A SURVEY OF DOCTRINAL DEBATES ON "THE GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS"

"Medeni Milletlerce Tanınmış Hukukun Genel İlkeleri"ne Dair Doktrin Tartışmalarına İlişkin Bir İnceleme

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Abstract

Article 38/1-c of the Statute of International Court of Justice qualifies the "general principles of law recognized by civilized nations" as one of the three main sources of international law which the Court will apply. Compared to the other two sources, namely international treaties and international custom, general principles of law have been the subject of a much more intense doctrinal controversy. This debates started with the inclusion of general principles of law in the Statute of the Permanent Court of International Justice as a third source by the Advisory Committee of Jurists during *travaux préparatoires* of the Statute and still continues. This study is an effort to collect and comprehend these doctrinal controversies. For this purpose, first, the discussions in the Advisory Committee of Jurists when drafting the Statute which can be used as a supplementary mean of interpretation and later, the controversy among international lawyers and their thoughts which I think derived mostly from the prejudgments of their authors about the binding nature of international law and their approaches to the jurisprudence of this field have been dealt. As a result, the functions of general principles of law can be described in three different categories: They can be used for providing a framework for interpreting, defining, and implementing other sources. Secondly, they can be used as a material source of the other two sources. Finally, in order to avoid *non liquet*in international law, where the other rules are not available, these general principles appear as substitute sources.

Keywords: General Principles of Law Recognized by Civilized Nations, Sources of International Law, International Court of Justice, Statute of the Court

Özet

Uluslararası Adalet Divanı Statüsünün 38/1-c maddesi, "medeni milletlerce tanınmış hukukun genel ilkeleri"ni, Divan'ın kendisine sunulan uyuşmazlıkları çözerken kullanacağı üç temel kaynaktan biri olarak nitelendirmektedir. Diğer iki kaynakla, yani uluslararası andlaşmalar ve uluslararası teamülle karşılaştırıldığında, genel hukuk ilkeleri, çok daha yoğun bir doktrinel ihtilafın konusu olmuştur. Bu tartışmalar, Statu'nün hazırlık çalışmaları sırasında Hukukçular Komitesi tarafından genel hukuk ilkelerinin üçüncü kaynak olarak Uluslararası Daimi Adalet Divanı Statüsü'ne eklenmesiyle başlamış, ve hala sürmektedir. Bu çalışma, bu kavramın ve tartışmaların anlaşılması çabasıdır. Bu amaca yönelik olarak, ilk olarak, Hukukçular Komitesi'nde Statü hazırlanırken ortaya konulan, yardımcı yorum aracı olarak kullanılabilecek, tartışmalar ve daha sonra, uluslararası hukukçular arasındaki ihtilaf ve bunların düşünceleri -ki bunlar çoğu zaman uluslararası hukukun bağlayıcılığına ilişkin bu kişilerin ön kabullerinden ve bu alana dair hukuk ilmine yaklaşımlarından doğmaktadır- ele alınmıştır. Sonuç olarak, hukukun genel ilkelerinin işlevleri üç kategori altında değerlendirilebilir: Diğer kaynakların yorumlanması, tanımlanması ve uygulanması konusunda bir çerçeve sunabilirler. İkinci olarak, diğer iki kaynağın maddi kaynakları olarak kullanılabilirler. Son olarak, diğer kaynakların uygun olmadığı durumda, uluslararası hukukta *non liquet*ten kaçınabilmek için bu genel ilkeler ikame kaynak olarak kullanılabilir.

Anahtar Kelimeler: Uluslararası Hukukun Kaynakları, Uluslararası Adalet Divanı Statüsü, Medeni Milletlerce Tanınmış Hukukun Genel İlkeleri, Genel Hukuk İlkeleri

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Introduction

Regardless of their approach to international law theory, all international lawyers agree on that the conventional and customary law should be considered as sources of international law. In the Advisory Committee of Jurists, which is responsible for the preparation of the Statute of the Permanent Court of International Justice, these two sources were accepted without any discussion. The main subject of the sessions on the sources of international law was whether there will be any sources other than these two in the Statute. After the discussions, "the general principles of law recognized by civilized nations" was added as one of the rules to be applied by the Court. This provision has led to intense doctrinal controversy.

Disputes related to the general principles of law appear under different headings. International jurists expressed different views on the source nature, content, autonomous and independent existence from the other two sources, function, relationship and hierarchy with the other two sources of the general principles of law and which legal systems these general principles will be derived and the legitimacy of analogy between domestic and international legal systems.

Some authors identify these general principles with the natural law. The result of this thought is the rejection of this new source from positivist point of view and acceptance gladly from naturalist thought. Some naturalists even declared the defeat of the positivism with the adoption of this provision. Some authors, on the other hand, argue that this provision reflects the positivist view based on the condition of "recognition by the civilized nations" in the Statute.

Some authors suggest that these principles have already been applied in modern arbitration practices[2], and that their implementation has become the customary rule. Another group, however, argues that these practices do not mean anything, and that the decisions are binding only on the parties, but do not have any effect on the general international law.

There are those who place the general principles of law to the basis of the international legal system. Some others reduce them to the application of a principle of domestic laws, only in the absence of two other sources, only in a specific case and to be binding only in respect of these cases and parties. A group of authors reject the idea that common principles may exist between different legal systems. Since such common principles cannot be found, a source in the form of general principles of law recognized by civilized nations will also become useless. On the other hand, some others reject the existence

[2] For a survey of these arbitration practices before the establishment of the Permanent Court of International Justice, see Mehmet Emin Büyük, **Uluslararası Hukukta Hukukun Genel İlkeleri**, İstanbul: On İki Levha, 2018, pp. 70-86.

of general principles of law as an autonomous source by placing them into the custom. Some argue that these principles can be considered as auxiliary means for determining the sources like judicial decisions and doctrine. Beyond that, some authors place them outside of both the main and auxiliary sources and equate them with *ex aequo et bono*.

Another subject of discussion arises from the relation of the law established by the treaty and the general international law. A group of writers, especially positivist jurists, argue that the general principles of law can only be asserted in the context of the Statute before the International Court of Justice. While another group, especially naturalists, argue that they are binding in terms of general international law independently of the Statute.

Furthermore, there are writers who consider that the general principles of law can be used only in the absence of the other two sources as a substitute source. And, on the contrary, some others put them to the top of the hierarchy between sources and argue that these principles should be applied in the first place. A different view suggests that these three sources are of equal weight and that they must be applied together.

Different ideas also appear concerning the systems from which the general principles will be derived. A group of writers is of the view that the Statute refers exclusively to the domestic law principles, especially with reference to preparatory work. Another idea is that the Statute's provision implies the principles of international law in the first place. Another group considers that all principles, regardless of domestic law or of international law, that can be dealt under the general principles of law can be applied as a binding norm under Article 38. Furthermore, there is an opinion that equates the application of the general principles of law specially with the private law analogy. And finally, some authors do not accept certain general principles within the limits of the Article suggesting that they are merely the results of legal reasoning.

All these different views on the interpretation of the text are based on the different theoretical perspectives of the authors. It is obvious that the text of the Article is not clear. This study is an effort for understanding the meaning of the relevant Article.

For this purpose, two occasions of theoretical debates will be dealt: First, in the Advisory Committee of the Jurist; and later, the opinions of international lawyers about the provision 38/3 -or 38/1(c) in the Statute of the International Court of Justice- after the creation of the Permanent Court of International Justice. About the theoretical debates of the international law writers, first, the negative views will be discussed in separate groups and then, the opinions of the writers who support the autonomous nature of the general principles will be explained. And, in the Conclusion, the positive and the negative opinions will be evaluated together, with the views of the author of this study.

I. Adoption of Article 38 of the Statute of the Permanent Court of International Justice

In February 1920, the Council of the League of Nations, in accordance with Article 14 of the Covenant of the League of Nations, constituted an Advisory Committee of Jurists (*Comité Consultatif de Juristes*), consisting of 10 members of different nationalities[3], in order to prepare the Statute for the establishment of the Permanent Court of International Justice and to submit a report to the Council. From mid-June to the end of July, the Committee held meetings at the Peace Palace in The Hague and submitted a draft text to the Council.[4] This text has been discussed at two meetings held in the Council in August and October, and adopted with minor amendments and presented to the General Assembly. Later, with a few simple improvements, this text was adopted unanimously on 13 December 1920 at the General Assembly as the Statute of the Court.[5]

During *travaux préparatoires* of the Statute the Statute, the Committee discussed many different issues related to the establishment and operation of the Court and put forward valuable insights on this day. One of the issues of discussion was the rules which the Court will apply in disputes. In particular, which rules other than treaties and custom will be within the authority of the judge to apply and whether the general principles of law will be included among these rules or how they will take place.[6]

At 13th Session, the President of the Committee Baron Descamps submitted his proposal of the article as follows:

"*The following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the undermentioned order:*

1. *conventional international law, whether general or special, being rules expressly adopted by the States;*

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3 The Committee consists of the following members: Minichiro ADATCI (Japan), Rafael ALTAMIRA (Spain), Clovis BEVILAQUA (Brazil; later Raoul FERNANDES appointed as a member of the Committee to replace Bevilaqua), Baron Édouard DESCAMPS (Belgium), Francis HAGERUP (Norway), Albert De LaPRADELLE (France), Bernard LODER (Netherlands), Elihu ROOT (USA). See **Permanent Court of International Justice/ Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16th – July 24th**, The Hague, Van Langenhuysen Brothers, 1920, Preface, s. III.

4 Olof Hoijer, **Le Pacte de la Société des Nations – Commentaire Théorique et Pratique**, Paris: Editions Spes, 1926, p. 229.

5 International Court of Justice, **The Permanent Court of International Justice; La Cour Permanente de Justice Internationale; El Tribunal Permanente de Justicia Internacional, 1922-2012**, The Hague, 2012, p. 19 (hereinafter: PCIJ, 1922-2012).

6 Procès-Verbaux, p. 293 ff.

2. *international custom, being practice between nations accepted by them as law;*
3. *the rules of international law as recognized by legal conscience of civilized nations;*
4. *international jurisprudence as a means for application and development of law."*[7]

This proposal led to controversies among the members. American member of the Committee, Elihu Root, said that he "*could not understand the exact meaning of the clause 3*."[8]According to him, it is necessary to draw boundaries of the jurisdiction in order for the States to accept the compulsory jurisdiction of the Court. He has no objection to the first two clauses, but also not sure that States will accept even the clause relative to custom. But he believes that the rules in the last two paragraphs extend the Court's jurisdiction. States will not accept the jurisdiction of a Court which will apply not only the law but also the rules that exist in conscience of civilized nations.[9]It must be stated that, in all sessions, as a highly experienced international lawyer who has been involved in such organizations several times, the primary concern of Elihu Root, was, considering the examples such as the failed International Prize Court experience, that the text prepared to be acceptable to the States.

From a different conception, Lord Phillimore, the British member, arrived at the same point as Root. He believes that clauses 3 and 4 of the proposal give the Court the power of legislation, but in international law, the legislation can only be possible by the universal agreement of all States. The rules which will be applied must be conventional law and international law in force. The other two clauses are either included in clause 2 or else, additions to this clause. However it shouldn't go beyond this bound.[10]

The French member of the Committee, Lapradelle, stated that he prefers a short wording such as "*the Court shall judge in accordance with law, justice and equity*." However, it further stated that the Court should not act as a legislative body. He also argues that forcing the Court to take into account only (positive) law can be too strict and even unjust. According to him, there should be no harm in taking into account by the Court that whether a legal solution of

7 Procès-Verbaux, Annex No. 3, p. 306.

8 It is important to note that all members of the Committee, except Elihu Root, spoke in French and the English texts for the records are the translation, except for the speeches and remarks of Root. Although Root makes his objection on the basis of the paragraph, he seems to be drawing attention to the language difference. See Procès-Verbaux, Preface, p. IV.

9 Procès-Verbaux, p. 293-294.

10 Procès-Verbaux, p. 295.

a situation is just and equitable, and even when necessary, changing this legal solution according to requirements of justice and equity.[11]

Norwegian member Hagerup agreed with Lapradelle as the formula must be short, simple and as little theoretical as possible but on the other hand, the Court should apply equity if the parties authorized him to do so. The important thing is that the Court should not refrain from making any decision on the grounds that there is no positive law rule to be applied.[12] He stated that one of the tasks of the new Court would be to develop international jurisprudence and, directed this as a question to Root that how a Court that would declare *non liquet* in the absence of a positive rule of law would contribute to the development of international law.[13]

According to Root, the question is not about the material basis of jurisdiction but instead, the readiness of the world to accept this compulsory jurisdiction. In his view, States are ready to accept the compulsory jurisdiction of a Court that will apply universally recognized rules of international law, but he doesn't think that they will accept the compulsory jurisdiction of a Court that will apply principles which are differently understood in different countries. It is better to establish a Court with relatively limited jurisdiction than a Court with broad competence but not working.[14]

In response to the statement by Root's that the principles of justice may vary from country to country, President Descamps said that may be true for certain rules of secondary importance. He thinks, however, that "*fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations."*[15] Degan correctly says that Grotius would probably undersign this statement but it is far from convincing the majority members of the Committee in 1920.[16]

Phillimore thinks that these serious differences of opinion arise from the differences between continental Europe and Anglo-Saxon concepts of justice. According to him, in continental Europe, judges are initially surrounded by strict rules. Later, with the fear that they are too constrained, they are given complete freedom within these boundaries. However, the British system is different. In this system, the judge takes an oath "*to do justice according to*

[11] Procès-Verbaux, p. 295.
[12] Procès-Verbaux, p. 295-296.
[13] Procès-Verbaux, p. 307-308.
[14] Procès-Verbaux, pp. 308-309.
[15] Procès-Verbaux, pp. 310-311.
[16] Vladimir Đuro Degan, **Sources of International Law**, The Hague: Martinus Nijhoff Publishers, 1997, p. 47.

law."[17] If Lord Phillimore's statements are examined carefully, it will be seen that he does not think much differently from Descamps. In fact, in terms of the law to be applied by the Court, he draws a line that implies more freedom than Descamps' proposal.[18] Phillimore states that the conventional law and the rules of international law "*from whatever source they may be derived"* will be sufficient to define as applicable law.[19]

At the 15th meeting, with the request of other members at the previous meeting, Root presented his amendment which they had prepared along with Phillimore for the article.[20] In this new proposal, some changes have been made to the draft prepared by Descamps. In paragraph 3, the expression "*the rules of international law as recognized by legal conscience of civilized nations*" was replaced with "*general principles of law recognized by civilized nations*" and in paragraph 4, the expression "*international jurisprudence as a means for application and development of law" was replaced with "the authority of judicial decisions and the opinions of writers as a means for application and development of law." Clauses related to conventions and custom were maintained without any changes.*[21]

The Italian member Ricci-Busatti made some reservations. Despite the fact that he is not opposed to the substance of the proposed text, he thinks that the expression "*undermentioned order*" (*ordre successif*) must be removed because the judge should consider the sources at the same time in relation to each other. He also considers that, in paragraph 3, "*principles of equity*" should be mentioned and included; and the opinions of writers in paragraph 4, should be seen as a source of law.[22]

Phillimore said that the inclusion of "equity" as a source of law would result too much liberty to the judge. Other members shared this idea. And also, he said that he didn't attach much importance to the successive order of sources; he simply took it from the proposal of Descamps.[23]

Lapradelle considers that the expression of "*general principles of law"* is proper but the expression of "*civilized nations*" is problematic. For the jurist, this is an unnecessary expression because "*law implies civilization*".[24] As can be seen from the meeting records, the members of the Committee didn't attach

17 Procès-Verbaux, p. 315.
18 Bin Cheng, **General Principles of Law as Applied by International Courts and Tribunals**, Cambridge: Cambridge University Press, 2006, p. 13.
19 Procès-Verbaux, p. 295.
20 Procès-Verbaux, pp. 331-344.
21 See Procès-Verbaux, Annex No. 1, p. 344.
22 Procès-Verbaux, p. 332-333.
23 Procès-Verbaux, p. 333.
24 Procès-Verbaux, p. 335.

any importance to Lapradelle's objection and didn't eliminate the following discussions concerning the qualification of civilization in the Statute.[25]

Lord Phillimore stated that the general principles referred here are principles *"accepted by all nations in foro domestico, such as certain principles of procedure, the principle of good faith, and the principle of res judicata, etc.*" And also added that he indented to mean "maxims of law" by "general principles of law". Lapradelle, however, said that the principles that formed the bases of national law were also accepted as sources of international law but those considered "generally recognized principles" are must have obtained unanimous or quasi-unanimous support. [26]

As far as the explanations for the amendment are concerned, the idea behind this new proposal must be, especially, Lord Phillimore.[27] These explanations of Phillimore are widely accepted in the doctrine and the practice of the Hague Courts and other arbitrations.[28]

Thus, in the draft text prepared by the Committee, the article which is accepted as draft article 35 of the Statute, concerning the legal rules to be applied is as follows:

"*The Court shall, within the limits of its jurisdiction as defined in Article 34, apply in the order following:*

1. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;*
2. *international custom, as evidence of a general practice, which is accepted as law;*

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25 For this discussions and the possible meanings of "*recognized by civilized nations*" and the effective interpretation of the Article concerning this text, see Büyük, Uluslararası Hukukta Hukukun Genel İlkeleri, pp. 140-160.

26 Procès-Verbaux, pp. 335-336.

27 Cheng reaches this conclusion by the fact that Root doesn't seem to have said anything more during the discussion. The members asked this amendment from Root and he came with the proposal but later on, the defense of this amendment was made by Phillimore. Cheng, General Principles of Law, p. 15 and footnote 63.

28 See for instance, **Dissenting Opinion of M. Anzilotti**, **Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzow)**, PCIJ, Judgment No. 11, Series A, No. 13, 1927, p. 27. See also **Separate Opinion of Judge Cancado Trindade, Pulp Mills on the River Uruguay, Merits**, Judgment, ICJ Reports, 2010, p. 140. See also examples of doctrine, Alfred Verdross, "Les Principes Généraux du Droit comme Source du Droit des Gens" **Recueil d'Études sur les Sources du Droit en l'Honneur de François Geny, Tome III - Les Sources des Diverses Branches du Droit** içinde, Paris: Librairie du Recueil Sirey, 1935, p. 387; Hersch Lauterpacht, **Private Law Sources and Analogies of International Law (with special reference to international arbitration),** London: Longmans, Green and Co. Ltd., 1927, p. 70-71, footnote 3; Clive Parry, **The Sources and Evidences of International Law,** Manchester: Manchester University Press, 1965, p. 83.

3. *the general principles of law recognized by civilized nations;*
4. *judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."*[29]

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At its 10th Session at Brussels, October 1920, some amendments were made by the Council of the League of Nations on draft scheme presented by the Advisory Committee of Jurists and as related to Article 35, the Council added at the beginning of Paragraph 4 the expression of "*subject to the provisions of Article 57(bis)*"30 (eventually became Article 59) as a formal modification because of the inclusion of Article 57(*bis*) to the draft of the Statute by the Council which follows: "*The decision of the Court has no binding force except between the parties and in respect of that particular case*."[31]

On the other hand, first, in the report of Italian Delegate to the Council for the amendments to the draft scheme[32], and then, with the objections of the French (Framegout) and Dutch (Loder) members of the Sub-Committee of the Third Committee[33], the expression "*in the order following*" at the beginning of the draft article has been deleted. Thus, a situation that can be interpreted as a hierarchy between the three main sources of international law has been eliminated.[34] And, by the suggestion of the British member (Cecil Hurst), the expression of "*within the limits of its jurisdiction as defined above*" has also been deleted.[35]

In the Sub-Committee, the French member proposed a modification at paragraph 3 of Article 35 as "*general principles of law and justice*" and this was accepted. Then, at the 10th meeting, the Greek member (Politis) proposed to modify the paragraph as follows: "*the general principles of law and with the consent of the parties, the principles of justice recognized by civilized nations"*.[36] Consequently, by the proposition of the French member (Framegout), at the end of Article 35, a separate provision has been added which as follows: "*This provision shall not prejudice the power of the Court to*

29 Procès-Verbaux, p. 680.
30 League of Nations, Permanent Court of International Justice, **Documents concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court**, League of Nations Publications, 1920, p. 58 (Hereinafter: Documents, 1921).
31 Documents, 1921, p. 60.
32 Documents, 1921, p. 29.
33 Documents, 1921, p. 145.
34 Cheng, General Principles of Law, p. 20.
35 Documents, 1921, p. 145.
36 Documents, 1921, p. 157.

decide a case ex aequo et bono, if the parties agree thereto."[37] This provision was accepted as paragraph 2 of Article 35 of Statute and the paragraph 1 was remained unchanged. It was stated that the aim of this clause is to give the article a more flexible character[38]

In this way, the general principles of law are separated from "*the general principles of equity*", and with the adoption of paragraph 2, the general principles of law have gained the character of positive law.[39]Therefore, the general principles of law took place in the Statute of Permanent Court of International Justice as a separate source which is different from conventional law and international custom but in the same category as main sources, and different from the judicial decisions and doctrine and not in the same category with them, and separate from equity as a positive rule of law. In other words, the consent of parties isn't required in the application of general principles of law; this means that these principles constitute part of the international law in force.[40]

The settlement of *ex aequo et bono* (from equity and goodness)[41] gives to the Court the authority to decide according to principles of equity *contra legem*[42] (or sometimes equity *praeter legem*[43]) if the parties of dispute expressly agree on that authorization. The Sub-Committee has made a clear distinction between making decisions on the general principles of law and the equity *contra legem*. It should be noted, however, that this provision doesn't provide any benefit in the practice of the Court. There is not a single decision given on *ex aequo et bono* in nearly a hundred years by the two Hague Courts.[44]

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37 Documents, 1921, p. 157.

38 Documents, 1921, p. 211.

39 Degan, Sources of International Law, p. 51

40 Cheng, General Principles of Law, p. 20.

41 Aaron X. Fellmeth ve Maurice Horwitz, **Guide to Latin in International Law,** Oxford: Oxford University Press, 2009, p. 91.

42 "*Against the law;based on a principle of equity in contradiction to a rule of positive law*" See Fellmeth-Horwitz, Guide to Latin, p. 65.

43 "*Apart from the law; Relating to a matter not clearly addressed by the law*" See Fellmeth-Horwitz, Guide to Latin, p. 227.

44 In the case of the Free Zones of Upper Savoy and the District of Gex between France and Switzerland, there was a debate about the Court's authority to decide *ex aequo et bono*. The idea that the facts of the case and the special agreement between parties concerning the jurisdiction of the Court can be interpreted as such has been examined. The Court, on the other hand, considered that no such authority was given: "(…) *even assuming that it were not incompatible with the Court's Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognized by it and taking into account considerations of pure expediency only, such power, which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to that effect, which is not to be found in the Special Agreement*". See **Case of the Free Zones of Upper Savoy and the District of Gex (Second Phase), Order of December 6th**, PCIJ, Series A, No. 24, 1930, p.

With these modifications, the draft article has been adopted as Article 38 of the Statute of the Permanent Court of International Justice which is as follows:

"*The Court shall apply:*

1. *International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;*
2. *International custom, as evidence of a general practice accepted as law;*
3. *The general principles of law recognized by civilized nations;*
4. *Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."[45]

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After the World War II, at the Conference of San Francisco, as the rapporteur of the Committee of Jurists which was responsible for drafting the Charter of the United Nations and the Statute of the International Court of Justice, Jules Basdevant pointed out that according to him even though Article 38 of the Statute of Permanent Court of International Justice wasn't well drafted, there was no time to spent for redrafting it.[46] In the final report of the Committee, the following statements are given concerning Article 38:

> "*Article 38, which determines, according to its terms, what the Court "shall apply" has given rise to more controversies in doctrine than difficulties in practice. The Committee thought that it was not the*

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And as to the scope of *ex aequo et bono,* Judge Kellogg stated, on his Observations in the same case, that the power given to the Court would only mean a somewhat broad interpretation of equity and justice. See **Observations by Mr. Kellogg,** PCIJ, Series A, No. 24, 1930, pp. 40-41. On the other hand, *ad hoc* Judge Dreyfus stated in his dissenting opinion that *ex aequo et bono* is "(…) *to play the part of an arbitrator in order to reach the solution which, in the light of present conditions, appeared to be the best, even if that solution required the abolition of the zones*". See **Dissenting Opinion by M. Eugène Dreyfus, Case of the Free Zones of Upper Savoy and District of Gex,** Judgment, PCIJ, Series A/B, No. 46, 1932, p. 212.

See also Manley O. Hudson, **Permanent Court of International Justice 1920-1942 - A Treatise**, New York: The Macmillan Company, 1943, p. 620-621; L. Oppenheim - H. Lauterpacht (Ed.), **International Law, A Treatise, Vol. II,** 7. Edition, Delhi: Orient Longman Ltd., 1955, p. 69, footnote 2.

45 Documents, 1921, p. 264.

46 **Documents of the United Nations Conference on International Organization**, **UNCIO**, San Francisco, Vol. XIV, 1945, p. 170. (Hereinafter: UNCİO, Vol. XIV).

> *opportune time to undertake the revision of this article. It has trusted to the Court to put it into operation, and has left it without change other than that which appears in the numbering of the provisions of this article.*"[47]

The only modification made by the Committee was that the addition of the expression "*whose function is to decide in accordance with international law such disputes as are submitted to it*" to the initial paragraph of Article 38.[48] This amendment is likely to have been put in place to emphasize that the International Court of Justice is an international judicial body, but it is unclear what the practical importance of this addition is[49], since the Permanent Court of International Justice has served as an international judicial body and has tried to resolve disputes according to rules of international law.[50]

II. Skeptical Approaches to the Nature and Autonomy of General Principles of Law as a Source of International Law

A) Dualist and Voluntarist Ideas and the Role of Principles of Domestic Law in International Law

For some authors, especially from the Positivist/Dualist school of thought, the general principles of law cannot be an autonomous source of international law. A strict dualist approach wouldn't accept the application of the principles of domestic law directly in international law. For such an application, there should be a clear authorization of reception, and this can only be possible if the authorization is in the classical sources *i.e.* custom or treaty.[51]

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47 UNCİO, Vol. XIV, p. 843.

48 **Documents of the United Nations Conference on International Organization**, **UNCIO**, San Francisco, Vol. XIII, 1945, pp. 284-285. (Hereinafter: UNCİO, Vol. XIII).

49 Nevertheless, it should be noted that Manley Hudson, one of the judges of Permanent Court of International Justice, clearly defined the lack of emphasis of the application of international law as a deficiency of the Statute. See Manley O. Hudson, **Permanent Court of International Justice 1920-1942 - A Treatise,** New York: The Macmillan Company, 1943, p. 615. On the other hand, Soviet writer Tunkin thinks that the addition of this statement to the Statute revokes the application of general principles of domestic laws. Grigory I. Tunkin, International Law in the International System, **Collected Courses of Hague Academy of International Law,** 1975 (IV), Alphen aan den Rijn: Sijthoff&Noordhoff, 1978, pp. 99-101.

50 **Separate Opinion of Judge Cancado Trindade, Pulp Mills on the River Uruguay, Merits**, Judgment, ICJ Reports, 2010, s. 142; Géza Herczegh, "The General Principles of Law Recognized by Civilized Nations", **Acta Juridica**, Vol. 6, 1964, s. 9. See also UNCİO, Vol. XIII, s. 392.

51 Robert Kolb, **La Bonne Foi en Droit International Public: Contribution à l'Étude des Principes Généraux de Droit,** Genève: Graduate Institute Publications, 2000, Web: http://books.openedition.org/iheid/2253, para. 70-74.

As an example to the international lawyers who have advocated this view, Anzilotti[52], Strupp[53], Cavaglieri[54], Härle[55], Seferiades[56], Morelli[57], Ross[58], Weil[59],

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52 Dionisio Anzilotti, **Cours de Droit International** (Premier Volume), (French Trans. 3rd Ed.: Gilbert Gidel), Paris: Librairie du Recueil Sirey, 1929, pp. 116-118.

53 Karl Strupp, "Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 47, 1934 (I), Paris: Librairie du Recueil Sirey, 1934, pp. 334-337; Karl Strupp, "Justice Internationale et Équité», **Recueil des Cours de l'Académie de Droit International,** T. 33, 1930 (III), Paris: Librairie du Recueil Sirey, 1931, pp. 449-452.

54 Arrigo Cavaglieri, "Règles Générales du Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 26-1, 1929, Paris: Librairie Hachette, 1930, p. 323. According to Cavaglieri, these principles do not belong to international law. He also describes these principles as natural law and justice rules and states that the Court can apply these principles in the absence of custom and treaty. See *Ibid.* p. 544. Cheng expresses that such a thought seems dangerous for a positivist, such as Cavaglieri, because Cavaglieri, in these words, indirectly acknowledges that the principles of natural law and justice are widely recognized in the domestic law of civilized nations. See Cheng, General Principles of Law, p. 4, footnote 14.

55 Elfried Härle, "Les Principes Généraux de Droit et le Droit des Gens", **Revue de Droit International et de Législation Comparée**, T. 16-4, 1935, pp. 664-687. "*In the international life, on the other hand, it is the States themselves which takes part in the creation of law, in the external form of treaties or in the form of the constant practice of government, recognized as law. If one now wants, as in the dominant view, to incorporate the "general principles of law" of the 3rd paragraph of Article 38 into the field of positive international law, it is important to provide proof that their validity in the law of nations through the creation of ordinary law in international law, in other words, they must be originated from either a treaty or a consistent governmental practice.*" (my translation) See *Ibid*. 670-671. "*The general principles of law are positive principles of law arising from customary law and having, in principle, only subsidiary validity in international law.*" (my translation) See *Ibid.* p. 687.

56 Stelios Seferiades, "Principes Généraux du Droit International de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 34, 1930 (IV), Paris: Librairie du Recueil Sirey, 1931, p. 210.

57 "*Article 38, as well as the other articles of the Statute, are procedural norms. Their aim is to point out the criteria that will form the basis of the proceedings of the Court; not the create material norms to regulate in a general way the relations between the contracting States. Therefore, the principles contained in Article 38/3 are unfamiliar with the international legal order. Article 38/3 provides the judge with a source other than international law and is considered to be apurely material source. This source enables the formulation of the rule to be created specifically for the present case.*" (my translation) See Gaëtano Morelli, "La théorie générale du procès international", **Recueil des Cours de l'Académie de Droit International**, T. 61, 1937 (III), Paris: Librairie du Recueil Sirey, 1938, p. 350.

58 Alf Ross, **A Textbook of International Law,** 1st Ed., London/New York/Toronto: Longmans, Green and Co., 1947, pp. 90-91; 2nd Ed., New Jersey: The Lawbook Exchange Ltd, 2008, p. 90-91. In defining the general principles of law, the author gives reference to the principles of domestic law, in accordance with the discussions in *travaux préparatoires* of the Statute. However, the author doesn't consider these principles in the same category of sources with the custom and treaty. According to the author, objectification or abstraction, which must exist in a source, is incomplete at this point, because by using these principles, the judge creates and applies the norm only for a concrete case. It would be appropriate to emphasize the similarities of the author's considerations with Anzilotti.

59 Prosper Weil, "Le Droit International En Quête de Son Identité, Cours Général de Droit International Public", **Recueil des Cours de l'Académie de Droit International**, T. 237,

Bokor-Szegö[60] can be mentioned. It is also possible to consider some of the analyses of Kelsen[61] and Kopelmanas[62] and also the views of Herczegh[63], one of the judges of International Court of Justice, in this category. On the other hand, with regard to the Turkish international law doctrine, Akipek[64] clearly opposes the general principles of law and the adoption of this separate source in the Statute, and Çelik[65] seems to share this idea.

According to some of these authors, there is no general rule of international law that allows the application of general principles which are taken from domestic law. Unless there is a general custom in this regard, this process may be possible only through a treaty.[66] A group of writers, e.g. Anzilotti, Strupp, Bokor-Szegö, from this point of view, consider the matter within the scope of the Statute of the International Court of Justice (and the Permanent Court of International Justice) and, are of the opinion that the judges of Court can apply the principles of domestic law with only explicit authority given by the Statute.[67] Another group of writers, e.g. Morelli, Weil, based on these ideas, oppose the formal source character of these principles, and according to them, the general principles of law can be only material sources of law.[68]

1992 (VI), The Hague: Martinus Nijhoff Publishers, 1996, pp. 148-151.

60 "*The author of this chapter shares the view that the Statute authorizes the International Court of Justice to apply the principles accepted by the States in foro domestico, but does not consider these principles to be a source of international law. Under the authorization given to the Court in Article 38, the parties to the Statute did not rank the general principles of law as a source of international law. What they did was to ratify the rules of procedure of a court, not a convention listing exhaustively the sources of international law. The Court applying the law is not authorized to create, through the general application of the principles of municipal law, new sources of international law applicable outside the scope of the dispute settled by the Court.*" Hanna Bokor-Szegö, «General Principles of Law», Mohammed Bedjaoui (Ed.), in **International Law: Achievements and Prospects**, Paris: UNESCO, 1991, p. 217.

61 Hans Kelsen, **Principles of International Law**, 3rd Ed., New York: Rinehart & Company Inc., 1959, pp. 393-394.

62 Lazare Kopelmanas, "Quelques Réflexions au Sujet de l'Article 38(3) du Statut de la Cour Permanente de Justice Internationale", **Revue Générale de Droit International Public**, T. 43, 1936, pp. 295-296.

63 Géza Herczegh, "The General Principles of Law Recognized by Civilized Nations", **Acta Juridica**, Vol. 6, 1964, pp. 22-28.

64 Edip F. Çelik, **Milletlerarası Hukuk**, 3rd Ed., İstanbul: Fakülteler Matbaası, 1969, pp. 81-88.

65 Ömer İlhan Akipek, **Devletler Hukuku - Birinci Kitap: Başlangıç**, 2nd Ed., Ankara: Başnur Matbaası, 1965, pp. 67-69.

66 Härle, Les Principes Généraux de Droit et le Droit des Gens, pp. 670-671.

67 Anzilotti, Cours de Droit International, s. 117-118; Strupp, Justice Internationale et Équité, p. 452; Strupp, Droit de la Paix, p. 336, Bokor-Szegö, General Principles of Law, p. 217.

68 Weil, Recueil des Cours, s. 148-151; Morelli, Recueil des Cours, p. 350.

According to the Italian jurist Anzilotti, who was one of the prominent figures of classical positivism in international law in the first half of the twentieth century, the usual forms of establishment of international rules are the treaties which are accepted by the States with their explicit consent and the customs which are accepted with their tacit consent.[69] The general principles of law that referred in Article 38/3 of the Statute are the general principles of international legal order or universally accepted principles in the laws of civilized nations. This latter group is also implicitly recognized in international law and the Court, therefore, applies them.[70] If the principle to be applied is exclusively a principle of national legal systems, then these principles can only be considered as a material source. Anzilotti opposes the formal sources characters of the general principles of law derived from domestic laws, and according to him, these principles do not exist in the international legal order. The judge determines the norm he will apply by using these principles in a concrete case, and thus, he creates a norm only for this case.[71]

As an example of his idea of implicit recognition of universally accepted principles in the laws of civilized nations in international law, Anzilotti makes the following remarks in his dissenting opinion in the Interpretation of Judgments Nos. 7 and 8 concerning the Factory of Chorzow:

> "*(...) it appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to "the general principles of law recognized by civilized nations", mentioned in No. 3 of Article 38 of the Statute, that case is assuredly the present one. Not 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*"[72]

As can be seen, Anzilotti considers that a number of principles are implicitly accepted because of the nature of the international legal system, and gives *res judicata* as an example of them. The basis of this idea is that according to Anzilotti, treaties do not only consist of written provisions; furthermore,

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69 Anzilotti, Cours de Droit International, p. 68.

70 In this respect, the author gives as an example the Chorzow Factory Case which he had served as a judge, and the principle that *a violation of a liability entails an obligation to repair*. See Anzilotti, Cours de Droit International, p. 117.

71 The author refers to Article 59 of the Statute of the Permanent Court of International Justice which as follows: "*The decision of the Court has no binding force except between the parties and in respect of that particular case*." See Anzilotti, Cours de Droit International, p. 118.

72 Dis. Op. of M. Anzilotti, **Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzow)**, PCIJ, Judgment No. 11, Series A, No. 13, 1927, p. 27.

the logical presuppositions of these written provisions and the necessary logical consequences are also part of the treaties. The consent of the parties to the norms in the treaty means that their consent to these hidden norms in the absence of which the treaty will become meaningless. Anzilotti calls these hidden norms, which are necessary for every legal system, "the constructive rules" (*les règles constructives*).[73] The author refers as an example to the *pacta sunt servanda* rule/principle regarding the binding force of treaties, and in the absence of this rule, the international legal system will become a hypothesis or an indemonstrable postulate.[74] Similarly, it places this rule on the basis of the binding force of the custom.[75]

The German lawyer Karl Strupp, who was another important representative of positivism in the period after the First World War, and who described himself as a "*pure-blooded positivist*", states that public international law is a law between States, not above them. Hence, with the equality of States among themselves, international law also represents a coordination. As a result, the States will only be bound by the norms they accept with their free will.[76]

Strupp argues that there is a tendency in the doctrine and even amongst the proponents of positivism (or believing themselves to be such) to put a third source of the law of the nations on the side of the custom and treaty. They speak of, in this sense, that legal norms common to the legal bodies of civilized nations, principles which would be qualified by the legal order of civilized nations or fundamental elements necessarily existing in every legal order.[77]

The author, who is an advocate of the dualist view, opposes the ideas of writers who accept this third source of international law, that general principles which are jointly accepted by civilized nations should be accepted in the same manner in international law and for the implementation of a norm in international law, it is sufficient to prove that it is accepted by a large number of civilized States as legal principles.[78] He also suggests that such common norms will not be much. But even if they really existed, the situation would not be so different. According to Strupp, these norms must be proved by the will of the States as the only creators of the law of nations.

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73 Anzilotti, Cours de Droit International, p. 68.

74 Anzilotti, Cours de Droit International, p. 69.

75 Anzilotti, Cours de Droit International, p. 74.

76 Stephen C. Neff, **Justice Among Nations - A History of International Law,** Massachusetts: Harvard University Press, 2014, p. 366.

77 Karl Strupp, "Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 47, 1934 (I), Paris: Librairie du Recueil Sirey, 1934, p. 334.

78 Karl Strupp, "Justice Internationale et Équité», **Recueil des Cours de l'Académie de Droit International**, T. 33, 1930 (III), Paris: Librairie du Recueil Sirey, 1931, p. 450.

With the exception of Article 38 of the Statute and the treaties which have taken the Statute as an example, constituting law between the parties in a case, Strupp expresses that he can't recognize other receptions of the general principles of law belonging to other areas of law, in the law of nations, unless these principles are specially and individually admitted (usually by custom and exceptionally by conventions) and not by virtue of an act in anticipation.[79] As a strict positivist, the author *categorically refuses* the existence of the third source of international law and in particular, the general principles of law as a third source.[80]

According to the French jurist Weil, the general principles of law cannot be an autonomous formal source of international law, despite the importance attached to Article 38 of the Court's Statute. They can only be considered as a material source. These principles may be important to avoid *non liquet* but with the development of international law, this temporary and limited role loses its importance. The general principles of international law have their normative characteristics by the way of the international custom.[81]

Kopelmanas, by approaching the matter through the legal technique, makes a similar observation at this point. For the author, it is not possible to create formal sources without human will. Each of these formal sources has its own competent agent determined *by* this legal order and *for* this legal order, and the method of regulation of law belongs to them. The general principles of law taken from domestic law are not regulated by the competent bodies of international law and it is not possible them to be the formal sources of this order.[82]

According to Kelsen, the possibility of the Court applying the general principles of law recognized by civilized nations is only possible if the two other norms *viz.* treaty and custom, do not bring a rule in a case. Obviously, the provision of Article 38/1(c) presupposes the existence of gaps in international law. This means that in cases where the other two norms do not provide a satisfactory solution, the Court authorized in a case to apply a rule which it considers as a general principle of law.[83]

The author, however, states that he is in doubt that the preparers of the Statute intended to give to the Court such an authorization. On the other hand, in the first paragraph of the Statute of the International Court of Justice, it is expressly stated that the duty of the Court is to act in accordance with

79 Strupp, Droit de la Paix, p. 336.
80 Strupp, Justice Internationale et Équité, p. 452; Strupp, Droit de la Paix, p. 336.
81 Weil, Recueil des Cours, p. 151.
82 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 295-296.
83 Kelsen, Principles of International Law, p. 393.

international law. Accordingly, the application of these general principles of law would only be possible if they are part of international law. This means that they are included in the rules listed in clauses (a) and (b). The conclusion of Kelsen from this is that *clause (c) is superfluous*.[84]

The Hungarian jurist Géza Herczegh, who served as the judge of the International Court of Justice, has also a positivist approach to the general principles of law.[85] The famous jurist places the principles of law in concrete norms and makes his distinction from this point. Each branch of law has its own principles. According to the author, the principles of law always mean that the concrete provisions of positive law which are formulated in a general and comprehensible form. In this case, the general principles of international law mean the generalization of the concrete rules of international law. Therefore, the general principles in this group should be sought in the context of international treaties and international customs.[86] The author answers negatively to the question of whether the general principles of law are an independent source of international law. The sources of law in international law should be the result of the common consent, express or tacit, of the States appears in the form of treaty or custom. An another form of common consent cannot be produced. Consequently, the general principles referred in Article 38/1(c) cannot be the general principles of international law (which cannot be considered as a separate source of international law).[87]

To comprehend the norms expressed in this provision *viz.* Article 38/1(c), Herczegh will look at arbitration practices. As a result of this examination, he reaches to the result that certain domestic law principles are already being implemented. According to the author, these domestic law principles are not the sources of international law. However, the process of implementation and the preparation of the Statute is followed, it will be seen that the principles referred to in Article 38/1(c) are the principles of domestic law. These principles shall apply if there is no rule in treaties and customs, regulating the dispute.[88] The Statute has made this practice which became a customary law, a part of international law. The way to do this will be the analogy with domestic law. The role of these principles is to technically stretch and improve the rigid aspects of international law by creating the new international customary rules.[89]

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84 Kelsen, Principles of International Law, pp. 393-394.
85 Degan, Sources of International Law, p. 73.
86 Herczegh, The General Principles of Law Recognized by Civilized Nations, pp. 18-21.
87 Herczegh, The General Principles of Law Recognized by Civilized Nations, p. 22.
88 Herczegh, The General Principles of Law Recognized by Civilized Nations, pp. 24-28.
89 Herczegh, The General Principles of Law Recognized by Civilized Nations, pp. 32-33.

B) Three Different Appearance of the Strict Monist Approach to the General Principles of Law:

Some writers who contribute to the theory of international reaches a similar conclusion with the positivist/dualist writers, following a different path from them. The difference here is that the authors will be mentioned here have reached this result with a radical monist look.[90] However, it is essential to talk about the authors' approaches in the strict monist view. In this section, the sociological method of the the French jurist Scelle[91], the pure theory of law and normative systematic of Kelsen[92] and his follower Guggenheim[93], and modern strict monist theory of Conforti[94] will be treated as three different methods.

1) Scelle's Intersocial Monism and a New Perspective of Sovereignty:

The French theorist Georges Scelle, known as the protagonist of sociological objectivism in international law[95], argues that the positivists' and specially Anzilotti's ideas about the application of the general principles of law by a Court is possible if it is only envisaged in a treaty, and only by this Court, and if there is a clear authorization for the reception of these principles, are strictly logical deductions from the dualist point of view but these ideas are contradicted with the facts. The general principles were always implemented by the Courts without the need by explicit authorization for reception.

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90 Kolb, La Bonne Foi en Droit International Public, para. 75-76.

91 Georges Scelle, "Droit de la Paix", **Recueil des Cours de l'Academie de Droit International,** T. 46, 1933 (IV), Paris: Librairie du Recueil Sirey, 1934, pp. 435-437; Georges Scelle, "Essai sur les Sources Formelles du Droit International", **Recueil d'Etudes sur les Sources du Droit en l'Honneur de François Geny, Tome III - Les Sources des Diverses Branches du Droit** içinde, Paris: Librairie du Recueil Sirey, 1935, pp. 423-426; Georges Scelle, **Manuel de Droit International Public**, Paris: Domat-Montchrestien, 1948, pp. 578-582.

92 Hans Kelsen, "Théorie du Droit International Public", **Recueil des Cours de l'Académie de Droit International,** T. 84, 1953 (III), The Hague: Kluwer Law International, 2002, pp. 119-122; Kelsen, Principles of International Law,pp. 393-394.

93 Paul Guggenheim, **Traité de Droit International Public - Tome I,** Genève: Librairie de l'Université, Georg &Cie., 1953, pp. 149-157.

94 Benedetto Conforti, "Cours Général de Droit International Public", **Recueil des Cours de l'Académie de Droit International,** T. 212, 1988 (V), The Hague: Martinus Nijhoff Publishers, 1991, pp. 77-80; Benedetto Conforti, **International Law and the Role of Domestic Legal Systems,** René Provost ve Shauna Van Praagh (trans.), Dordrecht: Martinus Nijhoff Publishers, 1993, pp. 63-67; Benedetto Conforti ve Angelo Labella, **An Introduction to International Law**, Boston: Martinus Nıjhoff Publishers, 2012, pp. 39-41.

95 Neff, Justice Among Nations, p. 375 ff. Two interesting articles on Scelle's theory of international law and for detailed information see Hubert Thierry, "The European Tradition in International Law: Georges Scelle", **European Journal of International Law,** Vol. 1, 1990, pp. 193-209**;** Gökhan Güneysu, "Uluslararası Hukuka Sosyolojik Bakış***;* Georges** Scelle ve Uluslararası Hukuk Kuramı**", Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi,** T. 16, 2014, pp. 4117-4137.

Moreover, the Committee of Jurists didn't intend to enact a specific positive legal text that will be applied only to the League of Nations.[96] According to Scelle, these thoughts emerged as a result of common dualist prejudice. In the author's thinking, the legal system is a whole, and all the general principles to be adopted are part of not only domestic law but also international law.[97]

Thus, the author places the discussion in his own theory of international law and the monist method. Scelle states that he can't agree with either of following conclusions which are defended by the majority of authors that there is this third source of the law of nations distinct from the custom as well as conventional law; and the Court can apply it only subsidiarily, that is, in the absence of a customary or conventional rule.[98] He argues that a formal source of law is the adoption of the rule by a competent agent and converted into a positive rule of law. *The general rules of law* which are not conventional rules, are originally established by the custom or by the legislative bodies of states; or they are also created by international judges. The latter are jurisprudential sources and are the work of the judge judging in equity; in the first hypothesis, they remain legislative rules or domestic law.[99]

This is essentially what the preparers of the Statute of the International Court of Justice are interested in: they have attempted to create a separate source different from conventional law and customary law.[100] The general principles of law are not the general principles of international law. These are essentially the *rules* of domestic law that must be searched in the legal orders of States, especially in statute law. They are found in all States or at least great majority of them. These principles take place in the conscience of the civilized nations and thus, turn into international rules.[101]

However, as mentioned above, since, according to Scelle, the legal system is in a single structure, the general principles of law are part of both domestic and international law. Accordingly, in terms of the monist doctrine that the author is a proponent of, the general principles of Article 38, there is none other than the fact of customary law of the law of nations.[102] It can be understood that Scelle did not see any difference among the general principles of law and customary law because the writer eliminated the line between the domestic law and the international legal system.

96 Scelle, Essai sur les Sources, p. 424.
97 Scelle, Recueil des Cours, p. 437.
98 Scelle, Essai sur les Sources, p. 423.
99 Scelle, Essai sur les Sources, p. 423.
100 Scelle, Recueil des Cours, p. 436.
101 Scelle, Essai sur les Sources, p. 423.
102 Scelle, Essai sur les Sources, p. 424

Nevertheless, the famous jurist states that there is a nuance between clauses 2 and 3 of Article 38. In clause 2, special or general, any custom are referred; whereas clause 3 is only about general customs and not special customs. This is important in terms of hierarchy between norms, because in this case, the general principles will be applied primarily either of the particular customs, or the conventional rules which would be in contradiction with them.[103] According to Scelle, this last point is clearly contradictory to the generally accepted view in the doctrine[104] -which is indeed the case. However, the author considers that the secondary role attributed to the general principles of law does not correspond to the legal or sociological facts.[105]

2) Vienna School and the Pure Theory of Law; Kelsen, Guggenheim:

The Austrian theorist Hans Kelsen is the founder and the most prominent name of the Vienna School, or with other names given to their ideas such as *analytical positivism, critical positivism or neo-positivism*.[106] The most important thing in Kelsen's theory is the strict normative nature of his approach. As will be explained below, a chain is established between norms and each norm is based on the previous norm. However, the source of these norms is certainly not the natural law. The school of Vienna builds the system within the limits of positivism and opposes to natural law.

According to theory of Kelsen, the norm that regulates the creation of other norms is *superior* to those which created according to former. The norms regulated in accordance with the provisions of another norm are considered *inferior* to the latter. İn this sense, each *superior* norm is the source of another *inferior* norm.[107] At the top of the chain established between the norms and the authorities, Kelsen puts not a sovereign ruler, but a sovereign norm which he called *Grundnorm* (the basic norm). With regard to the content of this norm, Kelsen makes reference to international custom as the reality that creates the law.[108] Kelsen states that "*the basis of customary law is the general principle that we ought to behave in the way that our fellow men usually behave and*

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103 Scelle, Essai sur les Sources, p. 425; Scelle, Manuel de Droit International Public, p. 580. In contrast to his ideas in these publications in 1935 and 1948, Scelle stated in his lecture at the Hague in 1933 that if the treaties and customs could not bring a solution to a dispute, the judge will search a relevant norme in general principles of law. *Cf.* see Scelle, Recueil des Cours, p. 437.

104 Scelle, Essai sur les Sources, p. 425.

105 Scelle, Manuel de Droit International Public, p. 580.

106 Neff, A History of International Law, p. 367. Josef Kunz and, for a time, Alfred Verdross, can be cited as examples of Austrian international lawyers of this school.

107 Kelsen, Théorie du Droit International Public, p. 119; Hans Kelsen, Principles of International Law, p. 303.

108 Neff, A History of International Law, p. 368.

during a certain period of time used to behave."[109] Custom, as one of the two principles methods of creating international law with treaties, is the older and the original source of either general or particular international law.[110] The author abandoned dualism of positivism and constructed domestic and international law systems within a single hierarchy of norms and in this hierarchy, puts the international law above.

Kelsen argues that, law creating methods *viz.* sources of domestic laws are legislation and custom, and international law are treaties and custom.[111] In terms of implementation in concrete cases, treaties and particular customs have priority over general customs. If there is no treaty of particular customary law to applicable to the situation, then general custom will be applied. According to the author, the absence of any treaty or customary law applicable to a concrete case is logically impossible. The present international law will provide a solution for each concrete case, that means, there will always be an answer to the obligation of a State -or another subject of international law- to act or not to act in a certain way. If an international legal person is not given an international obligation to act in a certain way, it is free to act as it wishes, and the decision will be made in this way.[112] Of course, such a decision may not be morally or politically satisfactory. Only this dissatisfaction may justify the introduction of "gaps" in international law, as in any legal order.[113]

The idea that the bodies responsible for the application of international law fill such gaps with norms other than customary of conventional law implies that these bodies have the authority to create law if they deem necessary. According to Kelsen, the authority to create law under the name of filling the gaps means an extraordinary authorization. Nevertheless, from the positivist point of view, the author states that it is possible to recognize such a power through a treaty and consider the Statute of the International Court of Justice as an example for such power.[114]

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109 Kelsen, Principles of International Law, p. 307.

110 Kelsen, Principles of International Law, p. 304.

111 Kelsen, Théorie du Droit International Public, p. 120; Kelsen, Principles of International Law, p. 304.

112 Kelsen's thought reminds the Lotus Case. As it is known, in this case, in this case, the absence of a rule of limitation arising from international law for jurisdiction has been interpreted as the legitimacy of such behavior. Nevertheless, according to the jurisdiction based on the nationality of the victim on the high seas rule has changed over time. On the other hand, in the area of international law, which is dominated by positivism, Kelsen's approach is dominant, but there is a tendency to expand the scope of binding rules for States in various ways.

113 Kelsen, Théorie du Droit International Public, p. 121; Kelsen, Principles of International Law, p. 305.

114 Kelsen, Théorie du Droit International Public, pp. 121-122; Kelsen, Principles of International Law, pp. 306-307.

In the opinion of the author, the possibility of the Court applying the general principles of law recognized by civilized nations is only possible if the two other norms *viz.* treaty and custom, do not bring a rule in a case. Obviously, the provision of Article 38/1(c) presupposes the existence of gaps in international law. This means that in cases where the other two norms do not provide a satisfactory solution, the Court authorized in a case to apply a rule which it considers as a general principle of law.[115] The author, however, states that he is in doubt that the preparers of the Statute intended to give to the Court such an authorization. On the other hand, in the first paragraph of the Statute of the International Court of Justice, it is expressly stated that the duty of the Court is to act in accordance with international law. Accordingly, the application of these general principles of law would only be possible if they are part of international law. This means that they are included in the rules listed in clauses (a) and (b). The conclusion of Kelsen from this is that *clause (c) is superfluous.*[116]

The Swiss jurist Paul Guggenheim, one of the followers of Kelsen, thinks that, form a monist point of view, the general principles are the norms passed from domestic law to international law via customary law. He argues that the application of general principles that clearly recognized in the treaties falls within the scope of conventional law. If a principle isn't recognized in the treaty, then the validity of the principle shall be based on customary law. For this reason, the general principles of law are based on either conventional or customary law.[117] According to this author, there is no technical requirement for the inclusion of the principles taken from domestic law as a source to the Statute because it is possible to resolve all international legal disputes by using custom and treaty. Accordingly, there will not be any situation requiring to declare *non liquet.*[118]

3) A modern approach to the monist theory of the superiority of domestic law; Conforti:

The monist theory that defended the dominance of domestic law over international law, which had important representatives of German international lawyers such as Jellinek, Zorn, Wenzel, has lost its effectiveness since the beginning of the 20th century. This theory affirms the supremacy of the law, and the whole legal order emerges as a result of the activities of State bodies. International treaties gain their validity only through the recognition by a law in domestic law.[119]

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115 Kelsen, Principles of International Law, p. 393.
116 Kelsen, Principles of International Law, pp. 393-394.
117 Guggenheim, Traité de Droit International Public, p. 151.
118 Guggenheim, Traité de Droit International Public, p. 150.
119 See for more information Lazare Kopelmanas, "Du Conflict entre le Traité International et

Conforti, the Italian lawyer, will come to a similar point with the other monists above *viz.* Scelle, Kelsen, Guggenheim, by defending a different method of monism which is domestic law being relatively dominant to international law. The existence of international law is based on the old theory of self-limitation because there is no supra-state organs to make the law.[120] According to Conforti, as of today, the way of ensuring the effectiveness of international law may be possible through the "domestic legal operators". Because the international law field has never had an integrated organization; there is not an absolute sanction power. Conforti consider that the enforcement of international law rules goes through the domestic legal systems of States. Thus, domestic law networks should be effective on this regard because a domestic legal system could prevent a State from violating international law.[121]

Conforti will also hand over the function of law creation in international law to domestic legal mechanisms. The rules of international law are formed by the compatibility of institutions' procedures in domestic law. For this reason, all kinds of domestic proceedings have an international dimension as long as they have an impact on the international interests of the State. There is no distinction between domestic law and international law; both arises from the actions of the same legal person *viz.* State. All kinds of competent bodies, even if they are not authorized in international relations, contribute to the development of the custom.[122]

Such a contribution is more evident in the general principles of law recognized by civilized nations. According to the author, in this case, Article 38/1(c) doesn't mean anything other than a particular kind of custom.[123] From this point, the author sets out parallel rules in terms of the application of the general principles of domestic laws in international law. Accordingly, these principles should primarily exist in the majority of States' domestic laws and be implemented on a regular basis. On the other hand, from the point of view of States, these principles must be considered mandatory in terms of both domestic law and international law. The Italian jurists, in his own words, defines a *sui generis* category of customary international law.[124]

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la Loi Interne" **Revue de Droit International et de Législation Comparée**, T. 18, 1937, pp. 326-330.

120 Kolb, La Bonne Foi en Droit International Public, para. 79.

121 Conforti, International Law and the Role of Domestic Legal Systems, pp. 8-10.

122 Conforti, Recueil des Cours, pp. 63-64; Conforti, International Law and the Role of Domestic Legal Systems, pp. 49-50.

123 Conforti, Recueil des Cours, p. 77; Conforti, International Law and the Role of Domestic Legal Systems, p. 63; Conforti, International Law and the Role of Domestic Legal Systems, p. 39.

124 Conforti, Recueil des Cours, p. 78; Conforti, International Law and the Role of Domestic Legal Systems, p. 64; Conforti, International Law and the Role of Domestic Legal Systems, p. 40.

C) General principles of law as subsidiary means for determining the applicable rule of law

While most of the above-mentioned authors attempt to shift the general principles of law in clause 38/1(c) into the norms contained in (a) and (b), a thought substitutes them in clause (d). The Polish jurist Makowski can be given as an example to the authors of this view.[125] According to the author, the general principles of law have only interpretative functions in a way similar to that envisaged in the Statute for judicial decisions and doctrine.[126]

> "*As for paragraph three, it has been even more subject to criticism than the first two. In fact, the judge does not apply the general principles of law in a concrete case, as he does with conventional or customary rules; at most, it can use them as an auxiliary means to discover and recognize a norm applicable to this case. Consequently, this provision should be written either as paragraph four or put these two paragraphs together in one."*[127]

Cheng states that Salvioli does not see more than a means of interpretation and application of treaty and custom in general principles of law.[128] Tunkin also sees something similar.[129] From Turkish doctrine, Akipek travels along the shores of this idea: As a source of positive law, Akipek accepts only the custom and the treaty. The author considers that to seeing a third source qualification in the general principles of law is to go beyond positive law. On the other hand, the Statute gives the Court the authority to use the sources of domestic law and, if necessary, to use of auxiliary sources such as doctrine and jurisprudence. Hence, the author says that if it is necessary to give a place to the principles of domestic law, perhaps it may be included among the auxiliary sources, but in the end, he indicates that they can be determined by the doctrine through induction; and therefore, he is opposed to giving an independent place even in the context of auxiliary sources.[130]

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125 French writers Ch. Rousseau and Charles Crozat state that Makowski identified the general principles of law with equity. In accordance with the references given by authors, it is true that Makowski used in his Hague Academy lesson which can be understood that he considered general principles of law and equity as the same. However, he makes his assessment on the basis of the Court Statute in a different way. *Cf.* see Charles Rousseau, **Principes Généraux du Droit International Public**, **Tome I: Introduction - Sources,** Paris: Éditions A. Pedone, 1944, p. 897; Charles Crozat, **Devletler Umumi Hukuku, Cilt: I, Umumi Prensipler ve Tarihçe**, Edip F. Çelik (tran.), İstanbul: İsmail Akgün Matbaası, 1950, p. 138.

126 Kolb, La Bonne Foi en Droit International Public, para. 100-101.

127 Julien Makowski, "L'Organisation Actuelle de l'Arbitrage International", **Recueil des Cours de l'Académie de Droit International**, T. 36, 1931 (II), Paris: Librairie du Recueil Sirey, 1932, pp. 360-361.

128 Cheng, General Principles of Law, p. 5, footnote 15.

129 Tunkin, Collected Courses, p. 106.

130 Akipek, Devletler Hukuku, pp. 68-69.

D) General principles of law as the authority to decide *ex aequo et bono*

In addition to his other criticisms[131], Kopelmanas reduces the general principles of law to the same level of equity as in paragraph 2 of Article 38, which can only be applied if the parties agree thereto.[132]

The author considers that the arbitral awards put forward by the advocates of the general principles of law have not been adequately examined, and according to the author, arbitration decisions cannot provide sufficient evidence on the existence of this source.[133] On the other hand, the idea that common principles can be found in different legal systems is also wrong. Each of these legal systems regulates different social relations -and this difference also applies to international law and domestic law.[134]

Another objection of the author is related to legal technique. Kopelmanas connects the creation of sources exclusively to the human will. Moreover, there is a body in charge in every legal order for creation of each formal source, and these organs regulates the law. The general principles of law taken from domestic law are not regulated by the competent bodies of international law and it isn't possible for those to be the sources of this order.[135]

Kopelmanas, at one point, puts close thoughts to the ideas of Anzilotti: According to the author, the judge who based his judgment on general principles of law makes legislative process because these principles are unfamiliar with international law and become international norms only by the judge who designs them according to international law. At this point, the author differs from Anzilotti: Eventually, it is impossible, in the opinion of the author, to draw a border between the application of a general principle and the decision based on equity (*équité*). Therefore, the provision 38/3 of the Statute gives the judge the authority to decide on the basis of equity. However, according to the last paragraph of Article 38, the parties must have explicitly declared their consent for a decision to be made on the basis of equity (*ex aequo et bono*). If we don't want to authorize the judge to create law in international law -and the Committee of Jurists who drafted the Statute clearly opposed that- the paragraph 3 related general principles of law becomes completely meaningless.[136]

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131 Kopelmanas, Essai d'une Théorie des Sources Formelles, p. 123; Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 303-308.

132 Kolb, La Bonne Foi en Droit International Public, para. 102-107.

133 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 288-290.

134 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), p. 295.

135 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 295-296.

136 Kopelmanas, Essai d'une Théorie des Sources Formelles, p. 123; Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 303-308.

E) *A priori* rejection of Common legal principles in different nations

Another group of lawyers rejects the possibility that there may be common principles of different societies. According to these authors, each legal system is based on its own historical, cultural, political, ideological, economic and social elements, and it is not possible to have common principles among the different structures built on these foundations. This view is especially advocated by the doctrine of socialist international law and Kelsen[137] seems to be joining this view. The Soviet writer Tunkin[138] appears as the protagonist to whom this thought is frequently referred. Herczegh[139] and Kopelmanas[140] also seem to emphasize this difference between societies.[141]

Among his other criticisms about the Court's Statute, Kopelmanas also opposes the idea that it is possible to determine a number of common general principles in different legal systems. The author asserts that it is difficult to determine the common general principles in this way by pointing out the differences between societies.[142] In addition, social relations which are the basis for the formation of legal rules are quite different between international law and domestic law. The common existence of certain principles in domestic law will not result as the implementation of these principles in international law if the existence of similar social cohesion is not proven.[143]

Concerning the general principles of law recognized by civilized nations in the context of the Statute of the International Court of Justice, Kelsen is suspicious of the existence of such common principles in the legal systems of civilized nations, particularly in view of the ideological opposition that *separates the communist and capitalist, autocratic and democratic legal systems*.[144]

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137 Kelsen, Principles of International Law, p. 393.

138 Tunkin, Collected Courses, p. 102; Grigory I. Tunkin, **Theory of International Law,** William E. Butler (Tran.), Massachusetts: Harward University Press, 1974, p. 199.

139 Herczegh, The General Principles of Law Recognized by Civilized Nations, p. 18.

140 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 294-295.

141 Kolb, La Bonne Foi en Droit International Public, para. 62-69. For similar ideas put forward by French author Charles Chumont, see Pellet, Article 38, p. 769; Kolb, La Bonne Foi en Droit International Public, para. 68, footnote 132.

142 According to the author, for example, how will common principles be mentioned between European countries like industrial England, mostly proletarian Germany or middle-class bourgeois France etc.? The creation of treaties is completely different in German and French law. The principle of *clausula rebus sic stantibus* is interpreted differently even by the two judicial bodies of France (La Cour de Cassation and Conseil d'Etat). For other examples given by the author, see Kopelmanas, Quelques Réflexions au Sujet de l'Article 38 (3), pp. 294-295.

143 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), p. 295.

144 Kelsen, Principles of International Law, p. 393.

Even though it has been dissolved as of today, the Soviet doctrine, and in particular Tunkin, is frequently referred for the critiques of the formal source nature of the general principles of law.[145] The main point that the Soviet jurist builds his thoughts is that the Statutes of the PCIJ and the ICJ are two separate Conventions. The new Statute appeared under different conditions than former and was signed by different parties. In this case, according to the author, the comments to be given to the provisions should not always be the same.[146]

Tunkin criticizes the studies in the Western literature on general principles of law. First of all, the author doesn't find acceptable the references given to arbitration practices in order to verify these principles. According to him, these practices took place between a certain number of *bourgeois* States and cannot be regarded as "general" practices in this sense.[147] The other point of criticism of his, on the other hand, is that the starting point of the studies is always *travaux préparatoires* of the Statute of the Permanent Court of International Justice.[148]Although in some instances the opinions of the lawyers in the Committee are important in terms of the interpretation technique of international treaties, they are mostly composed of representatives of the *bourgeois* legal systems, and the idea in their minds is that *the Court will resolve the disputes by using the general principles contained in the national legal systems of these bourgeois States.*[149]

However, according to the author, this method will not be accepted on the basis of the new Court Statute adopted at the San Francisco Conference. The provision 38/1(c) of the new Statute should be interpreted together with the addition to the initial paragraph which follows: "*whose function is to decide in accordance with international law such disputes as are submitted to it*". With this amendment, it is not possible to interpret this provision simply as "the common general principles in all civilized nations". It is clearly the general

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145 See Michel Virally, "The Sources of International Law" Max Sørensen (Ed.), **Manual of Public International Law** içinde, London: Palgrave McMillan, 1968, p. 147.; Johan G. Lammers, "General Principles of Law Recognized by Civilized Nations", Frits Kalshoven and others (Ed.), **Essays on the Development of the International Legal Order,** Alphen aan den Rijn: Sijthoff and Noordhoff, 1980, pp. 54-55; G.J.H. Van Hoof, **Rethinking the Sources of International Law,** Deventer: Kluwer Academic Publishers, 1983, p. 132; Fabian O. Raimondo, **General Principles of Law in the Decisions of International Criminal Courts and Tribunals,** PhD Thesis, Amsterdam Center for International Law (ACIL), 2007, pp. 42-43; Hüseyin Pazarcı, **Uluslararası Hukuk Dersleri - 1. Kitap,** 12. Edition, Ankara: Turhan, 2014, p. 238;

146 Tunkin, Collected Courses, pp. 98-99.

147 Tunkin, Theory of International Law, p. 198.

148 Tunkin, Collected Courses, p. 98. For the views of different *bourgeois* and socialist writers, see Tunkin, Theory of International Law, pp. 190-197; Tunkin, Collected Courses, pp. 99-101, 104-105.

149 Tunkin, Collected Courses, p. 99.

principles of international law, expressed here as the general principles of law. In this case, the fact that a principles takes place in the legal systems of all States will not make these principles the general principles of law. To be implemented in international law, they must be part of this legal system.[150]

Tunkin states that there is no common existence of any normative principles between two opposing systems *viz.* the socialist and capitalist legal systems. Even the rules that are seen as similar in these systems are actually different from each other. Because, in the author's view, the rules of law are not simple rules of conduct, but social rules with social content. Different class demands, objectives and different roles in these different societies, differentiate the norms of socialist and capitalist legal systems.[151] As a result, Tunkin argues that there will be no common normative legal principles between these two legal systems. However, the author acknowledges that some general legal concepts, logic rules, and some legal techniques that can be used in the application and interpretation of law can take place in common. But such "principles" are not normative; do not create rights and obligations. Tunkin gives the maxims *lex specialis derogat generali, lex posterior derogat priori, nemo plus juris transferre potest quam ipse habet* as examples.[152]

The application of such non-normative principles in international law would only be possible if they were recognized by States as applicable in international law, in other words, by an international treaty or custom. Therefore, the author accepts only conventional and customary law as sources of international law.[153] General principles of law cannot form the basis of a decision, but they can be used in the application and interpretation of other international law rules.[154]

III. The Rise of Neo-Naturalism in the Twentieth Century: the General Principles of Law as an Autonomous Source of International Law

Positivist and voluntarist authors have never doubted to reject the autonomy of the general principles of law. In particular, for authors with dualist views, the adoption of a distinct source of law based on the principles that derived from domestic law, would also contradict with the views of this very authors about the theory of international law. Some of these authors have tried to solve the problem on the basis of the classical theory and conventional nature of the Statute. For those who are not very strict in their opinions, in order to be the norm of positive law, it is sufficient for the general principles of law that they recognized in domestic laws.

150 Tunkin, Collected Courses, p. 99-101.
151 Tunkin, Collected Courses, p. 102; Tunkin, Theory of International Law, p. 199.
152 Tunkin, Theory of International Law, p. 200.
153 Tunkin, Theory of International Law, p. 202.
154 Tunkin, Collected Courses, p. 106.

The 19th Century has passed with the absolute dominance of positivism in international law doctrine. The period between the two World Wars was very lively and productive in terms of discussions on the theory of international law. With the impact of the World War I, serious criticisms directed to the strict positivism. Apart from the sociological theory and the internal demands for the reform of dogmatic positivism like Vienna School or neo-positivism, theorists, in this period, try also to interpret the natural law with new understandings. Lauterpacht announced in his book Private Law Sources and Analogies of International Law in 1927 that "*the dogmatic positivism of ten years ago is no longer predominant*". The author calls this new era as "*the renaissance of natural law*", and this rebirth is evolving with the increasing awareness of the *inadequacy of the rigid positivist method*. He argues that this is different from classical natural law, but rather "*the modern 'natural law with changing contents', 'the sense of right', 'the social solidarity', or 'the engineering' law in terms of promoting the ends of the international society.*[155]

In the same or later period with Lauterpacht, the writers such as Louis le Fur, Alfred Verdross, James Leslie Brierly, James Brown Scott and Erich Kaufmann can be mentioned as the examples of international lawyers on the side of natural law in this challenge.

For the naturalist authors, the inclusion of the general principles of law in the Statute of PCIJ has been seen as a life-saver and welcomed. These writers perceived this new development as a position gained in the battle they entered with positivist thought. The general principles of law imply for naturalist writers, a number of general rules of law outside the will of States. In this respect, one of the important areas where this above-mentioned theoretical debates took place is about the sources of international law and, in particular, the existence of the general principles of law as an autonomous source and the nature of these principles. At this point, the contributions of Lauterpacht and especially Verdross to the international legal literature have been enormous.

For these reasons, among authors who have a naturalist approach, the opinions of the four authors whose thoughts should have a special place of their own, will be examined under their own headings in order to ensure that the connection between reasoning is not broken.

[155] Lauterpacht, Private Law Analogies, p. 58, dipnot 7.

A) Hersch Lauterpacht:

Lauterpacht[156] argues that it isn't correct to conclude that there is a gap in the law and that international law cannot be applied if there is no international treaty or custom to apply in a legal dispute. In these cases, we also have a reserve source: the general principles of law recognized by civilized nations.[157]

According to the famous jurist, these principles cannot be the principles of moral justice apart from the law. They are not the rules of equity in the ethical sense, or the rules of theoretical law filtered through the legal and moral principles. "*They are, in the first instance, those principles of law, private and public, which contemplation of the legal experience of the civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character.*"[158]

He argues that the paragraph 3 of Article 38 of the Statute is a *declarative* provision, but it is rare that the recognition of an existing social and legal reality has had a revolutionary effect than this article.[159] He sees the inclusion of the general principles of law to the Statute as an important landmark in international law since the States expressly recognized a third source independent of custom and treaty.[160]This article is declarative because the previous arbitration decisions and arbitration treaties clearly recognize the general principles of law as a source for decision and beyond that, it is declarative because the general principles of law expresses a social necessity which surpass the consensus-based conventions and customary law, often incomplete and controversial and law in their developments, and without this social necessity, the development of international law or any other law is difficult.[161]

With the beginning of the modern international arbitration, States have always authorized the arbitrators to use of norms other than custom and treaty[162] and an opposite example is very rare. This fact points to awareness of

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156 For two separate studies on Hersch Lauterpacht's contribution to international law, see Martti Koskenniemi, **The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960,** Cambridge: Cambridge University Press, 2004, pp. 353-412; Wilfred Jenks, "Hersch Lauterpacht: The Scholar as a Prophet", **British Year Book of International Law**, Vol. 36, 1960, pp. 1-103.

157 Hersch Lauterpacht, **International Law - Being the Collected Papers of Hersch Lauterpacht - Vol. I - The General Works,** Elihu Lauterpacht (Ed.), Cambridge: Cambridge University Press, 1978, pp. 68-69.

158 Lauterpacht, Collected Papers, p. 69.

159 Hersch Lauterpacht, "Droit de la Paix", **Recueil des Cours de l'Academie de Droit International,** T. 62, 1937 (IV), Paris: Librairie du Recueil Sirey, 1938, p. 163.

160 L. Oppenheim - H. Lauterpacht (Ed.), **International Law, A Treatise, Vol. I,** 8. Ed., London: Longman Green and Co., 1955, p. 30.

161 Lauterpacht, Recueil des Cours, p. 164.

162 Lauterpacht, Private Law Analogies, p. 61-62. For the examples of arbitration practices

the inadequacy of these two norms. Lauterpacht consider that this practice *viz.* the recognition of effectiveness of rules other than treaty and custom, itself has become a customary rule of international law.[163] The author, however, underlines that the application of the general principles of law or the authorization of the Court by the "rules of justice and equity", doesn't grant the judge the jurisdiction to decide *ex aequo et bono*.[164]

According to Lauterpacht, Article 38 of the Statute of the PCIJ puts an end to the *embarrassing uncertainty* as to the sources of law to be applied by international courts.It has a guiding characteristic in many ways. It refers to a fundamental and competent abandonment of misguided doctrine that international law consists of a set of self-sufficient rules.

The Committee of Jurists were also aware of the importance of the text they prepare. At the end of all discussions, the agreement reached by mutual compromises was also the rejection of dogmatic positivism.[165] On the other hand, referring to the recognition by civilized nations means the rejection of the naturalist view. In this sense, this practice is of a nature that can be characterized as *Grotian* view[166], which, as the founding father of international law did, focuses on the will of States but doesn't completely detach this area from the general legal experience and practices of humanity.[167] In addition to the practices before the establishment of the Court, also after its establishment, although they were not bound with the Statute, some international tribunals have accepted Article 38 as being declaratory of the existing law and have taken the sources listed here as basis of their judgments.[168] In this respect, the author also doesn't share the opinion of some positivists (specially Anzilotti's) that the authorization in the Statute will be valid only for PCIJ (or ICJ).[169] The fact that the Court (and its successor) rarely used its authority to apply the general principles of law is because, in the case of disputes up to that time, the customary and conventional rules were sufficient in terms of deciding the

about the subject given by the author, see Hersch Lauterpacht, **The Function of Law in the International Community,** Oxford: Oxford University Press, 1933, Reprint 2011, pp. 123-126.

163 Lauterpacht, Private Law Analogies, pp. 62-63; Lauterpacht, Recueil des Cours, p. 164, footnote 1.

164 Lauterpacht, Private Law Analogies, pp. 63-64.

165 Lauterpacht, Private Law Analogies, pp. 67-68; Oppenheim-Lauterpacht, International Law, pp. 30-31.

166 See Hersch Lauterpacht, "The Grotian Tradition in International Law", **British Year Book of International Law**, Vol. 23, 1946, pp. 1-53.

167 Oppenheim-Lauterpacht, International Law, Vol. I, pp. 30-31. See also Lauterpacht, Collected Papers, p. 74-75.

168 Oppenheim-Lauterpacht, International Law, Vol. I, p. 30; Lauterpacht, Collected Papers, p. 75.

169 See Lauterpacht, Recueil des Cours, pp. 166-167.

case.[170]

The paragraph 3 of Article 38 was put against declaration of *non liquet* in dispute which cannot be solved by custom and treaty and the author states that *non liquet* theory hasn't been applied in arbitration practices in a long time.[171] Therefore, the role of these principle is the safety valve: an insurance/ assurance against which hasn't been realized, but to a continuing danger, that is, the Court cannot find a norm to apply in a conflict. The provision 38/3 has eliminated the danger of *non liquet* and this is its primary duty.[172] Furthermore, according to the author, prohibition of *non liquet* is also a general principle of law recognized by civilized nations.[173]

On the other hand, this provision doesn't eliminate the wills of States declared in treaties and customs. On the contrary, it puts them on top the hierarchies between sources. The judge must give priority to the norms that parties clearly express their will. However, the strict implementation of this order doesn't grant fruitful results. How, although they are at the second place in the ranking, the customs affect the treaties, because the latter need to be interpreted in the light of the customs; these two norms must be interpreted in accordance with the general principles of law.[174]

As for the question, "*What is the exact meaning of those general principles of law as recognized by civilized nations?*", Lauterpacht offers, to clarify this issue, to look three sources: First of all, it may be possible to determine what the concept is from arbitration practices before the establishment of the Permanent Court of International Justice. Secondly, this question can be sought on the basis of simple logical inferences that can be filtered through the content of Article 38/3. The Statute refers to the general principles of law that do not specifically belong to international law or to correspond *ex aequo et bono*. Consequently, the Court may apply for a particular case the principles of criminal law or administrative law; but generally, the principles of private law as a whole must be understood in the sense of this provision. Thirdly, the discussions of the jurists in the Committee preparing the Statute has some clues on the issue. For example, the President of the Committee, Descamps, exemplified the principle of *res judicata* in the Pious Fund Case. Another member Phillimore, stated

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170 Oppenheim-Lauterpacht, International Law, Vol. I, pp. 29-30. For the examples given by the author, see Hersch Lauterpacht, **The Development of the International Law by the International Court,** London: Stevens and Sons Limited, 1958, pp. 158-172; Lauterpacht, Recueil des Cours, pp. 166-167; Lauterpacht, Private Law Analogies, pp. 293-296; Lauterpacht, Collected Papers, pp. 69-70.

171 Lauterpacht, Recueil des Cours, p. 165.

172 Lauterpacht, Recueil des Cours, p. 167-169.

173 Lauterpacht, Recueil des Cours, p. 166.

174 Lauterpacht, Recueil des Cours, p. 166.

about the aforementioned rule that it is of the same nature as any written rule and that the general principles of common law are also a part of international law and can be applied in international law.[175]

B) Alfred Verdross

Austrian author Verdross believes that the idea of the positivist doctrine that States will be bound by only their implicit or explicit will is entirely *dogmatic*. On the other hand, it defends a realist method which requires looking for the practice of international law.[176] The opinion of dominant dogmatic positivism[177] that there is only two sources of international law doesn't reflect the realities of international law.[178]

First of all, there is a large number of arbitration decision that apply not only custom and treaty, but also a third set of rules of law, namely the general principles of law.[179] This shows that the disputes between States are resolved not only by conventional and customary law, but also by using the general principles of the law found in the domestic laws of the civilized States.[180] Verdross concludes from these practices that the international judicial bodies have never accepted a pure positivist doctrine.[181]

The author states that some may claim this argument that the arbitration authorities have overstepped their powers to evaluate the sources of law in deciding the cases. According to him, however, that this objection would be overruled by the fact that the States parties to the cases didn't raise any objection on this issue. States have accepted all these decisions.[182] Consequently, it can be said that the States have found the application of these principles as appropriate. States would have objected to these arbitration awards if they had any possible opinion that the general principles of law were not binding on them.[183]

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175 Lauterpacht, Private Law Analogies, pp. 69-70.

176 Alfred Verdross, "Les Principes Généraux du Droit Applicables aux Rapports Internationaux",**Revue Générale de Droit International Public**, T. 45, 1938, p. 44.

177 Alfred Verdross, "Droit International de la Paix", **Recueil des Cours de l'Academie de Droit International**, T. 30, 1929 (V), Paris: Librairie Hachette, 1931, p. 301.

178 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 383.

179 The author gives examples of different arbitration decisions, see Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 384. See also Alfred Verdross, "Les Principes Généraux du Droit dans la Jurisprudence Internationale", **Recueil des Cours de l'Academie de Droit International**, T. 52, 1935 (II), Paris: Librairie du Recueil Sirey, 1936, pp. 195-251.

180 Verdross, Droit International de la Paix, p. 302.

181 Verdross, Principes Généraux du Droit Applicables aux Rapports Internationaux, p. 45.

182 Verdross, Principes Généraux du Droit et le Droit des Gens, p. 490-491.

183 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 384.

And finally, Article 38 of the Statute of PCIJ obliges the Court to implement the general principles of law recognized by civilized nations, unless there is a conventional or customary rule in the matter.[184] Similar provisions are also included in many arbitration agreements.[185]

The conclusion to be obtained from this information is that Article 38/3 of the Statute doesn't provide a new source for international law; but it has codified a long-recognized principle in international practice.[186]

One of the critical issues here is that will these principles be effective only on the Hague Court because of the provision 38/3 of the Statute; or, in the same way, on the States and, in the absence of a clear provision, on any international court or arbitral tribunal. Verdross doesn't share the idea of positivists that it is only the Court that is obliged to apply these principles and it is not obligatory for other tribunals and States. According to the author, such an interpretation contradicts the new jurisprudence of that time.[187] Verdross argues that even if a provision in this direction is not included in the arbitration, the judge whose duty is to apply international law, should determine the sources to be applied by using Article 38 of the Court's Statute. And also, if States had not been convinced that these principles were internationally valid, they wouldn't have accepted that the new Court had such authority.[188]

Verdross opposes the view that the general principles of law are natural law rules. He thinks that Article 38, in conformity with the international law, gives the Court the authority to apply general principles of law *viz.* positive principles adopted by civilized nations. However, in order for a principle to be compulsory in the international sphere, it is not sufficient to be accepted in the domestic law of one or more States. Again, it is not enough to be written in the laws of several States. On the contrary, this principle must have been the subject of an intense practice and must also have been adopted in domestic laws not by all civilized States, but of the civilized States in general.[189]

These principles are the subsidiary sources in the law of nations.[190] If there is a customary or conventional rule that eliminates a general principle of law;

184 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, pp. 384-385.

185 For different arbitration agreements given as examples by the author, see Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 385.

186 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 385.

187 For the examples given by the author, see Verdross, Principes Généraux dans la Jurisprudence Internationale, p. 232; Verdross, Droit International de la Paix, p. 302. See also Verdross, Principes Généraux du Droit et le Droit des Gens, p. 496; Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 385.

188 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 386.

189 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, pp. 387-388.

190 Verdross, Droit International de la Paix, p. 303.

these are the norms that will be applied in first place. Such a situation is not extraordinary. In fact, it is a requirement of the generally accepted principle that *lex specialis derogat legi generali*. As a result, the special rules of international law, that is, the treaty and convention, have priority over the principles of law which do not belong to international law but which are common in the internal laws of civilized States. This natural order was also accepted by the Committee of Jurists who prepared the Statute,[191] and it is envisaged to apply this sort of ranking in the Statute at the beginning.[192]

C) Louis le Fur

The French jurist le Fur also presents the practices of the modern arbitration and the PCIJ and the texts adopted in the Hague Conferences and the Court's Statute as the examples of the recognition of the general principles of law. In the same way, the author has examined the discussions in the preparation of the Statute and concludes that the authority given to the Court is not new.[193]

According to the author, in the context of Article 38/3, for the existence of a general principle of law, two conditions must be present:

First, there should be a situation that requires an urgent implementation of the superior principle of justice, a direct consequence of objective law. According to the author, it is an exaggeration to say that the general principles of law are confused with natural law or objective law. In fact, it is possible to reduce the principles covered by natural law to two to abide by the promise given by free will, to compensate for the damage caused by injustice. However, the general principles of law within the scope of 38/3 are numerous. However, it would not be wrong to say that, if they are not confused, they are in very close relationship. The general principles of law come through directly from natural law or objective law. They both derive their source from the concepts of justice and morality which is universal and can be said to be natural in man.

Secondly, however, this requirement is not sufficient. In order for the general principles of law to be regarded as objective international law, they must also be found in the positive domestic law of almost all civilized States; in other words, they must recognized by the positive law of the States.[194]

This character distinguishes the principles set out in the Article from the principles of international law. Because the principles of international law are recognized directly by international law practice and they form the international

191 Verdross, Principes Généraux du Droit et le Droit des Gens, pp. 494-495.
192 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 388.
193 Louis le Fur, "Droit International de la Paix", **Recueil des Cours de l'Academie de Droit International,** T. 54, 1935 (IV), Paris: Librairie du Recueil Sirey, 1936, pp. 199-204.
194 Le Fur, Recueil des Cours, p. 205.

law directly. In the Statute, the general principles of international law cannot be pointed out; because in this case it will be an unnecessary repetition with paragraph 2.[195] Moreover, the general principles of law can only be a part of international law if they are recognized as positive in domestic law. Often these principles are the principles of civil law; and there is a simple reason for this that the conflicts often arise between individuals and must be solved first.[196]

Do these principles have to be recognized by all States without exception, or can they be proposed against a State that has never accepted them? According to Le Fur, the answer to these questions is clear: general principles are a reflection of objective law and are binding on both States and individuals.[197] Sometimes States may also have norms that are the reflection of objective law in their domestic law but they do not become the rules of international law. The fact that a few states have placed a rule in domestic law is not sufficient in terms of becoming the rule of international law in the context of Article 38/3.

Le Fur also considers that the application of the general principles of law is only possible in the absence of a provision in customary and conventional law to settle the case. The general principles of law completes the other two sources. Furthermore, the general principles of law have another function: they enable the interpretation and clarification of an international treaty or customary rule. In this case, the general principles of law have a dual function: interpretative and complementary.[198]

D) Kotaro Tanaka

The dissenting opinion of Tanaka in the South West Africa Case[199]is frequently cited in studies concerning the general principles of law in the doctrine of international law. In this case, the applicant States, as one of their arguments, relied on the general principles of law recognized by civilized nations under Article 38/1(c) of the Statute. Judge Tanaka, regarding this claim of the parties, examines whether the prohibition of discrimination that forbids the *apartheid* practice can be considered within the meaning of this article of the Statute.

The Japanese Judge states that the meaning of the provision of the Statute is not very clear. In this case, Tanaka would first oppose the reduction of these general principles to the principles of private law or principles of procedural

195 Louis le Fur, **Précis de Droit International Public**, 4. Ed., Paris: Librairie Dalloz, 1939, p. 246.
196 Le Fur, Recueil des Cours, pp. 205-206.
197 Le Fur, Recueil des Cours, p. 207.
198 Le Fur, Recueil des Cours, p. 213.
199 **Dissenting Opinion of Judge Tanaka, South West Africa, Second Phase**, Judgment, ICJ Reports, 1966, pp. 250-324.

law. Since there is no qualification for what the "general principles of law", the expression of law here must be understood to meet all branches of law; including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc. As for the analogies to be drawn, he refers the ideas of Judge McNair in his separate opinion to the Advisory Opinion of the Court for the International Status of South West Africa that "*not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules*". It would not be right to reduce these principles to the written provisions and institutions of national law. On the contrary, it should be extended to the basic concepts of each branch of law as long as they meet the requirement of being recognized by the civilized nations.[200]

Tanaka, in his interpretation of Article 38/1(c), argues that human rights the protection of these rights are within the general principles set forth in this article. If a norm arises out of the will of the State and cannot be changed even with this will *because it is deeply rooted in the conscience of mankind and of any reasonable man*, it is possible to call it 'natural law' as the opposite of 'positive law'. In the constitutions of some States, it is the case that human rights are categorized as *"inalienable", "sacred", "eternal", "inviolate"*, etc. If we mention about *jus cogens* in international law which can't be changed by States, the rules about the protection of human rights can be considered as *jus cogens.*

Judge Tanaka says these thoughts can be criticized on the grounds that they have a dogmatic understanding of natural law. In this respect, he will continue his reasonings as follows:

> " (…) *it is undeniable that in Article 38, paragraph 1 (c), some natural law elements are inherent. It extends the concept of the source of international law beyond the limit of legal positivism according to which, the States being bound only by their own will, international law is nothing but the law of the consent and auto-limitation of the State. But this viewpoint, we believe, was clearly overruled by Article 38, paragraph 1 (c), by the fact that this provision does not require the consent of States as a condition of the recognition of the general principles. States which do not recognize this principle or even deny its validity are nevertheless subject to its rule. From this kind of source international law could have the foundation of its validity extended beyond the will of States, that is to say, into the sphere of natural law and assume an aspect of its supra-national and supra-positive character*."[201]

[200] Diss. Op. of Tanaka, South West Africa, pp. 294-295.
[201] Diss. Op. of Tanaka, South West Africa, p. 298.

Famous jurist states that the aim of eliminating the danger of *non liquet*, which is expressed as one of the important reasons for adopting Article 38/1-c, is the point of recognition of the inadequacy of positive law.[202] Tanaka makes his assessment of the order among the sources in Article 38 in accordance with the above considerations. According to the judge, from a voluntary/positivist point of view, first the application of the treaty and the custom, then of the general principles of law will be accepted. On the other hand, with the view of the supranational objective law, the general principles of law precede; and the other two norms will follow. Because, if we accept the convention and customary law as the concretization and expression of the general principles already exists, we give priority to this third source vis-à-vis the other two sources.[203]

IV. The Basis of the General Principles of Law

A) The General Principles of Law Derived from Domestic Laws as an Autonomous Source of International Law

Many international jurists have taken into account the ideas that emerged in the Committee of Jurists on the preparation of the Statute of the International Court of Justice, and the words "recognized by civilized nations" in the Statute to explain these general principles.[204]In the Committee, Lord Phillimore, in response to the question of Lapradelle how to determine these general principles, states that these principles *accepted by all nations in foro domestico, such as certain principles of procedure, the principle of good faith, and the principle of res judicata, etc*.[205] According to this view, the general principles of the law serve the purpose of filling the gaps arising from the convention and convention, which present a danger to the functioning of international law. For this purpose, the general principles discovered by a comparative study and available to meet international requirements, which are common in different domestic laws, can be transferred to international law through analogy.[206] This thought is defended by many jurists including Ch. De Visscher[207], Verdross[208],

202 Diss. Op. of Tanaka, South West Africa, p. 299.

203 Diss. Op. of Tanaka, South West Africa, p. 300.

204 Kolb, La Bonne Foi en Droit International Public, para. 110-121; Hugh Thirlway, **The Sources of International Law**, Oxford: Oxford University Press, 2014, p. 95.

205 Procès-Verbaux, p. 335.

206 Portugal submitted to the Court a comparative study of principles for free passage in different civilizations and legal systems in the Right of Passage Case, see **Right of Passage over Indian Territory, Merits**, Judgment, ICJ Reports, 1960, pp. 6-144.

207 Charles De Visscher, "Contribution à l'étude des Sources du Droit International", **Revue de Droit International et de Législation Comparée,** Vol. 14, 1933, pp. 405-406. For the same article of the author see also **Recueil d'Etudes sur les Sources du Droit en l'Honneur de François Geny, Tome III - Les Sources des Diverses Branches du Droit**, Paris: Librairie du Recueil Sirey, 1935, pp. 395-396.

208 Verdross, Droit International de la Paix, p. 302; Verdross, Études sur les Sources du Droit

Le Fur[209], Lauterpacht[210], Brierly[211], Ripert[212], Bourquin[213], Virally[214], McNair[215],

en l'Honneur de F. Geny, pp. 387- 388; Verdross, Principes Généraux du Droit Applicables aux Rapports Internationaux, p. 49.

209 Le Fur, Recueil des Cours, pp. 205-206; Le Fur, Précis de Droit International Public, p. 246.

210 Lauterpacht, Private Law Analogies, pp. 69-70; Oppenheim-Lauterpacht, International Law, Vol. I, p. 29.

211 James Leslie Brierly, **The Law of Nations - An Introduction to the International Law of Peace**, 5. Ed., Oxford: Oxford University Press, 1955, pp. 63-64; Andrew Clapham, **Brierly's Law of Nations,** 7. Ed., Oxford: Oxford University Press, 2012, p. 64; James Leslie Brierly, "Règles Générales du Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 58, 1936 (IV), Paris: Librairie du Recueil Sirey, 1937, pp. 77-78.

212 Georges Ripert, "Les Règles du Droit Civil Applicables aux Rapports Internationaux (Contribution à l'Etude des Principes Généraux du Droit Visés au Statut de la Cour Permanente de Justice Internationale)", **Recueil des Cours de l'Académie de Droit International**, T. 44, 1933 (II), Paris: Librairie du Recueil Sirey, 1934, p. 580.

213 Maurice Bourquin, "Règles Générales du Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 35, 1931 (I), Paris: Librairie du Recueil Sirey, 1932, p. 73-74.

214 "*Originating in municipal systems of law, or, more exactly, in municipal law in general, and constituting a distinct source, the general principles of law must be distinguished from the principles of inter- national law itself, which are in reality no more than those rules of international law which are derived from custom or treaty.*" See Michel Virally, "The Sources of International Law" Max Sørensen (Ed.), **Manual of Public International Law** içinde, London: Palgrave McMillan, 1968, pp. 143-148; See also Michel Virally, "Panorama du Droit International Contemporain", **Recueil des Cours de l'Académie de Droit International**, T. 183, 1983 (V), The Hague: Martinus Nijhoff Publishers, 1985, pp. 171-175.

215 "*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. 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.*" See **Separate Opinion By McNair**, **International Status of South West Africa**, Advisory Opinion, ICJ Reports, 1950, p. 148.

Habicht[216], Waldock[217], Sørensen[218], Schwarzenberger[219], Lachs[220], Paul De

[216] "*A grammatical interpretation must admit that this provision applies both to the general principles of the law of nations and to the general principles of national law. In practice, only the latter interest us, because we are of the opinion that the general principles of the law of the people can already find their application according to the paragraphs 1 and 2 of article 38, and that, if the paragraph 3 it is only a repetition. What we would like to emphasize is the fact that the paragraph 3 of Article 38 allows the Court to apply the general principles of law recognized by civilized nations in their domestic law.*" (My translation). See Max Habicht, "Le Pouvoir du Juge International de Statuer «ex aequo et bono»", **Recueil des Cours de l'Académie de Droit International**, T. 49, 1934 (III), Paris: Librairie du Recueil Sirey, 1935, pp. 286-287.

[217] "(…) *we further know that the text was then amended to its present form in order to make it plain that by "the general principles of law" was meant exclusively principles actually recognized and applied in national legal systems -in foro domestico, as Lord Phillimore explained.*" Humphrey Waldock, "General Course on Public International Law", **Recueil des Cours de l'Académie de Droit International**, T. 106, 1962 (II), The Hague: Kluwer Law International, 1993, p. 57.

[218] Max Sørensen, "Principes de Droit International Public", **Recueil des Cours de l'Académie de Droit International**, T. 101, 1960 (III), The Hague: A. W. Sijthoff, Leyde, 1961, pp. 18-34.

[219] Georg Schwarzenberger, **International Law as Applied by International Courts and Tribunals: I**, 3rd Ed., London: Stevens & Sons Limited, 1957, pp. 43-49.

[220] Manfred Lachs, "The Development and General Trends of International Law in Our Time (General Course in International Law)", **Collected Courses of Hague Academy of International Law**, 1980 (IV), The Hague/Boston/London: Martinus Nıjhoff Publishers, 1984, p. 195 and particularly 196. The author thinks that the principles of international law are either in the treaties, or, usually, related to custom.

Visscher[221], Abi-Saab[222], Rosenne[223], Dupuy[224], Thierry[225], Pellet[226], Cassese[227] and from Turkish doctrine Bilsel[228] and Eroğlu[229]. In addition, even though he didn't openly take a side, it is understood that Gündüz interpreted the Statute in this context.[230]

The main idea here is to strengthen the normative structure of international law. The preparers of the Statute of the Permanent Court of International Justice wanted to prevent the idea of the rigid positivism that the sources of international law are consisted solely of conventional and customary law. The idea to declare *non liquet*in a case if there are no rules to apply in these

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221 Paul de Visscher, "Cours Général de Droit International Public", **Recueil des Cours de l'Académie de Droit International**, T. 136, 1972 (II), The Hague: Kluwer Academic Publishers, 1993, pp. 112-119 (Particularly pp. 115-116).

222 Abi-Saab states that, with the reference to the Committee of Jurists preparing the Statute, he understands the expression in the Statute as principles derived from domestic law, in particular to strengthen the normative qualities of the other two sources. Therefore, these principles do not cover the principles of international law. Georges Abi-Saab, "Cours Général de Droit International Public", **Recueil des Cours de l'Académie de Droit International**, T. 207, 1987 (VII), The Hague: Martinus Nijhoff Publishers, 1996, pp. 188-189.

223 Shabtai Rosenne, **The Perplexities of Modern International Law,** Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 40-41.

224 "*The general principles of international law, unlike the preceding category, are proper to this legal order. Their origins are diverse, but they are essentially the product of the combined action of the international judge and the normative diplomacy of the States. The doctrine sometimes helps to define them. Contrary to the general principles of law recognized by civilized nations, they are often of contemporary enunciation.*" (My translation) Pierre-Marie Dupuy, "L'Unité de l'Ordre Juridique International. Cours Général de Droit International Public", **Recueil des Cours de l'Académie de Droit International**, T. 297, 2002, The Hague: Martinus Nijhoff Publishers, 2003, p. 182.

225 Hubert Thierry, "L'évolution du Droit International", **Recueil des Cours de l'Académie de Droit International,** T. 222, 1990 (III), The Hague: Martinus Nijhoff Publishers, 1991, pp. 39-40.

226 Alain Pellet, "Article 38", Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm ve Christian J. Tams (Ed.), **The Statute of International Court of Justice - A Commentary** içinde, 2. Ed., Oxford: Oxford University Press, 2012, pp. 764-773.

227 "*These principles (general principles of law) must not be confused with the general principles of international law which are sweeping and loose standards of conduct that can be deduced from treaty and customary rules by extracting and generalizing some of their most significant points*." Antonio Cassese, **International Law,** 2. Ed., Oxford: Oxford University Press, 2005, p. 188.

228 Cemil Bilsel, **Devletler Hukuku - Giriş,** 2. Ed., İstanbul: Kenan Basımevi, 1940, pp. 48-49.

229 HamzaEroğlu, **Devletler Umumi Hukuku - El Kitabı**, 2. Ed., Ankara: Turhan, 1984, pp. 86-88.

230 Aslan Gündüz, **Milletlerarası Hukuk Temel Belgeler ve Örnek Kararlar,** 8. Ed., İstanbul: Beta, 2015, p. 24-26.

two sources has been rejected.[231] In this way, the framework of the rules of international law to be applied was expanded. Hence, the judge's authority to reach a more equitable decision was made possible.

B) General Principles of Both Domestic and International Law as an Autonomous Source of International Law

Some jurists tend to extend the scope of Article 38/1(c). According to these authors, the general principles of law mentioned in the Article cover the principles of international law together with the common principles in different domestic legal orders.[232] The starting point of this idea is that the Statute did not use an epithet of law in which the principles would be derived; therefore, there is not an issue in inclusion of a number of international legal principles. At the same time, the idea of transferring the principles from internal law through analogy was also abandoned. The general principles of law are the general rules of law that are inherent in the concept of law itself. Wherever there is law, there are *legal experiences that are crystallized in these principles*, regardless of internal law or international law.[233] In this view, the strict dualist approach was clearly abandoned. This idea is defended by the authors such as Wolff[234], Ræstad[235], Kaufmann[236], Kellogg[237], Basdevant[238], Rousseau[239], Crozat[240],

231 See Procès-Verbaux, pp. 308, 315.

232 Kolb, La Bonne Foi en Droit International Public, para. 122-127; Thirlway, The Sources of International Law, pp. 95-96.

233 Kolb, La Bonne Foi en Droit International Public, para. 122.

234 Karl Wolff divides the general principles of law into three and states that the analogy is only necessary for the principles to be taken from domestic law. Furthermore, according to the author, the past practices of the general principles of law have made, not just certain principles, but the application of the general principles of law, the customary rule of law in general international law. See Karl Wolff, "Les Principes Généraux du Droit Applicables dans les Rapports Internationaux", **Recueil des Cours de l'Académie de Droit International**, T. 36, 1931 (I), Paris: Librairie du Recueil Sirey, 1931, p. 498.

235 Arnold Ræstad, "Droit Coutumier et Principes Généraux en Droit International", **Nordisk Tidsskrift for International Ret**, 4, 1933, pp. 61-84 (Particularly pp. 72-73).

236 Erich Kaufmann, "Règles Générales du Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 54, 1935 (IV), Paris: Librairie du Recueil Sirey, 1936, pp. 507-524.

237 Observations by Mr. Kellogg, PCIJ, Series A, No. 24, 1930, p. 40.

238 Jules Basdevant, "Règles Générales du Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 58, 1936 (IV), Paris: Librairie du Recueil Sirey, 1937, pp. 499-504 (Particularly p. 504.)

239 Charles Rousseau, **Principes Généraux du Droit International Public**, **Tome I: Introduction - Sources,** Paris: Éditions A. Pedone, 1944, pp. 901-924; Charles Rousseau, **Droit International Public Approfondi**, Paris: Dalloz, 1958, pp. 88-87.

240 Crozat, Devletler Umumi Hukuku I, pp. 137-143.

Cheng[241], Mosler[242], Zemanek[243], Akehurst[244], Tanaka[245], Schachter[246], Degan[247], Gaja[248] and Trindade[249]. Turkish writers Lütem[250], Meray[251], Pazarcı[252] and Sur[253] seem to share this view. On the other hand, some international lawyers, such as Hudson[254] and Castberg[255], think that the Article primarily refers to the

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241 "*It is of no avail to ask whether these principles are general principles of international law or of municipal law; for it is precisely of the nature of these principles that they belong to no particular system of law, but are common to them all.*" Cheng, General Principles of Law, p. 390.

242 Hermann Mosler, "General Principles of Law", Bernhardt, Rudolf (Ed.), **Encyclopedia of Public International Law** içinde, Amsterdam: North-Holland, Elsevier, Instalment 7, 1984, pp. 89-105; Hermann Mosler, **The International Society as a Legal Community**, Alphen aan den Rijn: Sijthoff and Noordhoff International Publishers, 1980, pp. 122-140.

243 "*The orthodox interpretation of Article 38, paragraph 1 (c), accepts only concurrent recognition of a principle by domestic legal orders as valid "recognition by civilized nations". This interpretation neglects genuine principles of international law. Such principles may originate in conventions, like the principles of the Charter which have been reiterated and elaborated in the Friendly Declaration and which the ICJ found in the Nicaragua case to have become part of international custom. It also excludes rules of international custom on which the opinio juris, or better: the consensus of opinion among States, has not yet developed beyond the stage of principle.*" Zemanek also states that, about this aforementioned interpretation, it is not caused by the text in the Statute of ICJ and the text doesn't exclude the principles other than their existence *in foro domestico*. Karl Zemanek, "General Course on Public International Law", **Recueil des Cours de l'Académie de Droit International**, T. 266, 1997, The Hague: Martinus Nijhoff Publishers, 1998, pp. 135-136.

244 Peter Malanzcuk, **Akehurst's Modern Introduction to International Law,** 7. Ed., London: Routledge, 1997, p. 48.

245 Diss. Op. of Tanaka, South West Africa, p. 295.

246 Oscar Schachter, "International Law in Theory and Practice, General Course in Public International Law", **Recueil des Cours de l'Academie de Droit International**, 1982 (V), Kluwer Academic Publisher Group, 1983, p. 75.

247 Degan, Sources of International Law, p. 73.

248 Giorgio Gaja, "General Principles of Law", in **Max Planck Encyclopedia of Public International Law**, Vol. 7, Oxford: Oxford University Press, 2008, para 7-20.

249 **Separate Opinion of Judge Cançado Trindade, Pulp Mills on the River Uruguay (Argentina v. Uruguay),** Judgment, ICJ Reports, 2010, pp. 135-215 (Particularly pp. 143-145).

250 İlhan Lütem, **Devletler Hukuku Dersleri I,** Ankara: Balkanoğlu Matbaacılık, 1956, pp. 91-92.

251 Seha L. Meray, **Devletler Hukukuna Giriş - Birinci Cilt**, 2. Ed., Ankara: Ajans-Türk Matbaası, 1960, pp. 86-87.

252 Hüseyin Pazarcı, **Uluslararası Hukuk Dersleri - 1. Kitap,** 12. Ed., Ankara: Turhan, 2014, p. 238.

253 Melda Sur, **Uluslararası Hukukun Esasları**, 9. Ed., İstanbul: Beta, 2015, pp. 86-88.

254 Hudson, Permanent Court of International Justice, 611.

255 Frede Castberg, "La Méthodologie du Droit International Public", **Recueil des Cours de l'Académie de Droit International**, T. 43, 1933 (I), Paris: Librairie du Recueil Sirey, 1933, p. 370.

principles of international law and then the principles of domestic law.

In the process of adopting the Statute of PCIJ in the Committee, as explained above, based on the fact that the expression contained in the first proposal of President Descamps was "*the rules of international law as recognized by legal conscience of civilized nations*"[256], it is suggested that Descamps also considered that the third source outside the treaty and the custom is general principles of both domestic and international law.[257] Likewise, it is seen in the Committee that Fernandes, in his statement, refers to the principles of international law.[258]

As a final example, Article 2 of the draft articles of the Institute of International Law which has been debated and uncovered among qualified jurists from different schools of thought is as follows: "*General principles of law are rules grounded in universal legal consciousness, whether these rules result from the nature of the relations between subjects of international law, or are recognized by civilized nations in their domestic law, and are applicable to international relationships.*"[259]

Conclusion

As stated earlier, the addition of the general principles of law to the Statute was particularly welcomed by the natural jurist writers; however, there were different reactions from different schools of thought.

The idea that general principles of law cannot be a source of international law with a prejudice that it is not possible to have common principles among different nations is open to criticism. Lammer thinks that it is not possible to convince others with such assumptions. According to the author, empirical researches should be made on this subject and the issue must be based on this.[260] On the other hand, for instance Kopelmanas offers serious examples of the impossibility or difficulty of identifying common principles.[261] However, I think these examples will always be insufficient, no matter how many given. While it may be accepted that such common norms may be difficult to find, the categorical rejection of their existence appears to be unacceptable, no matter how large the given examples are.[262] Virally finds this thought exaggerated.

256 Procès-Verbaux, p. 306.

257 See Hudson, Permanent Court of International Justice 1920-1942, p. 611. See also Sep. Op. of Judge Cancado Trindade, Pulp Mills on the River Uruguay, pp. 135-215.

258 Procès-Verbaux, p. 346.

259 My Translation. See Alfred Verdross, "Les Principes Généraux du Droit et le Droit des Gens", **Revue de Droit International, fondée et dirigée par A. de Geouffre de La Pradelle**, Tome XIII, 1934, p. 353.

260 Lammers, General Principles of Law Recognized by Civilized Nations, pp. 55-56.

261 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 294-295.

262 *Cf.* see H. C. Gutteridge, **Comparative Law: An Introduction to the Comparative**

According to author, although it may be difficult to find a number of ideological principles among different legal systems, principles that can be applied in the procedural and international arena can be found.[263] Kolb also implies that it would be difficult for universal international law to exist if this kind of opinion is true. Moreover, a number of general principles, which are also present in domestic law, have been considered indispensable or prescriptive because of the social nature of man without them society will be dragged into chaos.[264]

The most fundamental problem of the views which *a priori* rejects the common norms or places general principles of law under different categories is that they make a provision in the Statutes of the International Court of Justice and its predecessor completely useless and, in other words, make a *dead provision*.[265] This is contrary to the widely known principle of effective interpretation of treaties (*ut res magis valeat quam perat*).[266] In the context of this principle, in a situation that multiple interpretations of a text is possible, one severely restricts the value of the treaty, while the other imposes a reasonable interpretation; the latter will be preferred.[267] There are more than one decisions of the Court that emphasize this principle.[268]

It is evident that the States parties to the Statutes and preparers of the Statutes have framed and understood the general principles of law differently from the customary and conventional law, subsidiary means of determining the law, and to decide a case ex aequo et bono. If there was an opposite situation; they put this provision in the other paragraphs.[269] The Committee of Jurists has created a text that can be seen as a compromise between different legal opinions, and in this text, the general principles of law are deemed separate from the treaties and custom and equity. So, the common opinion of the Committee is that it is possible that some legal rules which cannot be considered within the scope

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Method of Legal Study and Research, Cambridge: Cambridge University Press, 2015, p. 65.

263 Virally, The Sources of International Law, p. 147.

264 Kolb, La Bonne Foi en Droit International Public, para. 68-69.

265 Paul de Visscher, Recueil des Cours, p. 115; Van Hoof, Rethinking the Sources of International Law, p. 133; Kolb, La Bonne Foi en Droit International Public, para. 82; Lammers, General Principles of Law Recognized by Civilized Nations, p. 55.

266 Fellmeth-Horwitz, Guide to Latin, p. 286. For further explanation, see Oliver Dörr, "Interpretation of Treaties", Oliver Dörr ve Kirsten Schmalenbach (Ed.), in **Vienna Convention on the Law of Treaties - A Commentary**, Berlin: Springer, 2012.

267 Verdross, Principes Généraux du Droit Applicables aux Rapports Internationaux, pp. 47-48.

268 **Acquisition of Polish Nationality**, Advisory Opinion, PCIJ, Series B, No. 7, 1923; p. 23; **Case of the Free Zones of Upper Savoy and District of Gex, Order,** PCIJ, Series A, No. 22, 1929, p. 13**; Corfu Channel, Merits,** Judgment. ICJ Reports, 1949, pp. 23-24;**Fisheries Jurisdiction (Spain/Canada)**, **Jurisdiction of the Court**, Judgment, ICJ Reports, 1998, para 52.

269 Verdross, Principes Généraux du Droit Applicables aux Rapports Internationaux, p. 48.

of the conventional and customary law can be applied to international legal disputes. Particularly in relation to fairness, The Committee's attitude is clear. There is agreement between the members that no authority can be given to the Court that can be understood as the authority to create law. The broad and vague wording of Descamps's initial proposal was rejected for this reason and, in the latter case, the issue was resolved by referring to the existing law with the condition of "*recognition by civilized nations*".[270]

According to Descamps, the Chairman of the Committee, the fact that the international courts donot make the case inconclusive because of the lack of a rule in customary and conventional law and the application of certain other rules *viz.* the general principles of law in these instances, constitute an ongoing practice.[271] For this reason, the Committee's activity is not the creation of a new norm, but the codification of old practices.[272]

On the other hand, some authors, such as Strupp and Kopelmanas, argue that these arbitration practices cannot be a precedent because States are the only authorities in the creation of international law. Furthermore, in the absence of explicit authorization, the arbitrators who applied the general principles of the law overstepped their authorities. Moreover, these arbitration decisions do not reflect general international law; only constitute a judgment *inter partes* and only are binding only for the parties.[273]

As Verdross expressed in more than one of his works, if such an excess of power had been existed, or if the States were in a position to think that these norms could not be applied, they wouldn't accept and would object to these decisions.[274]The author believes that a rigid positivism has never been accepted by international judicial bodies. As a contribution to this idea, it can be said that there is an awareness that a pure or rigid positivism was never been and will never be a solution for the activities and operations of the international judiciary.[275]

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270 Procès-Verbaux, p. 315.

271 Procès-Verbaux, p. 316.

272 Lauterpacht, Private Law Analogies, pp. 62-63; Verdross, Droit International de la Paix, pp. 302; Le Fur, Recueil des Cours, pp. 202-204.

273 Strupp, Justice Internationale et Équité, p. 451; Strupp, Droit de la Paix, pp. 335-336; Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), p. 290.

274 Verdross, Principes Généraux du Droit et le Droit des Gens, pp. 490-491; Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 384; Verdross, Principes Généraux du Droit Applicables aux Rapports Internationaux, p. 47; Verdross, Principes Généraux dans la Jurisprudence Internationale, pp. 199-200.

275 Apart from being a party to the Statute, for the examples of the claims and defenses of the States using general principles of law before the Court, see South West Africa, Second Phase, p. 47; **Temple of Preah Vihear, Preliminary Objections**, Judgment, ICJ Reports, 1961, p. 30; **Merits**, Judgment, ICJ Reports 1962. p. 26; **The Gabcikovo-Nagymaros Case**

The idea that degrades the general principles of the law with the auxiliary means of determination of the law in the 38/1(d) of the Statute[276]must be rejected without doubt because the Statute itself has clearly demonstrated this distinction and counted the general principles of the law as a separate clause within the main sources. Moreover, the practice of the general principles of law, even if it is not very wide, reflects the opposite situation of this view. The general principles of law are the norms of international law which are binding in themselves.

As for the consideration that the general principles of the law do not have a qualification of source in terms of general international law, outside of the Courts' Statutes; first of all, it should be noted that this idea is unfounded in terms of the practices before the establishment of the Permanent Court of International Justice as well as subsequent arbitration practices. Apart from the examples where the parties to the case refer to the Statute or transfer the sources contained in the Statute to the arbitration agreement, it is possible to mention the arbitration practices based on the Statute of the Court in cases where the norms to be applied aren't specified in the agreement.[277]

The fact that a number of rules, which are accepted as the general principle of law, have been transformed into a customary rule or have a place in an agreement will not change the general principle of law character of these norms. The principles of *pacta sunt servanda*, and in connection with it, the principle of good faith can be given as examples. Undoubtedly, these rules have taken place in State practices over time and have formed *opinio juris* among the States. At the same time, these rules are also included in the Vienna Convention on the Law of Treaties. However, the fact that *pacta sunt servanda* fall within these sources, this will not change its general principle of law character.[278] Besides, it is clear that even if a basic rule such as *pacta sunt servanda* has not gained a customary character or is not included in the treaty, it is still necessary for the functioning of a legal system and in particular international law. Moreover, for the custom, the State practice condition which is the necessary material element other than *opinio juris*, doesn't exist in first place. In this case, it is necessary to acknowledge the existence of the general principles of law for the construction of a legal system.[279]

(Hungary-Slovakia), Judgment, ICJ Reports, 1997, p. 53.

276 Makowski, Recueil des Cours, pp. 360-361.

277 Oppenheim-Lauterpacht, International Law, Vol. I, p. 30; Lauterpacht, Collected Papers, p. 75. See also for the examples of arbitration practices following the establishment of the PCIJ Verdross, Principes Généraux dans la Jurisprudence Internationale, pp. 230-238 and Verdross, Droit International de la Paix, p. 302.

278 Degan, Sources of International Law, p. 74.

279 Verdross, Principes Généraux du Droit Applicables aux Rapports Internationaux, p. 50.

The general principles of law and more advanced domestic law systems were widely used, especially in the periods when international law began to emerge.[280] Likewise, up to the present day, especially in the codification works, this source have been used inevitably. In this respect, in many cases, it should be said that the general principles of law formulate the idea and practice of international law as archetypes of other norms.

Apart from the example of *pacta sunt servanda* given above, the rules of interpretation contained in the Vienna Convention on the Law of Treaties are based on a number of general principles in this area. In addition to that, some invalidity causes have been envisaged under the international law of treaties by using the contractual rules in the civil laws. Principles such as error, fraud, and corruption of a representative of a State are included in the Convention. Of course, the International Law Commission, while transferring these principles, arranged them in accordance with the international law. However, it should be noted that the development of international law is based on the general principles of law, without relying on an established customary law in these areas and without giving examples of the practice.[281]

It could be observed, however, that The Hague Courts applied appropriate customary or conventional rules which reflect also general principles of law and didn't name them as the general principles of law. This is a correct method because the generally accepted principles such as *lex posterior derogat legi priori, lex specialis derogat legi generali and lex posterior generalis non derogat legi priori speciali* make it necessary. These three principles are the basic principles governing the relationship between the rules of international law.[282]

It would not be wrong to suggest that the difference of the authors who place the general principles of law together with the customary law because of their strict monist point of view *eg.* Kelsen, Scelle, Guggenheim and Conforti etc. is due to their conceptualization. It can also be said that these authors have attributed an important role to general principles.[283] For example, Kopelmanas thinks that the naturalist Verdross and the monist Scelle have come to the same conclusion from different ways. Both understand the principles taken from domestic law in the provision 38/3 but there is only a difference in their terminology. However, it should be added that Scelle considered the general principles of law are the general customary law and placed them at the top of the hierarchy in terms of implementation.[284] On the other hand, Verdross sees a

280 In this regard, see Lauterpacht, Private Law Analogies, pp. 8-17.
281 For further explanation, see Degan, Sources of International Law, pp. 77- 78.
282 Cassese, International Law, p. 154; Raimondo, General Principles of Law, p. 44.
283 Kolb, La Bonne Foi en Droit International Public, para. 98.
284 Scelle, Essai sur les Sources, p. 425; Scelle, Manuel de Droit International Public, p. 580.

substitute source in the general principles of law.[285]

In my opinion, a debate concerning general principles of international law or of exclusively domestic law is relatively secondary. Because international law, like every legal order, needs some basic and logical principles and framework rules, and the implementation of these principles is a necessity. The principles of territorial sovereignty, freedom of high seas, equidistance, freedom of communication in the seas, elementary considerations of humanity as in the Corfu Channel Case have emerged in the field of international law, without relying directly on the rules of practice and without analogy with domestic laws. After an acceptance of the general principles of international law separate from the custom and the treaty, there are two ways to comprehend this: 1) either these principles will be considered under Article 38/1(c); 2) or these principles shall be deemed to be binding principles for States outside of the Statute of the Court.

Thus, disagreements about the legal order to which the general principles of law belong are shaped by these possibilities. It is understood from the preparatory work of the Committee of Jurists that the Statute provision refers to domestic law, and these preparatory works are considered as complementary interpretation instruments in the framework of the interpretation rules in the Vienna Convention on the Law of the Treaties. But this does not preclude the parties of an agreement to understand a certain interpretation from an expression in a treaty. Moreover, the text of the Statute itself does not explicitly refer to internal law, the general principles of law is used without an epithet. Therefore, it is possible to evaluate the general principles of international law within the scope of the Article.

About the substitute source nature attributed to the general principles of law and the question of the possible hierarchy between the sources, I think *a priori* assignment of the priority between sources and an idea of an hierarchy doesn't make any sense. It can be said that these ideas, especially for the first periods, represent a resentment against the dominant positivist view and based on seeing these principles exclusively domestic law principles. In addition, the phrase "the following order" in the text of the Committee has been deleted and there is no priority regulation in the present text.[286] Also, the principles of *lex posterior derogat legi priori; lex specialis derogat legi generali* which are the basic principles governing the relationship between the rules are the general principles of law. In this case, the right way for the judge to consider the sources to be applied as a whole and to resolve the dispute according to

[285] Verdross, Droit International de la Paix, p. 303.
[286] Cheng, General Principles of Law, p. 20.

these aforementioned principles.[287]

As a conclusion, the general principles of law have important functions in the international law. As stated above, every legal system, and therefore international legal system, needs these general principles. The practice of judicial organs and States proves this. These functions may be in the form of being material source of the other two formal sources and these rules are already a reflection of the general principles of law. Another function is they provide a framework for the interpretation, scope and implementation of the other sources. Finally, and most importantly, they can be used in the absence of the other rules to prevent *non liquet* as a substitute source. This latter function is the source of almost all the discussions and objections mentioned above. And all the stated reasons indicate the need for an independent source in the international legal system.

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[287] "*The priority given by Article 38 of the Statute of the Court to conventions and to custom in relation to the general principles of law in no way excludes a simultaneous application of those principles and of the first two sources of law*." See **Dissenting Opinion of Judge Fernandes**, Right of Passage over Indian Territory, Merits, ICJ Reports, 1960, pp. 139-140.

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