PUBLIC LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW

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1. Introduction

The focus of this paper is the extent to which 'general principles of law recognized by civilized nations'[1] are capable of adjusting to the progress and needs of the international community. I argue that they are, and I do so taking the view that general principles should draw on principles developed in the rules of public law as they are applied *in foro domestico*. I offer three examples: first, the principle of legality; second, the principle requiring positive legal basis for State action; and, third, the principle that even the highest emanation of the executive power cannot escape judicial review.

As is well-known, when the Committee of Jurists in 1920 addressed the question of which law the Permanent Court of International Justice was to administer, the Committee took the view that one of the sources of law were general principles of law.[2] 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, as it was thought to be older, more intense, and richer than the international.[3] It was, according to Lord Phillimore, the Continental members of the Committee who wanted general principles to be included.[4] These members had feared that, if

[1] Art 38(1)(c), Statute of the International Court of Justice, 26 June 1945, 892 UNTS 119.

[2] *Procès-Verbaux of the Proceedings of the Committee* (Van Langenhuysen 1920) 310 *et seq*.

[3] R Quadri, 'Cours général de droit international public' (1964) 113 Hague *Recueil* 351.

[4] Lord Phillimore, 'Scheme for the Permanent Court International Justice' (1920) 6 GST 89, 94

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".'[5]

It seems that what the delegates had in mind were, in the first instance, procedural principles. In the debates explicit reference was made by Lord Phillimore to 'certain principles of procedure, the principle of good faith, and the principle of *res judicata*'.[6] Indeed, the one arbitral authority cited in the deliberations was *Pious Funds*,[7] on the procedural principle of *res judicata*. The focus on procedure persisted after the adoption of Article 38.[8] Still today the most successful use of domestic law analogies before the International Court has been in the field of procedure.[9] The reason for this may well be that procedural law is the field in which judicially discovered principles are the least threatening to the freedom of action of States:[10] substantive principles, on the other hand, might be thought to pose more of a threat. Perhaps another reason is 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.

Wishing by the late 1920s to develop such substantive principles, Lauterpacht turned, in his eponymous study of private law sources and analogies of international law, to domestic *private* law.[11] This 'right step in the wrong direction'[12] was not deprived of logic: in a system based on bilateral relations only between States, borrowing from domestic private law concepts made eminent sense, the contractual relationships of individuals being applied to States in their

[5] ibid.

[6] *Procès-Verbaux* (1920) 335 (Phillimore)

[7] *Pious Funds* (1902) 9 RIAA 11; *Procès-Verbaux* (1920) 310 (Deschamps), 316 (Phillimore).

[8] A Ræstad, '"Droit coutumier" et "principes généraux" en droit international' (1933) 4 NJIL 61, 74

[9] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 36–7.

[10] D Anzilotti, *Cours de droit international* (G Gidel tr, Sirey 1929) 118.

[11] H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans 1927).

[12] The line is taken from S Žižek, *In Defense of Lost Causes* (Verso 2008) 95, who applied it to Heidegger.

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.[13]

But, if it once used to be the case that international law was inherently bilateral, that is no longer the case. At the present day for example international organizations and individuals enjoy rights and are bound by obligations. The bilateral is giving way to the multilateral.

International decision-making needs to be mirrored by constitutional and administrative law safeguards. Principles of *public* law are needed, as public problems call for public answers. To the extent that international law has not been able to proffer them itself, such principles are beginning to be and should be sought 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',[14] then that mooring is in public law, not procedural or private.

International law today is today far from being 'private law writ large'.[15] Its future maturation and sophistication depends on the development of general principles of law taken from public law. In that regard Judge Koretsky observation in *South West Africa*, a case bearing on more than just synallagmatic relations between two States, has aged well:

> Long ago there were warnings against the danger of an unreserved transference of the principles of civil law and process into international (public) law and into the procedure of international courts. Here the character of relations and rights is of another kind. Here one cannot think in civil law categories.[16]

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[13] P Weil, 'Droit international public et droit administratif' in *Mélanges Trotabas* (LGDJ 1970) 511, 513–14. This is patently wrong as a matter of the law that was actually in existence, and had been for a long time (see P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) Ch 1)—but it may nevertheless be a valid explanation.

[14] C McLachlan, L Shore & M Weiniger, *International Investment Arbitration* (2nd edn, OUP 2017) 315.

[15] T Holland, *Studies in International Law* (Clarendon 1898) 152; H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans 1927) 81.

[16] *South West Africa (Second Phase)*, Dissenting Opinion, ICJ Rep 1966, p 242.

The changes that the international legal system has been going through over the last decades are such that what is needed is not only general principles that tinker with the operation of certain sub-systems of international law. Something more is needed. And, whilst the existing literature does interrogate the extent to 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.[17]

Although Lauterpacht focused in his early work on private law concepts, he later came to countenance the idea that general principles of law might also encompass principles of public law, as general principles were in his view:

> those principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character … a comparison, generalization and synthesis of rules of law in its various branches—private and public, constitutional, administrative, and procedural—common to various systems of national law.[18]

Quadri went further and argued that '*il est erroné de se limiter aux principes du droit privé, puisque les principes du droit public peuvent également être utilisés quand les exigences à satisfaire sont les mêmes*',[19] giving the example of how the Permanent Court in *Interpretation of the Treaty of Lausanne* relied on the public law rule that no one can be judge in his own suit (*nemo judex in re sua*).[20]

General principles of law are to be understood as first principles, '*propositions premières*', common to domestic legal systems and capable of being transported onto the

[17] See eg SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010).

[18] H Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht Vol I* (CUP 1970) 69; see also *South West Africa—Voting Procedure*, Separate Opinion, Judge Lauterpacht, ICJ Rep 1955, p 67.

[19] R Quadri, 'Cours général de droit international public' (1964) 113 Hague *Recueil* 352.

[20] *Interpretation of the Treaty of Lausanne* (1925) PCIJ Series B, No 12, p 32. See *South West Africa—Voting Procedure*, Separate Opinion, Judge Lauterpacht, ICJ Rep 1955, p 67, 104–5 on the characterization of this rule as a general principle of law.

international legal order.[21] In order for a rule to be characterized as a general principle of law, it would have to go through a two stage process, the first stage of which is *abstraction*; the second, *generalization*. This process would strip the domestic rule of its detailed particularities and, through a process of synthesis, bring out its most general and truly universal features.[22] What is important in that regard are not the superficial similarities of rules obtaining in different legal systems; it is the principle that undergirds and explains those rules.[23] General principles are thus not the sum of domestic legal rules nor a lowest common denominator.[24] As Samson has observed:

> *contrairement à ce qu'on a pu écrire, l'identification d'un principe général de droit n'implique pas d'étudier un à un l'ensemble des droit nationaux. Il suffit de sonder les différentes "familles juridiques", quitte à creuser avantage en cas de doute*.[25]

Indeed, the International Court observed in *Barcelona Traction*, the rule at issue needs no more than to be 'generally accepted by municipal legal systems'.[26]

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.[27] Once the domestic rule has been reduced to its disembodied abstraction, the principle must be implanted on the level of international law; this means that flesh must be given to the bones of what was the domestic principles such that it can function on the international level.[28] As Weil has put it:

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[21] J Basdevant, *Dictionnaire de la terminologie du droit international* (Sirey 1960) 475.

[22] C De Visscher, *Théories et réalités en droit international public* (4th edn, Pedone 1970) 419.

[23] ibid.

[24] P Weil, 'Le droit international en quête de son identité' (1992) 237 Hague *Recueil* 145.

[25] B Samson, 'PGD: de et pas du' in H Ascencio et al (eds), *Dictionnaire des idées reçues en droit international* (Pedone 2017) 433, 434.

[26] *Barcelona Traction, Light and Power Company, Limited*, ICJ Rep 1970, p 3, 37, para 50.

[27] P Weil, 'Le droit international en quête de son identité' (1992) 237 Hague *Recueil* 145.

[28] ibid 146.

> *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 nécessites et les objectifs de l'ordre international sont compatibles avec ceux des droits nationaux*.[29]

Therefore, only principles of domestic law which are '*non incompatibles avec les exigences de l'ordre international*' are capable of being elevated to the international level and of operating there as a source of law.[30] But, even then, the principles extracted from domestic law will need to be refashioned as a function of the needs of the international legal order.[31] Even when international law is 'called upon to recognize institutions of municipal law that have an important and extensive role in the international field', such as limited liability companies, the Court observed in *Barcelona Traction*, '[t]his does not necessarily imply drawing an analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law'.[32] A measure of caution is in other words needed.

2. *General principles of public law?*

Four points need stressing in relation to the possibility of general principles of law of a specifically public law character. First, it is worth remembering that the word that international law uses for the works of writers or other persons skilled in international law is, in the well-known wording of Article 38 of the Statute, 'teachings of the most highly qualified publicists'. The word publicist is perhaps more readily understood by Francophone audiences than Anglophone ones. In the Cartesian system of French law, there is a division between the

[29] ibid 147.

[30] J Basdevant, 'Règles générales du droit de la paix' (1936) 58 Hague *Recueil* 501.

[31] P Weil, 'Le droit international en quête de son identité' (1992) 237 Hague *Recueil* 147.

[32] *Barcelona Traction, Light and Power Company, Limited*, ICJ Rep 1970, p 3, 33, para 38. Also: *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* ICJ Rep 2010, p 639, 675, para 104

'*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 specializing 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.[33]

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 for as long since the 1870s,[34] 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*'.[35] Shortly thereafter the concept made an appearance in the literature, in Lafferière's classic *Traité de la juridiction administrative*,[36] and thereafter also in the case-law of the Conseil d'État,[37] a superior court which sits only in public law cases, where in the post-war period it would become one of the foremost sources of French public law.[38] In private law, meanwhile, there was in French law no comparable concept of general principles of law.[39]

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[33] See eg P Weil (& D Pouyaud), *Le droit administratif* (25th edn, PUF 2017) and P Weil, *Écrits de droit international* (PUF 2000); E Zoller, *La bonne foi en droit international public* (Pedone 1977) and E Zoller, *Introduction au droit public* (2nd edn, Dalloz 2013) (incidentally, the two have also been the leading foreign relations lawyers in France: P Weil, 'Le contrôle par les tribunaux nationaux de la licéité des actes des gouvernements étrangers' (1977) 23 AFDI 16; E Zoller, *Droits des relations extérieures* (PUF 1992)).

[34] B Stirn & Y Aguila, *Droit public français et europeen* (Dalloz 2014).

[35] *Dugave et Bransiet* Tribunal des Conflits 8 February 1873.

[36] E Lafferière, *Traité de la juridiction administrative* (Berger-Levraut 1887) xiii.

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

[38] B Stirn & Y Aguila, *Droit public français et européen* (Dalloz 2014) 211–22.

[39] ibid 211–12.

Third, it is worth remembering that already in the 1930s the Permanent Court, in *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, naturally 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',[40] equally naturally leading the Court to emphasize 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:

> Provisions concerning such rights occur in most of the constitutions drawn up since the beginning of the XIXth 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.[41]

Under the rule of law, continued the Court, the intention is 'to reserve to the law so as to safeguard individual liberty from any arbitrary encroachment on the part of the authorities of the State'.[42] The increasing concern of international law for the precepts of the rule of law, and the protection it affords against arbitrariness,[43] was also brought out by the International Court when, in *Asylum*, it warned against 'arbitrary action' being 'substituted for the rule of law'.[44] Some forty years later, in *ELSI*, a Chamber of the International Court observed, in relation to

[40] *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (1935) PCIJ Series A/B No 65, 54.

[41] ibid.

[42] ibid 56.

[43] See D Akande & E Bjorge, 'The United Kingdom Ministerial Code and International Law: A Response to Richard Ekins and Guglielmo Verdirame', *UK Constitutional Law Blog*, 10 December 2015, available at https://ukconstitutionallaw.org/2015/12/10/dapo-akande-and-eirik-bjorge-the-united-kingdom-ministerial-code-and-international-law-a-response-to-richard-ekins-and-guglielmo-verdirame/.

[44] ICJ Reports 1950, p. 266, 284.

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'.[45] 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 (1912–18) of administrative law, publishing in that period a treatise on French constitutional law,[46] and only since 1918 a professor of public international law. Secondly, Professor Edouard-François-Eugène Deschamps, later Baron Deschamps, had in 1871 begun his Belgian university career teaching administrative law, and published several works on domestic administrative and constitutional law,[47] before he was invited, in 1881, to concentrate on public international law.[48] Nevertheless, as is clear from the deliberations of the Committee of Jurists referred to above, general principles of public law did not take on any prominence whatever in the deliberations of the Committee.

If, in 1920, the most highly qualified publicists of the day suppressed the public law character of their legal formation, and of public international law, inclining as they did before the synallagmaticity of a system consisting only of sovereign States, it is now for the present

[45] ICJ Rep 1989 p 15, 76.

[46] A de La Pradelle, *Cours de droit constitutionnel* (Pedone 1912).

[47] See R Yakemtchouk, 'Deschamps (Edouard-François-Eugène)' in *Biographie nationale, 41ème tome, supplément tome XIII* (Bruylant 1979) 198, 199–200.

[48] ibid 201.

generation to let what Lafferière in 1887 called the '*principes inhérent à notre droit public*'[49] run their course in international law. Against that back-cloth, the focus can then turn to assessing the fitness as general principles of law of the three rules mentioned in the introduction.

3. *A principle of legality?*

A text emanating from a State must, in principle, be interpreted as producing and as intending to produce effects in accordance with existing law and not in violation of it.[50] The principle is that the intention to derogate from general international law cannot be presumed;[51] a derogation from the general law cannot be acceded to unless it is clearly spelled out in the treaty at issue.[52]

The principle seems to have surfaced in rudimentary form in *Namibia*.[53] There it was contended that the Covenant of the League of Nations[54] did not confer on the Council of the League 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 greater powers than had inured to the League itself.[55] The Court observed that, for this objection to prevail, it would be necessary to show that the original mandates system, 'excluded the application of the general principle of law that a right of

[49] E Lafferière, *Traité de la juridiction administrative* (Berger-Levraut 1887) xiii.

[50] *Right of Passage* ICJ Rep 1957, p 142.

[51] R Kolb, *Interprétation et création du droit international* (Bruylant 2006) 468.

[52] *Dette publique ottoman* (1925) 1 529, 555 (Sole Arbitrator Borel). See eg *South West Africa—Voting Procedure*, Separate Opinion, Judge Lauterpacht, ICJ Rep 1955, p 67, 99; G Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1954–9: General Principles and Sources of International Law' (1959) 35 BYIL 183, 227–8; A Pellet, *Recherche sur les principes généraux de droit en droit international* (Université de Paris 1974) 420; M Kamto, 'La volonté de l'état en droit international' (2004) 310 Hague *Recueil* 122–3.

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

[54] 28 June 1919, 225 CTS 195.

[55] 'The stream cannot rise above its source': J Crawford, 'Chance, Order, Change' (2013) 365 Hague *Recueil* 303.

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'.[56] The Court added, on the relationship between the treaty and the principle of general international law applicable in the case, that: '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'.[57] In *ELSI* a Chamber of the International Court was more explicit.[58] The United States had argued that the rule of the exhaustion of local remedies did not apply to a case brought under Article XXVI[59] of the 1948 Treaty of Friendship, Commerce, and Navigation between Italy and the United States.[60] The Chamber concluded that it found itself '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'.[61]

Might international law benefit in this connection from the more intense and richer experience of internal law?[62] There is a rule 'generally accepted by municipal legal systems'[63]

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[56] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep 1971, p 16, 47, para 96.

[57] ibid. Also: ibid p 47–8, para 97–8. For contemporary authority from other courts and tribunals see: *Humblet v Belgium*, Judgment of 16 December 1960, ECJ Case No 6/60; *Amoco International Finance Corporation v Iran* (1987–II) 15 Iran–USCTR 189, 22, para 112; (1987) 83 ILR 500, 541, para 112.

[58] *Elettronica Sicula SpA* (*ELSI*) ICJ Rep 1989, p 15.

[59] '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.'

[60] 2 February 1948, 79 UNTS 171.

[61] *Elettronica Sicula SpA* (*ELSI*) ICJ Rep 1989, p 15, 42, para 50. See further C Rousseau, 'L'Independence de l'État dans l'ordre international' (1948) 73 Hague *Recueil* 211–12; D Alland, 'L'interprétation du droit international public' (2013) 362 Hague *Recueil* 172; R O'Keefe, 'Public International Law' (2011) 81 BYIL 339, 402.

[62] R Quadri, 'Cours général de droit international public' (1964) 113 Hague *Recueil* 351.

[63] *Barcelona Traction, Light and Power Company, Limited*, ICJ Rep 1970, p 3, 37, para 50.

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 matter of the operation of '*les principes généraux du droit*'.[64] They are the general law against the background of which primary and secondary legislation fall to be interpreted.[65] 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 (ie regulation, statute, constitutional provision) and the seniority or rank of the general principle (ie '*valeur réglementaire*', '*valeur législative*', '*valeur constitutionnelle*').[66] Most general principles of law have come to be held to be of constitutional rank.[67] The right to judicial review ('*le droit au recours pour excès de pouvoir contre tout acte administratif*') was relied on by the Conseil d'État in *Lamotte* in a manner similar to the judicial technique of the principle of legality as exemplified in the common law by *Ex parte Simms.*[68] The Conseil d'État followed the *Commissaire du gouvernement* (a species of reporting judge, not dissimilar to the Advocate General of the Court of Justice of the European Union), who had concluded that:

> 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.[69]

[64] B Stirn, *Les sources constitutionnelles du droit administratif* (9th edn, LGDJ 2016) 22–6.

[65] B Stirn & Y Aguila, *Droit public français et européen* (Dalloz 2014) 219–20.

[66] ibid.

[67] ibid.

[68] *Ex parte Simms* [2000] 2 AC 115, on which see below.

[69] *Lamotte* Conseil d'État 17 February 1950 (conclusions: Devolvé); translation in L Neville Brown & JS Bell, *French Administrative Law* (5th edn, OUP 1998) 171.

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 postwar 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 UK 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 Rechtgrundsätze*') as the German Federal Constitutional Court has termed them,[70] play a role in the interpretation and application of legislation.

According to what in the common law is called the principle of legality (and this is a term of art, 'the principle of legality' having in the common law a very specific meaning), legislation will not be held to allow an interference with a fundamental principle of constitutional law or a fundamental common law right unless this has been expressly sanctioned by Parliament.[71] The principle is also known as the *Ex parte Simms* principle, as Lord Hoffmann in that case cast the principle in a particularly attractive form: '[i]n 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.'[72]

[70] *Südweststaat* BVerfGE 1, 14, at 61; *7,5%-Sperrklausel* BVerfGE 1, 208, at 233; *Gleichberechtigung* BVerfGE 3, 225, 232; *Ausbürgeung I* BVerfGE 23, 98, at 106.

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

[72] *Ex parte Simms* [2000] 2 AC 115, 131.

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".[73] The principle has been reaffirmed by the courts time and again.[74] In *Rottman* Lord Hutton expressed himself in the following terms: "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."[75] Writing extra-judicially, Laws LJ has 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';[76] 'crystal clear' is also the formulation relied on by the Supreme Court in relation to principles of UK constitutional law.[77] 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 the Anglo-Commonwealth.[78]

If these rules applied *in foro domestico* are subjected to the abstraction and generalization necessary for domestic legal rules to be able to operate as general principles of

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[73] E Coke, *Institutes of the Laws of England* (17th edn, London 1817) 200.

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

[75] *R (on the application of Rottman) v Commissioner of Police for the Metropolis* [2002] UKHL 20; [2002] 2 AC 692, [75].

[76] J Laws, 'Constitutional Guarantees' (2008) 29 SLR 1, 8.

[77] *R (on the application of Evans)* [2015] UKSC 21; [2015] AC 1787, [56]–[58], [90] (Lord Neuberger).

[78] See C McLachlan, 'The Allocative Function of Foreign Relations Law' (2012) 82 BYIL 349, 366. Also: C McLachlan, *Foreign Relations Law* (CUP 2014) 105–9.

law in international law, and we strip them of their domestic particularities,[79] they seem capable of becoming a general principle of law. They 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 such principles as protect the rights of the individual, what the Permanent Court already in 1935 termed 'fundamental rights'.[80] Could not this general principle of law be relied on to develop and refine the approach of international courts and tribunals to treaty instruments which are said, or purport, to derogate from important principles of the general law? Could not also the insistence *in foro domestico* on fundamental rights in the application of the principle of legality be elevated to the international level?[81]

4. 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.[82] Is the subject of the legal system free to do as he pleases, except where the system 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?[83] In

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[79] C De Visscher, *Théories et réalités en droit international public* (4th edn, Pedone 1970) 419; P Weil, 'Le droit international en quête de son identité' (1992) 237 Hague *Recueil* 145.

[80] *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (1935) PCIJ Series A/B No 65, 54.

[81] Perhaps this is crystallizing in cases such as *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, 147 ILR 107 & *Nada v Switzerland* (2012) 56 EHRR 18.

[82] See on the '*Lotus* principle' set out in *SS 'Lotus' (France v Turkey)* 1927 PCIJ (Series A) No 10, p 18: G Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius 1986) 146–7; A Pellet, '*Lotus* : que de sottises on profère en ton nom' in E Belliard (ed), *Mélanges Pierre Puissochet* (Pedone 2008) 215; D Guilfoyle, '*SS Lotus*' in E Bjorge & C Miles (eds), *Landmark Cases in Public International Law* (Hart 2017) 89, 90 & 106–9.

[83] G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 Hague *Recueil* 50.

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 confirm, the action of the State is held to be lawful. This model would involve a presumption of legality unless the contrary could be established.

Fitzmaurice thought neither of the two models described the international field 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 of illegality: '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.'[84]

The third model has received support in the case-law of international courts and tribunals and in doctrine. Weil seems to have supported this third model, referring to it as 'the principle of self-interpretation or self-appreciation',[85] and pointing for support to *Lake*

[84] ibid 50–1.

[85] P Weil, 'The Court Cannot Conclude Definitively… *Non Liquet* Revisited' (1998) 36 Col J of Transnatl L 109, 119.

Lanoux[86] and *Air Services Agreement of 27 March 1946*.[87] Similarly Jennings seems to have thrown his weight behind it in an article about the problem of refugees, a problem of international relations that has lost none of its topicality, and to which in his view general and customary international law was relevant. The specific question he looked at was the consideration of the legality or illegality of the conduct of the state which creates a refugee population.[88] Whilst on the one hand Jennings took the view that the treatment accorded by a state to its own subjects, including the conferment or deprivation of nationality, is a matter of purely domestic concern,[89] international law also entered into it: '[A]s soon as the persecution of a minority does in fact result in a refugee movement which causes embarrassment to other states, the matter clearly becomes one of international concern'; 'for a state to employ these rights with the avowed purpose of settling other states with unwanted sections of its population is as clear an abuse of right as can be imagined'.[90]

Interestingly, Fitzmaurice took the view that both the first and the second position were unsatisfactory fundamentally for the same reason: what he considered in the 1950s as being the substantively incomplete and undeveloped state of international law.[91] Given this state, it

[86] *Lake Lanoux (France v Spain)* (1957) 24 ILR 101, 132 (Petrén, P; Bolla; Reuter; F de Visscher; de Luna) ('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.').

[87] *Air Services Agreement of 27 March 1946 (Unites States v France)* (1978) 18 RIAA 417, 443, para 81 (Riphagen, P; Ehrlich; Reuter) ('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.').

[88] RY Jennings, 'Some International Law Aspects of the Refugee Question' (1939) 20 BYIL 98.

[89] Largely confirmed in *Nottebohm (Second Phase)* ICJ Rep 1955 p 4, 20.

[90] RY Jennings, 'Some International Law Aspects of the Refugee Question' (1939) 20 BYIL 98, 112–13

[91] G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 Hague *Recueil* 51.

would not be practical to begin with a presumption of illegality for international State action, and for there to be an onus on States of demonstrating the legality of their actions in the international field.[92] For the same reason it would not be satisfactory to say that a State may do as it pleases so long as it was not in breach of any positive rule of international law: what Fitzmaurice saw in 1957 as the comparatively unsettled or undeveloped condition of international law would, if this approach were to be taken, give too free a licence to unrestricted State action.[93] Can the rules applied *in foro domestico* assist international law in its maturation and sophistication in this regard?

Over the last fifty years or so a rule 'generally accepted by municipal legal systems'[94] has crystallized according to which any State action to be taken must be justified by positive law. Weil observed that the modern public law of France is, above all, '*la limitation par le droit du gouvernement, de ses services, de ses agents*',[95] encapsulating the '*limitation de l'action gouvernementale par le droit*'.[96] 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'.[97] Similarly, Italian constitutional and administrative law adheres to a strict version of the principle of legality, spelt out in numerous provisions of the Constitution,[98] and the principle of legality means here the precept that the State can act only when it has legal

[92] ibid 51–2.

[93] ibid 52.

[94] *Barcelona Traction, Light and Power Company, Limited*, ICJ Rep 1970, p 3, 37, para 50.

[95] P Weil & D Pouyaud, *Le droit administratif* (25th edn, PUF 2017) 77.

[96] ibid 78.

[97] Conseil d'État, 17 August 1917, *Baldy* (conclusions: Corneille). Translation in B Stirn, *Towards a European Public Law* (E Bjorge tr, OUP 2017) 111. 'Police' is used here in the broad sense, as in 'police powers'.

[98] See eg Arts 13, 23, 32(2), and 42(2) of the Italian Constitution.

authority to do so.[99] Under German law the principles of public law require that the executive always needs an authorisation by parliamentary statute if its action encroaches on the individual's sphere of rights.[100] 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'.[101]

The position is now no less clear in UK law.[102] As Craig has said of State action under the public law of the UK, 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.[103] Craig went on to observe that: '[i]f the government cannot provide a legal foundation for its action then the UK courts would regard the action as unlawful, since there would be no lawful authority for it.'[104] The position was set out judicially by Laws J, as he then was, in *R v Somerset Country ex p Fewings*, 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 opposite, as 'any action to be taken must be justified by positive law'.[105] In other words, whereas in English law individuals are free to do anything which is not prohibited,

[99] S Bartole, 'The Doctrine of the Separation of Powers and the Italian Constitution' (1995) 2 The Public 33, 35.

[100] W Heun, *The Constitution of Germany: A Contextual Analysis* (Hart 2011) 37.

[101] *Fraport*, BVerfGE 128, 226 at [48].

[102] *cf Malone v Metropolitan Police Commissioner* [1979] Ch 344, 367 (Megharry V-C) ('the tapping of telephones … does not require any statutory or common law power to justify it; it can be lawfully done simply because there is nothing to make it unlawful').

[103] P Craig, 'The Rule of Law', evidence to the House of Lords Constitution Committee, 2006, HL 2006–7, 98.

[104] ibid.

[105] *R v Somerset County Council ex p Fewings* [1995] 1 All ER 513, 524 (upheld on appeal: [1995] 3 All ER 20, Bingham LJ observing, at 25, of the local authority at issue that: 'it is not lawful for you to do anything save what the law expressly or impliedly authorises.').

State action requires legal authority.[106] If it was not the case fifty years ago, the rule seems today generally to be accepted by municipal legal systems.

But could these 'obvious maxims of jurisprudence of a general and fundamental character'[107] as they apply in domestic public law be transported onto the field of international law? They seem capable both of the abstraction and the generalization referred to above; they are capable of being stripped of national particularities so that their most general and universal features come to the fore.[108] The quintessence of the rule generally accepted by municipal legal systems is simply that, by operation of the rule of law, State action needs a positive legal basis. Such a rule seems to be, again to rely on Basdevant's phrase, '*non incompatibles avec les exigences de l'ordre international*'.[109]

5. *A principle of judicial review?*

Is the International Court, 'the principle judicial organ of the United Nations',[110] competent judicially to review the validity of Security Council resolutions? Or is the Leviathan[111] 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 nineteenth century?[112] According to the International Court, '[t]here is a fundamental distinction between the acceptance by a State of the Court's

[106] A Tomkins, 'The Authority of *Entick v Carrington*' in A Tomkins & P Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart 2015) 161, 184.

[107] H Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht Vol I* (CUP 1970) 69; see also *South West Africa—Voting Procedure*, Separate Opinion, Judge Lauterpacht, ICJ Rep 1955, p 67.

[108] See C De Visscher, *Théories et réalités en droit international public* (4th edn, Pedone 1970) 419.

[109] J Basdevant, 'Règles générales du droit de la paix' (1936) 58 Hague *Recueil* 501.

[110] Art 92, Charter of the United Nations, 26 June 1945, 892 UNTS 119.

[111] See J Crawford, 'Chance, Order, Change' (2013) 365 Hague *Recueil* 202–3.

[112] See eg *Prince Napoléon* Conseil d'État 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 P Weil & D Pouyaud, *Le droit administratif* (25th edn, PUF 2017) 78–9.

jurisdiction and the compatibility of particular acts with international law.'[113] But surely a similar principle cannot apply to the Security Council? The picture is complex. In a famous passage, the International Court observed in *Certain Expenses* that: 'In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations.'[114]

In spite of this broad dictum, however, the International Court went on in its Advisory Opinion to soften its stance somewhat, by observing that '[i]f the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization"'[115]—the words 'must be presumed' pointing in the direction of the conclusion that this is no more than a (rebuttable) presumption. In the event, the Court would go on actually to scrutinize the measures at issue.[116]

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'.[117] But, again, in the event the Court did go on to soften its initial stance, by reviewing the legality of the resolutions at issue in *Namibia*, concluding 'that the decisions made by the Security Council in paragraphs 2 and 5 of resolutions 276 (1970), as related to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolutions 269 (1969), were

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[113] *Fisheries Jurisdiction (Spain v Canada)* ICJ Rep 1998, p 432, 456, para 55.

[114] *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Rep 1962, p 151, 168.

[115] ibid.

[116] 175–7. See R Wolfrum, 'Judicial Review of Security Council Decisions', Institut de Droit International, 76–7, para 172.

[117] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep 1971, p 16, 45, para 89

adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25.'[118]

Nevertheless, some have excluded completely the possibility of the International Court exercising judicial review, President Schwebel in *Lockerbie* observing that:

> The texts of the Charter of the United Nations and of the Statute of the Court furnish no shred of support for a conclusion that the Court possesses a power of judicial review in general, or a power to supervene the decisions of the Security Council in particular. On the contrary, by the absence of any such provision, and by according the Security Council "primary responsibility for the maintenance of international peace and security", the Charter and the Statute import the contrary.[119]

In *Lockerbie* Libya instituted proceedings under the Montreal Convention[120] seeking a declaration that it had complied with its obligations thereunder in connection with two Libyan nationals charged with the Lockerbie bombing. 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.[121] The Court decided that it was unnecessary to prescribe provisional measures, holding that it was 'not at this stage called upon to determined definitively the legal effect of Security Council resolution 748 (1992)'.[122] At the preliminary objections stage, the

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[118] ICJ Rep 1971, p 16, 53, para 115.

[119] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v United Kingdom)*, Dissenting Opinion of President Schwebel, Preliminary Objections, ICJ Rep 1998 p 9, 162.

[120] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177.

[121] SC res 748 (1992), 31 March 1992, p 7.

[122] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Rep 1992, p 3, 15, para 40.

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 jurisdiction when the claim was filed and that the subsequent Security Council resolution could not affect this.[123]

It can be concluded that, if nothing else, this limited jurisprudence demonstrates, as Wolfrum has observed, that:

> the International Court of Justice has, so far, not considered itself to be competent to declare a decision of the Security Council to be in violation [of] the UN Charter. However, this jurisprudence also indicates that the Court does consider itself competent to scrutinize objections raised against a particular Security Council decision and to interpret such decisions if this is necessary to decide on an issue submitted to it.[124]

Crawford has observed that situations where this might be possible can arise only incidentally in contentious proceedings, to which the Security Council will necessarily not be a party.[125] There are, as he continues, 'pressures which push in the direction of accountability';[126] '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'.[127] Might the experience of domestic law provide any assistance in this regard?

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[123] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v United Kingdom)*, Preliminary Objections, ICJ Rep 1998 p. 9, 23–4, para 38.

[124] R Wolfrum, 'Judicial Review of Security Council Decisions', Institut de Droit International, 78, para 177.

[125] J Crawford, 'Chance, Order, Change' (2013) 365 Hague *Recueil* 319.

[126] ibid 320.

[127] ibid 321, citing J Crawford & S Marks, 'The Global Democracy Deficit: An Essay in International Law and Its Limits' in D Archibuigi, D Held, and M Köhler (eds), *Re-Imagining Political Community* (Polity Press 1998) 84.

In French law there is a clear right to judicial review for excess of power of any administrative act.[128] 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.[129] It follows from decisions such as *D'Aillieres*[130] and *Lamotte*,[131] that this is so even if the administration has been explicitly empowered to act 'without there being recourse to any court'.[132] 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 '*principes généraux du droit*' that the decision of any public body, including military tribunals set up by a decree signed by the head of state, must by subject to review by a court, in the event the Cour de cassation.[133]

UK 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,[134] Lord Templeman observing that: '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 favour and not as a matter of necessity, a proposition which would reverse the result of the Civil War'.[135]

In the majority judgment in the more recent landmark judgment of *Evans*, the Supreme Court's President, Lord Neuberger, who cited *M v Home Office*, added that: 'The proposition

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[128] The exception that proves the rule being the doctrine of '*acte de gouvernement*', now reduced almost to vanishing point: P Weil & D Pouyaud, *Le droit administratif* (25th edn, PUF 2017) 78–80 ('*la liste des actes de gouvernement n'a cessé de rétrécir « comme une peau de chagrin »*').

[129] B Stirn & Y Aguila, *Droit public français et européen* (Dalloz 2014) 219.

[130] *D'Ailliers* Conseil d'État 7 February 1947.

[131] *Lamotte* Conseil d'État 17 February 1950.

[132] L Neville Brown & JS Bell, *French Administrative Law* (5th edn, OUP 1998) 237.

[133] *Canal* Conseil d'État 19 October 1962. See B Stirn & Y Aguila, *Droit public français et européen* (Dalloz 2014) 219; L Neville Brown & JS Bell, *French Administrative Law* (5th edn, OUP 1998) 57, 217–18 & 237; P Weil & D Pouyaud, *Le droit administratif* (25th edn, PUF 2017) 78.

[134] S Sedley, *Lions under the Throne: Essays on the History of English Public Law* (CUP 2015) 221–2.

[135] *M v Home Office* [1994] 1 AC 377, 395.

that a member of the executive can actually override 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.'[136] His Lordship went on to observe that in UK law '[t]he constitutional importance of the principle that a decision of the executive should be reviewable by the judiciary'[137] is beyond doubt, and it has been so for a long time.[138]

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 fundamental rights shall bind the legislature, the executive and the judiciary as directly enforceable law.' By reason of this rule the courts are obliged to enforce such rights against both the executive and the legislative,[139] 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 right be violated by public authority, recourse to the courts shall be open to him.' This system of judicial review is considered in German law to be 'an emanation of the more general constitutional principle of *Rechtsstaat*'.[140]

It seems eminently possible to extract from these rules, 'generally accepted by municipal legal systems',[141] a quintessence that is capable of being elevated to the international plane. That quintessence is that, quite simply, a decision of the executive should be reviewable

[136] *R (on the application of Evans) v Attorney General* [2015] UKSC 21; [2015] AC 1787 [53] (Lord Neuberger).

[137] ibid [54].

[138] *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, [2006] 1 AV 262, [159] (Lady Hale); *In re Racal Communications Ltd* [1981] AC 374, 383 (Lord Diplock); *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 170D (Lord Reid); *R v Cheltenham Commissioners* (1841) 1 QB 467, 474 (Lord Denman CJ). See also S Sedley, *Lions under the Throne: Essays on the History of English Public Law* (CUP 2015) eg 110–11.

[139] G Nolte & P Rädler, 'Judicial Review in Germany' (1995) 1 EPL 26, 26.

[140] ibid. Also: G Nolte, 'General Principles of German and European Administrative Law' (1994) 57 MLR 191.

[141] *Barcelona Traction, Light and Power Company, Limited*, ICJ Rep 1970, p 3, 37, para 50.

by the judiciary.[142] By reason of this general principle of law the International Court is competent to declare a decision of the Security Council to be in violation of the UN Charter.

6. 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.[143] 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, in addition to the two sources flowing more directly from the will of States, 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. At the table of international law, general principles of law are not accommodated below the salt: they are specifically considered more highly ranked than 'subsidiary means', the term confined to Article 38(1)(d).[144] Nothing in the wording of Article 38 should therefore discourage reliance by the Court on general principles of law and, all the more so in today's international legal order 'strongly influenced by ideas of public law',[145] 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. In the international law of today, '*les exigences à satisfaire*',[146]

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[142] *R (on the application of Evans) v Attorney General* [2015] UKSC 21; [2015] AC 1787 [54] (Lord Neuberger).

[143] C Redgwell, 'General Principles of International Law' in S Vogenauer & S Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 5, 18–19.

[144] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 34.

[145] *Kosovo*, Declaration of Judge Simma, ICJ Rep 2010 p 478–9.

[146] R Quadri, 'Cours général de droit international public' (1964) 113 Hague *Recueil* 352.

to use Quadri's words of more than half a century ago, are of a public nature rather than private: by the same token it would be '*erroné de se limiter aux principes du droit privé*'.[147] 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 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'[148]—if for no other reason than the fact that international law no longer governs relations of States only.

[147] ibid.

[148] R Jennings & A Watts (eds), *Oppenheim's International Law Vol I* (9th edn, Longman 1992) 36–7 (emphasis added).