GENERAL PRINCIPLES OF LAW AND THE PROBLEM OF LACUNAE IN THE LAW OF NATIONS

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1. Article 38(1)(c) of the Statute of the International Court of Justice. — Article 38 of the Statute lists the following sources that may and should be applied by the International Court of Justice:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59,1 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.

Article 38 of the Statute of the International Court of Justice has been directly taken over from article 38 of the Statute of the extinct Permanent Court of International Justice. The history of article 38 shows that the “general principles of law recognized by civilized nations” have been included into the list mainly because of the fears that international treaties and international customary law were not sufficient for solving all conceivable disputes of legal nature that could arise between states.2 The purpose of the third source of international law was to prevent a situation of non liquet, i.e. a situation where the World Court would have to refuse to give judgment because of the lack of applicable legal rules or, in other words, because of a gap in the structure of international law.3 This was a problem that worried primarily the Continental lawyers who did not expect the court to create law, but only to apply it.

There is a huge amount of literature concerning the role of the general principles of law in the law of nations. One might perhaps expect that the discussion would be fo-

1. Article 59 of the Statute provides that the decisions of the International Court of Justice shall have no binding force except between the parties and in respect of that particular case.

2. For the history of article 38, see Permanent Court of International Justice, Procès-verbaux of the proceedings of the Advisory Committee of Jurists (The Hague 1920); Herczegh, General principles of law and the international legal order (Budapest 1969) 12–20.

3. About the problem of non liquet in general, see Rabello, Non-liquet from modern law to Roman law: 9 Israel L.R. 63–84 (1974); Stone, Non liquet and the function of law in the international community: 35 B.Y.I.L. 124–161 (1959); Lauterpacht, Some observations on the prohibition of non-liquet and the completeness of the legal order: Symbolae Verzijl (The Hague 1958) 196–221.
cused on the question whether or not some particular legal rules are "general principles of law recognized by civilized nations". In reality, the discussion seldom gets that far, since opinions are divided already at the basic questions: Can there, at all, be any gaps in international law? Is the list of sources in article 38 an authoritative enumeration of sources of international law in general, or is its relevance limited to the International Court of Justice? Does article 38 establish a hierarchy of sources, so that the general principles of law are inferior to treaties and legal custom? Which nations are "civilized"? Must the principles be recognized universally, i.e. by all "civilized" nations? What is the difference between a general principle of law and a particular legal rule? The general principles of law, are they principles of municipal or of international law? How can the general principles of law be used to fill the gaps in the law of nations?

In this paper, we shall make an attempt to answer these questions.

2. The problem of lacunae in international law. – The question whether or not there are gaps in the norm structure of international law has been widely discussed in legal literature. To a certain extent, this is a terminological dispute. As Gihl put it, if the general principles of law are a part of international law, they cannot be used to fill gaps in the same international law. The question whether the general principles of law are an independent source of the law of nations will be handled later on (section 3 infra). The authors discussing the problem of gaps in international law consider often only treaties and international customary law, asking whether there may be situations that cannot be solved by application of these two sources of international law. Let us put the same question in order to show that these two sources are not sufficient and that the general principles of law have sometimes to be used to fill the gaps. The term "gaps" will thus here be used to denote the lacunae that remain after the application of treaties and of the customary law of nations.

In the view of some authors, the existence of gaps in international law is quite impossible and theoretically inconceivable. Their line of thought can be summarized in the following way: The subjects of the law of nations are sovereign states. All that is not forbidden by treaties or by international customary law is lawful for them to do. If there is a situation for which there is seemingly no law, the states may in fact behave as they please. In practice, this normally means that the respondent state cannot be obliged to act in a specific way: the action against it has to be rejected. There is consequently no place for a non liquet and no need to fill any alleged "gaps".

To some extent, this reasoning is correct. Indeed, in no case has any international tribunal refused to give judgment or arbitral award on the ground that there was no