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Article

The Origins and Operation of the General Principles of Law as Gap fillers

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ABSTRACT

The gap-filling function is a prominent feature of general principles of law (GPL). However, there are several questions surrounding the prominence and characterization of this function. In light of this, this article revisits the origins of the GPL and their gap-filling function to understand why it gained prominence, and what it means to international law. By tracing the debates of the Advisory Committee of Jurists on the sources of international law, this article identifies that the necessity of gap filling is tied to the prevalent idea of the completeness of the international legal system. The article further explains the origins of the gap-filling requirement and how the GPL satisfy it. By historicizing the gap-filling discourse, the article argues that the GPL have been used to strengthen the completeness of international law.

1. INTRODUCTION

General principles of law (GPL) recognized by civilized nations are codified as a source of international law in Article 38.1(c) of the Statute of the International Court of Justice (ICJ).[1] Among the sources of international law, the GPL have always been considered a gap filling, auxiliary, or secondary source, particularly in comparison to treaties and custom.[2] Since the International Law Commission (ILC) mandated the study of GPL in 2017, there has been a renewed interest in them as a

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1 There are divergent opinions on what constitute GPL. Some believe that the GPL include both principles of national law (GPNL) and principles of international law (GPIL), see for instance, Marcelo Vázquez-Bermúdez, 'ILC First Report on the General Principles of Law' (2019) 35–41. Others consider that the GPL include more than GPNL and GPIL, encompassing some fundamental natural law concepts intrinsic of law and fundamental to all legal systems which are founded on the nature of man as a rational and social being. O Schachter, International law in theory and practice: General course in Public International Law (vol. 178)' (1982) *Collected Courses of the Hague Academy of International Law*, 74–75.

2 See eg Malgosia Fitzmaurice, 'The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present' in Samantha Besson and Jean D'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (1st edn, OUP 2017) 193.

secondary source. One important reason that GPL are seen as a secondary or subsidiary source, according to some publicists, is precisely related to their gap-filling function.[3] It is also timely to review the GPL's gap-filling function at this juncture as the ILC Special Rapporteur sets out to study the function of GPL in his next report (third report).[4]

The view that the GPL are a gap-filling source is broadly recognized in the writings of eminent publicists. Vaughan Lowe calls them 'a stop-gap to which judges may revert if they fail to find a rule of treaty of custom that determines an issue before them'.[5] Alfred Verdross identifies that the function of the GPL is '*afin de combler les lacunes que nous avons pu constater*'.[6] In the *Oppenheim's International Law*, GPL enable 'rules of law to exist which can fill gaps or weaknesses in the law which might otherwise be left by the operation of custom and treaty'.[7] Malcolm Shaw writes that the GPL were 'inserted into article 38 as a source of law, to close the gap that might be uncovered in international law and solve this problem which is known legally as *non liquet*.'[8] Antonio Cassese says that most general principles 'primarily serve the purpose of filling possible gaps'.[9] Hilary Charlesworth employs an equivalent term of 'safety net' to describe the role of the GPL, when no treaty or custom is available for the dispute settlement.[10] Martti Koskenniemi similarly notes that general principles 'are said to be especially useful in the filling of gaps in law'.[11] Bin Cheng, who has conducted extensive research on the GPL, pays special tribute to their gap-filling function, saying that it 'has contributed greatly towards defining the legal relations between states'.[12] Lucien Siorat's monograph about the gaps in international law, published in 1958, also makes an important contribution to the scholarship in this regard.[13] He argues that the GPL have a gap-filling capacity based on equity and logic, by individualizing abstract notions in specific cases.[14] We can also find this

3 See eg Alain Pellet and Daniel Müller, 'Ch.II Competence of the Court, Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 942, para 296.

4 Marcelo Vázquez-Bermúdez, 'ILC Second Report on the General Principles of Law' (2021) UN Doc A/CN.4/741, 56, para 182.

5 Vaughan Lowe, *International Law* (OUP 2007) 87.

6 Translation: to fill in the gap that we could have observed. Alfred Verdross, Institute de Droit International (1932) 'Annuaire de Institute de Droit International' 317.

7 Lassa Francis Lawrence Oppenheim, *Oppenheim's International Law, Vol 1, [1]: Peace. Introduction and Part 1* (9th edn, Longman 1996) 40.

8 Malcolm Shaw, *International Law* (8th edn, CUP 2017) 370.

9 Antonio Cassese, *International Law* (2nd edn, OUP 2005) 188; Lowe (n 5).

10 Hilary Charlesworth, 'Law-Making and Sources' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (1st edn, CUP 2012) 197.

11 Martti Koskenniemi, 'General Principles: Reflexions on Constructivist Thinking in International Law' (1st edn, Routledge 2000) *Sources of International Law* 365.

12 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Digitally printed 1st pbk version, CUP 2006) 390.

13 Lucien Siorat, *Le Problème Des Lacunes En Droit International: Contribution à l'Étude Des Sources Du Droit et de La Fonction Judiciaire* (Librairie générale de droit et de jurisprudence 1958) 312.

14 ibid.

idea of the GPL as gap filler in a raft of legal scholarship,[15] and in the reports of the ILC Special Rapporteur on the GPL.[16]

Interestingly, unlike legal scholarship, the decisions of international courts and tribunals less directly engage with the idea of gap filling of the GPL, but rather highlight the concept of equity as a gap filler. For instance, in the 1928 *arbitral award concerning the responsibility of Germany for the damages caused in the Portuguese colonies*, the tribunal claimed that equity had the capacity to fill the gap ('combler la lacune') in the absence of applicable international rules to the litigious facts.[17] Similarly, the umpire in the 1928 *Pinson v. Mexico* case invoked the concept of equity to fill gaps in international law.[18] In Judge Ammoun's separate opinion in the *North Sea Continental Shelf* case, he stated that the principle of equity 'fills a lacuna, like the principle of equity *praeter legem*, which is a subsidiary source of law' and Article 38.1 sub-paragraph (c) 'appears to be of assistance in filling the gap'.[19] The question arises as to why the courts and tribunals prefer the concept of equity to the GPL when they engage in gap filling. The other side of this question, then, is why publicists and basic primers place emphasis gap filling in their analyses of the GPL.

Similarly, instead of explicitly referring to gap filling, many cases state an order of application among different sources of international law: GPL apply only in the absence of applicable treaty or customary rules.[20] In Hans Kelsen's words, GPL are to be 'applied if the two other [sources]—treaty and custom—cannot be applied'.[21] However, many jurists disagree that there is an order of application, because that

15 Akehurst cites many cases to justify this gap-filling function played by GPL but with a material source of equity. Michael Akehurst, 'Equity and General Principles of Law' (1976) 25 The International and Comparative Law Quarterly 801. Paul Guggenheim is in favour of the gap-filling function for GPL, because it could 'enlarge the rights of the Court'. Paul Guggenheim and Hague Academy of International Law, *The General Principles of Private International Law* (Académie de Droit International de la Haye 1958). See also, Jan Hendrik Willem Verzijl, *International Law in Historical Perspective*, vol 1 (Springer 1968) 47–74; Wilhelm Wengler, *Völkerecht [International Law]*, vol 1 (Springer 1964) 361–71; ILC Yearbook 2006, 'Conclusions of the Study Group on Fragmentation of International Law, vol II, Part Two', para 15; Mahmoud Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1990) 11 Michigan Journal of International Law 768; Giorgio Gaja, 'General Principles of Law' *Max Planck Encyclopedias of International Law* (2013); Louis Henkin, *International Law: Politics and Values* (Martinus Nijhoff 1995) 40.

16 Vázquez-Bermúdez (n 1) 48.

17 *Sentence arbitrale du 31 juillet 1928 concernant la responsabilité de l'Allemagne a raison des dommages causes dans les colonies portugaises*, PCJI, 2 RIAA, 1013, 1016.

18 *Georges Pinson (France) v United Mexican States*, 1928 Recl Sentences Arbitr 358.

19 Separate Opinion of Judge Ammoun, *North Sea Continental Shelf case*, ICJ Judgment 1969, 132, para 32.

20 These cases include, *Barcelona Traction* case, *Anglo-Norwegian Fisheries* case, *Reparation of Injuries* case and *Eastern Extension, Australasia and China Telegraph Co., Ltd* case. In these cases, the adjudicators decided that they would apply the GPL in the absence of applicable rules or corresponding institutions of international law. *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ICJ Judgment 1970, para 50. *Fisheries (United Kingdom v Norway)* ICJ Judgment 1951, 20. *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Advisory Opinion 1949, at 182. *Eastern Extension, Australasia and China Telegraph Co, Ltd*, British-American Arbitral Claims Commission 6 RIAA, 1923, 114–15.

21 Hans Kelsen, *Principles of International Law* (Lawbook Exchange 2003) 307. See also similar ideas in Hersch Lauterpacht, *The Function of Law in the International Community* (OUP 2011) 76. Dionisio Anzilotti, *Cours De Droit International*, vol 1 (Recueil Sirey 1929) 119.

would require a hierarchy between the sources of international law.[22] The ICJ Statute does not establish such a hierarchy, despite the widely held belief among legal scholars that the GPL are a subsidiary source *vis-à-vis* treaties and customs.[23] Their subsidiarity is also implied by the fact that the ICJ has barely relied upon the GPL to decide cases, mostly using them as an auxiliary source to verify other positive rules.[24] However, the only hierarchy contained within the statute is Article 38.1(d) (judicial decisions and legal writings of famous publicists); there is no textual reason to believe that general principles are a subsidiary means.[25] The gap-filling label attached to the GPL is one of the reasons that implies they have a subsidiary function, even though that role was not established by the drafters of the ICJ statute. In other words, these characterizations of the GPL (gap filling, order of application and subsidiarity) circularly refer to each other for explanation, but they are controversial *per se*.

In order to address these questions, this article revisits the origins of the GPL and their gap-filling function. Section 2 discusses the prevalence of the idea, the importance of completeness of the international legal system, and the gap-filling urge of international jurists. Drawing from the debates of the Advisory Committee of Jurists (ACJ) regarding the sources of international law, and the ICJ Statute, this section explains the origins of the gap-filling requirement and how the GPL satisfy it. Section 3 explains why the GPL are called upon to fulfil that requirement rather than other possibly more suitable doctrines, such as the prohibition of *non liquet* and the principles of equity. After this excavation of the origins of the GPL's gap-filling function, Section 4 further analyses their operation in practice, and examines how the gap-filling metaphor facilitates that operation. Section 5 concludes. Overall, this article intends to explain the popularity of the gap-filling function in scholarly descriptions of the GPL.

2. THE COMPLETENESS OF INTERNATIONAL LAW AND THE GAP-FILLING FUNCTION OF THE GPL

In 1927, Hersch Lauterpacht published a paper discussing the question of 'gaps' and the necessity of gap-filling. He scrutinized the limitations of treaties to 'eliminate the possibility of gaps' and stressed 'the freedom of the judicial development of the law'.[26] He considered that there were rules of international law which were 'independent of customary and conventional international law', and that the GPL were 'of

22 At the ACJ debates, some members (Baron Descamps and Elihu Root) were supportive of using the wording 'in the order following' to show that this successive order was 'an order of natural précellence,' but some members disagreed. At the end, the final text did not retain these words due to the drastic disagreement on the issue. ACJ, 'Procès-Verbaux of the Proceedings of the Committee' (1920) 318. Alain Pellet and Daniel Müller, 'Ch.II Competence of the Court, Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019), 740, 933, paras 30, 273.

23 Vladimir Đuro Degan, *Sources of International Law* (M Nijhoff 1997) 16. Pellet and Müller (n 3) 923. Mahmoud Cherif Bassiouni (n 15) 775.

24 Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcolm D Evans (ed), *International law* (5th edn, OUP 2018) 97–98; Pellet and Müller (n 3) para 296.

25 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 34.

26 Lauterpacht (n 21). An earlier version of this paper was incorporated in *the Private Law Sources and Analogies of International Law* (published in 1927).

a revolutionary character only by reason of [their] almost universal acceptance' as capable of comprising such rules.[27] According to Lauterpacht, the GPL '[have] definitely removed the last vestige of the possibility of gaps conceived as a deadlock in the way of the settlement of a dispute'.[28] Supporting this claim, he noted that the completeness of the legal system was itself a general principle of law.[29] Thus, 'general principles play a central role in Lauterpacht's conception of the rule of Law in international society.'[30]

Lauterpacht went through several analytical steps to reach this conclusion. First, he considered that domestic law was different from international law. In domestic law, it was possible to imagine *lex ferenda* as completing the rule of law whenever there was a gap in the law; in contrast, the rule of international law was not yet established in the 1920s and was *a priori* incomplete.[31] In such a context, there was no effective way to strengthen the porous international legal system; for courts to do so, every state would have to submit to compulsory jurisdiction. Otherwise, the remedial rules created would be only applicable to those states accepting jurisdiction. This would create imbalances in obligations and would result in unfairness in international law. That was also the view of Elihu Root, the American member of the ACJ, during the discussion of whether to use the GPL as a gap-filling tool.[32] Lauterpacht disagreed, and argued that the lack of compulsory jurisdiction would not be a legal barrier to judicial gap filling.[33] In his view, when states accepted compulsory jurisdiction, they had accepted simultaneously the fact that international law was imperfect and was in need of being perfected through the application of the GPL.[34] Moreover, he contended that because the prohibition of *non liquet* was an *a priori* legal principle (and 'a general principle of law recognized by civilized nations'), 'it is inconceivable that a court should pronounce a *non liquet* because of the absence of law [under the normal rule of law].'[35] Lauterpacht believed that the inclusion of the GPL in Article 38.1 of the Statute of the Permanent Court of International Justice (PCIJ) was intended precisely to achieve the completeness of international law.[36]

Lauterpacht's view was shared by Charles De Visscher, who in 1933 contended that the GPL were a vehicle for conveying the general spirit of international juridical

27 ibid 74.

28 ibid.

29 ibid.

30 Iain Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' (1997) 2 European Journal of International Law 269.

31 Lauterpacht (n 21) 72.

32 Root believed that so long as some states rejected compulsory jurisdiction, the active usage of principles to fill the gaps to avoid a *non liquet* would create more obligations for those states who had accepted compulsory jurisdiction. ACJ, 'Procès-Verbaux of the Proceedings of the Committee' (1920), 13th Meeting on 1 July 1920 (speech of Root) 293; 14th Meeting on 2 July (speech of Root) 308–10. However, other ACJ members inclined to separate the issues of compulsory jurisdiction from *non liquet*, considering that the latter was concerned with the sources of international law as a substantive legal issue, while the former was a jurisdictional issue. ibid, 14th Meeting on 2 July (speech of Loder) 311.

33 Lauterpacht (n 21) 76–77.

34 ibid 74.

35 ibid 73.

36 As Lauterpacht said, 'the completeness of the rule of law [. . .] is an *a priori* assumption of every system of law.' ibid 64.

institutions and the unity of international law, above any particular or fragmented solutions.[37] James Brierly, in his 1936 Hague Academy lecture, also endorsed the creative function of the judges by recourse to the GPL as a safeguard against the danger of a *non liquet*.[38] Brierly believed that the account of the sources of international law could only be *complete* with the creative activity of judges, and that judges could always treat principles as a reservoir from which to substantiate the formal sources.[39] The idea of the completeness of international law, as expressly articulated by Lauterpacht, was embedded in the ACJ discussions. As Ole Spiermann pointed out, 'the discussion in the Advisory Committee revealed a need for international law that went beyond the positive rules then identified with treaty and custom.'[40] Or, in Malgosia Fitzmaurice's words, 'the PCIJ had to make the law'.[41] Together with the idea of the completeness of international law was the idea of the international rule of law as advocated by a group of publicists, which was also prevalent before and during the period of the ACJ.[42] This was manifested during discussions of an International Prize Court in the Hague Peace Conferences of 1899 and 1907. Article 7 of the Prize Court stressed the need to apply the 'rules of international law' and 'general principles of justice and equity'.[43] Louis Renault—a key figure in the project of the International Prize Court—emphasized the role of Article 7 as being able to '*combler les lacunes du droit conventionnel*'.[44] Renault deeply believed that judiciaries and arbitrators can be entrusted to apply and make the law.[45] His words also implied support for the completeness of international law, and for the belief that the international community should be led by an international rule of law.

However, the withdrawal of the UK from the Declaration of London—which was meant to reach an accord on the rules of prize law—led to the failure of the International Prize Court.[46] The ACJ members, bearing in mind the potential failure of the PCIJ project, were dedicated to finding a balance between the rule of law and ensuring state confidence in the court.[47] Some members (such as Elihu Root) were cautious about whether judges should be given a wide scope of discretion in decision

37 According to De Visscher, the value of the GPL was a 'manifestation d'un besoin rationnel d'unité qui conduit à dégager, au-dessus des solutions particulière ou fragmentaires, l'esprit général qui anime une institution juridique.' C De Visscher, '"Contribution à l'Étude Des Sources Du Droit International"' (1933) 60 Revue de Droit International et de Législation Comparée 395, 409–11.

38 James-Leslie Brierly, 'Règles Générales Du Droit de La Paix (Volume 58)' in *Collected Courses of the Hague Academy of International Law* (Brill 1936) 75.

39 ibid 80.

40 Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (CUP 2005) 61.

41 Fitzmaurice (n 2) 183.

42 Arthur Watts, when articulating the international rule of law, also linked back to Lauterpacht's view on the completeness of international law as an important epistemological consensus in the international community. Arthur Watts, 'The International Rule of Law' (1993) 36 German Yearbook of International Law 27.

43 Convention (XII) Relative to the Creation of an International Prize Court, The Hague, 18 October 1907.

44 Translation: Fill in the Gaps of Conventional Law. See the report of Louis Renault, in James Brown Scott, *The Hague Peace Conferences of 1899 and 1907* (Johns Hopkins Press 1909) 420.

45 ibid 234.

46 ACJ (n 32), 13th Meeting on 1 July 1920 (speech of De Lapradelle) 287; 14th Meeting on 2 July 1920 (speech of Loder) 311–12.

47 ibid.

making, since such discretion could be detrimental to state voluntarism.[48] Yet, most members of the ACJ considered it necessary to shift the characterization of controversies from political issues to judicial questions.[49] As James Scott (the then-assistant to Elihu Root in the ACJ) observed, the purpose of Article 38 was to 'transfer certain questions to a court of justice [. . .], to the end that the conduct of nations may be guided by rules of law instead of that greater or lesser force which nations have at their disposal, and that the society of nations may become [. . .] "a government of laws and not of men".'[50] The mission of the new international court was underlined by both Jonkheer van Karnebeek (the Dutch Minister of Foreign Affairs) and Léon Bourgeois (the French Member of the Council of the League of Nations) in their speeches at the launch of the ACJ. Van Karnebeek said that the new court would 'settle international conflicts by pacific means'.[51] Bourgeois stated that this international court would be 'entrusted with the important task of administering international law and enforcing among the nations the *cuique suum* which is the law which governs human intercourse.'[52] Both statement expressed an aspiration that a court-based system, led by international rule of law, would be able to peacefully resolve conflicts. After the ACJ, a great many authors also contributed to the idea of building the international rule of law through general principles, including James Brierly in his 1936 lecture on *Règles Générales du Droit de la Paix*, and Gerald Fitzmaurice's 1957 lecture *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, both at the Hague Academy.[53]

Against this context—that there was a calling for a complete international legal system and international rule of law in this period—there appeared a scholarly conviction that the GPL were a possible agent of gap filling, facilitating the completeness of international law.[54] However, as was shown in the debates of the ACJ, it was actually the GPL that enabled this gap filling. First of all, some ACJ members (Arturo Ricci-Busatti and Albert de Lapradelle) correctly pointed out that adding a third source alongside treaties and customs did not necessarily exclude the possibility of a *non liquet*.[55] Secondly, in the ACJ context, there was little attention paid to the

48 In the words of Root, 'if these clauses were accepted, it would amount to saying to the States: "You surrender your rights to say what justice should be".' ACJ (n 32), 13th Meeting on 1 July 1920 (speech of Root) 293.

49 James Brown Scott, 'Advancement of International Law Essential to an International Court of Justice' (Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969), vol 15, 27 April 1921).

50 ibid.

51 ACJ (n 32) 4.

52 ACJ (n 32) 5.

53 Brierly (n 38); Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law (Volume 92)' [1957] Collected Courses of the Hague Academy of International Law.

54 For instance, Spiermann argued that a complete international law was needed because 'they knew there was more to international law than what was covered by "positive rules" that they looked for additional sources, not the other way around.' Spiermann (n 40) 61. To see more examples of this scholarly conviction, Emmanuel Voyiakis, 'Do General Principles Fill "Gaps" in International Law?' (2013) 14 Austrian Review of International and European Law Online 239, 240; Bassiouni (n 23) 782; Michael Bogdan, 'Michael Bogdan, General Principles of Law and the Problem of Lacunae in the Law of Nations' (1977) 46 Nordisk Tidsskrift for International Ret 37, 37.

55 ACJ (n 32) 336, 338.

gap-filling idea; only the French member, Albert De Lapradelle, mentioned explicitly that 'the Court must have the power to apply principles to fill the gaps in positive law.'[56] Instead, a large part of the ACJ debates had focused on the enabling nature of the GPL to do gap filling, because the GPL effectively allowed recourse to the mutually reinforcing traditions of domestic and natural law. These two traditions became two important conceptual foundations for grounding the GPL, during the process of codifying international law's sources at the ACJ.

General principles were first grounded in natural law traditions. Historical records show that the GPL were raised by the ACJ president, Baron Descamps, firstly in the name of 'objective justice'.[57] He asked that 'whether after having recorded as law conventions and custom, objective justice should be added as a complement to the others under conditions which are calculated to prevent arbitrary decision.' And he continued to say that 'objective justice is the natural principle to be applied by the judge' and a finding of no applicable rules 'merely because no definite convention or custom' would 'amount to a refusal of justice'.[58] The proposal by Descamps, unfortunately, encountered vehement criticism from Elihu Root. Root believed that sovereign states should not succumb to the scrutiny of international judges. The failure of the International Prize Court, which used the similar wording of 'justice and equity', would, according to Root, become an important lesson for the new international court initiative.[59] Some ACJ members were wary about whether un-ripened natural principles could amount to a sort of legislative power, and sneak into positive law to bind states. Others, such as Bernard Loder from the Netherlands, took the opposite view: 'it was precisely the court's duty to develop law, to ripen customs and principles universally recognized, and to crystalize them into positive rule.'[60] It was, for some members, unimaginable to envisage that the court might declare itself incompetent due to a *non liquet*.[61]

Amidst this dilemma, the British ACJ member, Lord Phillimore, proposed a revision of Descamps' proposal, supplemented with elaboration by Root (which later became the Root-Phillimore Plan).[62] The Root-Phillimore Plan, which was the precursor of the current Article 38 of the ICJ Statute, largely retained the essence of Descamps' proposal in spite of using of different wording.[63] In essence, it endorsed a margin of appreciation for international judges to realize objective justice through certain maxims and principles.[64] The reference to the GPL in the Root-Phillimore Plan performed the role that objective justice had in Descamps' proposal—the GPL

56 ibid 296.

57 ibid 322.

58 ibid 323.

59 See n 43. art 7: 'In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.' ACJ (n 32) (speech of Root) 286.

60 ACJ (n 32) 294.

61 ibid (speech of Hagerup) 296, 307, 317; (speech of De Lapradelle) 312–13; (speech of Descamps) 336.

62 ibid 310–14.

63 Cheng (n 12).

64 ACJ (n 32) 335. As Root explained, 'the general principles referred to . . . were those who were accepted by all nations in *foro domestico*, such as certain principles of procedure, the principle of good faith, the principle of *res judicata*, etc.' Root called these general principles as 'maxims of law.'

were intended to serve the purposes of corrective justice and equity. In other words, the proposal allowed for the possibility of positivizing some natural law principles through the GPL.

The GPL's omnipotent gap-filling function is frequently attributed to this natural law heritage. Scholars studying natural law have traced the relationship between the GPL, *ius gentium* and *ius naturale*.[65] In those articulations, the GPL are an *ius gentium* to govern relations of all peoples; a 'law common to all people' and 'a universal law'.[66] *Ius gentium* became over time confused with the *ius naturale*—'eternal and universal principles of law discoverable by right reasons, which entered Roman law through Greek stoic philosophy.'[67] In John Finnis's landmark work on natural law, he identified a number of general principles, which were both *ius gentium* and *ius naturale*, to justify particular rules as principles of natural justice.[68] It is also well-recognized in legal scholarship that the concept of the GPL is germane to antique notions of equity and justice.[69]

Louis Henkin concurred that 'principles common to the principal legal systems often reflect natural law principles that underline international law.'[70] In Judge Tanaka's dissenting opinion in the *South West Africa* case, he similarly noted that 'it is undeniable that in Article 38, paragraph 1(c), some natural law elements are inherent.'[71] Hersch Lauterpacht more straightforwardly stated that the GPL 'as a source of international law are in many ways indistinguishable from the law of nature as often applied in the past in that sphere.'[72] Alfred Verdross similarly stressed that the 'GPL underlie the legal systems of civilized peoples with a reflection of natural law and general legal consciousness.'[73] The ACJ debates considered the natural law character of the GPL multiple times. Descamps, for example, during debate on the *Rules of Law to be Applied*, stated that 'objective justice is the natural principle to be applied

65 Stephen Hall, 'The Persistent Spectre: Natural Law: International Order and the Limits of Legal Positivism' (2001) 23 European Journal of International Law 292.

66 ibid 293.

67 ibid 294.

68 John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 288.

69 See for instance, Hugh Thirlway, *The Sources of International Law* (2nd edn, OUP 2019) 120; Vaughan Lowe, 'The Role of Equity in International Law' (1988) 12 Australian Year Book of International Law; Ulrich Fasternrath, 'Relative Normativity in International Law' in Martti Koskenniemi (ed), *Sources of International Law* (Routledge 2000) 168. This can also relate to Hugo Grotius's constant references to general principles of law of nature and natural equity in his articulation of the law of nations. Hugo Grotius, *Hugo Grotius on the Law of War and Peace, Edited by Stephen Neff* (CUP 2012) 3, chs X.I, XIV, I.2.

70 Louis Henkin, 'International Law: Politics, Values and Functions General Course on Public International Law (Volume 216)' [1989] Collected Courses of The Hague Academy of International Law 61. In Henkin's words, 'if the law has not yet developed a concept to justify or explain how such general principles enter international law, resort to this secondary source seems another example of the triumph of good sense and practical needs over the limitations of concepts and other abstractions.'

71 Dissenting Opinion of Judge Tanaka, *South West Africa (Liberia v South Africa)* (ICJ), second phrase, 298. Similarly, in the *North Sea Continental Shelf* Case, Judge Tanaka pointed out that Germany appealed to the corrective function of natural law by referring to the GPL under art 38.1(c). Dissenting Opinion of Judge Tanaka, *North Sea Continental Shelf*, ICJ Judgment 1969, 193.

72 Elihu Lauterpacht (ed), *International Law*, Being the Collected Papers of Hersch Lauterpacht, vol I (1970).

73 Alfred Verdross, *Die Quellen Des Universellen Völkerrechts (The Sources of Universal International Law* (Rombach 1973) 120–34.

by the judge.'[74] At the same time, he linked together the important natural law concept of equity in complementing the positive law, and the judges' role to remedy positive law's deficiencies.[75]

A second foundation of the GPL's gap-filling function is through reference to domestic law.[76] The reservoir from which GPL may be drawn is believed to be limited to *foro domestico* (to use Lord Phillimore's words).[77] Humphrey Waldock said, 'it is only general principles of positive national law whose application is authorized by Article 38.'[78] As *Oppenheim's International Law* writes, '[t]he intention [of having the GPL in Article 38] is to authorise the Court to apply the general principles of municipal jurisprudence, insofar as they are applicable to relations of states.'[79] In the early 20th century, when international law was still short of mature norms to govern many situations,[80] recourse to domestic law was an indispensable method for giving 'shape and definite form to those general sources'.[81]

Some authors more specifically referred to private law and jurisprudence that are available in domestic law.[82] For example, Lauterpacht stated the following in his dissertation at LSE, *Private Law Sources and Analogies of International Law*:

> Most rules of law embody a principle of common sense, but frequently it takes, within the society of nations, decades or centuries of strife to bestow upon an obvious principle of common sense the authority of a rule of law. It is *private law* which, by supplying in many cases the formulation of principles of legal

74 ACJ (n 32), Speech by Descamps on the Rules of Law to be Applied (Annex no 1).

75 ACJ (n 32), Annex 6 (Descamps), 48.

76 The ACJ barely mentioned the principles of international law because the proponents of the GPL were endeavouring to enlarge judges' discretion to develop international law, rather than to address the divide regarding the origins of GPL between national law and international law. Indeed, De Lapradelle mentioned that 'the principles which formed the bases of national law, were also sources of international law.' But he continued that 'the only generally recognised principles which exist, however, are those which have obtained unanimous or quasi-unanimous support.' Therefore, he preferred keeping it simply as 'general principles of law' without indicating the origins. ACJ (n 32) 335. Nowadays, it is generally agreed that the GPL can both derive from domestic legal systems and form within the international legal system; however, opinions are divided among soviet authors and common law authors. Soviet lawyers generally believe that the principles common to socialist law are different from the principles common to bourgeois law, and they are incommensurable. For a summary of different views about the origins of the GPL, see Johan Lammers, 'General Principles of Law Recognized by Civilized Nations' in Frits Kalshoven, Johan Lammers and Pieter Jan Kuyper (eds), *Essays on the Development of the International Legal Order: In Memory of Haro F(rederik) van Panhuys* (Sijthoff & Noordhoff 1980) 57; Vázquez-Bermúdez (n 4) 7–20.

77 ACJ (n 32) 335. Lord Phillimore said, 'the general principles referred to ... were those which were accepted by all nations in *foro domestico*, such as certain principles of procedure, the principle of good faith, and the principles of res judicata, etc.'

78 Humphrey Waldock, 'General Course on Public International Law (Volume 106)' [1962] Collected Courses on Public International Law, 57 .

79 Oppenheim (n 7).

80 Shaw (n 8).

81 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (T and A Constable LTD, University Press 1927) 68–69.

82 It is contended in some literature that there is a binary choice of the use of analogy between public and private law analogies. But nowadays, it is more widely accepted that the divide between public and private law analogies is meaningless in the use of domestic law analogy and both can serve as inspiration for international law. An Hertogen, 'The Persuasiveness of Domestic Law Analogies in International Law' (2018) 29 European Journal of International Law 1127.

> reason and legal justice, smoothes the way and suggests the solution [emphasis added].[83]

Similarly, James Brierly used the term 'principles of private law' to state that the GPL include 'the principles of private law administered in national courts where these are applicable to international relations.'[84] Lord McNair's separate opinion in the *South West Africa* advisory opinion of 1950 also used the term 'private law' as an inspiration for finding GPL:

> The way in which international law borrows from this source [the GPL] is not by means of importing private law institutions 'lock, stock and barrel' ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of the 'general principles of law'. In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institution of *private law* as an indication of policy and principles rather than as directly importing these rules and institutions [emphasis added].[85]

The assimilation of domestic law and private law analogies in some authors' writings often gave rise to confusion, but was less confusing when they made clear reference to the GPL. In essence, by smoothing the way and suggesting a solution, grains of domestic/private law and jurisprudence demonstrated legal reason and common sense, and were treated cogent motives and appropriate links for filling voids in international law.[86] This meant that some domestic principles were entrusted to embody and shape common sense, which was then incorporated into the rule of law.

General principles, when characterized as natural law and carrying accompanying equitable values, provoked the concerns of positivist lawyers, who were hesitant to hand back the hard-won victories of state voluntarism and sovereign equality to individuals who could use natural law to interfere within the affairs of sovereign states.[87] If such a concern is taken to be valid, the analogy to domestic law is more justified, because it prevents the GPL from 'degenerat[ing] into altogether subjective natural law or legal philosophy'.[88] This fear of judges having unfettered discretion to fill gaps (particularly when judges are selected in an unconstitutional international society) loomed large among ACJ members. The compromise thus made was to constrain the gap-filling power, using concretized domestic jurisprudence to constrain the broader notion of "common sense" and natural law. As Paul Guggenheim explained, 'ces principes devaient être concrétisés dans les ordres juridiques nationaux, et que

83 Lauterpacht (n 81).

84 James-Leslie Brierly, *The Law of Nations* (5th edn, OUP 1955) 63.

85 *Separate Opinion of McNair, South West Africa (Liberia v South Africa)* (ICJ) 148.

86 To use 'grains of private jurisprudence' is inspired by both Judge McNair's famous quote (the rejection of lock-stock-barrel approach in using private law) and Michel Virally's use of 'reservoir of rules.' ibid. Michel Virally, 'The Sources of International Law' in Max Sørensen (ed), *Manual of Public International Law* (Palgrave Macmillan UK 1968) 147.

87 For instance, Kelsen condemns the law-creating function to be endowed to the courts as a law-applying organ. Kelsen (n 21) 306.

88 Oppenheim (n 7). Lauterpacht, *Private Law Sources and Analogies of International Law* (n 26) 68–69.

c'était seulement dans ces limites étroites que le juge ou l'arbitre international pouvait y avoir recours.'[89] By gap filling with reference to domestic law, the GPL may be used to strike a balance between promoting the dynamic development of international law and inhibiting judicial activism.[90] Therefore, characterizing the GPL as a gap-filler allays concerns about the encroaching law-creating power resulting from decentralized international law, and maximizes the flexibility of international courts to pursue natural justice.[91] To put it in different terms, the GPL and the sources doctrine in general allow an escape from determination deriving from state consent *or* natural justice, providing space for judicial autonomy within the legal profession.[92]

3. GPL'S GAP-FILLING *VIS-À-VIS NON LIQUET* AND EQUITY

Having explained in the previous section the origins of the gap-filling requirement in international law and how the GPL satisfy that requirement through reliance on domestic law and natural law, this section explains why the GPL are called upon to fulfil that requirement rather than other possibly more suitable doctrines, such as *non liquet* and equity *praeter legem*. The crucial questions are what *non liquet* and equity *praeter legem* mean. The answers to these questions also shed light on why the GPL gained prominence in the ACJ debates.

A. Non Liquet

Non liquet, which finds its provenance in Roman law, literally means 'it is not clear.'[93] Many authors in international law simply equate *non liquet* with a gap in law. [94] For instance, Daniel Bodansky provides that *non liquet* 'implies a gap within international law'.[95] However, this formulation does not resolve all the questions: the other half of the sentence, as implied in his formulation, is that not all the gaps are *non liquet*. If this is true, which gaps are *non liquet*? What should we do if there is a *non liquet*? It is critical to respond to these questions in order to better understand why the GPL were called upon during the ACJ debates. Meanwhile, we may need to think in a more complicated way about what *non liquet* means historically and socially, particularly given consequences in international law.

Inherited from Roman tradition, *non liquet* in the modern sense indicates an incapacity for a competent court/tribunal to adjudicate for certain reasons. These reasons may vary, but typically include the following: (i) lack of applicable law; (ii) lack

89 Translation: These principles should be concretised in a national juridical order, and it was only in these strict limits that the judge or the international arbitrator could have recourse to.' Paul Guggenheim, *Traité de Droit International Public*, vol 1 (Georg & Cie SA 1967).

90 The invention of GPL as James Scott explained was a solution created by 'our English cousins' when 'confronted with the dilemma of accepting the tribunal and investing the judges of that court with the power of deciding what principles should be applied if there were no principles generally recognized [. . .]' Scott (n 49).

91 Brierly (n 84).

92 Thomas Skouteris, 'The Force of a Doctrine: Art.38 of the PCIJ Statute and the Sources of International Law' in Fleur Johns, Richard John Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2011) 75.

93 Ulrich Fastenrath and Franziska Knur, 'Non Liquet', *Oxford Bibliographies* (31 March 2016) .

94 Lauterpacht (n 21); Akehurst (n 15).

95 Daniel Bodansky, 'Non Liquet' in *Max Planck Encyclopedia of Public International Law* (2006).

of clarity in the legal rules; (iii) lack of consistency among different rules; or (iv) the possibility of an injustice led by an established interpretation of a legal rule.[96] The reasons given here are neither exhaustive nor agreed upon by every jurist.[97] For instance, Julius Stone claimed the *non liquet* problem to be a subset of the issue of non-justiciability.[98] According to Stone, non-justiciability meant that some problems were extra-legal problems concerning the overriding assertion of certain state interests; *non liquet* falls within this meaning, because there is no applicable rule of appropriate content and precision to adjudicate the clash of interests.[99] Some authors consider that the existence of *non liquet* is purely due to the lack of applicable rules as legal reasons, while others argue that *non liquet* is a policy result because particular state interests are implicated. Hence, the meaning of *non liquet* is uncertain.

A perhaps greater challenge is circumscribing the scope of *non liquet*. Scholars have devised multiple ways to discern a *non liquet*, including distinguishing between epistemological or ontological situations,[100] provisional *non liquet* versus decision-making *non liquet* versus systemic *non liquet*,[101] or categorizing a situation as 'a real *non liquet*.'[102] Setting aside what these terms signify, they provide a glimpse of how onerous it is to identify *non liquet*. This may offer a preliminary explanation of why the GPL are preferred over the doctrine of *non liquet* when gap filling.

Moreover, *non liquet* has uncertain consequences. As mentioned, the invention of *non liquet* was to permit the court to bail out when the law was unclear. However, an important reason raised to reject *non liquet* and require judges to take a more proactive role is that the pronouncement of *non liquet* is very rare in national legal systems, except for Roman law.[103] The ACJ members noted that *non liquet* was unacceptable in the domestic laws of France, Switzerland, and the Netherlands.[104] Compared to these explicit domestic prohibitions of *non liquet*, the situation in international law is rather chaotic. Statutes and rules of procedure of international courts and tribunals, in general, neither preclude nor permit *non liquet*.[105] The ICSID convention is be a rare exception, and excludes the pronouncement of a *non liquet* in its Article 42.2.[106] Similarly, the ILC's Draft Convention on Arbitral Procedure (1958)

96 Fastenrath and Knur (n 93).

97 Lauterpacht and Bodansky have respectively provided similar but slightly different circumstances for the grounds of *non liquet*. Lauterpacht (n 21); Bodansky (n 95).

98 Julius Stone, 'Non Liquet and the Function of Law in the International Community' (1959) 35 British Year Book of International Law 124, 124.

99 ibid.

100 Bodansky (n 95). Epistemological *non liquet*: the law is obscure; ontological *non liquet*: the law is silent.

101 Provisional *non liquet* denotes that 'a gap which seemingly exists due to the absence of a precise rule but can be filled by application of legal methods.' Stephen C Neff, 'Search of Clarity: Non Liquet and International Law' in Michael Bohlander, Kaiyan Homi Kaikobad and Colin Warbrick (eds), *International Law and Power Perspectives on Legal Order and Justice* (Martinus Nijhoff 2009).

102 Michael Bogdan, 'General Principles of Law and the Problem of Lacunae in the Law of Nations' (1977) 46 Nordisk Tidsskrift for International Ret 37.

103 Fastenrath and Knur (n 93).

104 ibid; see also ACJ (n 32), 14th Meeting on 2 July (Loder's speech), 322, 326.

105 Fastenrath and Knur (n 93).

106 ICSID Convention (the Convention on the Settlement of Investment Disputes between States and Nationals of Other States) art 42.2: 'The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.'

also prohibited *non liquet*, although some sovereign states were strongly opposed to the inclusion of this clause.[107]

In comparison to the more proactive attitude of investment arbitration, the WTO approach is more cautious. Some WTO experts believe that the setting of WTO is more permissible of *non liquet*, in keeping with its general support for state voluntarism.[108] At the ICJ the situation is more complex, especially given the ICJ's Advisory Opinion in the *Nuclear Weapons* case.[109] Some authors believed that this Advisory Opinion was an implicit announcement of *non liquet*, while the dissenting opinion of Judge Bedjaoui argued that the ICJ did not pronounce a *non liquet*.[110] Judge Shahabuddeen's dissenting opinion also argued strongly that 'there is no *non liquet*' because the ICJ had made a decision that the use of nuclear weapons was neither prohibited nor authorized.[111] Some scholars argue that whether to pronounce a *non liquet* is at the ICJ's discretion: in an advisory opinion, they consider that the margin of appreciation for the ICJ is wider than in a compulsory jurisdiction case.[112]

If an adjudicative body does identify a *non liquet*, it must choose between two major options, each with different consequences: the first is to refrain from making judgment due to *non liquet* (as corresponding to the Roman law tradition of *non liquet*); the second is to engage in gap filling due to the prohibition of *non liquet* (as corresponding to many domestic law arrangements). As said, each option has its adherents.

Under the first option, if an adjudicative body would find itself incapable to address the problem and pronounces a *non liquet*, that is the end of the matter. This is consistent with not only the Roman law tradition but also the well-known *Lotus* case: it follows the logic that acts are permitted unless a rule exists regulating them.[113] This suggests that if there is no rule about a particular situation, adjudicators should not create one. This was also considered to be the ICJ's approach in the *Nuclear Weapons* advisory opinion, as the ICJ held that there was neither customary nor conventional international law authorizing or prohibiting the threat or use of nuclear weapons.[114] Additionally, in the case of *Haya de la Torre* and the case of *Gabčíkovo/Nagymaros*, the ICJ refrained from making decisions on matters where

107 For instance, India held that 'the extension of this principle to judicial arbitration in the international field appears to be fraught with grave risks.' International Law Commission, 'Report of the International Law Commission Covering the Work of Its Fifth Session (Draft Convention on Arbitral Procedure)' (1958) (UN Doc A/CN.4/76) 234.

108 R Rajesh Babu, *Remedies under the WTO Legal System* (Martinus Nijhoff 2012).

109 The relevance of this case is whether there is international law prohibiting nuclear weapon, as a question raised to the ICJ. *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion 1996.

110 Dissenting Opinion of Judge Bedjaoui, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion 1996, paras 11–15.

111 Dissenting Opinion of Judge Shahabudden, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion 1996, 389–90. See also the discussion by Ige F Dekker and Wouter G Werner, 'The Completeness of International Law and Hamlet's Dilemma - Non Liquet, The Nuclear Weapons Case and Legal Theory' (1999) 3 Nordic Journal of International Law 68, 227.

112 Edward Gordon, 'Legal Disputes Under Article 36(2) of the Statute' in Lori F Damrosch (ed), *The International Court of Justice at a Crossroads* (Transnational 1987).

113 *The Lotus Case (France v Turkey)*, PCIJ Judgment 1927 (ser A) No 10.

114 *Legality of the Threat or Use of Nuclear Weapons* (n 109) 266.

the applicable rules provided no answers to the disputes.[115] Many authors support the idea that it is legitimate to have a *non liquet* decision or judgment.[116] However, during the last century, there was a general appetite for increased judicial settlement of international disputes.[117] As a result, some authors consider that declaring a *non liquet* is an undesirable approach.[118]

Given this, the second option is to engage in gap filling if a *non liquet* is identified. Most of the ACJ members preferred this approach as they believed that it was inconceivable to have a *non liquet* in international law.[119] Therefore, by analogy to their domestic law traditions, the members incorporated the GPL as a method for remedying *non liquet*. An exemplary case is the 1928 arbitral award concerning the responsibility of Germany. As mentioned earlier, the award first recognized the absence of applicable rules to the litigious facts, and affirmed the necessity to fill the gap according to general principles of equity by analogy to domestic law.[120] However, to justify gap filling as a response to *non liquet*, two major legal obstacles must be overcome: the legitimacy of the domestic law analogy, and the lack of general acceptance of compulsory jurisdiction. This is pertinent because the gap-filling obligation is based on practices in domestic law, which carries compulsory jurisdiction, whereas in the international legal environment, both premises (the domestic law analogy and compulsory jurisdiction) remain questionable. On the one hand, even though a number of scholars—and ACJ members—were or are wholly supportive of the viability of analogizing international and domestic law to domestic law,[121] using domestic law analogies in international law remains controversial.[122] This is because international law and international relations are distinguished from domestic law in several ways.[123] The lack of general acceptance of compulsory jurisdiction acts as the second

115 Thirlway (n 69) 130. *Haya de la Torre (Colombia v Peru)*, ICJ Judgment 1951, 80; *Gabčíkovo/Nagymaros (Hungary v Slovakia)*, ICJ Judgment 1997, 83, para 155(2)(B).

116 Siorat (n 13); Thirlway (n 69).

117 In private law tribunals, they tended more unwillingly to pronounce *non liquet* because that might imply a denial of justice.

118 See for instance, Ole Spiermann, 'The History of Article 38 of the Statute of the International Court of Justice: "A Purely Platonic Discussion"?' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 171–76.

119 De Lapradelle stated that 'it is impossible to admit a declaration of non liquet by an international court; denial of justice must be excluded from international court just as from National Courts.' ACJ (32) 312.

120 See n 17.

121 See for instance, Loder said 'this eventuality [pronouncement of *non liquet*], which amounted to a denial of justice, should be inadmissible as well as in international law as in national law.' ACJ (n 32) 312. See the support from scholars for the domestic law analogy, Hertogen (n 82); Lauterpacht (n 81).

122 See for instance, the explanation by Hugh Thirlway regarding the protection of human rights in the *South West Africa* case. Hugh Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning (Volume 294)' [2002] Collected Courses of the Hague Academy of International Law, 288–90. See also Simon Chesterman, 'An International Rule of Law?' (2008) 56 The American Journal of Comparative Law 331, 358. DeWitt Dickinson, 'The Analogy between Natural Persons and International Persons in the Law of Nations', 26 Yale Law Journal (1917) 564, 582. See also Brownlie on the difference between domestic law and international law, Ian Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations (Volume 255)' [1995] Collected Courses of the Hague Academy of International Law, 30–31.

123 See Judge Tanaka's dissenting opinion in the *South West Africa* case, in the sense that using domestic human rights values on the international plane would be discriminating to the universal ideal of human rights, Dissenting Opinion of Judge Tanaka (n 71) 297–98.

obstacle. As mentioned earlier, some ACJ members were concerned that without compulsory jurisdiction, no generality can be inferred as applicable among all states.[124] This concern was particularly pertinent when the notion of state voluntarism was more robust.

Given these legal obstacles to *non liquet*, it appears preferable to forego this notion even if there is a gap, and to instead use the GPL to fill gaps without referring to Roman law. The ICJ's Advisory Opinion on the threat or use of nuclear weapons is arguably an archetypal example of this. The ICJ was asked to issue an advisory opinion on whether 'the threat or use of nuclear weapons in any circumstance [is] permitted under international law'.[125] After finding that there was no law prohibiting or allowing the use of nuclear weapons, the ICJ nonetheless held that a use of force, consistent with the requirements of self-defense, must also be consistent with principles of humanitarian law.[126] Judge Higgins, in this regard, contended that the ICJ's recourse to the principles of humanitarian law demonstrated that there 'can be no ground for a *non liquet*'.[127] According to Higgins, 'it is exactly the judicial function to take principles of general application, to elaborate their meaning and to apply them to specific situations.'[128] Judge Bedjaoui's dissenting opinion and many later academic works, largely sympathized with this explanation.[129] The approach of the ICJ seems to be to set aside the doctrine of *non liquet* and apply the GPL for the purpose of gap filling.[130] The *non liquet* doctrine is less popular, owing to the uncertainty surrounding its meaning and consequences. The GPL, in contrast, are seen as a more reliable method by which to resolve lacunae in international law.

B. Equity

In addition to the doctrine of *non liquet*, another competing doctrine widely discussed in the scholarly work is the principle of equity. To be precise, the principle of equity can be used for gap filling mainly due to the sub-concept of equity *praeter legem*. Traditionally speaking, equity has three aspects of meanings: equity *infra legem*, equity *praeter legem* and equity *contra legem*.[131] Where equity *infra legem* and *contra legem* address, respectively, the interpretive and corrective capacities of equity, equity *praeter legem* is often taken to refer to gap filling.[132] From this perspective, equity *praeter legem* can be seen as a term of art for gap filling.

124 ACJ (n 32), 14th Meeting on 2 July, 1920 (speech of Root).

125 *Legality of the Threat or Use of Nuclear Weapons* (n 109) 6, para 1.

126 To be more precise about what the ICJ said, if the state's survival is at stake, that state is not excluded from operating nuclear weapon for self-defense under the strict abidance of the principles of necessity and proportionality. *Legality of the Threat or Use of Nuclear Weapons* (n 109) paras 41–46.

127 Dissenting Opinion of Rosalyn Higgins, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion 1996, 369, para 32.

128 ibid.

129 Dissenting Opinion of Judge Bedjaoui (n 110) paras 15–17; Stephen C Neff, 'Search of Clarity: Non Liquet and International Law' in Michael Bohlander, Kaiyan Homi Kaikobad and Colin Warbrick (eds), *International Law and Power Perspectives on Legal Order and Justice* (Martinus Nijhoff 2009) 79–81.

130 WM Reisman, 'International Non-Liquet: Recrudescence and Transformation' (1969) 3 The International Lawyer, American Bar Association 770, 775.

131 Lowe (n 69) 56. See also Catharine Titi, *The Function of Equity in International Law* (OUP 2021) 85.

132 Lowe (n 69) 56.

In academic writings, equity *praeter legem* and gap filling are often conflated.[133] When there is a gap, it would be unthinkable for the principle of equity to leave this gap unfilled because equity *praeter legem* (as inherent in equity) entails a gap-filling obligation. The association of equity *praeter legem* and gap filling may date back to the drafting period of the ACJ, when the relationship between the GPL and equity was considered. Some ACJ members favoured equity doctrines: the Italian member, Arturo Rucci-Busatti, had proposed the wording of 'the general principles of equity.'[134] This proposition was opposed by other members for fear that equity was too ambiguous as a legal concept, leading to undisciplined discretion, as well as associating equity with the failed project of the International Prize Court.[135] This disagreement ultimately led the ACJ to omit the term 'equity' when describing the GPL, despite that multiple members intended for the GPL to bring in equity as a corrective to the rule of law.[136] The concept of equity became obscure, whereas the GPL moved to the forefront of the sources of international law. Akehurst suggests that the GPL were preferred because the notion of equity was too subjective. [137] After the ACJ's sessions, some adjudicators began to characterize maxims of equity with the GPL so as to positivize certain meanings of equity.

This occurred, for example, in the 1925 *Diversion of Water of Meuse* case (*The Netherlands* versus *Belgium*). Judge Manley Hudson and Judge Anzilotti, respectively, construed certain maxims of equity as 'general principles recognized by civilised nations', because these maxims were 'so just, so equitable, so universally recognized'.[138] Later, in the *Barcelona Traction* case, the ICJ considered equity in the light of a rising theory that diplomatic protection may be provided by the state of a company's shareholders.[139] It found, however, that accepting this theory would open the gate of 'competing diplomatic claims' from both the state of the company and the state of the shareholders.[140] Though the concept of equity did not apply, the ICJ resorted to equitable principles as 'GPL' and held that at the very least, it was equitable for shareholders to receive tax and other benefits in exchange for a lack of diplomatic protection by the state of the company.[141] In this sense, the idea that the GPL could be used to incorporate equitable principles became prevalent in legal literature. However, the mixed usage of the GPL and the concept of equity have tended to

133 Akehurst (n 15) 801; Thirlway (n 69) 121–22.

134 ACJ (n 32) 332, 549.

135 De Lapradelle disagreed with that the insertion of 'general principles of equity' because he 'did not know these principles; equity varied from case to case; generally speaking, care must be taken not to employ words with a special meaning; justice includes equity.' ACJ (n 32) 335. See also Descamps' speech at the ACJ when he said that 'I should say equity, if I did not fear that a misunderstanding might occur, owing to the various meanings put upon that word.' ACJ (n 32) 324. Hagerup also said that 'equity was a very vague conception and was not always in harmony.' ACJ (n 32) 296.

136 ACJ (n 32) (speech of Descamps) 324; (speech of Rucci-Busatti) 332 (speech of Phillimore) 316.

137 Akehurst (n 15) 811–12.

138 These maxims included 'equality is equity', 'he who seeks equity must do equity', and 'the principle of *inadimplenti non est inadimplentum*.' *The Diversion of Water from the Meuse (The Netherlands v Belgium)*, PCIJ Series A/B No 70, 73.

139 *Barcelona Traction* (n 20) 49, para 92.

140 ibid para 96.

141 ibid para 99. See also Separate Opinion of Koo, *Barcelona Traction, Light and Power Company*, ICJ Judgment 1964, 51, para 32. And Titi (n 131) 55.

invoke equity as if it were a concrete principle. This leads to a question of precisely what equity it.

Different nations may have different answers to this question. On the one hand, the meaning of equity may be traced back to ancient Greece and the Aristotelian legacy.[142] In that Aristotelian frame, equity primarily exists to correct injustice.[143] This view of equity was carried over in Roman praeterian law, and praeter as a source of equity was understood as a lawmaker instead of a judge.[144] On the other hand, equity has a specific meaning in the English legal context in parallel to the common law. The equity applied in the English Court of Chancery was not constrained by guiding precedent and formalities of the common law, but rather relied on natural justice operationalized by the judges.[145] Yet, the meaning and application of equity were still very limited to the system of Roman and common law. Hence, there is neither a universal recognition of equity nor an agreed-upon definition of it among all states.

In international law, equity has typically been considered more in the light of Article 38.2 of the ICJ Statute in the sense of decisions *ex aequo et bono*.[146] At the same time, equity has also featured prominently in the discussions of GPL. Sometimes, the use of concept in specific cases can be invoked by virtue of both *ex aequo et bono* and GPL. For instance, in the *North Sea Shelf* case, the ICJ considered that the application of equitable principles in the question of continental shelf delimitation implicated both Articles 38.2 and 38.1(c). But the decisive argument given in the ICJ judgment was that the ICJ 'was not applying equity simply as a matter of abstract justice, but applying a rule of law which itself requires the application of equitable principles.'[147] In other words, the ICJ was not simply applying equity as an *ex aequo et bono*, but rather in the meaning of a positivized rule of the GPL which incorporated equitable principles.[148]

Judge Morelli's dissenting opinion in this case also shed some light on the ICJ's approach, which identified the GPL (such as a just and equitable principle on delimitation) to declare and create new rules, by referring the matter to equity.[149] According to Morelli, this reference to equity is a reference to some extra-legal criteria, which remains outside of the law.[150] In this sense, the ICJ creatively used the concept of equity to bring forward the equitable principles. Yet, its approach to this mixture of the GPL and equity resulted in a greater mystification of their

142 Georg Schwarzenberger, 'Equity in International Law' (1972) YB World Affairs 346, 348.

143 Titi (n 131) 20.

144 ibid 21.

145 Francesco Francioni, 'Equity in International Law' in *Max Planck Encyclopedias of International Law* (2020) para 1.

146 ibid.

147 *North Sea Continental Shelf*, ICJ Judgment 1969, 47, para 85.

148 The ICJ basically aligned with Germany's opinion on this point. ibid, 22, para 17. Germany provided that 'the principle of the just and equitable share was one of the recognized general principles of law which, by virtue of paragraph 1 (c) of the same Article [Article 38], applied as a matter of the *justifia distributiva* which entered into all legal systems.'

149 Dissenting Opinion of Judge Morelli, *North Sea Continental Shelf*, ICJ Judgment 1969, 214–215, para 19.

150 ibid.

relationship.[151] This entangled relationship can be encapsulated in two aspects: on the one hand, the GPL seem to be entrusted with the goal of bringing equity; on the other hand, the principle of equity can itself act as a general principle of law recognized by nations. While Article 38.2 of the ICJ Statute leans more on the idea of equity as abstract natural justice and the rule of law, the GPL enshrined in Article 38.1(c) appear to bring more positive concreteness to reflect the idea of equity.[152] The fact that the GPL are positive rules adopted in the ICJ Statute, and capable of incorporating equity, is an important part of why they have been preferred when engaging in gap filling. In Skouteris's words, Article 38 of the Statute provides a pragmatic approach to applying international law; this became a critical reason for the prominence of sources discourse in the epistemic community, as it provides 'a way to insulate practical application from the grand debates of the high theory,' such as those about equity.[153]

4. THE OPERATION OF THE GPL'S GAP FILLING

Having discussed previously the GPL's qualification for gap filling, in terms of both the origins of the GPL and the gap filling, as well as its outperformance *vis-à-vis* other competitive doctrines, this section addresses a more practical aspect: how do the GPL operationalize the idea of gap filling? Before investigating this question, I introduce first the idea of metaphor and its power in smoothing over the application of the GPL to fulfil the role of abstract equity. With that episteme in place, I then explain how the GPL fill the gap in practice.

Above all, law is a discipline that is deeply engaged with metaphors. Law is very often itself referred to as a metaphor.[154] Metaphor is defined in the dictionary 'as a figure of speech in which a word or phrase literally denoting one kind of object or idea which is used in place of another to suggest a likeness or analogy between them.'[155] Put more poetically, it is an aesthetically pleasing way of communicating meaning that could have been expressed literally.[156] Metaphor is also the practice of supposing relations between images so that 'the affectively infused experience of the unfamiliar, the strange and the unexpected' can be translated into thoughts and meanings in our minds.[157] Metaphors are the results of generative exercise full of

151 Several authors have tried to understand and explain the difference between equity as an abstract justice and equitable principle as a general principle in different contexts. See for instance, Thirlway (n 69) 127–28. Lowe (n 69) 61–63.

152 It is also in this light that many authors construe equity as a material component of the GPL.C De Visscher (n 37); Lauterpacht (n 21); Cheng (n 12); Francioni (n 145). Christoph Schreuer called equity 'part of the fabric of international law,' a 'general principle of international law of a customary law nature' and 'one of the most important sources of international law.' Foreword by Christoph Schreuer, in Titi (n 131) viii.

153 Skouteris (n 92) 74.

154 Jan G Deutsch, 'Law as Metaphor: A Structural Analysis of Legal Process' (1978) 66 The Georgetown Law Journal 1339.

155 See the meaning of metaphor in dictionaries <https://www.merriam-webster.com/dictionary/metaphor> (accessed on 2 August 2022).

156 Gerald W Casenave, 'Taking Metaphor Seriously: The Implications of the Cognitive Significance of Metaphor for Theories of Language' (1979) 17 The Southern Journal of Philosophy 20.

157 Maks Del Mar, 'Metaphor in International Law: Language, Imagination and Normative Inquiry' (2017) 86 Nordic Journal of International Law 170, 171.

imagination. They function as a mental tunnel between the known and unknown.[158] The known become known through an endless process of metaphor transforming itself into meaning.[159] By seeking materials to incarnate its last inspiration, imagination will try to seize upon a suitable word/phrase and uses it as a metaphor to create meaning. 'The progress is from [. . .] imagination, and from imagination, through metaphor, to meaning; inspiration grasping the hitherto unapprehended, and imagination relating it to the already know.'[160] By transforming and self-repeating, initially empty metaphors are then filled with meaning.

Metaphors are part of law's scaffolding.[161] They provide a language agent to capture and depict the law's operation, so that lawyers can build a 'shared cognitive system' as a 'tangible universe of legal meaning'.[162] Saying that metaphors are significant to law will surprise no one. Lawyers are unequivocally aware of this significance and actively use metaphors to persuade audiences and to justify arguments. They 'help decipher what might be difficult to understand otherwise'.[163] In the realm of international law, metaphors come easily to mind: soft and hard law, the family of nations, the veil of sovereignty, fragmentation and forum shopping, among many others. Juridical opinions and legal literatures are also replete with metaphors. Some studies have already expounded how the ICJ applied the metaphors of 'growing up,' 'ripening' and 'crystallization' in customary international law.[164] These cases include the *Fisheries* case, the *Tunisia/Libya* case on the North Sea Continental Shelf (1982), and the *Nicaragua* case, where the metaphor of crystallization helped to validate customary international law arguments.[165] Metaphors such as 'crystallization' are evocative as they provide persuasive visuals of how rules are born.

Metaphors have successfully helped 'shape doctrines that might otherwise be normatively neutral or contested'.[166] It is in this episteme that the gap-filling metaphor can help pave the way for references to the GPL. In the previously mentioned case about the responsibility of Germany, the tribunal was asked to address the damages caused to Portuguese colonies in southern Africa. Having reviewed the Treaty of Versailles regarding the sanction of acts caused by aggressions, the tribunal found that because there were no 'rules of law of nations applicable', it had to apply the general principle of equity to fill in the gap, by virtue of Article 38.1(c) of the PCIJ

158 Natasha Wheatley, 'Spectral Legal Personality in Interwar International Law: On New Ways of Not Being a State' (2017) 35 Law and History Review 753, 764.

159 Owen Barfield, *Poetic Diction: A Study in Meaning* (Wesleyan University Press 1987) 140–41.

160 ibid.

161 Harlan G Cohen, 'Metaphors of International Law' in Andrea Bianchi and Moshe Hirsch (eds), *International Law's Invisible Frames - Social Cognition and Knowledge production in International Legal Processes* (OUP 2021).

162 ibid.

163 Andrea Bianchi and Moshe Hirsch, 'Introductory Insights' in *International Law's Invisible Frames - Social Cognition and Knowledge production in International Legal Processes* (OUP 2021).

164 Cohen (n 161); Del Mar (n 157). ibid.

165 Del Mar (n 157) 190. Eg the Court said that 'two concepts [breadth of the territorial sea and the extent of fishery rights] have crystallized as customary law. . .' *Fisheries (United Kingdom v Norway)* (n 20), para 44. Besides, the Court continued to use 'crystallize' metaphor in the *Nicaragua* case, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Judgment 1986, para 177. See also, *Continental Shelf (Tunisia / Libya)*, ICJ Judgment 1982, 24, para 24.

166 Cohen (n 161).

Statute.[167] In the *North Sea Continental Shelf* case, the ICJ had actually resorted to a gap-filling exercise by following a hierarchical order of investigation, from the treaty (1958 Geneva Continental Shelf Convention), to customs (the equidistance principle as a custom), and then finally to equitable principles on 'a foundation of very general precepts of justice and good faith'.[168] Even though the ICJ did not explicitly reference the gap-filling function of GPL when it applied the principle of equity, Judge Ammoun's dictum also explained the logics of a hierarchical process: where treaties and custom failed, GPL provided 'assistance in filling the gap'.[169] This ICJ's approach in this case was also considered as a fascinating example of the exercise of '*de facto* legislative power', which made the rules of maritime delimitation more settled and predictable together with years of accumulated jurisprudence.[170] In the 1962 *South West Africa* case, the ICJ was asked whether it had jurisdiction over a dispute regarding human rights atrocities taking place in South Africa. The ICJ upheld its jurisdiction on the basis that the complainants Ethiopia and Liberia, as members of the former League, had *legal interest* towards the 'well-being and development of the inhabitants of the mandated territory'.[171] This legal interest, according to Judge Jessup's separate opinion, was on general humanitarian grounds, acting as a general principle of law capable of filling the gap.[172]

The GPL, in these cases, were applied in a robust and down-to-earth manner which enabled the filling of gaps in the law. Although this function was not directly mentioned by the ICJ majority in its decisions, it was highlighted both in separate opinions and in scholarship. As a result, the metaphor of gap filling has served to smooth the application of the GPL and to visualize their effect, rendering it less abstract. The GPL's gap-filling function has become a shared narrative, guiding practitioners in their interpretation of a regime's rules and suggesting responses to better fulfil the values those rules intend to realize.[173] Metaphor functions as a container or *topos* for concretizing abstract notions, which would otherwise be meaningless or impenetrable. The metaphor of gap filling in the function of the GPL is exactly such a *topos*, on which the argumentative progression of the GPL is based. The abstract concept of the GPL serves the function to create and justify the expectation of international legal order as a 'neatly functioning, self-contained and internally-coherent totality'.[174] Meanwhile, the concept of gap filling provides authority for the technique, offering an argumentative platform that makes this progressive development of international law 'less jarring and thus more acceptable'.[175] The potency of

167 See n 17.

168 *North Sea Continental Shelf* (n 147) paras 83–85.

169 Separate Opinion of Judge Ammoun (n 19) para 32.

170 Pellet and Müller (n 3) paras 331, 332.

171 *South West Africa* case, ICJ Judgment 1962, 344.

172 In the words of Jessup, 'States may have legal interests in matters which do not affect their financial and economic or other material interests' but 'the right of a State to concern itself, on general humanitarian grounds, with atrocities affecting human beings in another country.' Separate Opinion of Judge Jessup, ibid 100, 110.

173 Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 254–58

174 Euan MacDonald, *International Law and Ethics after the Critical Challenge: Framing the Legal within the Post-Foundational* (Martinus Nijhoff 2011) 351.

175 ibid.

metaphor as gap filling in the self-fulfilling process of the GPL remains in its guiding value for future action since 'metaphors may create realities for us, especially social realities'.[176] By being the guide for future action (and 'such actions will, of course, fit the metaphor'), the metaphor self-reinforces to make experiences coherent.[177] The teleological significance of the GPL's ability to fill gaps exactly resides the provision of guidance, in the realization of the values of international law, and in how it creates a coherent vision of a complete international legal system. Not only does the GPL's gap filling as a metaphor help concretize meaning, but Article 38 of the PCIJ/ICJ Statute also enables the sources of international law to shift from a sort of 'indeterminate' and 'open-ended' nature to a status of 'standardization' and 'formalization' in 'the pursuit of correctness'.[178]

5. IN CLOSING

It is interesting to observe that jurists are fascinated by the question of 'functions' of the GPL, to an extent well beyond such analysis of other sources of law. Scholars rarely enquired into the functions of customs or treaty rules, nor did the Special Rapporteurs of the ILC (on treaties, customs or subsequent practices/agreements).[179] One rationale could be an ontological doubt about the GPL as a qualified source of international law. Thus, a question frequently asked by scholars is: 'do GPL constitute a special source of international law to be distinguished from rules of conventional or customary international law?'[180] In investigating what makes the GPL distinct from other sources, this article has explored both their history—from proposal to incorporation in the PCIJ statute—and their application in order to understand how 'function' has played out in the legal debates and literature. These historicizing efforts demonstrate that the GPL's gap filling are an important tool for achieving completeness of international law. The gap-filling metaphor has further ensured the significance of the GPL in the progressive development of international law.

Undoubtedly, the historical contingencies and necessities for the GPL's gap filling to fulfil this great mission are open for broader investigation. The notion of gap filling is susceptible to many critiques that are not addressed in this article. Further critical reflections on the controversies of gap filling are needed. However, as this article tries to situate the prominence of the gap-filling function and explain its origins and operations in the GPL, it registers the perpetual fight between the statist objections to judicial activism and the pursuit of international lawyers for the progressive development of international law. James Scott's speech in 1920 elucidated this point: 'the great difficulty in the establishment of a court of international law, as distinguished from a tribunal of arbitration, lies in the fact that the rules of law to be applied in a court are supposed to be known in advance. Nations are very chary and properly so about agreeing to an institution and binding themselves in advance to abide by its

176 George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press 2003) 375–76.
177 ibid.
178 Skouteris (n 92) 75.
179 But one of the tasks of the Special Rapporteur on the GPL is to identify the functions of the GPL, and this point was recognized by many members of the ILC. Vázquez-Bermúdez (n 1) 74, para 260.
180 Lammers (n 76) 54.

decisions when they have doubt as to the principles of law which are to be applied or which they may reasonably expect to be applied.'[181] The contemporary objections to gap filling also largely stem from this concern.

Having said that, this article has only focused on the phenomenon of the GPL as gap fillers. Yet the idea of gap filling is not exclusive to general principles; it has a broader role in international law. For instance, in the ILC's famous fragmentation report, the Special Rapporteur Martti Koskenniemi mentioned the gap-filling function of general law in special regimes to reconcile the fragmentation.[182] BS Chimni also contemplated a gap-filling role of the customary international law in the service of capitalism: 'the historical role of customary international law has been to facilitate the functioning of global capitalist system by filling crucial gaps in the international legal system.'[183] The idea of *ex aequo et bono* in Article 38.2 of the ICJ Statute is also frequently associated with the purpose of achieving equity and filling the gap.[184] Hence, to inquire about the gap-filling function of the GPL is not to cancel out the linguistic possibilities of gap filling in other legal phenomena.[185] In relation to the arguments made in Section 2 of this article, there has been an aspiration for a complete international legal order; this cannot be achieved without the broader idea of gap filling in international law.

In Ian Brownlie's Hague Academy course on *International Law at the Fiftieth Anniversary of the United Nations*, he addressed in the first chapter 'the function of law in the international community'. In that chapter, he noted how the rule of law in international law was chronically poor—which was one of the 'principal causes of low morale among students of international law'—and he made the point that there is some legal science as 'extra-legal criteria' to determine the validity and effectiveness of a legal order.[186] The legal science according to Brownlie includes 'especially legal science based upon the paradigm of domestic law'.[187] Or, in Gerald Fitzmaurice's words, 'the validity of any criterion, or of any source of right can only be discussed and established by reference to something outside itself—ie in terms of an antecedent criterion or source.'[188] These extra-legal criteria may constitute the grains for a complete international legal order.

181 Scott (n 49) 22.

182 ILC Yearbook 2006, 'Conclusions of the Study Group on Fragmentation of International Law, vol II, Part Two' para 122.

183 BS Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 American Journal of International Law 1.

184 See for instance, Titi (n 131) 2.

185 Pellet and Müller listed out also some options for avoiding a finding of *non liquet* (including GPL, *ex aequo et bono*, interpretation and other sources). Pellet and Müller (n 3) para 89.

186 Brownlie (n 122).

187 ibid.

188 Fitzmaurice (n 53) 44–45.