the International Court of Justice* (Hart Publishing 2021) 6–7.

¹⁵ PCIJ, ‘Procès-Verbaux’ (n 7) 310.

¹⁶ *ibid.* The current wording of art 38(1)(c) of the ICJ Statute reflects the final agreement reached by the Committee on the opposing views of Root and Descamps. According to Cheng, the final version of art 38(1)(c) of the Statute of the PCIJ was a joint work of Elihu Root and Lord Phillimore, the latter holding views in substance quite close to those of Baron Descamps. Cheng understands that ‘[r]eviewing the discussion in the Advisory Committee, it is quite plain that the Root-Phillimore amendment marked a reversal of Mr. Root’s original attitude and his conversion to the views of Lord Phillimore, to whose pen it seems safe to attribute the amended draft’ (B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1993) 14–15).

¹⁷ Saunders (n 14) 42.

¹⁸ See PCIJ, ‘Procès-Verbaux’ (n 7), 14th meeting, in particular 310–11.

¹⁹ See the ILC, ‘First Report’ (n 10) para 169; para 225 and ff) and the Second Report (n 5) on GPL (para 19). In the same sense, see J Ellis, ‘General Principles and Comparative Law’ (2011) 22 (4) EJIL 953.

- (a) the existence of a principle common to the various legal systems of the world; and
- (b) its transposition to the international legal system.²⁰

The first step involves the process of distillation of a general principle from municipal law, considering the ‘various legal systems of the world’. Draft Conclusion 5, provisionally adopted in 2022, specifies that this step should follow a comparative methodology ascertaining that a given GPL is present in different domestic legal systems. In the second step, ‘... once the Judge has found that a given principle is recognized by the “principal legal systems of the world”, [...] he must then ascertain whether it is transposable to the international sphere’.²¹

The following subsections review the practice of the PCIJ and ICJ: subsection II.A analyses the first step (the ‘comparative methodology’ requirement), and subsection II.B examines the second step (the ‘transposability to the international legal system’).

A. The Comparative Methodology

The discussions on GPL in the Advisory Committee revolved around the origins of this source, among other issues. As Verdross pointed out in 1935, the origins of GPL were controversial, and had not even been clarified by the *Institut de Droit International*.²² While a natural law approach sees GPL as deriving from legal logic or a natural sense of justice, a positivist approach sees it as deriving from the law of national legal systems.²³ Article 38 does not, in itself, lean towards one or the other; its wording seems to confirm that GPL must derive from national legal systems, but at the same time, the provision does not determine whether it must be recognized by domestic *legislation* of civilized nations (they can also be principles of ‘legal conscience’ recognized by the domestic scholarship, for example).²⁴

Special Rapporteur Vázquez-Bermúdez considers that, while the practice of States and international jurisprudence ‘admittedly present some divergences ...’, an overall approach can be drawn from them: the comparative analysis for the purposes of determining the existence of a [GPL] must be wide and representative, covering different legal families and the various regions of the

²⁰ ILC, ‘2021 Report’ (n 3) fn 418 and para 172.

²¹ A Pellet and D Müller, ‘Article 38’, in A Zimmermann et al, *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2021) para 270.

²² A von Verdross, ‘Les principes généraux du droit dans la jurisprudence internationale’ (1935) 52 *Recueil des Cours de l’Académie de Droit International* 228–9.

²³ See also the distinction between the voluntarist and the formalist approaches within the umbrella of the positivist school, as explained by Ellis (n 19) 953.

²⁴ According to Verdross, ‘... l’article 38 ne stipule pas que ces principes doivent être reconnus par le droit interne des nations civilisées. Il semble donc possible d’admettre qu’il peut s’agir également des principes reconnus par la conscience juridique et exprimés par la doctrine des nations civilisées’ (Verdross (n 22) 224).

world'.²⁵ He also considers that the position that GPL should exist 'within a sufficiently large number of States' is 'generally accepted in the literature and ... supported by practice'.²⁶ Accordingly, Draft Conclusion 5 follows the positivist approach to GPL:

Draft Conclusion 5

Determination of the existence of a principle common to the various legal systems of the world

1. To determine the existence of a principle common to the various legal systems of the world, a comparative analysis of national legal systems is required.
2. The comparative analysis must be wide and representative, including the different regions of the world.
3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.²⁷

Thus, to ascertain the existence and content of a GPL, adjudicators should carry out a comparative analysis. This examination consists of an assessment of domestic legislation and national court decisions, and the analysis must 'be wide and representative, including different regions of the world'.

While there was broad agreement on a first step to 'determine the existence of a principle common to the various legal systems of the world', the requirement of a 'comparative analysis' to pursue the first step was much debated in the Commission's 2021 meeting. Some Commission members considered that this approach would be 'too strict' and that 'in practice such comparative analysis was not always wide and representative'.²⁸

Some scholars have long considered that general principles should reflect the municipal systems of the world and that they should be representative of different legal systems.²⁹ In 1927, Lauterpacht considered that 'Only general principles of private law recognized by the main systems of jurisprudence, ascertained by comparative study ... are a suitable object of analogy'.³⁰ Moreover, decisions having recourse to domestic legal systems and Roman law to ascertain the existence of GPL can be traced back to practice even

²⁵ ILC, 'Second Report' (n 5) para 50.

²⁶ ILC, 'First Report' (n 10) para 167.

²⁷ Due to differing views on how the two criteria should be laid down, in the 2021 meeting the Commission had 'taken note' of Draft Conclusion 5. The version above was provisionally adopted by the Drafting Committee in 2022, with minor changes to the text proposed by the Special Rapporteur. The text originally discussed read (expressions that have been modified are italicized): 'Draft conclusion 5. Determination of the existence of a principle common to the *principal legal systems of the world*: 1. To determine the existence of a principle common to the *principal legal systems of the world*, a comparative analysis of national legal systems is required. 2. The comparative analysis must be wide and representative, including *different legal families and regions of the world*. 3. The comparative analysis includes an assessment of *national legislations and decisions of national courts*' (ILC, '2021 Report' (n 3) 151).

²⁸ ILC, '2021 Report' (n 3) 155 para 201.

²⁹ On this, see the detailed account on the history of art 38(1)(c) by Saunders (n 14) Ch 2.

³⁰ H Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (Longmans, Green and Co. 1927) 85.

prior to the establishment of the PCIJ.³¹ Still, the need for a comparative study was not systemically emphasized, and the natural law approach to GPL shared the stage with the view that general principles should reflect national legal systems.

Indeed, the practice of the PCIJ and the ICJ does not consistently reflect the comparative approach.³² The World Court's early case law determined the existence of a GPL broadly and without methodological rigour. In the *Polish Upper Silesia* case, Poland had advanced an objection to the case's admissibility grounded on a legal argument similar to that of *lis pendens*. However, to make this claim, Poland did not undertake a comparative study of different legal systems. In turn, the Court dismissed the claim, considering that the requirements for *lis pendens* had not been met, but did not determine whether the concept reflected a GPL.³³

The PCIJ's decision in *Factory at Chorzów* also illustrates this point. Some authors submit that the Court's reference to principles of reparation reflects an instance of the PCIJ's reliance on GPL.³⁴ In that case, the Court considered that 'As regards the first point, the Court observes that it is a principle of international law, and *even a general conception of law*, that any breach of an engagement involves an obligation to make reparation'.³⁵ The expression 'general conception of law' denotes the idea of a general principle of legal logic and can assist in determining whether reparation is a GPL. However, the Court does not offer an assessment of domestic legal systems to buttress this.

In a rare direct reference to Article 38(1)(c) in the PCIJ's case law, Judge Anzilotti referred to *res judicata* as a GPL. He grounded this merely by saying that '[n]ot without reason was the binding effect of *res judicata* expressly mentioned by the Committee of Jurists entrusted with the preparation of a plan for the establishment of a Permanent Court of International Justice, amongst the principles included in the above-mentioned article'.³⁶ Here also, no reference to domestic legal systems is made.

Similarly, disputants and judges in the ICJ do not systemically resort to a comparative approach. In the *Corfu Channel* case, the first case determined by the ICJ, the Court grounded its assessment on the applicability of the

³¹ See examples in the Special Rapporteur's 'First Report' (n 10) paras 77ff.

³² Ellis (n 19) argues that the actual practice of international courts and tribunals of ascertaining the existence of a GPL fails to follow a sufficiently representative comparative approach.

³³ PCIJ, *Polish Upper Silesia* (Preliminary Objections) [1925] A06, 19–20. See also fn 64 and accompanying text.

³⁴ Verdross (n 22) 240; Sir Humphrey Waldock, 'General Course on Public International Law' (1962) 221 *Recueil des Cours de l'Académie de Droit International* 58–9; see also the Special Rapporteur's 'First Report' (n 10) fn 212 and accompanying text. This is not an undisputed reference to GPL by the PCIJ.

³⁵ PCIJ, *Factory at Chorzów* (Merits) [1928] A17, 29 (emphasis added).

³⁶ PCIJ, *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* [1928] A13, Dissenting Opinion by M Anzilotti, A13, 27.

procedural principle of ‘circumstantial evidence’ on the fact that ‘[t]his indirect evidence is admitted in all systems of law, and its use is recognized by international decisions’.³⁷ Equally, in their submissions United Kingdom and Albania did not seek to determine whether there was a general principle of ‘indirect evidence’ based on a comparative approach.³⁸

The *Right of Passage over Indian Territory* case is a noteworthy exception to this trend, and arguably a turning point in the approach to the identification of GPL. The dispute is often given as the primary illustration of the use of comparative methodology to ascertain GPL.³⁹ In that dispute, Portugal advanced the existence of ‘the principle to be inferred from domestic legislations, which authorize a right of access for the benefit of owners of enclaved property’.⁴⁰ India argued that none of the principles invoked by Portugal were general principles of law in the sense of Article 38(1)(c), since these ‘... are to be understood as comprising the principles generally adopted by civilized States within their domestic law’.⁴¹ Portugal reacted to this by commissioning a comparative study on the existence of a right of access to enclaves. The claim evoked the ‘analogous situation’ of ‘a piece of land which has no access to the public highway and which cannot be reached in any way other than by passing over the land or lands belonging to some other person or persons’.⁴²

This observation justifies the proposition that the right of passage in the sense in which it is claimed against India by Portugal has a firm basis in the general principles of law recognized in the internal laws of practically all countries and that this universal recognition constitutes the expression of an idea of justice underlying ail systems of law including International Law.⁴³

The study presented by Portugal compares civil law, common law, ‘communist and socialist’ traditions and Islamic countries, amounting to 64 jurisdictions. For this examination, Portugal commissioned Prof. Max Rheinstein, a scholar from the University of Chicago specializing in comparative law.⁴⁴

³⁷ ICJ, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (Meris) [1949] 18.

³⁸ ICJ, *Corfu Channel*, ‘Reply submitted by the Albanian Government according to Order of the Court of 28 March 1948’, para 30ff; ICJ, *Corfu Channel*, ‘Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland’ (30 September 1947) para 77ff.

³⁹ In addition to the Second Report (ILC, ‘Second Report’ (n 5) paras 30 and 57), see eg Pellet and Müller (n 21) 928, para 265.

⁴⁰ ICJ, *Right of Passage over Indian Territory (Portugal v India)*, ‘Application Instituting Proceedings’ (22 December 1955) 6.

⁴¹ ICJ, *Right of Passage over Indian Territory (Portugal v India)*, ‘Preliminary Objection of the Government of India’, 182, para 190.

⁴² ICJ, *Right of Passage over Indian Territory (Portugal v India)*, ‘Observations and Submissions of the Government of the Portuguese Republic on the Preliminary Objections of the Government of India’, 714 (Annex 20 – ‘Étude Comparative sur le droit d’accès aux domaines enclaves, par le Professeur Rheinstein’).⁴³ *ibid.*

⁴⁴ As justified by Portugal, ‘*L’autorité dont jouit le professeur Rheinstein le qualifiait particulièrement pour cette tâche*’ (*ibid* 629).

The Court did not take a position on whether the right of access advanced by Portugal reflected a GPL under Article 38. The Court found that the concept at issue corresponded to a 'practice well understood by the parties',⁴⁵ and hence it did not '... consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result'.⁴⁶

Unlike the Court's decision, some of the judges' separate and dissenting opinions addressed the legal nature of the right of access to enclaved properties. Some of these opinions associated the GPL at issue, sometimes interchangeably, with expressions such as 'a reason deeply rooted in the legal consciousness of all peoples'⁴⁷ and a 'principle of justice founded on reason'.⁴⁸ This is noteworthy since, even in the face of an exhaustive comparative study, some did not associate the existence of a GPL with the results of comparative methodology.

It seems that after the *Right of Passage* decision references to comparative law as a methodology to ascertain GPL started to feature more prominently, though mostly in separate and dissenting opinions rather than in the judgments of the Court.⁴⁹ In the context of State submissions, subsequent direct and indirect references to comparative methodology for ascertaining a GPL were not always accompanied by an extensive analysis of municipal legal systems of the sort presented by Portugal in its submissions in the *Right of Passage* case. For example, in the *North Sea Continental Shelf* case, the parties disputed whether a 'just and equitable share' was a general principle of law. Germany submitted that goods held in common by several parties are to be 'meted out in accordance with an appropriate standard equally applicable to all of them'.⁵⁰ It argued that this principle 'is a basic legal principle emanating from the concept of distributive justice and a generally recognized principle inherent in all legal systems, including the legal system

⁴⁵ ICJ, *Right of Passage over Indian Territory (Portugal v India)* (Merits) [1957] 43.

⁴⁶ *ibid.*

⁴⁷ ICJ, *Right of Passage over Indian Territory (Portugal v India)*, Dissenting Opinion of Judge Fernandes (translation), para 34.

⁴⁸ ICJ, *Right of Passage over Indian Territory (Portugal v India)*, Separate Opinion of Judge V. K. Wellington Koo, paras 26–27.

⁴⁹ See, for example, Judge Jessup's Dissenting Opinion in the *South-West Africa cases (Second Phase)* at 333; more vaguely the Court's reference to a 'wealth of practice already accumulated on the subject in municipal law' in the *Barcelona Traction* decision at 39; Judge Dillard's Separate Opinion in the *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* 113–114; Judge Oda's Separate Opinion in *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)* (Merits) 86; Judge Shahabudeen's Separate Opinion in *Certain Phosphate Lands in Nauru* (Merits) 287ff; Judge *ad hoc* Rigaux's Dissenting Opinion in *Oil Platforms* (Order of 10 March 1998) 230ff; Judge Al-Khasawneh's Dissenting Opinion in *Aerial Incident of 10 August 1999 (Jurisdiction, Judgement of 21 June 2000)* paras 22ff; Judge Simma's Separate Opinion in *Oil Platforms* (Merits) paras 66 ff; Judge Simma's Separate Opinion in *Application of the Interim Accord of 13 September 1995* (Merits) para 12.

⁵⁰ ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, 'Memorial submitted by the Government of the Federal Republic of Germany' (21 August 1967) 30, para 30.

of the international community'. Yet Germany did not offer a comparative study of different national legal systems. Rather, it argued that the principle 'ranks among those general principles of law which might be argued as having such an inherent, self-evident, and necessary validity', a natural law argument.⁵¹ In response, Denmark and the Netherlands did not contest Germany's methodology for advancing the existence of a general principle of just and equitable shares.

More recent State submissions before the Court increasingly incorporate comparative studies to support the existence of a GPL under Article 38(1)(c).⁵² One notable example is Nauru's memorial in *Certain Phosphate Lands in Nauru*. This includes an appendix featuring a comparative study specially commissioned to support Nauru's argument that the concept of trusteeship reflects a general principle of law, similar to the study commissioned by Portugal in the *Right of Passage* case.⁵³

Yet this trend is not absolute. In the more recent *Obligation to Negotiate Access to the Pacific Ocean* case, Bolivia drew on the notions of good faith, estoppel and legitimate expectations to claim that Chile had 'repeatedly and formally committed itself' to an obligation to negotiate access to the sea.⁵⁴ It did not specify whether estoppel and legitimate expectations reflected general principles of law, but in some passages it did advance the claim that legitimate expectations was a GPL. Bolivia did not, however, include any comparative study to support its assertion. Chile challenged Bolivia's claims concerning these principles on several grounds and argued that the applicant's arguments were insufficient to demonstrate that legitimate expectations was a self-standing principle of international law.⁵⁵ There was no disagreement specifically on whether legitimate expectations and estoppel reflected GPL under Article 38(1)(c); the disagreement mainly concerned whether the concepts were applicable to the case. Accordingly, the Court did not devote much attention to the issue. The Court concluded that the conditions for establishing an estoppel were not fulfilled and it dismissed Bolivia's claim concerning legitimate expectations in one sentence. The Court found that references to investor-State arbitral awards were not sufficient to demonstrate the existence '... in general international

⁵¹ ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, 'Reply submitted by the Government of the Federal Republic of Germany' (31 May 1968) 393, para 11.

⁵² For example, Malta's oral submissions in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Intervention), 'Verbatim record 1981, Oral Arguments on the Application for Permission to Intervene' (1981) 341; ICJ, *Certain Property (Liechtenstein v Germany)*, 'Memorial of the Principality of Liechtenstein' (28 March 2002) para 6.7ff; *Avena and Other Mexican Nationals (Mexico v United States of America)* (Questions of jurisdiction and/or admissibility), Memorial of Mexico (20 June 2003) paras 374–376.

⁵³ ICJ, *Certain Phosphate Lands in Nauru (Nauru v Australia)* (20 March 1990) Appendix 3.

⁵⁴ ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, 'Memorial of Bolivia' (17 April 2014) 168, para 436; Reply of Bolivia (21 March 2017) 126, para 319ff.

⁵⁵ ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, 'Rejoinder of Chile' (15 September 2017) paras 2.20 and ff.

law of a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation'.⁵⁶

This overview of the practice of and before the World Court leads to the following conclusions. First, the need for and the resort to a comparative study by States as a means to ascertain a GPL is not found in early case law. This trend seemingly shifted after the *Right of Passage* case, becoming more common, albeit still in a restricted number of cases, in more recent decisions (ie, in the past three decades). Second, the methodology employed to ascertain GPL may vary according to the importance of the principle to the case at issue. For example, in the *Right of Passage* case, the existence of a GPL on the right of access between enclaved territories was one of the main arguments advanced by Portugal as applicable law. It was not just a procedural matter, but rather a substantive one. Portugal's emphasis on the principle prompted India to challenge its status as a GPL; equally, India's vigorous rejection of this led to Portugal producing its detailed comparative study on national legal systems. In the *Obligation to Negotiate Access to the Pacific Ocean* case, even though estoppel and legitimate expectations were central to Bolivia's arguments, there was no express disagreement concerning these being GPL under Article 38(1)(c). Perhaps because of this, neither the parties nor the Court addressed the two-step approach in detail. However, had Bolivia demonstrated that legitimate expectations reflected a principle on the basis of the two-step methodology, one may wonder if the Court would have addressed the claim more thoroughly in order to determine whether a principle of legitimate expectations really did exist in general international law.

The Special Rapporteur's Second Rapport abounds in references to international decisions stressing that a given principle must be widely recognized in domestic legal systems.⁵⁷ This notwithstanding, the comparative approach is not the unequivocal methodology used to ascertain GPL in the PCIJ and ICJ's case law. At the same time, more recent State practice before the Court indicates the need for a comprehensive and representative comparative methodology to *legitimize* claims of a GPL. States may challenge the existence of a GPL when this is lacking. This type of counterargument suggests there is an expectation that this methodology must be followed, even if the Court itself does not necessarily abide by it. Such an *expectation to legitimize* the invocation of a GPL through a wide and representative comparative methodology may be considered to at the very least to reflect a trend in State practice and *opinio juris* towards the methodology proposed by Draft Conclusion 5.

⁵⁶ ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Merits) [2018] para 162.

⁵⁷ ILC, 'Second Report' (n 5) paras 27–28.

B. Transposability to the International Legal System

Once it is determined that a general principle is common to the principal legal systems of the world, the next step is to ascertain whether it is also ‘applicable within the international legal system’,⁵⁸ bearing in mind the structural differences between these two spheres of law. The current version of Draft Conclusion 6 states:

Draft Conclusion 6**Ascertainment of transposition to the international legal system**

A principle common to the principal legal systems of the world is transposed to the international legal system if:

- (a) it is compatible with fundamental principles of international law; and
- (b) the conditions exist for its adequate application in the international legal system.⁵⁹

Draft Conclusion 6 thus sets forth two cumulative sub-conditions: the first of ‘compatibility’ and the second of ‘applicability’. However, for clarity, they will be referred to here as aspects of the general requirement of *transposability*.⁶⁰

Like the first step, the requirement of transposability is not self-evident from the wording of Article 38(1)(c). Moreover, like the comparative approach that informs the first step, the second step only makes sense if GPL are not considered to be a manifestation of natural law. Indeed, if a given principle is grounded upon certain ‘notions of fairness and justice’ which impart to it a natural law validity, the principle in question should be equally applicable to domestic and international spheres. Conversely, transposing notions from the domestic to the international sphere on a positivist basis almost by definition requires an assessment of transposability.

In the first case submitted to the PCIJ, the *SS Wimbledon* dispute, the applicants invoked the concept of servitude in international law. The Court considered that it ‘[was] not called upon to take a definite attitude with regard to the question, which is moreover of a very controversial nature, whether in the domain of international law, there really exist servitudes analogous to the servitudes of private law’.⁶¹ Circumventing the applicability of the concept of servitude to the case in hand, the Court looked to the wording of Article 380 of the Treaty of Versailles⁶² concluding that ‘[it] fe[lt] obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted’.⁶³

⁵⁸ ILC, ‘2021 Report’ (n 3) 163.

⁵⁹ ILC, ‘Second Report’ (n 5) 58. At the time of writing, Draft Conclusion 6 had not yet been discussed within the Drafting Committee; see fn 1.

⁶⁰ See discussions on the differentiation between the terms ‘transposition’ and ‘transposability’ in the commentaries to Draft Conclusion 4: ILC, ‘2021 Report’ (n 3) 163.

⁶¹ PCIJ, *S.S. “Wimbledon”* (Merits) PCIJ Rep Series A n. 01, 24.

⁶² *ibid* 24.

⁶³ *ibid* 24–25.

The PCIJ's 1925 judgment in *Polish Upper Silesia* tackles a similar problem in a similar way. As explained above, Poland had invoked the concept of litispendence, and the Court considered that

It is a much disputed question in the teachings of legal authorities and in the jurisprudence of the principal countries whether the doctrine of litispendence, the object of which is to prevent the possibility of conflicting judgments, can be invoked in international relations ... There is no occasion for the Court to devote time to this discussion in the present case, because it is clear that the essential elements which constitute litispendence are not present.⁶⁴

The Court concluded that there were not two identical disputes pending before international tribunals and that the parties were not the same; therefore, there was no litispendence, *even if* this concept was applicable in international law.

The Court did not explicitly address the transposition of a GPL to the international legal order in either dispute, it simply dismissed the applicability of the domestic law concept. Still, the Court's reasoning in both judgments offers an embryonic form of the transposability stage of the test, as it queried whether domestic law concepts were applicable to international law.

The requirement of transposability takes an explicit form in the famous *dictum* by Lord McNair in his Separate Opinion in the *South West Africa* Advisory Opinion. Lord McNair examined the legal nature of the League of Nations' mandate system, 'based on the analogy of the contract of mandate in private law'.⁶⁵ He considered:

What is the duty of an international tribunal when confronted with a new legal institution the object and terminology of which are reminiscent of the rules and institutions of private law? To what extent is it useful or necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? ... *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. ... 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.*⁶⁶

⁶⁴ *ibid* 19–20.

⁶⁵ ICJ, *International Status of South West Africa* (Advisory Opinion) 1950, Separate Opinion by Sir Arnold McNair, 146.

⁶⁶ *ibid* 148 (emphasis added). See also the ICJ's Judgment, concluding that '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', ICJ, *International Status of South West Africa* (Advisory Opinion) 1950 132. The Court's Judgment, however, does not make reference to the question as falling within the umbrella of GPL.

It is necessary to refer to this in full: it is the textbook quotation explaining the requirement of transposability in the context of GPL.⁶⁷

After the *South West Africa* Advisory Opinion, references to the second step become more frequent and explicit in the ICJ case law. In the *South West Africa* cases, South Africa contested that the concept of non-discrimination advanced by the applicants as was a GPL under Article 38(1)(c). South Africa argued that GPL 'are taken from the realm of municipal law, they are elevated by analogy from that law into international law relationships and applied there ...'.⁶⁸ The Court 'disposed of the case on different grounds',⁶⁹ and did not examine the merits of these arguments concerning non-discrimination. However, the Court did examine the notion of *actio popularis*, finding that 'although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present'.⁷⁰

In the *North Sea Continental Shelf* case, Denmark and the Netherlands contested Germany's invocation of a general principle of a 'just and equitable share' on the basis that it conflicted with the 'whole legal approach to the determination of boundaries in international law'.⁷¹ Denmark and the Netherlands argued that it violated the equality of States and also sought to demonstrate that State practice did not support the existence of a just and equitable share when delimiting boundaries of coastal States.⁷²

In *Certain Phosphate Lands in Nauru*, Australia claimed that the notion of 'trust' in domestic law would 'mistake completely the fundamental elements of the United Nations Trusteeship System'. Additionally, Australia referred to McNair's *dicta* pointing to 'the inappropriateness of seeking to apply private law institutions directly to an international institution'.⁷³

⁶⁷ Inter alia, ILC, 'First Report' (n 10) para 225; International Law Association (ILA), 'Statement of principles applicable to the formation of general customary international law', Final report of the Committee, London Conference (2000) para 217; Pellet and Müller (n 21) para 269.

⁶⁸ ICJ, 'Pleadings, Oral Arguments, Documents: South West Africa Cases', vol X (1966) 44. For a thorough description of this dispute, see H Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol I (OUP 2013) 237–40.

⁶⁹ H Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning' (2002) 44 *Recueil des Cours de l'Académie de Droit International* 289 ('Concepts').

⁷⁰ ICJ, *South West Africa* (Second Phase) [1966] para 88. See also Judge Tanaka's Dissenting Opinion, directly quoting Lord McNair's 'lock, stock and barrel' expression to state that 'analogies drawn from these laws should not be made mechanically' and to analyse the applicability of the non-discrimination principle to international law (*ibid*, Dissenting Opinion of Judge Tanaka, at 295–296).

⁷¹ See *fn*s 50–1 and accompanying text.

⁷² See ICJ, *North Sea Continental Shelf*, 'Counter-Memorial submitted by the Government of the Kingdom of Denmark' (20 February 1968) 187ff.

⁷³ ICJ, *Certain Phosphate Lands in Nauru (Nauru v Australia)*, 'Counter-Memorial of the Government of Australia' (29 March 1993) paras 292ff. The Court dismissed the case in the Preliminary Objections phase, thus the arguments were not addressed by Nauru or by the adjudicators.

The exercise of determining the compatibility of a domestic GPL with the underpinnings of the international legal order became more frequent after the *South West Africa* Advisory Opinion. Still, this did not seem to reflect transposability as a *step*, that is to say as a part of a structured methodology to ascertain a GPL applicable under Article 38(1)(c). Liechtenstein's Memorial in the *Certain Property* case is perhaps the clearest example of recourse to the two-step methodology, and the condition of transposability in particular.⁷⁴

Liechtenstein, the claimant, explicitly invoked the two-step methodology to demonstrate the applicability of the principle of unjust enrichment. It argued that a 'rule must be considered as a general principle of law (i) if it is applied in the main systems of municipal law and (ii) if it is "transposable" in international law, ie, it is not inconsistent with any general principle of or applicable rule of public international law'.⁷⁵ After arguing that the unjust enrichment 'is a foundational principle underlying restitution or compensation in numerous domestic legal systems',⁷⁶ it claimed that 'the principle is received at the international level'.⁷⁷ Liechtenstein invoked Lord McNair's opinion in the *South West Africa* Advisory Opinion before arguing that there were no incompatibilities between the principle and general international law.⁷⁸ The Court's decision that it lacked jurisdiction meant that it did not consider these arguments.

Other references to the requirement of transposition can be found in Judge Tanaka's Dissenting Opinion in *South West Africa* cases,⁷⁹ Judge Simma's Separate Opinion in the *Interim Accord* case⁸⁰ and (implicitly) in Judge Greenwood's Separate Opinion in the *Delimitation between Nicaragua and Colombia*.⁸¹

⁷⁴ ICJ, *Certain Property (Liechtenstein v Germany)*, 'Memorial of the Principality of Liechtenstein' (28 March 2002). ⁷⁵ *ibid* para 6.5. ⁷⁶ *ibid* para 6.15. ⁷⁷ *ibid* para 6.16.

⁷⁸ *ibid* para 6.18ff. The Court dismissed the case in the Preliminary Objections phase, thus the arguments were not addressed by the Respondent Germany or by the adjudicators.

⁷⁹ ICJ, *South West Africa cases (Second Phase)* [1966], Dissenting Opinion of Judge Tanaka, 295–296.

⁸⁰ Reviewing Greece's claim of the *exceptio non adimpleti contractus* as a GPL: 'The question is, of course, the transferability of such a concept developed *in foro domestico* to the international legal plane, respectively the amendments that it will have to undergo in order for such a general principle to be able to play a constructive role also at the international level' (ICJ, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)* (Merits) [2011], Separate Opinion of Judge Simma, para 13).

⁸¹ Ascertaining the applicability of *res judicata*, a doctrine whose 'origins' are in domestic law, in international law: 'It is the principle of *res judicata* in international law, in particular as developed in the jurisprudence of the Court, which has to be applied' (ICJ, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) [2016], Separate Opinion of Judge Greenwood, paras 2–4).

The transposability condition is also often accompanied by McNair's *dictum* rather than an inference from Article 38(1)(c) or even presented as a logical inference from the concept of GPL deriving from domestic legal systems). The nudge to consolidate transposability as a step/condition for ascertaining the existence and applicability of a GPL thus seems to have been derived from, or at least solidified by, the *South West Africa* Advisory Opinion.

The Special Rapporteur's references to 'evidence confirming transposition' as a separate step when ascertaining GPL are less abundant and more ambiguous than those relating to the first step.⁸² There are few instances in the Court's jurisprudence which expressly highlight the requirement of transposability, and State practice before the ICJ does not seem consistent enough to suggest that this is established. Similarly, the ICJ references described above are not unanimous on how to determine transposability, and this requirement is more often referred to in separate opinions. Even more scarce are references to the twofold analysis within the transposability step as set out in Draft Conclusion 6. Therefore, as far as PCIJ and ICJ practice is concerned, the procedure described by Draft Conclusion 6 and commentaries appears to be an example of progressive development.

III. THE TWO-STEP METHODOLOGY IN INTERNATIONAL LEGAL SCHOLARSHIP

Many factors may have had a bearing on the development of the two-step methodology beyond the PCIJ/ICJ practice. Possible elements include doctrinal shifts in the conceptions of international law and other changes in the international law sphere. The composition of the bench may also play a role in the development of the Court's jurisprudence. For example, Sir Hersch Lauterpacht served as a judge of the ICJ from 1955 to 1960 and was particularly interested in the nature and role of general principles as a source of international law.⁸³ While the actual influence of Lauterpacht's conception of GPL on the Court's methodology concerning this source of law falls outside the scope of this article, it seems likely that the views of this prominent judge influenced the approach followed by the Court.⁸⁴ More generally, changes in the composition of the bench may well affect the approaches to international law—and consequently of the sources of international law—that it adopts.

⁸² ILC, 'Second Report' (n 5) paras 97ff.

⁸³ Lauterpacht, '*Private Law Sources*' (n 30); H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933). Although based on analogies from domestic legal systems, Lauterpacht viewed general principles from a natural law viewpoint. On this, see in particular PC Jessup and RR Baxter, 'The Contribution of Sir Hersch Lauterpacht to the Development of International Law' (1961) 55(1) AJIL 98–9; IGM Scobbie, 'The Theorist as Judge Hersch Lauterpacht's Concept of the International Judicial Function' (1997) 2 EJIL 264.

⁸⁴ See, eg, Thirlway, 'Concepts' (n 69) 275.

Other possible factors influencing the identification of GPL are the increasing calls for international law to be more representative and inclusive, as illustrated by the emergence of Third World Approaches,⁸⁵ the rise of comparative law as an independent field of law with a distinct legal methodology,⁸⁶ the quest to formalize international law,⁸⁷ the practice of other international courts and tribunals⁸⁸ and the related works of the ILC on sources of international law. It is beyond the scope of this article to explore the impact of each of these phenomena. In light of the role played by doctrine in the ILC's work (even if not expressly acknowledged as authoritative material), this section focuses on the role of scholarship in the consolidation of the two-step methodology for identifying GPL. Section III.A provides an overview of the evolution of mainstream scholarship on the topic. It does so without any pretence of being exhaustive, as a comprehensive analysis would merit a stand-alone exploration.⁸⁹ Section III.B considers whether developments in the practice of the PCIJ/ICJ concerning GPL mirror the evolution of the topic and international legal scholarship and whether international legal scholarship may have influenced the development of the current approach to the methodology for determining it.

A. The Two Steps in International Legal Scholarship

The first step, ie the need to investigate national legislation in order to ascertain GPL, can be found in early scholarly works.⁹⁰ The idea of using analogy to

⁸⁵ For an introduction, see A Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) Ch 10.

⁸⁶ As an illustration, it is noteworthy that Lord McNair, who coined the 'lock, stock and barrel' phrase in the *South West Africa* Advisory Opinion, in addition to being a judge at the ICJ, took up the position of Professor of Comparative Law at the University of Cambridge.

⁸⁷ On this, J d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2012).

⁸⁸ Significantly, the practice of the international criminal courts and tribunals has been 'innovative in applying general principles of law, in comparison with the PCIJ and the ICJ': See FO Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff Publishers 2008) 193.

⁸⁹ This research aimed to examine the trends and developments in the treatment of GPL from the early years of the PCIJ Statute to contemporary international legal scholarship. When selecting the materials, preference was given to commentaries on Article 38 of the PCIJ and the ICJ, although international law handbooks were also pinpointed. It covers works published between 1920 and 2019. This analysis is limited by the materials and languages available to this author (English, French and Italian), which may present a bias to the conclusions reached. Indeed, views on the nature (and consequently methodology for the identification) of GPL vary not only throughout time, but also according to author, affiliation to dualism or monism, approaches to international law, etc. See, for instance, diverging approaches on the nature of GPL in BS von Stauffenberg, *Statut et Règlement de la Cour Permanente de Justice Internationale: Elements d'Interpretation III* (1934) 276–7; G Scelle, *Manuel Élémentaire de Droit International Public* (Domat-Montchrestien 1943) 400; C Rousseau, *Droit International Public Approfondi* (Daloz 1958) 86–7; G Morelli, *Nozioni di Diritto Internazionali* (CEDAM 1963) 43–6.

⁹⁰ Among which Verdross (n 22) 193; MO Hudson, *The Permanent Court of International Justice: 1920–1942* (The MacMillan Company 1943) 610–11; M Dubisson, *La Court Internationale de Justice* (LGDJ 1964) 116–17.

derive concepts of international law from domestic legal systems features in scholarly works preceding the PCIJ Statute.⁹¹ However, the use of analogy varied, and scholars did not address the scope of ‘comparative’ methodology in detail. The comparative approach to determining the existence of a GPL in the sense of Article 38(1)(c) emerged in scholarly works in the second half of the twentieth century. One of the first significant contributions to the idea that comparative law as a structured methodology should be used for this purpose is Schlesinger’s 1957 proposal concerning ‘Research on the General Principles of Law Recognized by Civilized Nations’.⁹²

Yet the trend was not uniform. Rosenne’s *The Law and Practice of the International Court*, to this day one of the main commentaries on the case law of the ICJ, considered in its 1965 edition that the Court’s references to GPL ‘... show that the “general principles of law recognized by civilized nations” are not so much generalizations reached by application of comparative law ... , as particularisations of a common underlying sense of what is just in the circumstances’.⁹³ Rosenne therefore viewed GPL with a hint of a natural law perspective.⁹⁴ Moreover, the idea that a comparative analysis should be ‘wide and representative’ is also a recent development that arguably is still not implemented in practice.⁹⁵

Conversely, scholarship seldom identified the requirement of transposability before the *South West Africa* Advisory Opinion.⁹⁶ Prior to the 1950s, some scholars did refer to the different features of domestic and international law and the need to acknowledge these differences. Yet even those works did not view transposability as a separate step in the process of identification of GPL, and the scope of this requirement was not clearly delineated.⁹⁷ For example, in

⁹¹ See, for example, H Triepel, *Droit international et droit interne* (Pédone 2010; Reprod. de l’éd. Pédone, 1920), section 8 (*‘La réception du droit interne dans le droit international’*).

⁹² R Schlesinger, ‘Research on the General Principles of Law Recognized by Civilized Nations’ (1957) *AJIL* 51(4) 734–53. See also HC Gutteridge, ‘Comparative law and the law of nations’ (1944) *BYBIL* 1–10. Both Schlesinger and Gutteridge were professors of comparative law, rather than of international law.

⁹³ S Rosenne, *The Law and Practice of the International Court*, vol II (Sithoff 1965) 610. This extract can still be found in more recent editions of Rosenne’s *Law and Practice* eg vol III (4th edn, Martinus Nijhoff 2006) 1549.

⁹⁴ Another example of this trend adopting a natural law view to GPL, Jalet analysed and criticized the comparative trend in 1963. He considered that the search was ‘spearheaded today by the comparativists ... This urge to search appears to be motivated not so much by a desire to clarify “general principles of law” for the International Court, which has seldom, and then only with reluctance, had recourse to them, as it is to benefit so-called private international law and to enlighten the international business world’. (FTF Jalet, ‘The Quest for the General Principles of Law Recognized by Civilized Nations – A Study’ (1963) 10 *UCLA Law Review* 1043).

⁹⁵ See Ellis (n 19).

⁹⁶ The need to adapt a GPL derived from domestic legal systems to the international legal order cannot be found, for example, in G Morelli, *Nozioni di Diritto Intenazionale* (CEDAM 1947); R Quadri, *Diritto Internazionale Pubblico* (Priulla 1950) 74–6 ; G Scelle, *Manuel de Droit International Public* (Domat-Montchrestien 1948) 578–9.

⁹⁷ For example, Ripert’s 1933 Hague Academy Course noted that ‘*Il est pourtant certain que l’on ne peut appliquer en matière internationale des règles de droit interne sans que ces règles*

his 1927 *Private Law Sources and Analogies of International Law*, Lauterpacht wrote that ‘... of all attempts to apply to relations between States conceptions taken from private law, none has caused more confusion or has brought the recourse to analogy into more disrepute than the efforts made to introduce the conception of servitudes into international public law’.⁹⁸ Still, when discussing the issue of transposition, he did not expressly mention the need to consider the transposability of the private law principle of servitude into the international sphere. Rather, Lauterpacht considered that ‘... it should be resorted to only when there is no doubt that the parties intended it to be a permanent relation independently of who is the sovereign of the entitled or encumbered territory’.⁹⁹ Lauterpacht’s reasoning focused on the need to consider the parties’ will. He thus seemed to accept the existence of a general principle of private law generally recognized by the majority of States, but which should be applied by means of an *in dubio mitius* approach (similar to the Court’s reasoning in *SS Wimbledon*).¹⁰⁰

In this context, the *South West Africa* Advisory Opinion appears to have caused a ripple effect not only in the Court’s jurisprudence, as described above, but also in international legal scholarship. Rosenne’s 1957 *The International Court of Justice* refers to McNair’s *dicta*, noting the ‘dangers of drawing hasty analogies’ from municipal law into international law.¹⁰¹ Schwarzenberger’s 1957 *International Law* goes as far as to imply that the requirement of transposability was a development brought about through the practice of the ICJ: ‘Although it does not follow from the text of Article 38 (1)(c) of the Statute, a fourth condition of the applicability of a general principle of law on the international level has to be considered’. Schwarzenberger then quotes McNair’s *dicta*, and explains that

subissent une certaine transformation’ (Georges Ripert, ‘Les règles du droit civil applicables aux rapports internationaux’ (1933) 44 *Recueil des Cours de l’Académie de Droit International* 581, para 12). Further, Rousseau’s 1944 ‘Principes Généraux du Droit International Public’ removes from the scope of Article 38(1)(c) principles taken from domestic law ‘whose transposition could not take place without disregarding the specific features and exigences of the international legal order’ (Charles Rousseau, *Principes Généraux du Droit International Public*, Tome I (Pedone 1944) 899 (this author’s translation)).

⁹⁸ Lauterpacht, ‘*Private Law Sources*’ (n 30) 119. The Second Report on GPL also refers to the question of servitude in an arbitration award (1910) as an example of early references to the criterion of transposability (ILC, ‘Second Report’ (n 5) para 76).

⁹⁹ Lauterpacht, ‘*Private Law Sources*’ (n 30) 123.

¹⁰⁰ See fn 62–3 and accompanying text.

¹⁰¹ S Rosenne, *The International Court of Justice: An Essay in Political and Legal Theory*’ (Sithoff 1957) 422. This work would be the basis for Rosenne’s *The Law and Practice of the International Court* (see fn 93). This extract can still be found in more recent editions of Rosenne’s *Law and Practice* eg vol III (4th edn, Martinus Nijhoff 2006) 1548. The importance of McNair’s *dictum* can be perceived from the author’s description of the extract as a ‘statement which bears the hall-marks of a classic enunciation of the guiding principles’ (ibid). See also Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol 1 (Grotius Publications 1986) 10–11.

In view of the inherent differences between private and public law, a legal principle may be general and accepted by civilized nations, but still so much more congenial to private law or relations between individuals than between groups that it would be unsuitable for incorporation into international law.¹⁰²

After the *South West Africa* Advisory Opinion, the two requirements then progressively mutate from scant, unsystematized references in the literature to a systematized two-step methodology.¹⁰³ It is interesting, for example, to consider the slight shift from de Visscher's 1953 *Théories et réalités en droit international public* to his 1960 third edition of the same monograph. While the former simply refers to 'procedure of abstraction',¹⁰⁴ the latter explicitly mentions a two-step process.¹⁰⁵ The 1960 *Dictionnaire de la Terminologie du droit international* considered that dominant scholarship viewed GPL as propositions 'enshrined in the internal law of civilized nations insofar as they are transposable to the international order'.¹⁰⁶ In more recent scholarship, important contemporary handbooks and texts on GPL refer to the two-step methodology as a given,¹⁰⁷ even if the natural law versus positivist divide is still acknowledged.¹⁰⁸

In 2018, the ILA issued a report on 'The use of domestic law principles in the development of international law'.¹⁰⁹ Following an analysis of different international jurisdictions and international law bodies (such as the ILC), the ILA concluded that to identify a GPL, the 'comparative method could be used' and 'the identified general principle should fit into the international context and be able to address the specific legal problem at international level'.¹¹⁰ Interestingly, the cases described in the ILA report do not strictly follow this methodology.

There also seems to be a prevalence of a positivist approach to GPL in contemporary scholarship. Some recent works go beyond the procedure of a

¹⁰² G Schwarzenberger, *International Law*, vol 1 (Stevens & Sons Ltd 1957) 45–6.

¹⁰³ L Siorat, *Le problème des lacunes en droit international* (LGDJ 1958) 343–75 ; A Pellet, *Recherche sur les principes généraux de droit en droit international public*, thèse Paris II (1974) 193 ; Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (9th edn, Longman 1992) 36–8 ; A Pellet, *Droit International Public* (Presses Universitaires de France 1981) 32.

¹⁰⁴ C de Visscher, *Théories et réalités en droit international public* (Pédone 1953) 426.

¹⁰⁵ 'Le recours aux principes généraux s'effectue par un double processus d'abstraction d'abord, de généralisation ensuite, qui, dépouillant les règles du droit interne des particularités nationales dont les a revêtues une élaboration technique beaucoup plus poussée, permet, par un effort de synthèse, de les ramener à leurs aspects le plus généraux et seuls vraiment universalisables'. C de Visscher, *Théories et réalités en droit international public* (Pédone 1960) 481.

¹⁰⁶ Union Académique Internationale, *Dictionnaire de la Terminologie du Droit International* (Sirey 1960) 475, translation by this author.

¹⁰⁷ P Daillier, M Forteau and A Pellet, *Droit International Public* (8th edn, LGDJ 2009) 383 ; G Gaja, 'General Principles of Law' (2013) Max Planck Encyclopedia of Public International Law, para 7 ; A Pellet and D Müller, 'Article 38' in A Zimmermann et al, *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) paras 268–270 ;

¹⁰⁸ On this, see Thirlway, 'Sources' (n 11) 109–10.

¹¹⁰ *ibid* 68, para 211.

¹⁰⁹ ILA (n 67).

comparative study, denouncing a 'Westernized approach' to the source in international courts and tribunals and arguing for a more significant role to be given to different domestic legal systems in the process of ascertaining GPL.¹¹¹ The overall trend reaffirms the two-step approach. The ILA and ILC then reinforce this trend by adopting the same methodology.

B. Remarks on Scholarship Concerning The Two-Step Methodology

This analysis supports the conclusion reached in Section II that the two-step methodology was not initially viewed as the undisputed method for the identification of GPL in the early years of the Statute of the PCIJ. Instead, this approach evolved over time. Bearing in mind the caveats previously mentioned,¹¹² the evolution of international legal scholarship leads to two conclusions relating to each of the two steps.

First, the idea that GPL should be derived from a comparative analysis of national legal systems was present from the early years of the PCIJ. However, this did not require an examination of a broad sample of domestic legal systems or to be representative. This is hardly surprising, as natural law approaches to GPL were dominant at the beginning of the last century. Even when not associated with natural law, GPL would often be defined as 'certain broad rules and maxims, common to the good sense and conscience of civilized mankind, which are found in all great systems of law' by some authors.¹¹³ It seems to be only around the second half of the twentieth century that more refined considerations of how to conduct the comparative analysis started to emerge. This trend seems to have been pushed by comparativists more than by international legal scholars.¹¹⁴ The timing coincides with the *Right of Passage* case, examined in Section II.A, Portugal's submission remaining to this day a unique example of an exhaustive study of domestic legal systems in support of an alleged GPL.

Secondly, international legal scholarship rarely acknowledged the requirement of transposability until Judge McNair's Separate Opinion in the *South West Africa* Advisory Opinion. After the publication of that *dictum*, not only did transposability gain more space in commentaries to Article 38(1) (c) (often referring to the 'lock, stock and barrel' formula), but it was also increasingly acknowledged as a formal requirement for the determination of a GPL deriving from domestic legal systems. The consolidation of the two-step methodology, as such, seems to be a very recent phenomenon, subsequent to the maturing of the requirement of transposability.

¹¹¹ Saunders (n 14). This discussion was taken up in the 2021 ILC meeting (ILC, '2021 Report' (n 3) 155, para 201).

¹¹² See more generally the introduction to Section III.

¹¹³ AP Fachiri, *The Permanent Court of International Justice: Its Constitution, Procedure and Work* (OUP 1932) 103.

¹¹⁴ See eg fn 86.

IV. CONCLUDING REMARKS: CODIFICATION OF SCHOLARSHIP AND PROGRESSIVE DEVELOPMENT OF PRACTICE

The discussions concerning the Statute of the PCIJ at the beginning of the twentieth century did suggest that the two-step method was the uncontested methodology for determining GPL. A century later, the work of the ILC seem to be leaning towards adopting this approach, as it received ‘virtually unanimous support’ in the 2021 meeting of the Commission.¹¹⁵ The two-step methodology may have been a product of judicial practice and the development of international law. This article has questioned whether and the extent to which it is so.

On the one hand, Section II showed that the first step to identify a GPL, in the form of comparative methodology, seems reflective of more recent State practice and ICJ case law, with the caveat that the comparative assessment is often limited to certain (usually Western) legal systems. Furthermore, some recent submissions challenge claims concerning GPL, criticizing the lack of a comparative study and hinting at the need to produce such surveys, if only to legitimize such claims. This contrasts with the lack of evidence that the second step (ie the transposability test) is consistently adhered to. Consequently, it is difficult to conclude that the two-step approach proposed by the Second Report codifies the methodology for the identification of GPL under Article 38(1)(c) of the ICJ Statute.

On the other hand, Section III concluded that contemporary international legal scholarship endorses the two-step approach. In particular, the transposability test (or variations of it) has been examined by writers for decades, despite its scant presence in judicial practice.

As far as the PCIJ/ICJ is concerned, the two-step approach does not reflect ‘rules of international law in fields where there already has been extensive State practice, precedent and doctrine’, as set out in the definition of ‘codification’ in the statute of the ILC. As a result, the two-step approach, whose exact scope still remains to be delineated in the forthcoming work of Special Rapporteur Vázquez-Bermúdez, is perhaps best understood as an example of progressive development. However, it reflects a methodology which is widely accepted in mainstream scholarship.

To grasp the impact that its endorsement by the ILC may have, by the Commission, a parallel may be drawn with the codification of the rules on interpretation of treaties in the Vienna Convention on the Law of Treaties. While many elements in Article 31 of the Vienna Convention may have been deemed codification of customary international law, the systematization of the interpretative steps into one set of ‘guidelines’ set that procedure in stone. The ‘general rule of interpretation’ is now strictly followed by most international courts and tribunals. Article 31(1) itself is composed of different elements: ‘good faith’, ‘ordinary meaning’, ‘context’, ‘object and purpose’. The

¹¹⁵ ILC, ‘2021 Report’ (n 3) para 179.

authoritative nature of ILC Draft Conclusions nudges or crystallizes a given approach.

Even more than the other sources of international law, invocations of GPL generally lack a consistent methodology. It might even be argued that the third source in Article 38 needs to be detached from rigorous method altogether. In this sense, one criticism is that the ILC *should not* codify a source *meant* to have an abstract and open-textured meaning—that is how GPL would fill lacunae.

In any case, once adopted, the ILC Draft Conclusions on General Principles of Law are likely to have an impact on the resort to general principles¹¹⁶ by authoritatively setting guidelines for its identification.¹¹⁷ As an illustration, whenever domestic legal systems are scrutinised for the purposes of identifying GPL, a representative review of legal systems globally does not always occur. The current draft conclusions and commentaries stress the need for such an approach at the first stage. Should the Commission maintain its approach, the stress on the need for a ‘wide and representative’ comparative analysis, ‘including the different regions of the world’ may not only reinforce the first step of the methodology, but also result in a trend towards a more comprehensive comparative methodology (itself, perhaps a nudge towards a more globalized approach to the sources of international law). More generally, the adoption of a two-step methodology could help cement the tendency towards adopting a positivist approach to GPL, and crystallize the need to legitimize invocations of GPL through the use this methodology.

¹¹⁶ For an assessment on the impact of the works of the ILC in the practice of the ICJ, see FL Bordin, ‘Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law’ (2014) 63(2) ICLQ 535; also D Azaria ‘The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making’ in UN, *Seventy Years of the International Law Commission* (Brill 2020).

¹¹⁷ See ILA (n 67); Ellis (n 19).