WHAT IS THE SIGNIFICANCE OF ‘GENERAL PRINCIPLES OF LAW’ AS A SOURCE OF INTERNATIONAL LAW?

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ABSTRACT

This article examines whether the general principles are derived from national or international law. The general principles play multiple roles in international law. First, they serve as a source of international law, allowing courts to address novel legal issues within a principled framework and reach equitable decisions. In this way, they help ensure uniformity and consistency, which are among the pillars of justice. Second, the general principles guide and foster the development of international law as it expands into new areas. This approach will lead the article to analyse the significance of the general principles of law as a source of international law. The article will proceed to explore the commonly shared legal values that are pillars of any effective legal system and will consider how international law benefits from the inclusion of these principles among the sources of law. In this regard, it will particularly focus on the values that are embedded in these principles and on their contribution to creating and maintaining justice, fairness and equality in the rights of states. The general principles have aided the development of international law and are likely to continue to do so. This article will be divided into two parts: Part I will look at the general principles of law, their definition, nature and status. Part II will address the rule of law, with particular focus on their relationship to the general principles of law.

INTRODUCTION

The Statute of the International Court of Justice (ICJ) provides that treaties, customary laws and general principles of law are the primary sources of international law for the use of its courts.

The inclusion of ‘general principles of law’ as a source of international law is a subject of debate in the scholarly community, particularly regarding the issues of what these ‘general principles of law’ actually entail and where such principles came from. Some

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1 PhD holder in International Law, Aberystwyth University, Wales
2 Statute of the International Court of Justice art 38(1).
scholars argue that the phrase refers to general principles of international law, while others maintain that it signifies general principles of national laws.\(^3\)

These questions have serious real-world implications because there are fundamental differences in the ways that rules are created, administered and enforced in the national and international legal systems. National laws are generally created by legislative bodies, adjudicated by a hierarchical system of courts, and enforced by national and local constabularies. The international legal system, on the other hand, does not include all-powerful legislative, judicial and enforcement bodies. International law is limited by the fact that the international legal system is based on states’ will and consent, and sovereign states generally do not consent to deferring to a higher authority.

Unlike treaty or customary law, the general principles are often abstractions rather than formal laws. These general principles are intended to help the international legal system function by filling the gaps in treaty or customary laws and by shedding light on the proper interpretation of international rules.

In light of the importance of consent in international law, the inclusion of general principles of law as a source of law might seem anomalous, since states have not given their express consent to these principles. But does not the notion of ‘general principles of law as recognized by civilized nations’\(^4\) necessarily imply that such principles are so widely and firmly established that the consent of states can be reasonably inferred? This is an issue that this article will explore, as it examines the usage and the usefulness of the Statute of the International Court of Justice’s inclusion of these general principles as sources of international law.

This article will explore the commonly shared legal values that are pillars of any effective legal system and will consider whether and how international law benefits from the inclusion of these principles among the sources of law. The article will particularly focus on the values

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\(^4\) *Statute of the International Court of Justice* art 38(1)(c).
that are embedded in these principles and on their contribution to creating and maintaining justice, fairness and equality in the rights of states. The general principles have aided the development of international law and are likely to continue to do so, as international law expands in such areas as nuclear energy, space, human rights, the environment, international trade and intellectual property rights.

This article will be divided into two parts: Part I will look at the general principles of law, their definition, nature and status. Part II will address the rule of law and its constitutive elements, with particular focus on their relationship to the general principles of law.

PART I: GENERAL PRINCIPLES OF LAW

Definition of the general principles of law

In the eyes of the ICJ, ‘the general principles of law as recognised by civilised nations’ hold primary status as a source of law and are distinguished from international conventions (treaty law) and international custom (customary law). For the purposes of this article, and in keeping with contemporary usage, the archaic and somewhat demeaning phrase ‘civilised nations’ will be replaced with ‘international community’, so the article will deal with ‘the general principles of law as recognised by the international community’.

These general principles provide courts with mechanisms for tackling issues that are not addressed clearly or sufficiently in treaties or customary laws. From the outset of the drafting of the Statute, there has been debate about the definition – and vagueness – of the general principles of law. Nevertheless, the ICJ Statute’s inclusion of the general principles as primary sources of law forces us to acknowledge their significance.

One way to look at the general principles is as constructs that are necessary for international law to function effectively. Because international law is constantly developing, the principles

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6 International space law is the body of international law governing space-related activities. Available at http://www.oosa.unvienna.org/oosa/SpaceLaw/index.html (Last accessed on 26/03/2017)

7 Statute of the International Court of Justice art 38(1).
are needed as reference points in addressing new issues that are not yet covered by treaty or customary laws.

Treaty law is formulated through a long process of drafting, negotiation, signature, and ratification. Also, the Vienna Convention on the Law of Treaties (VCLT) has helped shape the parameters for treaties in general.

Customary laws are unwritten rules that, based on states’ conduct, have become accepted norms. They are broader and less formal than treaty laws. It is useful to keep in mind that treaties do not introduce customs and norms; treaties merely formalise pre-existing customs and norms. The general principles of law supplement these two sources of law when the courts are called on to resolve an uncharted legal issue or interpret an unsettled legal rule. The general principles of law give courts an additional tool to help resolve what might otherwise be non liquet cases.

Courts have suggested that eschewing the general principles and relying strictly on treaties and custom would be detrimental to achieving equitable outcomes. Courts also rely on the general principles when they are weighing conflicting interpretations of a treaty or customary rule.

The stated goal of the United Nations (UN) is to promote peaceful co-existence and co-operation. Interestingly, Verzijl has defined the general principles as those principles that are fundamental to maintaining peaceful co-existence in any society. In light of the history that led to the creation of contemporary international law, there can be no doubt that

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11 Cassese, above n 2, 152.

12 Charter of the United Nations (signed on 26 June 1945, entered into force on 24 October 1945) Preamble arts 1–2.


14 Charter of the United Nations Preamble, which refers to the scourge of the two World Wars and their devastating consequences.
peaceful co-existence was in the forefront of the minds of the drafters of the United Nations Charter and the ICJ Statute.

These general principles, which derive from natural justice and are common to all contemporary legal systems, include such essential values as good faith, proportionality and estoppel.\textsuperscript{15} The principles play a fundamental role in maintaining states’ respect for their obligations under international treaties and customary laws.\textsuperscript{16}

In summary, the general principles play multiple roles in international law. First, they serve as a source of international law, allowing courts to address novel legal issues within a principled framework and reach equitable decisions. In this way, they help ensure uniformity and consistency, which are among the pillars of justice. Second, the general principles guide and foster the development of international law as it expands into new areas.

Before exploring whether the general principles are derived from national or international law, it is necessary to examine the key differences between the international and national legal systems.

**DIFFERENCE BETWEEN THE GENERAL PRINCIPLES OF LAW IN NATIONAL AND INTERNATIONAL LAW**

In the wake of two world wars, contemporary international law grew out of the increasingly interdependent international community’s desire for a legal framework for resolving disputes without bloodshed. The creation of the United Nations in 1945 reflects states’ concerns about international justice, peace, security and stability.\textsuperscript{17}

The backdrop to this effort, however, was states’ concerns about their right to incur obligations only with their consent, and their right as sovereign states to not be subordinate to any higher authority. Unlike national legal systems, international law must operate in an

\textsuperscript{15} Malanczuk, above n 2, 49.
\textsuperscript{17} Charter of the United Nations.
environment in which the subjects of the laws (the states) are also the lawmakers, law breakers and law enforcers. In national legal systems, on the other hand, the subjects do not have the power to directly institute a law nor can they unilaterally limit their obligations under the law.

The dynamic of international law is different because of states’ autonomy.\(^{18}\) In international law, states’ consent is a central element in the law-making process, and they can in some situations elect to be exempted from obligations to which they do not consent.\(^ {19}\) An example is seen in the VCLT, which establishes the right to place a reservation on a treaty, unless the treaty specifically forbids any reservations or the proposed reservation would defeat the purpose of the treaty.\(^ {20}\)

The unique nature of international law demands a framework that is not based on centralised authority but on shared values – the general principles of law. This proposition is particularly true as international law faces new challenges that require new rules for which there are no pre-existing treaty rules or customs.

**THE NATURE AND STATUS OF THE GENERAL PRINCIPLES OF LAW**

There are many competing positions concerning the nature, status and purpose of including the general principles as a source of international law. At one extreme, Tunkin claims that the general principles are not a separate source of law but instead are legal notions and techniques upon which the sources of law can be interpreted and applied. As such, they are to be considered ‘legal phenomena applicable in international law’.\(^ {21}\) If Tunkin’s view were correct, however, it would make no sense for Article 38(1) of the Statute to expressly list the general principles as one of the primary sources of international law.\(^ {22}\)

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19 References to the importance of consent in international law are ubiquitous. See e.g. Genocide (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide) (Advisory Opinion) [1951] ICJ Rep 21; Charney, above n 17, 530.
21 Hoof, above n 2, 132.
22 Statute of the International Court of Justice art 38(1) states:
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted
Some scholars assert that the general principles add nothing to international law.\textsuperscript{23} They reason that the fundamental principles of international law, such as good faith and peaceful co-existence, are already established in treaty and customary law, so there is no need to resort to an ethereal concept like ‘general principles’.\textsuperscript{24} Still others believe that the general principles of law are a distinct source of international law and that these principles stem from the national laws of states.\textsuperscript{25} This is the view that is advanced in this article. The majority of scholars accept the general principles as a source of international law,\textsuperscript{26} but they disagree about the definition and derivation of the concept.

Akehurst argues that there is no reason that general principles in international law cannot encompass both national principles, which are useful in filling gaps in international law, and international principles, which arise from ‘the specific nature of the international community’ and states’ interactions.\textsuperscript{27}

Mosler has explored the distinction between the general principles that are derived from national law and those principles that are attributed to a particular structure or consensus of international law and the international community.\textsuperscript{28} Based on his analysis, Mosler distinguishes procedural principles from those principles that are used for regulating state interactions and legal relations. The former address the mechanisms that help courts reach

\begin{itemize}
\item a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
\item b. international custom, as evidence of a general practice accepted as law;
\item c. the general principles of law recognized by civilized nations;
\item d. […] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
\end{itemize}


\textsuperscript{24} Ivanovich Tunkin, above n 22, 195–6.

\textsuperscript{25} Brownlie, above n 2, 16. Brownlie refers to the view held by Guggenheim and Oppenheim that the inclusion of general principle of law was based on the assertion of the principles accepted in the national law of states and as such the courts are authorised ‘to apply the general principles of municipal jurisprudence, in particular of private law, insofar as they are applicable to relations of States’.

\textsuperscript{26} Shaw, above n 8, 99.

\textsuperscript{27} Malanczuk, above n 2, 48–9.

\textsuperscript{28} Mosler, above n 2, 122.
fair and just decisions,\textsuperscript{29} while the latter include hazier principles such as good faith and proportionality.\textsuperscript{30}

The polar positions on the origin of the general principles obviously are that (1) they are borrowed from national legal systems or (2) they flow from the principles inherent in international law. The evidence indicates that the drafters of the ICJ Statute intended to make generally accepted national principles, which had long track records, available to the international courts.\textsuperscript{31} Lord Phillimore, one of the authors of Article 38, has stated that the intention of the drafters was to encompass the principles generally accepted in national legal systems.\textsuperscript{32}

The principles common to national legal systems are, by definition, principles that the individual members of the international community generally accept. It should come as no surprise, then, that these shared principles would be reflected in states’ legal relationships and interactions with other states.

Nonetheless, the unique nature of international law must not be overlooked. A sovereign state is subject to international rules only to the extent that it consents to those rules. Taking the consensual nature of international law and the wording of Article 38(1)(c) literally, for a general principle of national law to be recognised as a source of international law, it must be recognised by all states.

This raises practical problems due to the varying structures of national legal systems, as well as the sheer number of nation states. There’s an additional problem in determining how to assess whether a particular principle that’s prevalent in national legal systems is applicable to the international system.\textsuperscript{33} In light of those concerns, it is easy to agree with Cheng’s view that the usefulness of the general principles lies mainly in how they help the ICJ interpret and apply international rules.\textsuperscript{34}

\textsuperscript{29} Ibid 124–31.
\textsuperscript{30} Ibid 131–4.
\textsuperscript{31} Hoof, above n 2, 140.
\textsuperscript{32} Brownlie, above n 2, 16; Ott, above n 2, 25.
\textsuperscript{33} Hoof, above n 2, 140–2.
\textsuperscript{34} Bassiouni, above n 12, 770.
Another issue is whether a particular national principle of law makes sense in the context of international law and international interactions. The purposes of the national and international legal systems are different, and a principle from the former may not be relevant or appropriate for the latter. The primary goal of international law is to provide a collection of rules and a framework for states’ conduct and interactions. The values of national legal systems, though widely shared, can be much less noble – from perpetuating the nation’s incumbent regime, to inflating the price of the nation’s primary export.

The focus here, however, should not be on whether international and national laws operate differently. Instead, the issue is whether national legal systems share certain principles that are hallmarks of any effective legal system. Examples of such common principles are good faith, res judicata (barring the re-litigation of a fully adjudicated dispute), nemo judex in causa sua (‘no man should be judge in his own case’).  

There are also commonly shared principles that apply differently in the national and international contexts. For example, the principle of estoppel in international law takes a different form than in domestic legal systems, but international law greatly benefits from the adoption of this principle in its modified form. Conversely, there are principles that emerge in international law that have no parallel principles in national legal systems. An example is reciprocity, which exists in many forms in international law, including the right of self-defence in response to a wrongful act by another state.

Mosler, affirming Verdross and Guggenheim’s viewpoint, declares that the general principles are autonomous in international law, borrowed from national law but adapted to the ‘international sphere’. This supports the view that the general principles from national legal

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35 Brownlie, above n 2, 16; Ott, above n 2, 25.
36 Many scholars have discussed whether estoppel in international law emanates from art.38(1)(b) of the ICJ Statute as a direct source of international law or whether it emanates from art 38(1)(c) of the Statute as a form of ‘general principles of law recognised by civilized nations’, thus stemming from general principles of domestic legal systems. Michael Byers, Custom, Power, the Power of Rules (Cambridge University Press, 1999); Enrico Pattaro et al, A Treatise of Legal Philosophy and General Jurisprudence (Springer, 2005) 3; Vladimir Duro Degan, Sources of International Law (Martinus Nijhoff Publishers, 1997).
37 Charter of the United Nations art 51, which provides that the ‘inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations’.
38 Mosler, above n 2, 126.
systems may not apply identically in international law. Nonetheless, *jus gentium*\(^\text{39}\) establishes values and standards of conduct that pervade national and international laws.\(^\text{40}\) The effectiveness of international law depends on the fact that these core values – such as justice, equality and fairness – are generally accepted by the individual members of the international community.

Contemporary international law is still developing, so there is room for the incorporation of additional national principles that are appropriate and relevant to the international arena. General principles of national laws can be incorporated implicitly or by direct reference in international legal instruments, such as the Universal Declaration of Human Rights,\(^\text{41}\) the Geneva Conventions\(^\text{42}\) and the International Covenant on Civil and Political Rights.\(^\text{43}\)

While the absence of a theoretical consensus about the identity of the general principles might have constrained their use as sources of international law, there is evidence that the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), have taken a practical approach to applying general principles of national laws to the international arena, albeit with limited scope.\(^\text{44}\)

In the *Chorzów Factory* case, the PCIJ applied a maxim of English law, *nullus commodum capere potest de injuria sua propria* (no one shall gain advantage from his own wrong), to international law, ruling that “it is a general conception of law that every violation of an engagement involves an obligation to make reparation”.\(^\text{45}\)

\(^{39}\) *Jus gentium* [Latin ‘law of nations’]. 1. International law, the body of rules that nations generally recognize as binding in their conduct toward one another; Roman law, those rules of law common to all nations. Bryan A. Garner (ed.), *Black’s Law Dictionary* (West, 8th ed, 2004) 877–8.

\(^{40}\) Mosler, above n 2, 123–5.

\(^{41}\) *Universal Declaration of Human Rights* art 10 addresses every person’s equal right to a fair and public hearing by an impartial tribunal when faced with criminal charges.

\(^{42}\) International Committee of the Red Cross, *Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) 75 UNTS 135 art 2* provides that: ‘should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy … such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal’.

\(^{43}\) *International Covenant on Civil and Political Rights* art 9 guarantees the right to information upon arrest, and a fair trial.

\(^{44}\) Shaw, above n 8, 99.

\(^{45}\) *Factory at Chorzów (Germany v Poland) [1927] PCIJ Rep Series A No 9, 29.*
In the Genocide Convention (Bosnia and Herzegovina v Serbia and Montenegro) case, the ICJ examined res judicata at length and concluded that the principle was important in national and international legal systems.46

In the Barcelona Traction case, the ICJ stressed the need to include municipal law in the court’s analysis because there were no relevant international legal rules directly on point.47

Judge McNair expressed a similar view in the advisory opinion in the International Status of South-West Africa case: International law has recruited and continues to recruit many of its rules and institutions from private systems of law … The way in which international law borrows from this source is not by means of importing private law institutions ‘lock, stock and barrel’, ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of ‘the general principles of law’ … [T]he true view of the duty of international tribunals … is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.48

In a dissenting opinion in the same case, Judge Tanaka agreed that the general principles of law include those adopted and adapted from domestic legal systems: To restrict the meaning to private law principles or principles of procedural law seems from the viewpoint of literal interpretation untenable. So far as the ‘general principles of law’ are not qualified, the ‘law’ must be understood to embrace all branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc.49

In both the *Gulf of Maine Area* and the *North Sea Continental Shelf* cases, the ICJ stressed the importance of reaching equitable solutions by applying equitable principles, stating in the latter case that ‘Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and … equitable’. The court added that ‘dispensing justice’ is the task of the law.

While claimants and courts have not extensively cited the general principles as sources of international law when arguing and deciding cases, the above examples demonstrate that the ICJ and its predecessor have endorsed the notions that general principles are necessary for justice and that those principles can be rooted in national laws.

As Akehurst points out, the laws of individual states share so many values that it would not be practical to exclude those principles from analyses of international legal issues. Indeed, the legitimacy and acceptance of international law are dependent on their being based on such shared values as peace, cooperation, justice and fairness.

The general principles of law are accepted values and principles that operate under the umbrella of the rule of law, which helps ensure that stability, justice and fairness prevail. The PCIJ in the *Lotus Case* stated that ‘[t]he rules of law binding upon States … emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law’.

It is in this context that this article will now reflect on the rule of law, which provides a basis for the durability of international law and inter-state relations. The rule of law creates stability so that the ‘will’ of states is not short-lived but instead is based on deep-rooted values. This is an essential requirement for the successful operation of international law.

50 *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, above n 9, para 69.
51 *North Sea Continental Shelf*, above n 9, para 88, [48].
53 Malanczuk, above n 2, 49–50.
54 *Lotus (France v Turkey)* [1927] PCIJ Rep Series A No 10 relates to the collision on 2 August 1926 between a French steamer (*SS Lotus*) and a Turkish steamer (*SS Boz-Kourt*), resulting in the death of eight Turkish nationals. The question for the court was whether Turkey had jurisdiction for the trial of the French captain, who was allegedly responsible for the collision. Based on the fact that the *Lotus* was flying the French flag at the time of the collision, France asserted jurisdiction.
55 Malanczuk, above n 2, 47.
PART II: 2 THE RULE OF LAW AND ITS CONSTITUTIVE ELEMENTS

What is the rule of law?

This section sets out to explore what we mean by the rule of law and to examine the role it plays in providing the framework of a legal order based on such notions as rights, duties and justice. The concept of the rule of law is particularly important in inter-state relations, where there are strong elements of decentralised authority and flexible acceptance of legal obligations.

The concept of the rule of law is not unique to international law; it is an element of the national legal systems of all democratic nations. Moreover, all of the sources of international law are underpinned by the application of the rule of law. The rule of law creates stability in international affairs by ensuring that the ‘will’ of states is based on deep-rooted values rather than the whims of the powerful.

To better understand the rule of law, it is helpful to consider the connections among its elements. These include legality/reason, consistency/uniformity, legitimacy and justice. These elements, or ‘codes’, are interdependent, and must function simultaneously. Each is analysed below.

LEGALITY

Legality plays a pivotal role in the acceptability of legal rules. Fuller enumerated eight parameters of legality that must be fulfilled for a rule to be considered a law, as opposed to a mere exercise of force. According to Fuller, legality requires that rules be general, public,
prospective, comprehensible, consistent, stable, possible to obey, and they must be congruent with officials’ actual behaviour.\textsuperscript{58}

This theoretical approach differs from Dworkin’s view that legality is more a matter of reasoning and interpretation. Dworkin considers legality to be the fruit of legal interpretation aimed at ensuring every individual’s rights and respect through accepted, coherent rules.\textsuperscript{59} Dworkin argues that rules are ‘all or nothing’ standards that provide a conclusive reason for an action. As a result, when two rules call for conflicting actions, one of the rules cannot be valid.\textsuperscript{60}

Raz accepts the eight parameters suggested by Fuller, but Raz believes that a rule can deviate from the parameters and still be acceptable.\textsuperscript{61} Fuller, on the other hand, believes that law and morality are so intertwined that there can be little deviation from the parameters without the rule losing its link to morality.

Summers criticises that position, arguing that Fuller’s parameters are ‘merely “oughts” of efficiency, not of morality’.\textsuperscript{62} In Summers’s view, the parameters denote what ought to take place in order for everyone to have a fair chance of abiding with the law, but compliance with the parameters does not automatically result in moral outcomes.

Raz believes that absolute conformity with the rule of law, while ideal, is not achievable.\textsuperscript{63} Raz suggests that the rule of law should not be accepted ‘blindly’ and that ‘radical’ deviations from the Fuller parameters can occur, since the rule of law is a set of standards that do not necessarily enforce morality. So the fundamental issue for Raz lies in the values promoted by the rule of law that enable assessments of possible deviations from the rule of law.\textsuperscript{64}

Reflecting on Allan’s work, Walters argues that legality within the rule of law is demonstrated by the pursuit of the ‘common good’, such as ensuring respect for the rights of

\textsuperscript{58} Lon L Fuller, \textit{The Morality of Law} (Yale University Press, 2\textsuperscript{nd} ed, 1969) 39, 44.
\textsuperscript{61} Joseph Raz, \textit{The Authority of Law} (Oxford University Press, 2009) 223.
\textsuperscript{63} Raz, above n 60, 222–5.
\textsuperscript{64} Ibid.
individuals. Therefore, in Walters’s view, the rule of law is not a matter of unquestioning obedience to legislation, but rather provides a reason for abiding by the law. Walters likens this vision of the rule of law to the approach of the common law system, in which the judiciary relies on precedents that are applications of generally accepted principles, with the aim of achieving harmony, consistency, unity and coherent reasoning.

Walters divides legality into two types: ‘legality as order’ and ‘legality as reason’. ‘Legality as order’ addresses the method and criteria by which the rules of governance are identified and established. The ‘legality as order’ concept suggests that the rule of law should be established through descriptive codes that dictate how the law is to be set out in a clear, public format. ‘Legality as reason’, on the other hand, addresses how the rule of law is affirmed through interpretations that are based on consistent, unified and coherent reasoning. Dicey calls this the ‘legal turn of mind’, and Rand classifies it as a ‘standard of reason’ or ‘artificial reason’.

An alternative purpose of the rule of law is to provide a sense of normative reasoning. This aspect is somewhat subtle, and rather more implied than described. Such normative features are not easy to capture in written documentation, yet they carry important weight in providing the rule of law with consistency and coherence. These implied features of legality might not necessarily appear in the written constitutional law, but they guide the administrative, executive and legislative systems.

There are three features common to almost all legal rules. First, every law has a reason behind its formulation. Second, the law is intended to serve the community and is not merely conceptual in nature. Third, the law can be interpreted through intuitive analysis rather than through the blind application of arbitrary rules. These common features are

66 Ibid.
67 Ibid 571, 584.
68 Ibid 585.
69 Ibid 585–6.
in keeping with the notion that the legal foundations of any community are rules that are based on shared values.  

Such rules must guide the actions of the community in one direction instead of alternative paths. Motor vehicle laws, to choose a mundane example, guide drivers towards safe behaviours and away from unsafe ones. Legal rules also must be binding on the community, the rules’ obligations must be felt by the community, and a failure to uphold the obligations must have consequences. The acceptance of such obligations must foster a change in attitude and behaviour, such as stopping at red traffic lights. Legal rules also must provide benchmarks against which people’s actions can be consistently judged to be right or wrong.

The rule of law, in its true essence, is based on reason, with the aim of promoting the accepted values of the community. Consequently, it cannot be self-contradictory in its purpose or in the obligations it imposes on the community.

**CONSISTENCY, COHERENCY AND UNIFORMITY**

To achieve consistency within the framework of the rule of law, rules must be in harmony with the common values and principles of the community, and they cannot contradict other rules. Consistency in the rule of law is achieved by eliminating the potential for inconsistent treatment, interpretation and enforcement of legal rules.

Inconsistency in legal rules can arise in three ways:

- *Total-total inconsistency*. This is where rules are totally incompatible in that they cannot be applied without directly contradicting one another.

- *Total-partial inconsistency*. This is where two rules conflict, but one of the rules can be applied in all circumstances.

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71 Galligan, above n 55, 50–1. Scholars such as Ronald Dworkin and Martti Koskenniemi have also discussed the notion that values inform and permeate the rule of law. Dworkin, above n 58; Dworkin, above n 59; Martti Koskenniemi, ‘The Politics of International Law’ (1990) 1(1) European Journal of International Law 1.

72 Galligan, above n 55, 51–2.
• *Partial-partial inconsistency.* This is where two rules conflict in some aspects but are free of contradiction otherwise.\(^73\)

To resolve conflicts between rules, the age, nature and specificity of each rule must be considered. When an older and newer rule conflict, the principle of *lex posterior derogat legi priori* dictates that the newer rule supersedes the older one.\(^74\) This maxim is embedded both in national and international jurisprudence.\(^75\) In international law, the principle appears in the *VCLT*, which states: ‘When all the parties to the earlier treaty are parties also to the later treaty, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty’.\(^76\) When a specific rule conflicts with a general rule, the principle *lex specialis derogat legi generali* favours the specific rule.\(^77\)

In ‘total-total inconsistency’ situations, *lex posterior* should be applied, and the new rule should trump the old one.\(^78\) In cases of ‘total-partial inconsistency’, the specificity/generality of the rules must be assessed, and *lex posterior* should be applied in conjunction with *lex specialis*.\(^79\) Finally, in situations of ‘partial-partial inconsistency’, *lex posterior* is still applicable, but it cannot be unconditionally applied. The intention behind the later rule must be considered, since it might have been intended to work in harmony with the earlier rule.\(^80\)

Consistency and uniformity cannot be attained without the application of judgement and ‘discretion’ by the judicial system.\(^81\) The rule of law in this situation creates the parameters

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\(^76\) VCLT art 30(3).

\(^77\) *Lex specialis derogat legi generali* means that a specific law prevails over a general law. Garner, above n 38, 34–5.

\(^78\) Ross, above n 72, 131–2. In situations of general inconsistency, the principles used to move away from the conflict are regarded as *lex posterior* or *lex superior*. The former principle means when both rules are of equal authority, the later rule prevails over an earlier rule. The latter principle means that in conflicts between rules of different weight, the rule with greater authority prevails.

\(^79\) Ross, above n 72, 131–2.

\(^80\) *Ibid* 131–2.

for the judges, but at the same time gives them the freedom to sculpt the rules to fit specific cases. The application of discretion and judgement, however, must itself be consistent.\textsuperscript{82}

The role of the rule of law is not to provide a set of dos and don’ts but rather to provide a legal framework and applicable principles, based on values shared within the community.\textsuperscript{83} This is particularly true in international law, where there are significant gaps in the rules that treaties and customs have not yet filled.

**LEGITIMACY**

Legality is concerned with the black-and-white task of declaring an act legal or illegal, and thus cannot abide contradictions. Legitimacy, in contrast, accommodates the notion that something might be legal although it has not yet been recognised as such through formal rules and principles.\textsuperscript{84} Legitimacy, unlike legality, addresses what ought to be legal. This is not to suggest, however, that legitimacy is an alternative to legality, since even if an action is legitimate, the decisions about its legality are still based on the law.

Georgiev sees the concept of legitimacy as a bridge between the rule of law and the contradictions that exist in the rules. In this view, legitimacy is more flexible than legality in in accepting of the principle of law, as opposed to specific laws.\textsuperscript{85}

Lawmakers are concerned with legitimacy because it is the factor that underlies the acceptability of any law. Legitimacy is rooted in the bedrock principles that are commonly associated with \textit{jus cogens} rules.\textsuperscript{86} In this sense, legitimacy provides the connection between \textit{jus cogens} rules and other rules of international law.\textsuperscript{87} Legitimacy is concerned with consistency with the general principles of law, which for legality are a secondary concern.\textsuperscript{88}

\textsuperscript{82} Ibid 59–60.
\textsuperscript{84} Ibid 12–13.
\textsuperscript{85} Ibid 12.
\textsuperscript{86} Ibid 13.
\textsuperscript{87} Ibid.
\textsuperscript{88} Ibid.
In the end, conformity with the rules relies on the existence of legality with a strong presence of legitimacy.

**JUSTICE**

The role of justice, in the context of the rule of law, is emphasised by the UN Charter, but that does not mean that the concept has a settled meaning. Quite to the contrary, scholars continually wrestle with such questions as: What does justice mean in the context of the rule of law? Is justice the same as equality? Does justice mean that everyone is to be deemed equal, irrespective of the circumstances?

A school of thought following Rawls regards the rule of law as the conceptualisation and formulisation of justice in the framework of a legal system. Rawls argues that formal justice ‘addresses to rational persons for the purpose of regulating their conduct and providing the framework for their cooperation’. The rule of law, in Rawls’s view, is a set of principles that ‘rational persons’ need to guide their conduct so as to avoid unnecessary conflicts and contradictions. This view is broadly shared by Raz, who maintains ‘that the law should be such that people will be able to be guided by it’, and for the law to be obeyed, ‘it must be capable of guiding the behaviour of its subjects’.

Despite the popular conception that justice must mean equality for everyone everywhere at all times, the principle of justice cannot ignore the circumstances of individuals. The aim of justice is to eliminate the arbitrary assessment of these circumstances, in favour of rules that

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89 The *Charter of the United Nations* states that one of the objectives of the United Nations is ‘to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained’. The *Charter* also states that a principal purpose of the United Nations is ‘to maintain international peace and security … and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace’. *Charter of the United Nations* Preamble art 1: ‘Purposes and Principles’. For further information on the UN rule of law programs see Available at http://www.unrol.org/article.aspx?article_id=3 and <http://www.un.org/en/ruleoflaw (Last accessed on 26/03/2017)

90 John Rawls’s book, *The Theory of Justice*, paved the way for the scholarly debate on justice and the rule of law. Joseph Raz and Michael Neumann have built on Rawls’s theory.


94 Raz, above n 60, 212–4.
treat like with like.\textsuperscript{95} To achieve like for like treatment, conceptual rules for evaluating and categorising disparate circumstances are clearly required.\textsuperscript{96}

The proper application of these rules, which form part of the rule of law, should lead to the achievement of justice through equality, since their application is binding under the rule of law. The primary aim of justice is to suggest a concept upon which the basic structure of society should be based. Rawls presents justice as a ‘deontological theory’ relating to the priority of the right over the good.\textsuperscript{97} He believes that ‘in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interest’.\textsuperscript{98}

Rawls employs two principles when defining his theory of justice: first, ‘justice as fairness’ driven by the priority of the right over the good, and, second, the relationship between the self and its ends. Rawls asserts that ‘each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all’ and that ‘social and economic inequalities are to be arranged … to the greatest benefit of the least advantaged and attached to offices and positions open to all under conditions of fair equality’.\textsuperscript{99} Rawls sets out these principles in order of priority, which means that the first principle must be satisfied before the second is considered.

According to Rawls, under ‘lexicographical prioritising: a principle does not come into play until those previous to it are either fully met or do not apply’. Consequently, according to these principles of justice, the equality of rights relating to basic liberties must be predominantly fulfilled.\textsuperscript{100}

Ross, meanwhile, provides a definition of ‘just’ and ‘unjust’ by suggesting that ‘just’ decisions are made by properly applying the principles and rules that are in force.\textsuperscript{101} This set

\begin{flushright}
\textsuperscript{95} Ross, above n 72, 269, 273.
\textsuperscript{96} Ibid 273.
\textsuperscript{98} Ibid 24–5.
\textsuperscript{99} Ibid 93–7, 265–6.
\textsuperscript{100} Ibid 38.
\textsuperscript{101} Ross, above n 72, 274.
\end{flushright}
of principles is provided by the rule of law. So, adherence to parameters within the rule of law must enhance justice in a just society.

Rawls’s argument focuses on the concepts of ‘original position’ and ‘the veil of ignorance’, where the ‘original position’ is the point at which fairness and justice are achieved\textsuperscript{102} and ‘the veil of ignorance’ descends when the principles in the ‘original position’ are made acceptable by excluding contingent or subjective elements such as cultural, economic or geographical bias.\textsuperscript{103} Rawls sees the principles of justice as universal ones that can apply to any just society at any given time.

Sandel challenges the basis of Rawls’s notion of ‘original position’ by arguing that it misclassifies people because it ignores their race, age, intelligence, and position in society.\textsuperscript{104} Their ‘ignorance’ does not seem to end here, and according to Sandel, people are also unaware of the good, their values and their aims in life.\textsuperscript{105} Sandel also believes that Rawls’s theory leads to the conclusion that justice and fairness are achieved only under ‘the veil of ignorance’.\textsuperscript{106}

Rawls also employs the concept of ‘circumstances of justice’, which are both objective and subjective.\textsuperscript{107} The objective circumstances consist, for example, of the relative scarcity of ‘primary goods’, which are ‘things it is supposed a rational man wants whatever else he wants’. Subjective circumstances, on the other hand, include the idea that the parties have differing aims and conceptions of good, and each wishes to advance his own interests above those of others.\textsuperscript{108} These circumstances would lead to the principles of justice that regulate the distribution of goods.

Sandel agrees that ‘circumstances of justice’ do in fact ‘prevail in human societies and make human co-operation both possible and necessary’, but he still opposes Rawls’s reasoning because, if it is to be assumed that ‘original position’ has a practical basis, then it cannot

\textsuperscript{102} Rawls, above n 91, 120.
\textsuperscript{103} Ibid 136–7.
\textsuperscript{105} Ibid.
\textsuperscript{106} Ibid 24–5.
\textsuperscript{107} Rawls, above n 92 (1999), 109–12.
\textsuperscript{108} Ibid.
represent the foundation of ‘deontological theory’. Sandel’s argument is based on the description of ‘deontological theory’ as the priority of the right over the good, which assumes a dependency of good and right. If that is true, one has to accept the existence of certain conditions in societies at specific times, and whenever these conditions are not applicable, then the priority of the right is open to challenge.

Sandel’s criticism of Rawls tends to focus on the assumption that Rawls’s reasoning does not allow for people’s commitments or attachments, while in reality this is not necessarily a conclusion deduced from Rawls’s approach. Sandel’s analysis of Rawls’s theory of the ‘person’ reflects a selective, rather than complete, view of Rawls’s outlook. Furthermore, Sandel does not seem to acknowledge that Rawls is addressing universal principles that would be applicable in any just society. Viewed in this light, Rawls’s task is to broadly identify the available options for the structures of interactions in such a society.

As mentioned earlier, links with consistency, uniformity, reason, legality and other elements come into play in the analysis of the characteristics of justice in the context of the rule of law. For the achievement of justice, there must be consistency in approach, uniformity in the evaluation of circumstances, and so on. Justice is an essential ingredient of any legal system, as decisions based on legality alone may yield an unjust result.

The importance of the role of justice is apparent in Banakar’s discussion of justice as an ethical form of judgement, where an unjust outcome of legal rules cannot be deemed valid and morality in the application of judgement is necessary. To Banakar, ‘positive law which produces grossly unjust results is not valid’; i.e., unjust law is not legitimate law.

Raz also observes this link between the rule of law and valid laws. He asserts that merely being part of a legal system does not make a rule a valid one. For Raz, a legally valid rule is one that imposes an obligation with normative characteristics. Therefore, a legal system that produces legitimate and consistent rules will still fall short if its rules ignore the
principles that promote justice. In short, Rawls and his followers believe that the rule of law is the conceptualisation of justice in the framework of a legal system.\footnote{Neumann, above n 90, 7–9.}

Equally, justice can be served only in a system that is based on the rule of law and that affords due respect to the various elements of the rule of law. A reciprocal relationship between justice and the rule of law must always exist, since the rule of law loses its essence without justice and justice cannot be established without the rule of law. In an authoritarian environment, where law is dictated by the ruler, justice will forever remain an unrealised concept.

The factors discussed above must simultaneously exist within the framework of the rule of law. If a legal rule lacks even one of these components, it falls outside the scope of the rule of law.

**FINAL REMARKS**

International law unites the international community through a legal framework. The UN was created to pursue justice, peace and security, and to promote respect for the rights and obligations of states. International law is based on states’ sovereignty and the equality of their rights, and it is uniquely consensual and voluntary.

The international legal system is also unique in that its subjects are the lawmakers, lawbreakers and law enforcers. Also, while governments may change, the principles that underlie international law remain constant. The unique nature of international law demands a framework that is not based on centralised authority but on shared values – the general principles of law. This proposition is particularly true as international law faces new challenges that require new rules for which there are no pre-existing treaty rules or customs.

The rule of law refers to the principle that concrete laws, rather than a ruler’s arbitrary decisions, are the governing authority. The constituent elements of the rule of law – legality,
consistency, coherency, uniformity, legitimacy and justice – are individually significant, but their greater importance lies in the way they collectively promote equality and fairness. Rule of law is enshrined in the national legal systems of all modern democracies, but the concept is particularly important in inter-state relations, which are marked by decentralised authority and largely uncodified legal obligations. The rule of law adds predictability, stability and durability to reciprocal inter-state relations because it helps distinguish the will of states from arbitrary whim.

Recognizing the need for ‘universal adherence to and implementation of the rule of law at both the national and international levels’, UN members have affirmed their commitment to ‘an international order based on the rule of law and international law’. Indeed, the rule of law undergirds the Charter of the UN. The preamble of the Universal Declaration of Human Rights (UNDHR) also stresses the importance of the rule of law.

International law evolves as the international community’s values evolve. New values will conflict with existing laws, and this tension will lead the international community towards an evolving view of the rule of law driven by its principles. It is useful to keep in mind that principles, unlike rules, do not provide all-or-nothing choices. Principles have dimensions of weight and importance, which prioritise some principles over others, thus helping to resolve issues.

The national laws share many of the values and principles of the international legal system, and national legal systems generally spell out those principles more clearly and have an extensive body of case law analysing and defining them. Contemporary international law is still relatively young and thus benefits from adopting the general principles of law from more mature national legal systems.

115 GA Res World Summit Outcome (24 October 2005) UN Doc A/RES/60/1 para 134.
116 GA Res 2625(XXV), above n 56. For information on UN rule of law programmes, see above nn 56, 88.
118 Malanczuk, above n 2, 49–50.