

# PUBLIC LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW

*Eirik Bjorge\**

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*Are the "general principles of law recognised by civilized nations" capable of adjusting to the progress and needs of the international community? This article argues that they are, and that international law needs, to a larger degree than what has been the case, to draw on principles of public law. Those principles of public law are not to supplant, but to supplement, those of private law. The article analyses four principles: the principle of legality; the principle requiring positive legal basis for state action; the principle that even the highest emanation of the executive power cannot escape judicial review; and the principle of protection of legitimate expectations. If one takes account of the needs of international law, there is no reason whatever why today we should accede to the orthodoxy that the intention behind the concept of general principles is only to authorise a court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of states – if for no other reason than the fact that international law no longer governs only relations of states.*

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## I INTRODUCTION

The focus of this article is the extent to which "general principles of law recognised by civilized nations"<sup>1</sup> are capable of adjusting to the progress and needs of the international community. The

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\* Professor of Law, University of Bristol.

1 Statute of the International Court of Justice 892 UNTS 119 (26 June 1945), art 38(1)(c). See for example Hersch Lauterpacht *Private Law Sources and Analogies of International Law* (Longmans, New York, 1927); Jean Spiropoulos *Die allgemeinen Rechtsgrundsätze im Völkerrecht* (Verlag des Institut für Internationales Recht an der Universität Kiel, Kiel, 1928); Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, Cambridge, 1953); AP Sereni *Principi generali di diritto e processo internazionale* (Giuffrè, Milan, 1955); Alfred Verdross "Les principes généraux de droit dans le système des sources du droit international public" in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Faculté de droit de l'Université de Genève, Geneva, 1968) 521; Alain Pellet *Recherche sur les principes généraux de droit en droit international* (Université de Paris, Paris, 1974); Hermann Mosler "Rechtsvergleichung vor völkerrechtlichen Gerichten" in René Marcic (ed) *Internationale Festschrift für Alfred Verdross zum 80 Geburtstag* (Wilhelm Fink Verlag, München, 1971) 381; Hermann Mosler "To what extent does the variety of legal systems of the world influence the application of the general principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice?" in *International Law and the Grotian Heritage* (TMC Asser Instituut, The Hague, 1985) 173; Prosper Weil *Écrits de droit*

argument made here is that they are. General principles should draw on principles developed in public law systems in domestic law. The conclusion is that international law needs to a larger degree than what has been the case to draw on principles of public law. Those principles of public law are not to supplant, but to supplement, those of private law. Four principles are subjected to analysis: first, the principle of legality; second, the principle requiring positive legal basis for state action; third, the principle that even the highest emanation of the executive power cannot escape judicial review; and, fourth, the principle of protection of legitimate expectations.

When the Committee of Jurists addressed in 1920 the question of which law the Permanent Court of International Justice was to administer, it took the view that one of the sources of law was general principles of law.<sup>2</sup> It was not an obvious choice. By according such weight to internal law, the Committee went far in giving prominence to the domestic legal experience.<sup>3</sup> It was, according to the account of Lord Phillimore, the British member of the Committee, the Continental members who insisted that general principles to be included.<sup>4</sup> These members had feared that, if general principles were not included as a source, injustice might be done: "And then to meet the fears of our foreign friends, we added—3. The general principles of law recognised by civilised nations".<sup>5</sup>

It seems that what the delegates had in mind were, in the first instance, procedural principles.<sup>6</sup> In the debates, Lord Phillimore made explicit reference to "certain principles of procedure, the principle

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*international* (University Press of France, Paris, 2000) at 379–402; Robert Kolb "General Principles of Procedural Law" in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds) *The Statute of the International Court of Justice: A Commentary* (2nd ed, Oxford University Press, Oxford, 2012) 871; Alain Pellet "Article 38" in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds) *The Statute of the International Court of Justice: A Commentary* (2nd ed, Oxford University Press, Oxford, 2012) 731; and Catherine Redgwell "General Principles of International Law" in Stefan Vogenauer and Stephen Weatherill (eds) *General Principles of Law: European and Comparative Perspectives* (Hart Publishing, Oxford, 2017) 5. The International Law Commission has included in its programme of work the topic "general principles of law", on the basis of the preliminary report of Marcelo Vázquez-Bermúdez (International Law Commission *Report on the work of the sixty-ninth session* UN Doc A/72/10 (2017) at Annex A), which includes a valuable outline of the debates and a bibliography.

2 *Procès-Verbaux of the Proceedings of the Committee* (Van Langenhuisen, The Hague, 1920) at 310 and following.

3 Rolando Quadri "Le système des règles internationales" (1964) 113 *Hague Recueil* 319 at 351.

4 Lord Phillimore *Scheme for the Permanent Court International Justice* (1920) 6 *GST* 89 at 94.

5 At 94.

6 See generally Sereni, above n 1; Robert Kolb "General Principles of Procedural Law" in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds) *The Statute of the International Court of Justice: A Commentary* (2nd ed, Oxford University Press, Oxford, 2012) 871; Robert Kolb *The International Court of Justice* (Hart Publishing, Oxford, 2013) at 917–952; and Carlo Santulli *Droit du contentieux international* (2nd ed, Librairie générale de droit et de jurisprudence, Paris, 2015) at 66–70.

of good faith, and the principle of *res judicata*".<sup>7</sup> The one arbitral authority cited in the deliberations was *Pious Funds*, on the procedural principle of *res judicata*.<sup>8</sup> This focus on procedure persisted after the adoption of Article 38.<sup>9</sup> Still today the most successful use of domestic law analogies before the International Court has been within the field of procedure.<sup>10</sup> Three reasons stand out in this regard. First, procedural law is probably the field in which judicially discovered principles are the least threatening to the freedom of action of states:<sup>11</sup> substantive principles, on the other hand, might be thought to pose more of a threat.

Second, the overlap between general principles of a procedural nature on the one hand and the inherent powers or jurisdiction of international courts and tribunals on the other could be thought to be another reason why general principles of a procedural nature are more palatable.<sup>12</sup>

Third, and logically connected with the two first, the decisive consideration for the Committee of Jurists was the desire to avoid a *non liquet*,<sup>13</sup> the fear being (latent in the quotation by Lord Phillimore given above) that a declaration of *non liquet* might lead to denial of justice.<sup>14</sup> To a large extent this explains the need for general principles such as "certain principles of procedure, the principle of good faith, and the principle of *res judicata*".<sup>15</sup> But in addition to enabling the Court to perform its judicial function when no specific rules deriving from treaty or customary international law exist, the reference to general principles of law would also operate such that the Court:<sup>16</sup>

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7 *Procès-Verbaux*, above n 2, at 335 (per Lord Phillimore).

8 *Pious Funds (United States v Mexico)* (1902) 9 RIAA 11; and *Procès-Verbaux*, above n 2, at 310 (per Baron Descamps) and 316 (per Lord Phillimore).

9 Arnold Ræstad "Droit coutumier" et 'principes généraux' en droit international" (1933) 4 NJIL 61 at 74.

10 James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 36–37.

11 Dionisio Anzilotti *Cours de droit international* (Gilbert Gidel (translator), Sirey, 1929) at 118.

12 See generally Robert Kolb *The International Court of Justice* (Hart Publishing, Oxford, 2012) at 77–108; Chester Brown *A Common Law of Adjudication* (Oxford University Press, Oxford, 2007) at 35–82; *Northern Cameroons (Cameroon v United Kingdom)* [1963] ICJ Rep 15 at 29; and *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253 at 259.

13 Alain Pellet, above n 1, at 832; Philippe Couvreur *The International Court of Justice and the Effectiveness of International Law* (Brill, Leiden, 2016) at 29; and Catherine Redgwell, above n 1, at 7. See *Procès-Verbaux*, above n 2, at 318 (per Baron Descamps), 311 (per Loder), 312–313 (per de Lapradelle) and 307 (per Hagerup).

14 *Procès-Verbaux*, above n 2, at 312 (per de Lapradelle) and 317 (per Hagerup).

15 At 335 (per Lord Phillimore).

16 Couvreur, above n 13, at 30. See also *Procès-Verbaux*, above n 2, at 311 and 318–319 (per Baron Descamps).

... would not render justice at the expense of the legal security and predictability which a court owes to litigants, and that it would still apply international law by having recourse to the said general principles ...

Wishing by the late 1920s to develop substantive principles, Lauterpacht turned in his eponymous study of private law sources and analogies of international law to domestic *private* law.<sup>17</sup> Borrowing from domestic private law concepts made eminent sense, the contractual relationships of individuals being applied to states in their equally synallagmatic relationships. Furthermore, it has been argued that there was at the time no such thing as public law in the country in which Lauterpacht had made his home.<sup>18</sup> There is still much to be said for Lauterpacht's approach, but it needs today to be completed by reversion also to public law principles. International decision-making needs to be mirrored by constitutional and administrative law safeguards. To the extent that international law has not been able to proffer them itself, such principles are beginning to be, and should be, sought also in public law rules developed and applied *in foro domestico*. To take one example: if, as has been suggested, today "[t]he protection of legitimate expectations within carefully defined limits is a general principle of law, anchored in the world's major legal systems",<sup>19</sup> then, as will be seen below, that mooring is in municipal public law, not procedural or private. Against that background, international law is today far from being only "private law writ large".<sup>20</sup> The grammar of private law still has much to offer international law, but the future maturation and sophistication of international law depend also on the development of general principles of law taken from public law.

It is important to remember, however, that the principles of domestic law cannot be recruited "lock, stock and barrel", ready-made and fully equipped with a set of rules".<sup>21</sup> As will be seen, it is important in this regard to take into account the differences in the grammar of internal public law and public international law.

There are already those who argue that public law sources and analogies must be allowed to play a greater role in international law. But, whilst the existing literature does interrogate the extent to

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17 Lauterpacht, above n 1.

18 Prosper Weil "Droit international public et droit administratif" in *Mélanges Trotabas* (Librairie générale de droit et de jurisprudence, Paris, 1970) 511 at 513–514. This is wrong as a matter of the law that was actually in existence, and had been for a long time (see Paul Craig *UK, EU and Global Administrative Law: Foundations and Challenges (The Hamlyn Lectures)* (Cambridge University Press, Cambridge, 2015) at ch 1) – but it may nevertheless be a valid explanation.

19 Campbell McLachlan, Laurence Shore and Matthew Weiniger *International Investment Arbitration* (2nd ed, Oxford University Press, Oxford, 2017) at 315.

20 Thomas Holland *Studies in International Law* (Clarendon Press, Oxford, 1898) at 152; and Lauterpacht, above n 1, at 81.

21 *International Status of South West Africa (Advisory Opinion)* [1950] ICJ Rep 128 at 148 (separate opinion of Judge McNair).

which public law analogies can be relied on in certain sub-fields of international law, such as international investment law and global administrative law, it largely ignores whether the mainstay of *general* international law can draw on domestic public law.<sup>22</sup>

## **II HOW PRINCIPLES DEVELOPED IN FORO DOMESTICO ARE ELEVATED TO THE INTERNATIONAL LEVEL**

General principles of law are to be understood as first principles, "*propositions premières*" as Basdevant called them, common to municipal legal systems and capable of being transported onto the international legal order.<sup>23</sup> In order for a rule to be characterised as a general principle of law, it needs to go through a two-stage process, the first stage of which is abstraction; the second, generalisation. This process strips the domestic rule of its detailed municipal particularities and brings out its general and universal features.<sup>24</sup> What is important in that regard are not the superficial similarities of rules obtaining *in foro domestico* within the different legal systems of the world: it is the principle that animates those rules.<sup>25</sup> Lord Lloyd-Jones has observed that what matters are the underlying legal principles which reflect the requirements of justice.<sup>26</sup> General principles are thus not the sum of domestic legal rules nor a lowest common denominator.<sup>27</sup> The identification of a general principle of law, therefore, does not entail the study of one domestic legal system after another: it is sufficient to study the various legal families.<sup>28</sup> As the International Court observed in *Barcelona Traction*, the rule at issue needs to be "generally accepted by municipal legal systems".<sup>29</sup> If it had been necessary to show, on the basis of close comparative study of one domestic system after another, that the principle was in existence in each of them, then, for example, estoppel could surely never have been considered to be a general principle of law, as it plainly (and correctly) has been.<sup>30</sup> Against this background,

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22 See for example Stephan W Schill (ed) *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010).

23 Jules Basdevant *Dictionnaire de la terminologie du droit international* (Sirey, Paris, 1960) at 475.

24 Charles De Visscher *Théories et réalités en droit international public* (4th ed, Pedone, Paris, 1970) at 419.

25 At 419.

26 Lord Lloyd-Jones "General Principles of Law in International Law and Common Law" (lecture at the Conseil d'État, 16 February 2018) at 3.

27 Prosper Weil "Le droit international en quête de son identité: cours général de droit international public" (1992) 237 *Hague Recueil* 1 at 145.

28 Benjamin Samson "PGD: de et pas du" in Hervé Ascencio and others (eds) *Dictionnaire des idées reçues en droit international* (Pedone, Paris, 2017) 433 at 434; and Hugh Thirlway "Concepts, principles and analogies: international and municipal legal reasoning" (2002) 294 *Hague Recueil* 273 at 279.

29 *Barcelona Traction, Light, and Power Co, Ltd (Belgium v Spain)* [1970] ICJ Rep 3 at [50].

30 See for example *Payment of Various Serbian Loans Issued in France (France v Yugoslavia)* (1929) PCIJ (series A) No 20; *Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil)* (1929) PCIJ (series A) No 21; *Legal Status of Eastern Greenland (Denmark v Norway)* (1933) PCIJ (series A/B) No

criticism such as the one raised by Roberts, that ascertaining the contours of a general principle of law will be impossible if "not all states recognize the doctrine",<sup>31</sup> seems misplaced. But, if the recognition need not be universal, the principle needs to be recognised on a very wide scale in the municipal orders of states.<sup>32</sup>

Transcending the technical particularities that are peculiar to each domestic system, general principles of law represent the quintessence of the totality of these domestic legal systems beyond their diversity.<sup>33</sup> Once the domestic rule has been reduced to its core, the principle must be raised to the level of international law, so that it can function at the international level.<sup>34</sup> In that regard Weil has pointed out that:<sup>35</sup>

Quant à la réintégration du produit désincarné issu de cette opération d'abstraction-généralisation dans le milieu du droit international, elle n'est possible que dans la mesure où les caractéristiques structurelles, les nécessités et les objectifs de l'ordre international sont compatibles avec ceux des droits nationaux.

Only principles of domestic law which are appropriate in the context of international relations, which fulfil the exigencies of the international order, are capable of being elevated to the international level and of operating there as a source of law.<sup>36</sup> In order for domestic law principles to be capable of such elevation, they may need to undergo a transformation which gives them an aspect in international law which may well be different from what they would have had in the various national legal systems.<sup>37</sup> That way international law may at one and the same time take inspiration from domestic

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53 at [52]–[54], [62] and [69]; *Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 6 at [31]–[32] and [39]–[51]; *North Sea Continental Shelf Cases (Germany v Denmark and the Netherlands) (Judgment)* [1969] ICJ Rep 3 at [30]; and *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)* [1984] ICJ Rep 246 at [145]. There was, for example, never a substantive principle of estoppel in French law and legal systems inspired by it: Philippe Pinsolle "Distinction entre le principe de l'estoppel et le principe de bonne foi dans le droit du commerce international" (1998) 125 JDI 905 at 928; Mattias Guyomar and Bertrand Sellier *Contentieux administratif* (Daloz-Sirey, Paris, 2010) at 273; and Conseil d'État *SARL Marsadis* (1 April 2010).

31 Anthea Roberts "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States" (2010) 104 AJIL 179 at 214–15. Compare McLachlan, Shore and Weiniger, above n 19, at 315.

32 Couvreur, above n 13, at 30.

33 Weil, above n 27, at 145.

34 At 146.

35 At 147.

36 Jules Basdevant "Règles générales du droit de la paix" (1936) 58 Hague Recueil 471 at 501.

37 Weil, above n 1, at 395.

law and safeguard its own independence.<sup>38</sup> What results is a body of international law that is influenced by domestic law but which remains its own creation.<sup>39</sup>

It is inherent in what has just been said that principles which operate in internal law must cohere in a general way with the grammar of international law if they are to be able to be successfully transposed into general principles of law operating in the international legal system. A defining feature (if not *the* defining feature) of this international legal system remains the absence of a central organ with legislative authority.<sup>40</sup> This has meant that, even at a time of international legislation through multilateral treaties, concepts inspired by the notion of the synallagmatic commitment continue, as the International Court observed in *Reservations to the Convention on Genocide*, to be "of undisputed value as a principle".<sup>41</sup> Still today international society remains, to a large extent, a society dominated by consensualism and the tradition of bilateralism.<sup>42</sup> As Crawford has observed: "the character of the rights and obligations under different legal systems evidently depends on and is deeply affected by the structure and development of *that* system"; "[a]nd according to a deeply ingrained view of international law and international society, the character of international rights and obligations is inherently bilateral".<sup>43</sup>

But, if the state still remains the prime subject of international law and the essential protagonist of international relations, other subjects and other protagonists now coexist with the state, a development that shows that international law is opening up vertically.<sup>44</sup> Although sovereignty

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38 Paul Reuter "L'extension du droit international aux dépens du droit national devant le juge international" in *Mélanges Waline* (Librairie générale de droit et de jurisprudence, Paris, 1974) 241 at 258.

39 Crawford, above n 10, at 35.

40 *Austro-German Customs Union Case (Advisory Opinion)* (1931) PCIJ (series A/B) No 41 at 57 (per Judge Anzilotti); and James Crawford "Multilateral Rights and Obligations in International Law" (2006) 319 *Hague Recueil* 335 at 344.

41 *Reservations to the Convention on Genocide (Advisory Opinion)* [1951] ICJ Rep 15 at 21 ("*une valeur de principe indéniable*" in the authoritative French text). See also Patrick Daillier, Mathias Forteau and Alain Pellet *Droit international public* (8th ed, Librairie générale de droit et de jurisprudence, Paris, 2009) at 283; Eirik Bjorge "'Contractual' and 'Statutory' Treaty Interpretation in Domestic Courts?" in Helmut Philipp Aust and Georg Nolte (eds) *Interpretation of International Law by Domestic Courts* (Oxford University Press, Oxford, 2016) 49 at 52; and Frank Berman and Eirik Bjorge "Treaties" in Christopher Greenwood and Dan Sarooshi (eds) *Oppenheim's International Law* (10th ed, Oxford University Press, Oxford) vol 1 (forthcoming).

42 Weil, above n 27, at 151; and Vera Gowlland-Debbas "The ICJ and the Challenges of Human Rights Law" in Mads Andenas and Eirik Bjorge (eds) *A Farewell to Fragmentation: Convergence and Reassertion in International Law* (Cambridge University Press, Cambridge, 2015) 109 at 144.

43 Crawford, above n 40, at 345.

44 Philippe Couvreur "A propos de l'effectivité de la Cour internationale de justice dans le règlement pacifique des différends internationaux" (1996) 4 *AYIL* 103 at 108.

remains the touchstone of international law, the role that states have decided to give to sovereignty in the post-war period shows that change is afoot.

One difference can be seen in the fact that, in the 1920s, such international organisations as were in existence were largely governed by states, the sovereignty of which was safeguarded by the voting rule applicable at that time,<sup>45</sup> the requirement of unanimity.<sup>46</sup> Today the requirement is an admixture of majority and qualified majority,<sup>47</sup> majority voting now being the normal requirement for decisions within international organisations.<sup>48</sup> In a similar vein, the rules governing reservations to treaties used to be based on the principle of absolute integrity: a reservation would be valid only if the treaty permitted it or all contracting parties agreed to it, failing which the reserving state would not be considered a party.<sup>49</sup> This has in the post-war period given way to a more flexible system, the 1951 Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* being an important milestone.<sup>50</sup> And, finally, it is now a common feature of international law that states make treaties for the benefit of legal or natural persons; these have been referred to as triangular treaties.<sup>51</sup>

What this means for the development of general principles of law of a public law character is that (as also with general principles of law of a private law character)<sup>52</sup> keen attention needs to be given to how the principle fits with the "hidden grammar of international legal language" of which it is meant to be a part.<sup>53</sup>

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45 See Covenant of the League of Nations 225 CTS 195 (signed 28 June 1919, entered into force 10 January 1920), art 5(1).

46 Kolb, above n 12, at 264 and 882.

47 See Charter of the United Nations, art 18.

48 Frank Berman and Eirik Bjorge "International Transactions" in Christopher Greenwood and Dan Sarooshi (eds) *Oppenheim's International Law* (10th ed, Oxford University Press, Oxford) vol 1 (forthcoming) at [575].

49 Crawford, above n 40, at 375.

50 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15. See Rosalyn Higgins and others *Oppenheim's International Law: United Nations* (Oxford University Press, Oxford, 2017) at [22.197]–[22.209]; and Berman and Bjorge, above n 41, at [614]–[616].

51 Anthea Roberts "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System" (2013) 107 AJIL 45 at 93; and Anthea Roberts "Triangular Treaties: The Extent and Limits of Investment Treaty Rights" (2015) 56 Harv Intl LJ 353.

52 See Ben Juratowitch and James Shaerf "Unjust Enrichment as a Primary Rule of International Law" in Mads Andenas and others (eds) *General Principles and the Coherence of International Law* (Brill) (forthcoming).

53 James Crawford *The Creation of States* (2nd ed, Oxford University Press, Oxford, 2006) at 41.

### III GENERAL PRINCIPLES OF PUBLIC LAW?

Four points need stressing in relation to the possibility of general principles of a specifically public law character. First, the word that international law uses for the works of writers or other persons skilled in international law is, in the wording of Article 38 of the Statute of the International Court of Justice, "teachings of the most highly qualified publicists".<sup>54</sup> The word "publicist" is perhaps more readily understood by Francophone audiences than Anglophone ones. According to Littré's *Dictionnaire de la langue française*, the word "*publiciste*" means "[c]elui qui écrit sur le droit public, qui est versé dans cette science". In the Cartesian system of French law, there is a division between the "*publicistes*", those skilled in "*droit public*", and the "*privatistes*", who are trained in "*droit privé*". All professors of public international law are in France also (or, in formal terms, first and foremost) professors of public law. Thus academic writers specialising in international law are in the Francophone tradition *by definition* public lawyers or, in other words, publicists. Still, in the modern period the leading French international lawyers can also be the leading French public lawyers, Prosper Weil and Elizabeth Zoller being prominent examples.<sup>55</sup>

Second comes the fact that in French public law general principles of law (specifically so-called "*les principes généraux du droit*") have been a prominent source of public law since the 1870s,<sup>56</sup> when the Tribunal des Conflits in *Dugave et Bransiet* stressed the need to interpret and apply primary and secondary legislation "*en les conciliant avec les principes généraux du droit*".<sup>57</sup> Shortly thereafter, the concept made an appearance in the literature, in Lafférière's classic *Traité de la juridiction administrative*,<sup>58</sup> and thereafter also in the case law of the Conseil d'État,<sup>59</sup> where in the post-war period it would become one of the foremost sources of French public law.<sup>60</sup> In private law, meanwhile, there was in French law no comparable concept of general principles of law.<sup>61</sup>

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54 See Franklin Berman "Authority in International Law" (lecture at Humboldt University, Berlin, 25 June 2018).

55 See for example Prosper Weil and Dominique Pouyaud *Le droit administratif* (25th ed, University Press of France, Paris, 2017); Prosper Weil, above n 1; Élisabeth Zoller *La bonne foi en droit international public* (Pedone, Paris, 1977); and Élisabeth Zoller *Introduction au droit public* (2nd ed, Dalloz-Sirey, Paris, 2013).

56 Bernard Stirn and Yann Aguila *Droit public français et européen* (2nd ed, Dalloz-Sirey, Paris, 2018).

57 *Dugave et Bransiet* Tribunal des Conflits, France, 8 February 1873.

58 Édouard Lafférière *Traité de la juridiction administrative* (Berger-Levrault, Paris, 1887) at xiii.

59 Conseil d'État *Cames* (21 June 1895) (conclusions: Romieu) ("*la solution ... nous paraît ... découler des principes généraux de notre droit*"); and Conseil d'État *Aramu* (26 October 1945) ("*principes généraux du droit applicable même en l'absence de texte*").

60 Stirn and Aguila, above n 56, at 239–241.

61 At 211–212.

Third, already in the 1930s the Permanent Court, in *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, looked to domestic law when it explicated the notion of the "*Rechtsstaat*", or "state governed by the rule of law", as being the "form of government under which all organs of the State are bound to keep within the confines of the law",<sup>62</sup> equally naturally leading the Court to emphasise the importance of fundamental rights. The Court pointed out that "Danzig's character as a State governed by the rule of law", or as a *Rechtsstaat*, was revealed particularly in the part of the Free State's Constitution that dealt with the fundamental rights of the citizen, adding that:<sup>63</sup>

Provisions concerning such rights occur in most of the constitutions drawn up since the beginning of the nineteenth century. They are designed to fix the position of the individual in the community, and to give him the safeguards which are considered necessary for his protection against the State. It is in that sense that the words "fundamental rights" (*Grundrechte*) have always been understood.

Under the rule of law, continued the Court, the intention is "to safeguard individual liberty from any arbitrary encroachment on the part of the authorities of the State".<sup>64</sup> The increasing concern of international law for the precepts of the rule of law, and the protection it affords against arbitrariness,<sup>65</sup> was also brought out by the International Court when, in *Asylum*, it warned against "arbitrary action" being "substituted for the rule of law".<sup>66</sup> Some 40 years later, in *ELSI*, a Chamber of the International Court observed, in relation to whether State action by the Italian executive had breached international law by being arbitrary, that "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to *the* rule of law".<sup>67</sup> It is difficult not to see in this elevation of the principle of the rule of law onto the international plane a reliance by international law on domestic public law principle.

Fourth, it might be thought to be surprising that such general principles of public law did not take on more prominence when Article 38 was drafted in 1920. For two of the leading members of the Committee of Jurists were themselves leading *publicistes*, eminently well-placed to see the utility of public law principles in public international law. First, the French member of the Committee, Professor Albert de La Pradelle, had from 1912 held a chair at the University of Paris, initially (1912–

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<sup>62</sup> *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (1935) PCIJ (series A/B) No 65 at 54.

<sup>63</sup> At 54.

<sup>64</sup> At 56.

<sup>65</sup> See Dapo Akande and Eirik Bjorge "The United Kingdom Ministerial Code and International Law: A Response to Richard Ekins and Guglielmo Verdirame" (10 December 2015) UK Constitutional Law Blog <[ukconstitutionallaw.org](http://ukconstitutionallaw.org)>.

<sup>66</sup> *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266 at 284.

<sup>67</sup> *Elettronica Sicula SpA (ELSI) (United States v Italy)* [1989] ICJ Rep 15 [ELSI] at 76.

1918) of administrative law, publishing in that period a treatise on French constitutional law,<sup>68</sup> and since 1918 a chair of public international law. Second, Professor Edouard-François-Eugène Deschamps, later Baron Deschamps, had in 1871 begun his Belgian university career teaching administrative law, and had published several works on domestic administrative and constitutional law,<sup>69</sup> before he was officially invited, in 1881, to concentrate on public international law.<sup>70</sup> Nevertheless, as is clear from the deliberations of the Committee of Jurists, general principles of public law did not take on any prominence whatever in the deliberations of the Committee. But if, in the almost entirely consensualist international society of 1920, the most highly qualified publicists of the day suppressed the public law character of their legal formation, it is now for the present generation to let what Laffèrière called the "*principes inhérent à notre droit public*"<sup>71</sup> run their course in international law alongside those of private law.

#### IV A PRINCIPLE OF LEGALITY

In international law, a text emanating from a state must, in principle, be interpreted as producing and as intending to produce effects in accordance with existing international law and not in violation of it.<sup>72</sup> The intention to derogate from general international law cannot be presumed;<sup>73</sup> a derogation from the general law cannot be acceded to unless it is clearly spelled out in the treaty at issue.<sup>74</sup>

The principle surfaced in rudimentary form in *Namibia*.<sup>75</sup> There it was contended that the Covenant of the League of Nations did not confer on the Council of the League the power to terminate a mandate for misconduct of the mandatory, and that no such power to terminate a mandate for misconduct could therefore be exercised by the United Nations, as it could not derive from the League

68 Albert de La Pradelle *Cours de droit constitutionnel* (Pedone, Paris, 1912).

69 See Romain Yakemtchouk "Deschamps (Edouard-François-Eugène)" in *Biographie nationale, 41ème tome, supplément tome XIII* (Bruylant, Brussels, 1979) 198 at 199–200.

70 At 201.

71 Laffèrière, above n 58, at xiii.

72 *Right of Passage over Indian Territory (Portugal v India)* [1957] ICJ Rep 142; and Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (9th ed, Longman, Essex, 1992) at 1275.

73 Robert Kolb *Interprétation et création du droit international* (Bruylant, Brussels, 2006) at 468.

74 *Dette publique ottoman* (1925) 1 RIAA 529 at 555 (Sole Arbitrator Borel). See for example *South West Africa – Voting Procedure (Advisory Opinion)* [1955] ICJ Rep 67 at 99 (separate opinion of Judge Lauterpacht); Gerald Fitzmaurice "The Law and Procedure of the International Court of Justice, 1954–9: General Principles and Sources of International Law" (1959) 35 BYIL 183 at 227–228; Pellet, above n 1, at 420; and Maurice Kamto "La volonté de l'état en droit international" (2004) 310 Hague Recueil 1 at 122–123.

75 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16.

greater powers than had inured to the League itself.<sup>76</sup> The Court observed that, for this objection to prevail, it would be necessary to show that the original mandates system:<sup>77</sup>

... excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human persons contained in treaties of a humanitarian character.

The Court added, on the relationship between the treaty and the principle of general international law applicable in the case, that:<sup>78</sup>

The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law.

In *ELSI* a Chamber of the International Court was more explicit.<sup>79</sup> The United States had argued that the rule of the exhaustion of local remedies did not apply to a case brought under Article XXVI of the 1948 Treaty of Friendship, Commerce, and Navigation between Italy and the United States.<sup>80</sup> The Chamber concluded that it found itself:<sup>81</sup>

... unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.

International law could in this connection benefit from the more intense and richer experience of internal law, where the principle of legality has taken on sharper contours than in international law.

There is a rule generally accepted by municipal legal systems according to which an affirmative statute does not take from the general law, or as it was traditionally expressed by way of Latin brocard: *statutum affirmativum non derogat communi legi*. In French law this question is conceived of as a

76 "The stream cannot rise above its source": James Crawford "Chance, Order, Change" (2013) 365 Hague Recueil 9 at 303; and Covenant of the League of Nations, above n 45.

77 *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, above n 75, at [96].

78 At [96], [47]–[48] and [97]–[98]. See also *Amoco International Finance Corporation v Iran* (1987–II) 15 Iran-USCTR 189, (1987) 83 ILR 500 at [112].

79 *ELSI*, above n 67.

80 Treaty of Friendship, Commerce, and Navigation between Italy and the United States 79 UNTS 171 (signed 2 February 1948, entered into force 26 July 1949). Article XXVI states: "Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means."

81 *ELSI*, above n 67, at [50]. See further Charles Rousseau "L'Indépendance de l'État dans l'ordre international" (1948) 73 Hague Recueil 171 at 211–212; Denis Alland "L'interprétation du droit international public" (2012) 362 Hague Recueil 53 at 172; and Roger O'Keefe "Public International Law" (2011) 81 BYIL 339 at 402.

matter of the operation of "*les principes généraux du droit*".<sup>82</sup> They are the general law against the background of which primary and secondary legislation fall to be interpreted.<sup>83</sup> The extent to which legal instruments will be interpreted against the background of these general principles, or even be disapplied completely, will depend upon the seniority or rank of the instrument to be interpreted (regulation, statute or constitutional provision) and the seniority or rank of the general principle ("*valeur réglementaire*", "*valeur législative*" or "*valeur constitutionnelle*").<sup>84</sup> Most general principles of law have come to be held to be of constitutional rank. The Conseil d'État in *Lamotte* relied on the right to judicial review ("*le droit au recours pour excès de pouvoir contre tout acte administratif*") in a manner similar to the judicial technique of the principle of legality as exemplified in the common law by *Ex parte Simms*.<sup>85</sup> The Conseil d'État followed the *Commissaire du gouvernement* (a reporting judge, not dissimilar to the Advocate General of the Court of Justice of the European Union), who had concluded that:<sup>86</sup>

The *recours pour excès de pouvoir* is available, even without legislative warrant, to challenge every administrative act, and its effect is to guarantee respect for legality in accordance with the general principles of law.

But the Conseil d'État went further and held that the respect for legality that was demanded by the general principles of law was so strong that the right to judicial review would still lie even in the face of widely phrased legislation saying there should be no judicial review. The legislation at issue was quite clear, providing that the measure in question "*ne peut faire l'objet d'aucun recours administratif ou judiciaire*"; but even this wording was held not to be clear enough to override the general law.

In post-war Germany the written Basic Law, and the numerous constitutional principles it sets out, will to a large extent play the role that the unwritten principles of the common or general law will play in United Kingdom and in French law. But even in German law, in the era of the Basic Law, certain unwritten principles of law, supra-positive principles of law ("*überpositive Rechtsgrundsätze*") as the German Federal Constitutional Court has termed them,<sup>87</sup> play a role in the interpretation and application of legislation.

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82 Bernard Stirn *Les sources constitutionnelles du droit administratif* (9th ed, Librairie générale de droit et de jurisprudence, Paris, 2016) at 22–26.

83 Stirn and Aguila, above n 56, at 219–220.

84 At 219–220.

85 *R v Secretary of State for the Home Secretary, Ex parte Simms* [2000] 2 AC 115 (HL), on which see below.

86 Conseil d'État *Lamotte* (17 February 1950) (conclusions: Devolvé) (translation in: L Neville Brown and John S Bell *French Administrative Law* (5th ed, Oxford University Press, Oxford, 1998) at 171).

87 *Südweststaat* 1 BVerfGE 14 at 61; *7,5%-Sperrklausel* 1 BVerfGE 208 at 233; *Gleichberechtigung* 3 BVerfGE 225 at 232; and *Ausbürgerung I* 23 BVerfGE 98 at 106.

According to what in the common law is called the principle of legality, legislation will not be held to allow to interfere with a fundamental principle of constitutional law or a fundamental common law right unless this has been expressly sanctioned by Parliament.<sup>88</sup> The principle is also known as the *Simms* principle, as Lord Hoffmann in that case cast the principle in a particularly attractive form:<sup>89</sup>

... in the absence of express language or necessary implication to the contrary, the courts ... presume that even the most general words were intended to be subject to the basic rights of the individual.

In reality the principle is no more than the constitutional variant of the age-old rule of English law according to which an affirmative statute does not take from the common law (*statutum affirmativum non derogat communi legi*). As Coke put it, "a statute made in the affirmative, without any negative expressed or implied, does not take away the common law".<sup>90</sup> The principle has been reaffirmed by the courts time and again.<sup>91</sup> In *Rottman* Lord Hutton expressed himself in the following terms:<sup>92</sup>

It is a well-established principle that a rule of the common law is not extinguished by a statute unless the statute makes this clear by express provision or by clear implication.

Writing extrajudicially, Laws LJ observed about the principle of legality that "rights protected by the common law could not be abrogated by statute save by crystal clear provisions leaving no room for doubt as to what the legislative intention was".<sup>93</sup> "Crystal clear" is also the formulation relied on by the Supreme Court in relation to principles of constitutional law.<sup>94</sup> McLachlan has shown that the "bedrock principles of legality within the unwritten British constitution" is no different in for example Australia and Canada, despite the fact that those two common law systems have written constitutions; it is a matter of what he terms "common law constitutional principles" shared by all the systems of

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88 Paul Craig "Constitutional and Non-Constitutional Review" (2001) 54 CLP 147 at 166; and *R (on the application of Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787 at [56]–[59] (per Lord Neuberger).

89 *Ex parte Simms*, above n 85, at 131.

90 Edward Coke *Institutes of the Laws of England* (17th ed, W Clarke, London, 1817) at 200.

91 See for example *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL) at 614 (per Lord Reid); *London Borough of Islington v UCKAC* [2006] EWCA Civ 340, [2006] 1 WLR 1303 at [28] (per Dyson LJ); and *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174 at [130] (per Lord Mance).

92 *Rottman v Commissioner of Police for the Metropolis* [2002] UKHL 20, [2002] 2 AC 692 at [75].

93 John Laws "Constitutional Guarantees" (2008) 29 SLR 1 at 8.

94 *R (on the application of Evans) v Attorney General*, above n 88, at [56]–[58] and [90] (per Lord Neuberger).

the Anglo-Commonwealth.<sup>95</sup> What the approaches to the principle of legality in internal law seem to share in common is the way in which they protect individual liberty, in addition to the integrity of the constitutional order.

If these rules applied *in foro domestico* are subjected to the abstraction and generalisation necessary for domestic legal rules to be able to operate as general principles of law in international law, and we strip them of their domestic particularities,<sup>96</sup> they seem capable of becoming a general principle of law. They could make up a principle of legality operating at the international level, according to which treaties will, in the absence of express or even crystal clear language, be presumed to have been intended to be subject to fundamental principles of general international law, including principles which protect the rights of the individual, what the Permanent Court already in 1935 termed "fundamental rights".<sup>97</sup> Arguably the Grand Chamber of the European Court of Human Rights relied on such a principle when in *Al Jedda v United Kingdom*, concerning the interpretation of Security Council resolutions, it determined that:<sup>98</sup>

... in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member State to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.

## V ***A PRINCIPLE REQUIRING POSITIVE LEGAL BASIS FOR STATE ACTION***

In 1957 Sir Gerald Fitzmaurice observed that in any legal system the question arises of the establishment of what he called a residual or presumptive position. This is what has been referred to as the *Lotus* principle, on the basis of the determination of the Permanent Court's judgment in that proceeding.<sup>99</sup> Is the subject of the legal system free to do as it pleases, except where the system

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95 See Campbell McLachlan "The Allocative Function of Foreign Relations Law" (2012) 82 BYIL 349 at 366; and Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014) at 105–109.

96 De Visscher, above n 24, at 419; and Weil, above n 27, at 145.

97 *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City (Advisory Opinion)* (1935) PCIJ (series A/B) No 65 at 54.

98 *Al-Jedda v United Kingdom* [2011] ECHR 1092 (Grand Chamber) at [102]. See also *Nada v Switzerland* [2012] ECHR 1691 (Grand Chamber) at [171].

99 See on the "*Lotus* principle" set out in *SS 'Lotus' (France v Turkey)* (1927) PCIJ (series A) No 10 at 18: Gerald Fitzmaurice *The Law and Procedure of the International Court of Justice* (Grotius, Cambridge, 1986) at 146–

prohibits the subject from doing so; or must the subject be able to account for and justify the activity by reference to some permissive rule or some other positive justification afforded by the legal system?<sup>100</sup> In Fitzmaurice's view, three models were possible in international law. The first was that the state must be able to point to positive justification for its actions under international law: the state's action will be held to be illegal unless it can adduce such positive justification, that is, the action has to be done in accord with a permissive rule. This model would imply a presumption of illegality unless the contrary could be established.

The second alternative was that states were free to act as they wished except to the extent that international law prevented them from doing so; absent any rule of international law forbidding the action, or there being some rule prescribing a particular course of action to which the action does not conform, the action of the state is held to be lawful. This model would involve a presumption of legality unless the contrary could be established.<sup>101</sup>

Fitzmaurice thought neither of the two models described would suit international law very well, suggesting instead a third possibility. This third model was particularly suited to a system such as international law, a model that would imply no presumption either way, whether of legality or illegality.<sup>102</sup>

... a State must at all times act in good faith, in a manner consistent with the spirit of the system, and, on this basis, avoid action which is abusive in character, even though technically within the right of the State and not positively prohibited by any rule of the system.

It is difficult to conclude, on the basis of positive international law, that the system of international law has elected any particular of these three models. There may be some support for the third model in the case law of arbitral tribunals, which have developed what Weil has referred to as the principle of self-interpretation or self-appreciation.<sup>103</sup> Thus in *Lake Lanoux*<sup>104</sup> the Tribunal observed that:<sup>105</sup>

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147; Crawford, above n 53, at 41–42; Alain Pellet "Lotus: que de sottises on profère en ton nom" in Edwige Belliard (ed) *Mélanges en l'honneur de Pierre Puissechet* (Pedone, Paris, 2008) 215; and Douglas Guilfoyle "SS Lotus" in Eirik Bjorge and Cameron Miles (eds) *Landmark Cases in Public International Law* (Hart Publishing, Oxford, 2017) at 89, 90 and 106–109.

100 Gerald Fitzmaurice "The General Principles of International Law Considered from the Standpoint of the Rule of Law" (1957) 92 Hague Recueil 50.

101 Crawford, above n 53, at 41–42; and *Procès-Verbaux*, above n 2, at 314 (per Ricci-Busatti).

102 Fitzmaurice, above n 100, at 50–51.

103 Prosper Weil "The Court Cannot Conclude Definitively... *Non Liquet* Revisited" (1998) 36 Col J of Transnatl L 109 at 119.

104 *Lake Lanoux (France v Spain)* (1957) 24 ILR 101.

105 At 132.

... it is for each State to evaluate in a reasonable manner and in good faith the situations and the rules which will involve it in controversies; its evaluation may be in contradiction with that of another State; in that case, should a dispute arise the Parties normally seek to resolve it by negotiation or, alternatively, by submitting to the authority of a third party; but one of them is never obliged to suspend the exercise of its jurisdiction because of the dispute except when it assumes an obligation to do so; by exercising its jurisdiction it takes the risk of seeing its international responsibility called into question, if it is established that it did not act within the limits of its rights.

In a similar vein, the Tribunal in *Air Services Agreement of 27 March 1946* determined two decades later that:<sup>106</sup>

Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organisations, each State establishes for itself its legal situation vis-à-vis other States.

The rules applied *in foro domestico* can assist international law in its maturation and sophistication in this regard. Over the last 50 years or so a rule generally accepted by municipal legal systems has crystallised according to which any state action to be taken must be justified by positive law. As regards French law, Weil has observed that modern public law is, above all, "*la limitation par le droit du gouvernement, de ses services, de ses agents*",<sup>107</sup> encapsulating the "*limitation de l'action gouvernementale par le droit*".<sup>108</sup> As the Conseil d'État's *Commissaire du gouvernement* Corneille held in *Baldy* already in 1917: "every public law dispute must ... begin with the realization that liberty [of the individual] is the rule; police restrictions, the exception".<sup>109</sup> Similarly, Italian constitutional and administrative law adheres to a strict version of the principle of legality,<sup>110</sup> spelt out in numerous provisions of the Constitution,<sup>111</sup> and the principle of legality means here the precept that the state can act only when it has legal authority to do so.<sup>112</sup> Under German law the principles of public law require that the executive always needs authorisation by parliamentary statute if its action encroaches

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106 *Air Services Agreement of 27 March 1946 (Unites States v France)* (1978) 18 RIAA 417 at [81].

107 Weil and Pouyaud, above n 55, at 77.

108 At 78.

109 Conseil d'État *Baldy* (17 August 1917) (conclusions: Corneille) (translation in: Bernard Stirn *Towards a European Public Law* (Eirik Bjorge (ed and tr), Oxford University Press, Oxford, 2017) at 111. "Police" is used here in the broad sense, as in "police powers".

110 As will be seen, the locution "the principle of legality" bears varying meanings in different domestic legal systems.

111 See for example Italian Constitution, arts 13, 23, 32(2) and 42(2).

112 Sergio Bartole "The Doctrine of the Separation of Powers and the Italian Constitution" (1995) 2 *The Public* 33 at 35.

on the individual's sphere of rights.<sup>113</sup> In a case concerning Article 3(1) of the Basic Law, which provides that "[a]ll persons shall be equal before the law", the Federal Constitutional Court in *Fraport* observed that the provision at issue was "based on a fundamental distinction: while the citizen as a matter of principle is free, the state as a matter of principle is bound".<sup>114</sup>

The position is now no less clear in United Kingdom law.<sup>115</sup> As Craig has said of state action under the public law of the United Kingdom, for government action to be permissible the government must be able to point to some legal basis for the action, and that legal basis needs to be regarded as valid by the legal system.<sup>116</sup> Craig went on to observe that:<sup>117</sup>

If the government cannot provide a legal foundation for its action then the United Kingdom courts would regard the action as unlawful, since there would be no lawful authority for it.

The position was set out in *ex parte Fewings* by Laws J, who observed that, whilst the rule for private persons was that "you may do anything you choose which the law does not prohibit", for public bodies the rule is the opposite, as "any action to be taken must be justified by positive law".<sup>118</sup> In other words, whereas in English law individuals are free to do anything which is not prohibited, government action requires legal authority.<sup>119</sup> If it was not the case 50 years ago, the rule seems today generally to be accepted by municipal legal systems.

The question is whether these "obvious maxims of jurisprudence of a general and fundamental character"<sup>120</sup> as they apply in domestic public law are capable of being transported onto the field of international law. They seem capable both of the abstraction and the generalisation referred to above; they are capable of being stripped of national particularities so that their most general and universal

113 Werner Heun *The Constitution of Germany: A Contextual Analysis* (Hart Publishing, Oxford, 2011) at 37.

114 *Fraport* 128 BVerfGE 226 at [48]. Thus enunciated, the principle could be thought to bleed into the principle of legality.

115 Compare *Malone v Metropolitan Police Commissioner* [1979] Ch 344 at 367 (per Megarry VC).

116 Paul Craig "The Rule of Law" in House of Lords Constitution Committee *Relations between the executive, the judiciary and Parliament* (HL Paper 151, 2006–2007) 97 at 98.

117 At 98.

118 *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 at 524 (upheld on appeal: [1995] 1 WLR 1037 (CA), with Bingham LJ observing, at 1042, of the local authority at issue that "it is not lawful for you to do anything save what the law expressly or impliedly authorises").

119 Adam Tomkins "The Authority of *Entick v Carrington*" in Adam Tomkins and Paul Scott (eds) *Entick v Carrington: 250 Years of the Rule of Law* (Hart Publishing, Oxford, 2015) 161 at 184.

120 Hersch Lauterpacht *International Law: Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press, Cambridge, 1970) vol 1 at 69. See also *South West Africa – Voting Procedure*, above n 74, at 67.

features come to the fore.<sup>121</sup> The quintessence of the rule is that, by operation of the rule of law, state action needs a positive legal basis. Such a rule seems, again to rely on Basdevant's phrase, "*non incompatibles avec les exigences de l'ordre international*".<sup>122</sup>

## **VI A PRINCIPLE OF JUDICIAL REVIEW WITHIN THE STRUCTURE OF THE UNITED NATIONS**

According to Article 7 of the United Nations Charter, the International Court of Justice is one of the United Nations' "principal organs";<sup>123</sup> indeed it is, according to Article 92, "the principal judicial organ of the United Nations".<sup>124</sup> According to itself, in *Corfu Channel*, the Court is also "the organ" of international law, which gives it a particular role in "ensur[ing] respect for international law".<sup>125</sup> But is the International Court competent judicially to review the validity of Security Council resolutions? Or is the Leviathan<sup>126</sup> of international relations in that sense above the law, in the manner that the Prince would be in many legal systems as late as in the 19th century?<sup>127</sup>

The *Institut de Droit International* has observed in this connection that:<sup>128</sup>

... in general the rule of law includes a principle according to which all persons, institutions and entities, public and private, including the State itself, are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated.

But the International Court observed in *Certain Expenses* that, although in the legal systems of states there is often some procedure for determining the validity of a legislative or governmental act: "no analogous procedure is to be found in the structure of the United Nations".<sup>129</sup> This is because, in the post-war period, it was felt that if the United Nations Security Council were to avoid meeting with the same fate as the Council of the League of Nations then it could not be hamstrung by legal mechanisms. When the Charter was negotiated the drafters put a premium on the strength and dispatch

121 See De Visscher, above n 24, at 419.

122 Basdevant, above n 36.

123 Charter of the United Nations, art 7.

124 Article 92.

125 *Corfu Channel* [1949] ICJ Rep 4 at 35 (emphasis added).

126 See Crawford, above n 76, at 202–203.

127 See for example Conseil d'État *Prince Napoléon* (19 February 1875), since which decision it is the court, and not the government, that decides whether a decision comes within the court's jurisdiction in public law cases. See Weil and Pouyaud, above n 55, at 78–79.

128 Institut de droit international *Review of Measures Implementing Decision of the Security Council in the Field of Targeted Sanctions* (Resolution, session de Hyderabad, 9 September 2017), preamble, para (4).

129 *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151 at 168.

of the Security Council, the executive organ of the United Nations. The dangers of abuse of power were now, explains Kolb, "to be prevented by political rather than legal means, namely the requirement of a qualified majority, and above all the affirmative votes of all five Permanent Members".<sup>130</sup>

Nevertheless, the International Court would soften its stance somewhat in that same Advisory Opinion, by going on actually to scrutinise the General Assembly and Security Council resolutions at issue, examining whether the activities they authorised were within the scope of the Charter and whether the expenses defrayed were made for the purposes of the United Nations.<sup>131</sup>

Furthermore, the International Court observed in *Namibia* that: "the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned".<sup>132</sup> But, here too, the Court would in the event review the legality of the resolutions at issue, concluding that the decisions made by the Security Council "were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25".<sup>133</sup>

In *Lockerbie* Libya instituted proceedings under the Montreal Convention seeking a declaration that it had complied with its obligations thereunder in connection with two Libyan nationals charged with the Lockerbie bombing.<sup>134</sup> After the hearing on provisional measures, but in advance of the Court's decision, the Security Council adopted a Chapter VII resolution which determined that Libya's failure to demonstrate its renunciation of terrorism and to respond fully and effectively to requests to surrender for trial the two Libyan nationals charged with the bombing amounted to a threat to international peace, deciding that Libya must comply with those requests.<sup>135</sup> The Court decided that it was unnecessary to prescribe provisional measures, holding that it was "not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992)".<sup>136</sup> At the preliminary objections stage, the Court did not accede to the objection advanced by the United States and the United Kingdom according to which Security Council resolution 748 (1992) superseded Libya's rights under the treaty under which it had based its claim, taking the view that it had

<sup>130</sup> Kolb, above n 12, at 883.

<sup>131</sup> *Certain Expenses of the United Nations*, above n 129, at 167–168; Couvreur, above n 13, at 137; and Rüdiger Wolfrum *Judicial Review of Security Council Decisions* (Institut de Droit International, Preparatory Work, 2017) at [172]. Compare Institut de droit international, above n 128.

<sup>132</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, above n 77, at [89].

<sup>133</sup> At [115].

<sup>134</sup> Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 974 UNTS 177 (signed 23 September 1971, entered into force 26 January 1973).

<sup>135</sup> *Libyan Arab Jamahiriya SC Res 748 (1992)* at 7.

<sup>136</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v United Kingdom) (Provisional Measures)* [1992] ICJ Rep 3 at 15.

jurisdiction when the claim was filed and that the subsequent Security Council resolution could not affect this.<sup>137</sup> There is no indication in the Orders of 1992 that the Court would refuse to examine the legality or validity of a resolution adopted by the Security Council, in particular under Chapter VII of the Charter.<sup>138</sup> Rather the Court indicated that it was not called upon at the provisional measures stage to determine the legal effects of resolution 748 in a definitive way and that Libya's purported rights were not "appropriate for protection" by the indication of such measures by the Court.<sup>139</sup>

No doubt situations where the International Court can judicially review the Security Council will arise only incidentally.<sup>140</sup> But there are real pressures which push in the direction of accountability.<sup>141</sup> As Crawford has observed:<sup>142</sup>

... only when the Court has "clear jurisdiction judicially to review action of all United Nations political agencies, including the Security Council ... could the rule of law be said to extend to international political life.

Here too internal law can assist the development of international law. In French law there is a clear right to judicial review for excess of power of any administrative act.<sup>143</sup> The Conseil d'État considers it to be a "*principe général du droit*" that the legality of an administrative act can always be reviewed by the administrative courts.<sup>144</sup> It follows from decisions such as *D'Aillieres* and *Lamotte*,<sup>145</sup> that this is so even if the administration has been explicitly empowered to act "without there being recourse to any court".<sup>146</sup> In the celebrated case of *Canal* the Conseil d'État held, in the face of threats of being shut down by General de Gaulle, that it followed from the "*principes généraux*

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137 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v United Kingdom) (Preliminary Objections)* [1998] ICJ Rep 9 at 23–24.

138 Couvreur, above n 13, at 143.

139 At 143.

140 Crawford, above n 76, at 319.

141 At 320.

142 At 321, citing James Crawford and Susan Marks "The Global Democracy Deficit: An Essay on International Law and Its Limits" in Daniele Archibugi, David Held and Martin Köhler (eds) *Re-Imagining Political Community* (Polity Press, Cambridge, 1998) 72 at 84.

143 The exception that proves the rule being the doctrine of "*acte de gouvernement*", now reduced almost to vanishing point: see Weil and Pouyaud, above n 55, at 78–80 ("*la liste des actes de gouvernement n'a cessé de rétrécir «comme une peau de chagrin»*").

144 Stirn and Aguila, above n 56, at 219.

145 Conseil d'État *D'Ailliers* (7 February 1947); and *Lamotte*, above n 86.

146 Brown and Bell, above n 86, at 237.

*du droit*" that the decision of any public body, including military tribunals set up by a decree signed by the head of state, must be subject to review by a court, in the event the Court of Cassation.<sup>147</sup>

United Kingdom law is no less exigent. In *M v Home Office* the Home Secretary was held liable for contempt of court, in virtue of his office, not as a private individual,<sup>148</sup> Lord Templeman observing that:<sup>149</sup>

... the argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War.

In the majority judgment in the more recent landmark judgment of *Evans*, the Supreme Court's then-President, Lord Neuberger, who cited *M v Home Office*, added that:<sup>150</sup>

The proposition that a member of the executive can actually overrule a decision of the judiciary because he does not agree with that decision is equally remarkable, even if one allows for the fact that the executive's overruling can be judicially reviewed.

His Lordship went on to observe that in United Kingdom law "[t]he constitutional importance of the principle that a decision of the executive should be reviewable by the judiciary"<sup>151</sup> is beyond doubt, and it has been so for a long time.<sup>152</sup>

*Ahmed v Her Majesty's Treasury* exemplifies the principle in the context of United Nations Security Council resolutions.<sup>153</sup> The case raised the potential of conflict between the United Kingdom's obligations under international law according to the United Nations Charter to follow United Nations Security Council resolutions on the one hand and judicial review of what has been

147 Conseil d'État *Canal* (19 October 1962). See Stirn and Aguila, above n 56, at 219; Brown and Bell, above n 86, at 57, 217–218 and 237; and Weil and Pouyaud, above n 55, at 78.

148 Stephen Sedley *Lions under the Throne: Essays on the History of English Public Law* (Cambridge University Press, Cambridge, 2015) at 221–222.

149 *M v Home Office* [1994] 1 AC 377 (HL) at 395.

150 *R (on the application of Evans) v Attorney General*, above n 88, at [53] (per Lord Neuberger).

151 At [54].

152 *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, [2006] 1 AC 262 at [159] (per Lady Hale); *In re Racal Communications Ltd* [1981] AC 374 (HL) at 383 (per Lord Diplock); *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) at 170 (per Lord Reid); and *R v Cheltenham Commissioners* (1841) 1 QB 467 at 474 (per Lord Denman CJ). See also for example Sedley, above n 148, at 110–111.

153 *Ahmed v Her Majesty's Treasury* [2010] UKSC 2, [2010] 2 AC 534.

termed "an extra-judicial confiscation scheme"<sup>154</sup> on the other.<sup>155</sup> The appellants were British citizens who had, pursuant to Article 41 of the United Nations Charter, been listed by a United Nations Committee set up by the Security Council, and then duly designated under the Terrorism Order and the Al-Qaida and Taliban Order in the United Kingdom.<sup>156</sup> The United Kingdom gave effect to Article 41 of the Charter through the United Nations Act 1946.<sup>157</sup> The question was what limits, if any, were there on the power conferred by s 1 of the United Nations Act on the executive and "whether the section confers power on the executive, without any parliamentary scrutiny, to give effect in this country to decisions of the Security Council which are targeted against individuals".<sup>158</sup> Lord Hope held for the Supreme Court that: "If the rule of law is to mean anything, decisions as to what is necessary or expedient in this context cannot be left to the uncontrolled judgment of the executive."<sup>159</sup>

In German law there is a general principle of judicial review based on the Basic Law and on the principle of *Rechtsstaat* itself. Under German law the system of judicial review is based on Article 1(3) of the Basic Law, which is cast in the following terms: "The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law." By reason of this rule the courts are obliged to enforce such rights against both the executive and the legislature,<sup>160</sup> and Article 19(4) of the Basic Law translates this general principle of judicial review into a fundamental right that is directly enforceable for individuals: "Should any person's rights be violated by public authority, he may have recourse to the courts." This system of judicial review is considered in German law to be "an emanation of the more general constitutional principle of *Rechtsstaat*".<sup>161</sup>

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154 Sedley, above n 148, at 111.

155 See McLachlan, Shore and Weiniger, above n 19, at [1.20] and [3.82]–[3.84]; and Eirik Bjorge "Common Law Rights: Balancing Domestic and International Exigencies" (2016) 75 CLJ 220 at 235–237.

156 Terrorism (United Nations Measures) Order 2006 (UK); and Al-Qaida and Taliban (United Nations Measures) Order 2006 (UK).

157 Section 1 is in the following terms: "If, under Article forty-one of the Charter of the United Nations signed at San Francisco on the twenty-sixth day of June, nineteen hundred and forty-five, (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order." See Eirik Bjorge "Can Unincorporated Treaty Obligations be Part of English Law?" [2017] PL 571 at 589–590.

158 *Ahmed v Her Majesty's Treasury*, above n 153, at [44] (per Lord Hope).

159 At [45].

160 Georg Nolte and Peter Rädler "Judicial Review in Germany" (1995) 1 EPL 26 at 26.

161 At 26. See also Georg Nolte "General Principles of German and European Administrative Law" (1994) 57 MLR 191.

It seems eminently possible to extract from these rules, generally accepted by municipal legal systems, a quintessence that is capable of being elevated to the international plane. In its broadest formulation, that quintessence is that a decision of the executive should be reviewable by the judiciary.<sup>162</sup> By reason of this general principle of law the International Court would be competent, if the question comes before it incidentally, judicially to review the legal effects of Security Council resolutions. It may well be that this principle owes something to the notion of inherent powers.<sup>163</sup> The Court has, as Couvreur has observed:<sup>164</sup>

... an inherent (albeit incidental) power to interpret, and possibly examine, the legal effects of the decisions of the other principal organs of the United Nations, a power that is necessary for it to fulfil its judicial function, whether advisory or contentious.

## **VII A PRINCIPLE OF PROTECTION OF LEGITIMATE EXPECTATIONS**

When a subject of international law makes assurances to another in a way that leads the other legitimately to place trust and confidence in them, then the expectations created are protected by international law.<sup>165</sup> As de Nanteuil has observed, such a principle of legitimate expectations has been in existence for a long time:<sup>166</sup>

... des décisions anciennes fondées sur le standard minimum de protection ont déjà accepté d'engager la responsabilité de certains Etats en raison d'une méconnaissance des attentes légitimes d'un ressortissant étranger, signe que la notion, si elle est apparue récemment dans le droit de l'investissement, n'est aucunement inconnue en droit international général.

In the 1905 award *Aboilard* the Haitian Government had concluded certain concession contracts with a French national who was investing in Haiti. After having acted over a period of time in such a way as to give rise to expectations on the part of the investor (by giving him exclusive concessionary rights to certain utilities in Port-au-Prince and Pétienville), the Haitian authorities had purported to take the view that certain domestic law conditions had not been fulfilled, and the concession was revoked. The Tribunal held that, in the circumstances, the revocation amounted to an internationally

162 *R (on the application of Evans) v Attorney General*, above n 88, at [54] (per Lord Neuberger).

163 See text accompanying n 12 above.

164 Couvreur, above n 13, at 144.

165 Robert Kolb "La sécurité juridique en droit international" (2002) 10 AYIL 103; Robert Kolb *Good Faith in International Law* (Hart Publishing, Oxford, 2017) at 15; Charles Cheney Hyde *International Law: Chiefly as Interpreted and Applied by the United States* (Little, Brown & Co, Boston, 1922) vol 1 at 368–369; Pierre Lalive *Le respect international des droits acquis* (Association des Études Internationales, Geneva, 1967) 49–50; and Jörg P Müller *Vertrauensschutz im Völkerrecht* (Carl Heymanns Verlag, Cologne, 1971).

166 Arnaud de Nanteuil *Droit international de l'investissement* (2nd ed, Pedone, Paris, 2017) at 353.

unlawful act on the part of the Haitian Government. In the view of the Tribunal, which explicitly was basing itself on principles of law ("*des principes du droit*"),<sup>167</sup> the Haitian Government had created "*des attentes légitimes qui, ayant été trompées par le fait du gouvernement lui-même, ont entraîné un préjudice dont réparation est due.*"<sup>168</sup>

The source of this principle is to be found in municipal law.<sup>169</sup> Although under differing labels, the principle of legitimate expectations is generally accepted in municipal legal systems such as Islamic law, the common law, and in the civilian tradition. Under Islamic law, faith and reliance are protected in ways similar to the principle of legitimate expectations. Mahmassani, an expert of Islamic jurisprudence,<sup>170</sup> explained in relation to the principle of *pacta sunt servanda* that a tradition of the Prophet reads that: "Muslims are bound by their stipulations".<sup>171</sup> This goes beyond only fulfilling contracts. The 13th century authority Al Qurtubi observed that a man is bound by what he does "both in word and deed"; this "comprises his dealings with his fellow men, his undertakings, and much besides, and the injunction that he should keep them and perform them".<sup>172</sup> This is no less clear in the civil and common law traditions that originated in Europe. As Craig has observed, the concepts of legal certainty and legitimate expectations are connected and, although their precise content may vary, can be found in the public law of many legal systems.<sup>173</sup> In the civil law, exemplified by French law, the premium has been on legal certainty, "*sécurité juridique*", the protection of which has been characterised as a general principle of law by the French courts.<sup>174</sup> According to Stirn, this principle of legal certainty overlaps with aspects of legitimate expectations.<sup>175</sup> Thus the Conseil constitutionnel has held that citizens are protected against violations of their "legally acquired positions" and changes that might "compromise the effects which may legitimately be expected in connection with such positions".<sup>176</sup> As regards the common law, the doctrine of legitimate expectations has firmly

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167 *Aboliard (France/Haïti) (Documents)* (1905) 12 RGDIP 13 at 15.

168 At 15.

169 McLachlan, Shore and Weiniger, above n 19, at 315.

170 Sobhi Mahmassani "The principles of international law in the light of Islamic doctrine" (1966) 117 Hague Recueil 201.

171 *Libyan American Oil Company (LIAMCO) v Libya* (1977) 62 ILR 140 at 190; and *Al-Jami' As-Sagher II* No 9213.

172 Ahkam XII at 107, quoted in JND Anderson and NJ Coulson "The Moslem Ruler and Contractual Obligations" (1958) 33 NYU L Rev 917 at 925.

173 Paul Craig *Administrative Law* (8th ed, Sweet & Maxwell, Oxford, 2016) at 670.

174 Conseil d'État *Société KPGM* (24 March 2006); and Conseil d'État *Société Techna* (27 October 2006).

175 Stirn, above n 82, at 121.

176 Decision No 2013-682 of 19 December 2013 (translation in: Stirn, above n 82, at 121).

established itself as a fundamental general principle of English law.<sup>177</sup> In the common law, the cases normally treated as the strongest cases of legitimate expectations are those where there has been an individualised representation in which the individual has put faith and reliance.<sup>178</sup> According to Craig, the reason these cases have been treated as the strongest is that such a representation has been considered to carry a particular moral force, and because holding the public body to such a bilateral representation would have less far reaching consequences for the administration.<sup>179</sup> Another reason might be that in those instances the court is able to point to a specific act on the part of the executive vis-à-vis the individual which is amenable to review in a manner that does not engage the legislative function.<sup>180</sup> "It is each State's undeniable right and privilege to exercise its sovereign legislative power."<sup>181</sup>

For the principle of legitimate expectations to be able to operate on the international level, however, the principle needs as discussed above to conform to the fundamental exigencies of the international order. In spite of the growing similarities between public international law and municipal public law, a defining feature of this international legal system remains the absence of a central organ with legislative authority.<sup>182</sup> Still today international society remains to a certain degree a society dominated by consensualism and the tradition of bilateralism.<sup>183</sup> As Crawford has observed, "according to a deeply ingrained view of international law and international society, the character of international rights and obligations is inherently bilateral".<sup>184</sup> In order for the principle of legitimate expectations to operate in international law, therefore, it arguably needs to be made to conform to the inherently bilateral character of rights and obligations in international law. The protection of legal security is in international law a bilateral matter.<sup>185</sup> As Kolb has observed, "[l]a sécurité juridique en

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177 Lloyd-Jones, above n 26, at 8. See also Sedley, above n 148, at 154–157; and Craig, above n 173, at 675–678.

178 Craig, above n 173, at 672.

179 At 672.

180 McLachlan, Shore and Weiniger, above n 19, at [7.162]–[7.165] and [7.179].

181 *Parkerings-Compagniet AS v Lithuania* ICSID Case No ARB/05/8, 11 September 2007 at [332].

182 *Austro–German Customs Union Case*, above n 40, at 57 (per Judge Anzilotti); and Crawford, above n 40, at 344.

183 Prosper Weil "Cours général: le droit en quête de son identité" (1992) 237 Hague Recueil 151; and Vera Gowlland-Debbas "The ICJ and the Challenges of Human Rights Law" in Mads Andenas and Eirik Bjorge (eds) *A Farewell to Fragmentation: Convergence and Reassertion in International Law* (Cambridge University Press, Cambridge, 2015) 109 at 144.

184 Crawford, above n 40, at 345.

185 Weil, above n 27; and Philippe Couvreur "Estoppel: synonyme pédant de la bonne foi" in Hervé Ascensio and others (eds) *Dictionnaire des idées reçues en droit international: en clin d'œil amical à Alain Pellet* (Pedone, Paris, 2017) 221.

*droit international est essentiellement une sécurité des rapports bilatéraux*".<sup>186</sup> A legitimate expectation therefore cannot in international law be based on general commitments or assurances (such as the publication of documents setting out government policy or an invitation to potential investors launching a tendering process) which are not directed to any particular recipient. This is why international courts and tribunals have been slow to hold that legitimate expectations can exist outside of bilateral relationships.<sup>187</sup> Thus conceived, the general principle of law protecting legitimate expectations is in line with the consensualist and still essentially bilateral nature of international law. That might go some way in obviating the misgivings of those who have deprecated the principle of legitimate expectations as being "a general and vague standard".<sup>188</sup> Within carefully defined bounds, the principle of protection of legitimate expectations is a general principle of law. As Lauterpacht observed more than seventy years ago, it is "a sound precept of law", operating to make it impossible under international law for a state "to cause confusion and to disappoint legitimate expectations by blowing hot and cold".<sup>189</sup>

### VIII CONCLUSION

No doubt it is true, as Redgwell has observed, that the reliance on general principles of law is closely bound up with the appropriate role to be played by international courts and tribunals in the interpretation and application of international law.<sup>190</sup> The function of the United Nations' principal judicial organ is set out clearly in Article 38 of the Court's Statute. The Court should take heart from the mandate it has been given in Article 38(1)(c), by deciding in accordance with international law such disputes as are submitted to it applying general principles of law in accordance with the needs of the progress of the international community. The reality is that general principles of law, in common with treaty and custom, enjoy pride of place within Article 38. General principles of law are specifically considered more highly ranked than "subsidiary means", the term confined to Article 38(1)(d).<sup>191</sup> Nothing in the wording of Article 38 should therefore discourage reliance by the Court

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186 Kolb, above n 165, at 142.

187 See for example *Aboliard*, above n 167, at 15; *Lewis (United States) v Great Britain (Adams case)* (1921) 6 RIAA 85 at 92; *Shufeldt Claim (Guatemala v United States)* (1930) 2 RIAA 1079 at 1094; *Situation in Manchuria: Report of the Lytton Commission of Enquiry* (League of Nations Publications, 1 October 1932) especially at 44; *ECE Projektmanagement International GmbH v The Czech Republic* PCA Case No 2010-5, 19 September 2013 at [4.762] and [4.767]; and *Minotte v Poland* ICSID Case No ARB(AF)/10/1, 16 May 2014 at [193]–[194].

188 James Crawford "Treaty and Contract in Investment Arbitration" (2008) 24 *Arb Int* 351 at 373.

189 Hersch Lauterpacht "Implied Recognition" (1944) 21 *BYIL* 123 at 150.

190 Catherine Redgwell "General Principles of International Law" in Stefan Vogenauer and Stephen Weatherill (eds) *General Principles of Law: European and Comparative Perspectives* (Hart Publishing, Oxford, 2017) 5 at 18–19.

191 Crawford, above n 10, at 34.

on general principles of law. Furthermore, in today's international legal order, a legal order increasingly "influenced by ideas of public law",<sup>192</sup> there is nothing in the provision that should lead one to conclude that somehow public law principles need tug their forelocks to private law ones. Public law principles, far from supplanting private law ones, supplement those emanating from the field of private law. In the international law of today, "*les exigences à satisfaire*",<sup>193</sup> to use Quadri's words of more than half a century ago, are increasingly of a public nature rather than only private. By the same token it would be "*erroné de se limiter aux principes du droit privé*".<sup>194</sup> If one takes account of the needs of international law, there is no reason whatever why today we should accede to the orthodoxy that the intention behind the concept of general principles is only "to authorize the Court to apply the general principles of municipal jurisprudence, *in particular of private law*, in so far as they are applicable to relations of States"<sup>195</sup> – if for no other reason than the fact that international law no longer governs only relations of states.

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192 *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Declaration of Judge Simma)* [2010] ICJ Rep 478 at 478–479.

193 Quadri, above n 3, at 352.

194 At 352.

195 Hersch Lauterpacht (ed) *Oppenheim's International Law* (8th ed, Longman, London, 1955) at 29 (emphasis added). The words "in particular of private law" were removed in the ninth edition: Jennings and Watts, above n 72, at 36–37.