

Contents

<i>Acknowledgements</i>	v
Introduction	1
1. A Framework for Analysing General Principles	5
I. Introduction: A Tetrahedral Framework.....	5
II. Jurisprudential Legitimacy: A Brief Consideration of Positivism and Natural Law.....	6
III. Function: A Binding Source of International Law?.....	8
A. ‘Hard’ and ‘Soft’ Rhetoric: Consent and Voluntarism.....	9
i. Treaties.....	10
ii. Customary International Law	10
iii. General Principles.....	11
IV. Type.....	12
A. Principles and Rules.....	13
B. Content of General Principles.....	13
V. Methodology	14
A. Domestic/International Forum.....	15
B. Comparativism/Categoricism	15
C. Judicial Discretion.....	16
i. Discretion and Gaps in International Law	17
D. Appropriateness	19
VI. Conclusion.....	19
2. History of Article 38(1)(c)	21
I. Introduction.....	21
II. Development Pre-World War I	22
A. Arbitral Procedure Regulations 1875	23
B. Permanent Court of Arbitration: 1899 and 1907.....	26
C. Court of Arbitral Justice: 1907.....	27
D. International Prize Court: 1907.....	29
i. General Principles of Justice and Equity	29
ii. The Prize Court’s Failure: A Bold Solution Goes Too Far	32
E. Development 1910–14.....	33

III.	Development Post-World War I.....	34
A.	The Draft Schemes	34
i.	Draft Scheme of Denmark, Norway and Sweden: 1918	34
ii.	Swiss <i>Avant-projet</i> : 1918–19.....	36
iii.	Five Powers Plan	36
iv.	Proposals of the German Government: 1919.....	37
v.	Draft Prepared by Clovis Bevilacqua	37
vi.	Memorandum, Permanent Secretariat	37
B.	Discretion and General Principles	38
IV.	Article 38(1)(c) and the PCIJ	38
A.	Advisory Committee of Jurists.....	38
i.	13th Meeting of the Committee	40
ii.	14th Meeting	42
iii.	15th Meeting	44
B.	Passage through the League of Nations	46
V.	Conclusion: Applying the Tetrahedral Framework.....	47
A.	Jurisprudential Legitimacy.....	47
B.	Function.....	48
C.	Methodology	48
i.	The Role of Judicial Discretion	49
ii.	The Forum from which General Principles are Drawn: The Role of Municipal Law.....	49
D.	Type of General Principles.....	50
i.	Principles and Rules	50
ii.	Procedural General Principles	50
iii.	<i>Jus Cogens</i>	50
3.	Consideration of Article 38(1)(c) by the PCIJ	52
I.	Introduction: Separating the Wheat from the Chaff	52
II.	Cases in Chronological Order	55
A.	<i>SS Wimbledon</i>	55
i.	<i>Salus populi supreme lex</i>	56
ii.	Good Faith – Impossible Consequences	56
B.	<i>Mavrommatis Palestine Concessions</i>	57
i.	Rejection of the Comparative Methodology	58
ii.	<i>Allegans Contraria Non Est Audiendus</i>	58
iii.	Jurisdiction.....	59
C.	<i>Mavrommatis Jerusalem Concessions</i>	60
D.	<i>Polish Upper Silesia</i> (Preliminary Objections)	60
i.	Stage of Procedure	61
ii.	Litispence.....	62
E.	<i>Polish Upper Silesia</i> (Merits)	62
F.	<i>Mosul Boundary Case</i>	63

G.	<i>SS Lotus</i>	64
	i. Universal Acceptance	64
	ii. Methodology	65
	iii. General Principles as a Source of Law	66
	iv. Logical Principles of Law	67
H.	<i>Chorzów Factory</i>	68
	i. Obligation to Make Reparation	68
	ii. No One Can Take Advantage of Their Own Wrong	71
	iii. Content of Reparations for an Illegal Act	71
I.	<i>Jurisdiction of the Courts of Danzig</i>	72
J.	<i>Interpretation of Judgments Nos 7 and 8 (The Chorzów Factory)</i>	73
K.	<i>Brazilian Loans</i>	73
	i. <i>Contra Preferentum</i>	74
	ii. <i>Jura Novit Curia</i>	74
L.	<i>Interpretation of the Greco-Turkish Agreement</i>	75
M.	<i>Greco-Bulgarian Communities</i>	76
N.	<i>Polish Nationals in Danzig</i>	76
O.	<i>Free Zones of Upper Savoy</i>	77
	i. Abuses of Rights	77
	ii. <i>Jura Novit Curia</i>	78
	iii. Jurisdiction	78
P.	<i>Eastern Greenland</i>	79
Q.	<i>Oscar Chinn Case</i>	80
R.	<i>Lighthouses Case</i>	81
	i. Good Faith	81
	ii. <i>Nemo Dat</i>	81
S.	<i>Consistency of Certain Danzig Legislative Decrees</i>	82
T.	<i>River Meuse</i>	82
	i. Estoppel	83
	ii. <i>Inadimplenti Non Est Adimplendum</i>	84
	iii. Good Faith	85
U.	<i>Lighthouses in Crete and Samoa</i>	85
V.	<i>Panevezys-Saldutiskis Railway</i>	86
W.	<i>Electricity Company of Sofia and Bulgaria</i>	87
	i. Prejudicial Effect	87
	ii. Later v Earlier Intentions	88
III.	Conclusion	88
	A. Function	89
	B. Methodology	89
	C. Type	90
	D. Jurisprudential Legitimacy	90

4. Development of Article 38(1)(c): 1945–91.....	91
I. Introduction.....	91
II. Historical Development: PCIJ to ICJ.....	93
III. Cases.....	96
A. <i>Corfu Channel</i>	99
i. Circumstantial Evidence.....	99
ii. General Principles and Natural Law.....	100
iii. A Dual Approach to General Principles?.....	100
B. <i>International Status of South West Africa</i>	101
C. <i>Fisheries Case</i>	102
D. <i>Anglo-Iranian Oil</i>	103
E. <i>Effect of Awards of Compensation</i>	104
F. <i>Voting Procedure</i>	104
G. <i>Certain Norwegian Loans</i>	105
H. <i>Right of Passage (Preliminary Objections)</i>	107
I. <i>Guardianship of Infants</i>	107
i. Judge Lauterpacht.....	107
ii. Judge Quintana.....	108
J. <i>Interhandel</i>	108
K. <i>Right of Passage (Merits)</i>	109
i. Judgment of the Court.....	110
ii. Judge Quintana.....	111
iii. Judge Koo.....	111
iv. Judge Fernandes.....	113
L. <i>Preah Vihear</i>	116
M. <i>South-West Africa (Preliminary Objections)</i>	118
N. <i>South-West Africa</i>	119
i. The Court.....	119
ii. Judge Van Wyk.....	120
iii. Judge Read.....	121
iv. Judge Tanaka.....	121
v. Judge Jessup.....	123
O. <i>North Sea Continental Shelf</i>	124
i. Judge Tanaka and Judge Bengzon.....	124
ii. Judge Ammoun.....	124
P. <i>Barcelona Traction</i>	126
i. Judgment of the Court.....	126
ii. Judge Ammoun.....	127
Q. <i>Legal Consequences for States</i>	127
R. <i>ICAO Council Appeal</i>	129
S. <i>Fisheries Jurisdiction (Order)</i>	129

T.	<i>Application for Review of Judgment No 158</i>	129
i.	The Court	130
ii.	Dissenting Opinion of Vice President Ammoun	130
iii.	Judge De Castro	131
U.	<i>Aegean Sea Continental Shelf</i>	131
V.	<i>Continental Shelf (Tunisia v Libyan Arab Jamahiriya)</i>	132
W.	<i>Nicaragua</i>	132
i.	Judgment of the Court.....	132
ii.	President Singh	133
iii.	Judge Oda	133
iv.	Judge Schwebel.....	134
X.	<i>Elettronica Sicula</i>	134
Y.	<i>UN Privileges and Immunities Convention</i>	135
IV.	Conclusion	136
A.	Conflation of Custom and General Principles	136
B.	Application of the Tetrahedral Model.....	136
C.	The Duality of General Principles.....	137
5.	Development of Article 38(1)(c) by the ICJ: 1992–2019	139
I.	Introduction	139
II.	Cases (Except for the Separate and Dissenting Opinions of Judges Weeramantry and Cançado Trindade)	142
A.	<i>Aerial Incident at Lockerbie</i> (Provisional Measures)	142
i.	Judge El-Koshi	142
ii.	Judge Ranjeva.....	143
B.	<i>Certain Phosphate Lands in Nauru</i>	143
C.	<i>Territorial Dispute</i>	144
i.	Estoppel	144
ii.	<i>Uti Possidetis</i>	145
D.	<i>Threat or Use of Nuclear Weapons</i>	145
i.	<i>Non Liquet</i>	146
ii.	Judge Fleischhauer	147
E.	<i>Application of the Genocide Convention</i> (Preliminary Objections)	148
F.	<i>Aerial Incident at Lockerbie</i> (Preliminary Objections)	149
G.	<i>Oil Platforms</i> (Order)	150
H.	<i>Kasikili/Sedudu Island</i>	150
I.	<i>Aerial Incident of 10 August 1999</i>	152
J.	<i>Maritime and Territorial Questions</i>	152
K.	<i>Arrest Warrant Case</i>	153
L.	<i>Pulau Ligitan and Pulau Sipadan</i>	153

	M. <i>Oil Platforms</i> (Merits)	154
	N. <i>Application of the Genocide Convention</i> (Judgment)	155
	O. <i>Application of the Interim Accord</i>	155
	i. Judge Simma	156
	ii. Judge ad hoc Roucounas	156
	P. <i>Jurisdictional Immunities of the State</i>	157
	Q. <i>Construction of a Road</i>	158
	R. <i>Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia</i>	159
III.	Contributions of Judge Weeramantry	160
	A. <i>Greenland and Jan Mayen</i>	160
	B. <i>Application of the Genocide Convention</i> (Provisional Measures)	161
	C. <i>Gabčíkovo-Nagymaros Project</i>	161
	D. <i>Land and Maritime Boundary</i> (Preliminary Objections)	163
	E. <i>Pulau Ligitan and Pulau Sipadan</i> (Application to Intervene)	164
IV.	Contributions of Judge Cançado-Trindade.....	165
	A. <i>Obligation to Prosecute or Extradite</i> (Provisional Measures)	165
	B. <i>Pulp Mills</i>	166
	i. Function.....	166
	ii. Jurisprudential Legitimacy.....	167
	iii. Methodology.....	167
	iv. Type.....	168
	C. <i>Certain Activities</i> (Joinder)/ <i>Construction of a Road</i> (Joinder)	169
	D. <i>Access to the Pacific Ocean</i>	170
	E. <i>Nuclear Arms and Disarmament</i>	171
	F. <i>Sovereign Rights and Maritime Spaces</i> (Preliminary Objections)	172
V.	Conclusion.....	173
6.	General Principles in Other Courts and Tribunals	177
	I. Introduction.....	177
	II. International Criminal Tribunals	178
	A. International Criminal Tribunal for the Former Yugoslavia	179
	i. Classification of General Principles	180
	ii. Function.....	181
	iii. Methodology and Jurisprudential Legitimacy.....	182
	iv. Type.....	188
	B. International Criminal Tribunal for Rwanda	189
	C. International Criminal Court.....	191

III.	International Economic Law	193
	A. World Trade Organisation	193
	B. GATT Panels.....	195
	C. International Investment Arbitrations	196
IV.	International Tribunal for the Law of the Sea	198
V.	Regional Bodies.....	199
	A. European Court of Justice: General Principles of EU Law.....	199
	B. European Court of Human Rights.....	201
	C. Inter-American Court of Human Rights	203
VI.	Conclusion.....	206
7.	Commentary in Context	208
	I. Article 38(1)(c) as a Norm-Creating Source of International Law.....	210
	A. Function Explained by Source Theory.....	211
	B. General Principles as Interpreters/General Principles as Unifiers	212
	II. The Rule/Principle Distinction	213
	A. ‘National’ International Law	215
	B. A Temporal Dimension to the Rule/Principle Distinction.....	217
	i. Pre-PCIJ.....	217
	ii. PCIJ and ICJ	218
	C. A Blurred Distinction	218
	D. Generality	220
	III. Judicial Discretion.....	221
	A. Comparativism, Categoricism and Discretion	222
	B. Discretion as to Appropriateness.....	224
	C. A Broader Discretion	226
	D. Nationality, Judicial Discretion and Methodology	228
	IV. Where are General Principles Drawn From?.....	229
	A. ‘Civilized’ Nations.....	229
	B. Domestic Forum.....	231
	C. General Principles Drawn from International Law	232
	i. General Principles as Deductions from Existing Rules of International Law.....	233
	ii. General Principles Gathered from International Material	234
	iii. International Forum as a Measure of Appropriateness	236
	V. Content of General Principles.....	237
	A. Public/Private Law	237
	B. Procedural/Substantive	238
	C. Crimes against Humanity and <i>Jus Cogens</i>	238

8. Global General Principles	240
I. Types of Legal Systems.....	243
A. Chthonic Legal Systems.....	243
B. Religious Legal Systems.....	245
C. Asian Legal Systems	247
II. Perspectives on General Principles.....	249
A. Chthonic Systems	249
i. Intersection between Chthonic Systems and International Law.....	249
ii. Chthonic Legal Systems and ‘Nations’	250
B. Religious Legal Systems	254
i. Intersections between Religious Legal Systems and International Law.....	254
ii. Law and Morality	255
iii. Where Should General Principles be Drawn From?.....	257
iv. Conceptions of International Law	260
C. Asian Legal Systems	261
III. The Comparativist’s Warning	261
A. ‘Thin’ Law and Legal Cultures.....	261
B. Legal Systems as Representatives of Legal Families.....	262
IV. Global General Principles in the Information Age.....	263
9. A Model of General Principles	268
I. A Tale of Two Sources: Illegitimate Duality	269
A. General Principles as Logical Deductions	270
II. General Principles and Legitimate Duality	270
A. The Baseline Model.....	271
B. General Principles as Principles.....	272
C. General Principles as Rules	272
III. The Future of General Principles	273
<i>Index</i>	277