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LAW: INTERPRETIVISM AND ITS JUDICIAL
CONSEQUENCES**

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THE PRINCIPLES OF INTERNATIONAL LAW: INTERPRETIVISM AND ITS JUDICIAL CONSEQUENCES

ABSTRACT:

Principles are part of international law as much as of other legal orders. Nonetheless, beyond principles referred to the *functioning* of IL, or the sector related discipline in discrete fields, those fundamental principles identifying the *raison d'être*, purpose and value of the legal international order, as a whole, remain much disputed, to say the least. In addressing such a problem, one that deeply affects interpretation and legal adjudication, this article acknowledges the limits and weakness of legal positivism in making sense of the inter- and supra-national legal order(s). It appraises also the novel from the late Ronald Dworkin, concerning IL, and its consequence for interpretivism in the international environment, so different from State political communities and their 'integrity'. Finally, some recent cases before international Courts shall be considered, that expose difficulties stemming from traditional legal positivist strictures, and explain how judicial reasoning actually profits from asking further questions of principles. All the more so, if the issues at stake happen to be covered by two or more diverging legal regimes, that would, per sé, lead to opposite outcomes.

KEY WORDS: INTERNATIONAL LAW, PRINCIPLES, LEGAL REGIMES, LEGAL ADJUDICATION, INTERPRETIVISM, JUSTICE.

1. Introduction; 2. What (and whose) Principles? 3. Dworkin's 'principled' theory of International Law; 4. The features of an interpretive (adjudicative) theory of law; 5. Multiple legalities, principles and exemplary case law; 6. As a conclusion.

1. Introduction

Despite their disputed nature, principles play a cardinal role in International Law (IL) and in Courts not only by filling legal gaps, but also as fundamental means for the interpretation of rules and the enhancement of legal reasoning¹.

A canonical way to see principles in IL places them among the sources of law, as stated by art. 38 (1c) of ICJ Statute. It is to be noted, however, that they can surface within more than one source. In the context of the ICJ, from art. 38

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¹ F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Brill, Leiden, 2008.

paragraph 1(a), or (b), *ie* in the application of conventional or customary law by which they might be generated, beyond the separate provision singling out those principles ‘recognized among civilized nations’, in paragraph 1 (c).² Famously, to the latter Hersch Lauterpacht³- Judge in the ICJ- referred as subsidiary general principles with the special, systemic, function of banning *non liquet* from the realm of (international) law.

Taking account of that background, the issue can be raised whether some set of principles, distinctively underpinning the international legal order, is capable of shaping its *identity*: as much as in any (State) legal systems, in their constitutional and primary law, principles frame the fundamental- ethical and political- choices to be pursued. They would function as gap-filling as well as interpretive resources supporting IL as a whole.

Accordingly, they *should belong in the fundamental raison d’etre of IL properly*. Besides principles of law-functioning, referring to how IL can work, like *pacta sunt servanda* or, say, *good faith*, they would be closer to the question as to *why* it is valued and *what* are being its substantive purposes.

In truth, such a question is not different from the one most recently tackled by the late Ronald Dworkin, in a posthumous article⁴, suggesting legal principles that, in his view, would frame IL, and help resolving ‘disagreements’ in identifying positive IL norms, to be applied in adjudicative issues.

This chapter shall also consider whether an ‘interpretive’ theory of law (renowned as one addressing the alleged weakness of strict legal positivism) can better suit the increasing appearance of principles and the current evolutionary trends of IL. To this regard, judicial cases, namely those originating from being a single issue under the reach of concurring, and often conflicting, legalities, shall be eventually examined. Among their many functions in IL, principles can help reconciling divergences stemming from the multiplicity of separate ‘regimes’ (presently featuring in IL) that hardly would be solved by ‘formal’ legal tools (*lex specialis*, *lex posterior*, etc.)⁵.

2. What (and whose) Principles?

2.1. “General principles of law recognised by civilised nations” (art 38 1 c) are held to play the function of those clauses that in domestic systems refer to natural law (as in the Austrian civil code, art. 7) or the general principles of the legal order of the State (Italian civil code, *disposizioni preliminari*, art. 12). As a consequence, reference to them is mainly meant to face the issue of legal *lacunae*. It embraces the doctrine of a legal system’s *completeness*, one that in turn

² *Ibidem*, p. 42.

³ H. Lauterpacht, “Some Observations on the Prohibition of Non Liqueet and the Completeness of the Legal Order”, in *Symbolae Verzijl* (1958), and published as ch. 9 in *Id.*, *International Law. Collected Papers*, Cambridge, CUP, 1975.

⁴ R. Dworkin, “A New Philosophy of International Law”, in *Philosophy & Public Affairs*, 41, no. 1, 1 ff.

⁵ M. Koskenniemi, *Introduction*, “Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of IL”, ILC, 58 sess, 2006 (A/61/10, para. 251). [<http://untreaty.un.org/ilc/reports/2006/2006report.htm>].

On the proliferation of regimes and courts, for ex. Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford, OUP 2003.

justifies, as mentioned above, (the feasibility of) the prohibition of *non liquet*⁶ : “the principle affirming the completeness of the legal order” is to be seen as “the positive formulation of the prohibition of non liquet”.⁷ And both should be seen as positive rules in *customary law*⁸.

In truth, reference to principles belonging to civilised legal systems has been understood as evoking *jus gentium*, and it is contended upon, between at least two main theoretical strands. One assumes that these principles pertain to no particular system, being instead fundamental to all systems, and showing the essential unity of law, apparently as a matter of reason⁹. The other derives its rationale from comparative legal approaches: enquiry throughout various national systems shows that the widest consensus supports some legal principles that accordingly become general international law, “independently of custom or treaties”¹⁰.

The resort of general principles, if seen through legal realist lenses, equates with an opening in favour of judicial discretion, if not judicial norm-creation. From some legal realist standpoint, general principles have been feared as the Trojan Horse of natural law and morality into the interstices of positive norms¹¹. For Julius Stone (commenting on Lauterpacht) “even if, for the sake of argument, we were to accept the 'natural law' version most favorable to Judge Lauterpacht's position, namely, that these principles represent a kind of inexhaustible storehouse of potential law, they still would not dispense the judge from making law-creative choices”¹². Stone stressed the point, later become largely undisputed among legal scholars, that principles might be conflicting themselves, “and, indeed, often to the same principle by reason of its ambiguity, circuitry or indeterminacy” can be traced diverse outcomes.¹³ Stone's early criticism notwithstanding, legal systems are undoubtedly held to include principles, whose standards, far from being a sheer appeal to vague morality or natural law, are positive law essential in the construction of present legal orders.

As I see them, and as legal theory and jurisprudence have abundantly afforded consistent evidence in that regard, principles as normative standards, regardless of their treatment in different legal theories, hold a central place as positive law. Likewise, even those most structural ‘general principles of law’, play a fundamental function in every legal order: this is why art. 38 of the ICJ

⁶ For J. Stone, “Non liquet comes into argument rather when applicable rules of appropriate content and precision are simply not available for adjusting the particular clash of interests.” (J. Stone, “Non Liquet and the Function of Law in the International Community”, 35 *Brit. Y. B. Int'l L.* 124, 1959, at p. 124).

⁷ H. Lauterpacht, ‘Some Observations on the Prohibition of Non Liquet and the Completeness of the Legal Order’, in *Symbolae Verzijl* (1958), and published as ch. 9 in Id., *International Law. Collected Papers*, supra fn. 3, p. 216.

⁸ *Ibidem* p. 196.

⁹ Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1987), Cambridge, CUP (Reprint) 2006, p. 24.

¹⁰ W. R. Hearn, ‘The International Legal Regime Regulating Nuclear Deterrence Warfare’, 61 *Brit Y.B. Int'l L.* 199, (1990), p. 225.

¹¹ In different words, the door opening to (rule's) validity criteria placed outside the legal system. The duty to decide holds despite absent or conflicting rules; its feasibility is granted by recourse to principles, whose membership in the legal system -if any- would hardly prevent any reference to law of nature or of reason.

¹² Stone, cit. supra fn 6, at p. 133

¹³ As a consequence, a “law-creating choice” shall be in place, although it shall be disguised by way of “logical deduction from the principle finally chosen” (*Ibidem*).

Statute upholds them as recognized among civilized nations, given their belonging to *law functioning*, as Lauterpacht would have them. Bin Cheng's analysis has recorded the general principles of law through their use by International Courts and Tribunals and listed several such as self preservation, good faith (and notably *pacta sunt servanda*, as well as malicious exercise of a right), varieties of sections on the principle of responsibility (fault, causality, individual responsibility, integral reparation, among them), most principles in judicial proceedings (from those inherent in jurisdiction to the various *jura novit curia, audiatur et altera pars, nemo judex in causa propria, res judicata*, etc.)¹⁴.

2.2. Also due to the special features of the international legal system, the capacity and latitude of fixed *rules stricto sensu*, in a positivist view, appears at times limited: be it a matter of completeness of the system or otherwise, there are cases where international norms have led to no answer or otherwise stated, unsatisfactory outcomes. As Jan Klabbers has recalled, “[M]any have held that the bombing of Belgrade in 1999 was illegal, yet legitimate; the non-activity of the United Nations in Rwanda or Srebrenica, in the mid-1990s, was legally difficult to condemn, yet morally wrong”.¹⁵

It is because of these and similar issues, that Klabbers is focusing on some ‘virtue ethics’ that should be inherently essential for at least those that are entrusted to make the most of international law norms, and international judges among them.¹⁶ And not by chance, among the general principles of international law, *good faith* is in pride of place in measuring how should the key norm *-pacta sunt servanda* -be observed¹⁷.

However, aside from the prospect of a possible virtue ethics in IL, as a matter of fact those problems that stem from missing or conflicting norms – or that as such are perceived- seem to be increasingly apparent in International law context, all the more so due to the more demanding objectives of the ‘civilised nations’ in the last 60 years. Thus, the full range of available IL principles is hardly overestimated and should better be felt as part of an on going constructive endeavor: it embraces certainly general principles of the law of civilized nations, principles of law-functioning, but also the principles belonging to specialized international rule-making (in, say, trade law, human rights law, environmental law, humanitarian law and the like)¹⁸. Nonetheless, it is worth

¹⁴ Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1987), Cambridge, CUP (Reprint) 2006.

¹⁵ Jan Klabbers, ‘Towards a culture of formalism? Martti Koskenniemi and the Virtues’, *Temple International & Comparative Law Journal*, autumn 2013, p. 430. See Bruno Simma, ‘NATO, the UN, and Use of Force: Legal Aspects’, 10 *EUR. J. INT’L L.* 1 (1999). And Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, London, Penguin, 2000, pp. 68–72.

¹⁶ Some requisites of personal integrity, impartiality, honesty and the like are held for U.N officials, and codes of conduct for those with special mandates as Rapporteurs. Cf. Klabbers, *supra* fn 15, pp. 433 ff and *Human Rights Council Res. 5/2, Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council*, 9th Sess., art. 3(e) (June 18, 2007).

¹⁷ *Vienna Convention on the Law of Treaties*, art. 26 (May 23, 1969, 1155 U.N.T.S. 331) (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

¹⁸ Those principles range from higher-lower levels of generality: think of the principle of non discrimination in its specific WTO appearance as the “most favoured nation” principle, and its underlying rationale of enhancing unrestricted free trade. For example, it is maintained that “In the current WTO, the traditional trade law principles of most favoured

supposing that adjudicative matters would better be viewed could one be drawing on *principles bearing some substantive raison d'être* of IL as a *specific* legal order.

To such principles might lead, for example, the idea, suggested by Anne Peters, of a 'compensatory constitutionalism', one encapsulating a general rationale of current IL. It conceives IL under a specific understanding which, through evidence of what she defines micro- and macro constitutionalisation trends, enhances fundamental norms that would help manage transnational level issues. Conflict-resolution requires a balancing of interests in the concrete case, in the absence of abstract hierarchy. According to Peters, the international lawyer should determine "the supremacy of international law over domestic constitutional law in a non formalist way", that is, assessing the rank of the norms at stake "according to their substantial weight and significance"¹⁹. However, fundamental norms would require some legitimacy, in the absence of a true international constitution, while state sovereignty and consent are no longer accepted as the sole source of legitimacy of international law²⁰.

As I see it, the interplay between different regimes of law and separate orders in the global intercourses should be guided through mutually pondering their respective fundamental principles; as they function like hermeneutic sources of interpretation, it is relevant how international law's rationale and legitimacy are justified and through what substantive principles.

2.3. Such a question is of a type familiar to State legal orders and to *constitutional* reasoning in the last decades. It is plain fact that substantive principles, often enshrined in our constitutions, define scope, values, and purpose of a legal order as a whole, by channelling rules' interpretation on one side and, on the other, connecting its general coherence both to the logical consistency of its norms and to the evolving political- ethical pillars of its own community of people.

Although such a role of principles has become uncontested, it was famously made part of a self-standing theory of law, neither positivist nor naturalist, but *interpretivist*, by Ronald Dworkin: a theory that is centred explicitly upon the *adjudicative* side²¹. Each legal order is to be referred to its own community, and principles belong to or constitute a bridge toward the *integrity* of its *political morality*. In truth, an interpretivist theory of law could accordingly be extended

nation and national treatment operate against state failure in the form of protectionism. These principles are constitutive of the system of multilayered governance and thus may be considered as amounting to constitutional principles of the trading system. They constrain the WTO members and are increasingly viewed as two facets of a constitutional principle of non-discrimination ultimately benefiting the ordinary citizens (such as importers, exporters, producers, consumers and taxpayers)" (K. Armingeon, K. Milewicz, S. Peter and A. Peters, "The constitutionalisation of international trade law", in *The Prospects of International Trade Regulation: From Fragmentation to Coherence*, Thomas Cottier and Panagiotis Delimatsis, eds., Cambridge, CUP, 2011, pp. 69-102, at p. 76.

¹⁹ A. Peters, "Conclusions", in J. Klabbers. A. Peters, G. Ulfstein, *The Constitutionalization of International Law*, OUP 2009, p. 348.

²⁰ A. Peters, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures Leiden Journal of International Law, Vol. 19, pp. 579–610, 2006.

²¹ Among his many works especially , R. Dworkin, *Law's Empire*, Cambridge Mass., Harvard Univ. Press, and London, Fontana Press, 1986.

to IL, as much as to any legal orders properly meant, provided that a general *rationale* characterising the essential principles in the political morality of an *international* system of law is found.

However, in the tradition of legal positivism, from Austin to Hart, the very foundations and the maturity of IL as a legal order were never fully recognised²²; on the other hand, substantive principles, of an ultimate nature, sustaining IL are not easily (nor unanimously) presupposed, despite the number of supranational preambles, charters, conventions and quasi-universal convergence upon peace, security, human rights (let alone *jus cogens* and banning of war, torture, genocide, slavery). It is contentious if historical progress of international law has overcome the traditional core of a law treating bilateral interests under the dogma of states' free will; if a *super partes* law²³, to be oriented by the interests of humanity has changed its nature²⁴; if individuals have superseded States as the ultimate subjects for whose sake sovereignty itself appears now a conditional notion²⁵, and so forth.

If we imagined to adopt an interpretivist approach, by Dworkin's lessons drawn on western constitutional States, it would be arduous to argue through the key notion of *integrity*²⁶, extended to IL. That concept connects coherence of a legal order with the political morality of a well defined social polity, while inter-states arena would still lack the unity of something like a universal community.

Nonetheless, in the article of his last days²⁷, eventually Dworkin tried to offer the missing template for IL, and made use of his 'interpretivist' theory of law in the domain of extra-State law, by providing some newly forged support, one that does not imply either some macro-polity, of a cosmopolitan nature, or an extended, universal and substantive 'integrity'.

He did so, by spelling what he believed the fundamental principles that specifically attain to IL, those that should *justify* the existence of the international legal order. Of course, even if found controversial, still they can set the scene for a long awaited focus upon the distinctive underpinning of IL, thereby making interpretive endeavour to begin as a *principle-based exercise*.

3. Dworkin's 'principled' theory of International Law

3.1. Dworkin rejects the positivist and Hartian idea²⁸ according to which rules are valid only depending on the criteria of recognition spelled by a fundamental secondary rule of the legal system. He refutes on one side the

²² J. Waldron, "International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?" (2013), *New York University Public Law and Legal Theory Working Papers*. Paper 427, http://lsr.nellco.org/nyu_plltwp/427/, pp. 209-223.

²³ A. Cassese, *International Law*, 2d ed., Oxford, OUP, 2005, p. 217.

²⁴ R. Teitel, *Humanity's Law*, Oxford, OUP, 2011; A. Cassese, *The Human Dimension of international law. Selected paper of A. Cassese*, Oxford, OUP, 2008.

²⁵ A.M. Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform', *The American Journal of International Law*, Vol. 99, No. 3 (Jul., 2005), pp. 619-631.

²⁶ Dworkin, *Law's Empire*, supra fn 21, pp. 176-275.

²⁷ R. Dworkin, "A New Philosophy of International Law", in *Philosophy & Public Affairs*, 41, no. 1, 1 ff.

²⁸ H.L.A Hart, *The Concept of Law* (with a *Postscript* edited by P.A. Bulloch and J. Raz)(2nd ed., Oxford Univ. Press 1997), chapter X.

conclusiveness of such a theory as policing system's borders, on the other side, the social convention that is held to pinpoint specifically the birth and life of IL, that is, States' *consent*.

The latter remains unpersuasive: it does not establish any priority among sources, gives no clue on whose consent is ultimately relevant, or when customary rules become peremptory; and what have states consented to remains often disputed (in many cases text cannot be decisive: e.g. art 2 (4) UN charter on prohibition of the use of force). Even more fundamentally, for States to accept something as law, "they need some other standard to decide what they should regard as law"²⁹. That more basic principle, not the fact of consent, provides "the grounds of international law": similarly, the obligating strength of promises, cannot be due to the mere *fact* of promising³⁰.

Thus, being consent irredeemably flawed (and Dworkin is not alone in making that point)³¹, the 'sociological' and descriptive answer according to which IL is law because it is believed law by "almost everyone"³² cannot be final³³.

Briefly to resume, Dworkin states that it is in order to improve the legitimacy of *their* coercive strength *vis à vis* their citizens, that States have a duty to accept a *mitigation* of their own power and to "accept feasible and shared constraints" based on IL³⁴. It is today adequate for the State to achieve its legitimacy only if its coercive power is "consistent with the dignity of citizens", that is, a matter of substance not of pedigree; and similarly, even the *international* order makes up for the coercive system that States impose to their citizen: for the State, "[I]t follows that the general obligation to try to improve its political legitimacy includes an obligation to try to improve the overall international system"³⁵ (that means, so improving its own government legitimacy), and such an obligation includes cooperative duties, beyond a law of co-existence³⁶.

²⁹ R. Dworkin, "A New Philosophy of International Law", *supra* fn 27, at p. 9.

³⁰ *Ibidem*, p. 10 and with reference to ch. 14 of R. Dworkin, *Justice for Hedgehogs*. Cambridge Mass., Harvard University Press, 2011.

³¹ For example, see Martti Koskenniemi on the vicious circle between facts and norms *ie* between States' consent and its being norm-generative (normative) upon States themselves: M. Koskenniemi, "The Politics of International Law", in *European Journal of International Law*, 1, 1, (1990), pp. 4-32.. And upon the problematic reflexivity of *pacta sunt servanda*, G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in FM van Asbeck *et al.* (eds.), *Symbolae Verzijl* (Martinus Nijhoff 1958), pp. 153-176.

³² Dworkin, "A New Philosophy of International Law", *supra*, n.27, p. 3

³³ This argument is not only typical to Dworkin's criticism of legal positivism. It is an objection that can be raised against any conventionalist approach. As Cotterrell noted, accepting as law simply what "people identify and treat through their social practices as 'law' ", keeps a "definitional concern with what the concept of law should cover, yet removing from the concept as defined all analytical power" (R. Cotterrell, "Transnational Communities and the Concept of Law", in *Ratio Juris*, 21, 1 (March 2008) (1–18), at p. 8. The reference is to B. Tamanaha, *A General Jurisprudence of Law and Society*. Oxford: Oxford University Press, 2001, p. 166.

³⁴ Dworkin, "A New Philosophy of International Law", *supra*, fn.27, p. 17.

³⁵ *Ibidem*

³⁶ *Ibidem*: "Any state ... improves its legitimacy when it promotes an effective international order that would prevent its own possible future degradation into tyranny" (p. 17); it does the same also when it can protect its people, on whom it has monopoly of force, from invasions of other peoples; moreover, a state fails in a further way if it discourages *cooperation* to prevent economic, commercial, medical or environmental disaster (*Ibidem*, p. 18). As to cooperation in IL see for ex. Wolfgang Friedmann, *The Changing Structure of International Law*, New York, Columbia University Press 1964.

The latter shall be all the more relevant in the future, if we think of those challenges to States self referentiality stemming from climate change or other environmental interests common to all peoples.

However, of itself, such a principle of mitigation is insufficiently determinative as to different possible regimes of IL; accordingly Dworkin coins the *principle of salience*. It is a normative principle itself, and works in connection with the first. It establishes the duty *prima facie* to abide by codes and practices already agreed upon by a consistent number of States and populations. A duty that shall have an obvious “snowballing effect”.³⁷ The moral obligation of all nations – for ex. to treat UN law as law- flows from the combined sense of those two principles, and explains as well why even States’ constitutions tend to include and protect more widespread rules considered as *jus gentium* or even peremptory, *jus cogens*.

3.2. Dworkin does not embrace any *cosmopolitan* view. International law principles are traced back to the rationale of the relationship between State power and its citizens, not to a global hypothetical government or to universal justice. It is a *second level order* of States, and international organisations, to matter, not a *universal community* of individuals. As far as I can see, even the ‘political morality’ of the international system can only enjoy a second level status, that is, the integrity of its values has a derivative status not a self standing substantive content. And in fact mitigation applies to the system of sovereigns. Therefore, even one of the fundamental canons of Dworkin’s general philosophy, *equal concern and respect*³⁸ for each individuals, does not feature within the scope of IL immediately. Mitigation and salience refer to *States’ system* (or to powerful international organisations) premised on the general duty of States to protect the dignity of individuals. Because States shall have to respect citizens’ rights, their sovereignty shall not prevent other States’ intervention to stop genocide; mitigation shall ask States not to refuse cooperation in facing communal interest of humanity, be it concerning security, hunger, environmental protection. Mitigation is explained, in a nutshell, as a source of both negative and positive duties. Although Dworkin suggests, as “phantasy upon phantasy”, an international court having jurisdiction “over all the nations of the world”, such a thought-experiment comes with a clear statement about the domain of International Law: a very distinct part of what “morality and decency require of States and other international bodies in their treatment of one another”³⁹. And again along these lines he asks which argument a hypothetical court should use to determine “the rights and obligations of States (and other international actors and organizations) that it would be appropriate for it to

³⁷ Dworkin, “A New Philosophy of International Law”, supra fn 27, p.19. As Dworkin writes: “If some humane set of principles limiting the justified occasions of war and means of waging war gains wide acceptance, for instance, then the officials of other pertinent nations have a duty to embrace and follow that set of principles” (Ibidem).

³⁸ “Equal concern and respect” had a pivotal role in Dworkin’s philosophy since his *Taking Rights Seriously* (with a new appendix, a response to critics), Cambridge Mass., Harvard University Press, 1978, *Introduction*, p. XII: “This most fundamental of rights is a distinct conception of the right to equality, that I call the right to equal concern and respect”.

³⁹ Dworkin, “A New Philosophy of International Law”, supra fn 27, p. 13.

enforce coercively?"⁴⁰. So the question is defined by the borders of the Westphalian system of States and within them. States are the theoretical bridge between social communities of individuals and international law.

All in all, the "new philosophy" can be seen as an upgrade in theory, intended to explain the state of the art in IL and to validate a legal order through its own systemic principles, replacing the presumption of *consent*. But once this reconstruction of IL has been done, IL becomes suited to Dworkinian theory of law as *interpretive* (as opposed to positivist theories of law, or natural law).

4. The features of an interpretive (adjudicative) theory of law

The features of interpretivism were spelled by Dworking in the last decades, and *not* with reference to IL. What Dworkin can contribute here, mirrors the logic of his criticism to Hartian theory in the '70s: roughly, the positivist view leaves too much to lawyers' discretion. Note that even with IL, Dworkin now warns that the recurrent appeal to morality as a direct reason for action, outside what law is held to prescribe (as Franck did in the case of NATO intervention in Kosovo)⁴¹ would be a fatal undermining of the still fragile IL. What Dworkin is thinking about is the relocation of those choices- deemed to be morally, although not legally, mandatory- as *disagreements within the legal domain*. And this can be done, as we already know, by interpreting "the documents and practices picked out by the principle of salience so as to advance the imputed purpose of mitigating the flaws and dangers of the Westphalian system".⁴²

However, as to the nature of law being interpretive, there is no novelty distinctive to IL. Law *is interpretive* because it postulates a practice where *participants can disagree* about what the practice (like International law) really requires, and assign a value and a purpose⁴³ to it, achieve insights about conditions of truth of particular propositions of law *under those purposes* and within the *constraints* of historical records, documents and relevant materials, sources shaping the object of that practice⁴⁴.

It is of importance that nowhere Dworkin denies that such structures, rules, and institutions are central to the existence or identification of a legal system.⁴⁵ However, being law interpretive, a descriptive/sociological view would not be definitive or sufficiently determinative as regards the *doctrinal* questions concerning *what is the law in particular cases*. Questions about the truth of propositions of law- or about whether and how a norm (or even a judicial

⁴⁰ Ibidem, p. 15.

⁴¹ Ibidem p. 23, Dworkin mentions Thomas M. Franck, "Lessons of Kosovo," *American Journal of International Law* 93 (1999), pp. 857–60.

⁴² Dworkin, "A New Philosophy of International Law", supra fn 27, p. 22.

⁴³ Dworkin, *Law's Empire*, supra fn. 21, p. 52.

⁴⁴ R. Dworkin, *Justice in Robes*, Cambridge Mass., Harvard Univ. Press, 2006, p. 140.

⁴⁵ "...Hart was right to think that the combination of first-order standards imposing duties and second-order standards regulating the creation and identification of those first-order rules is a central feature of paradigmatic legal systems. His emphasis on this structure was not itself remarkably original. [...] Hart's distinctive contribution was his claim that in paradigmatic legal systems the most fundamental secondary rule or set of rules — the complex standard for identifying which other secondary and primary rules count as law — has that force only through convention". R. Dworkin, "Hart and the Concepts of Law", in *Harvard Law Review Forum*, 119, (2006) 95, at p. 100.

outcome) is ‘valid’- are normally traced back to the *grounds of law*⁴⁶, that is, to the existing institutional premises (judicial precedents, legislatures, procedural requirements, and the like) that ‘positivism’ identifies by consensus. Such questions are allegedly solved, according to Hartian legal positivism, by verifying whether the required historical facts have been met (the proper procedural enactment, the ‘right’ source etc.). Although criteria of identification are provided in the rule of recognition of a legal order, disagreement would nonetheless possibly persist. True *disagreements* are hardly revolving around what the actual *grounds of law* are, their empirical (historical) existence and pedigree. Genuine disagreements, with Dworkin (who calls them ‘theoretical’) reach the identity (value and purpose) of the *grounds of law*, beyond their existence. Under contestation is not ‘what really happened’, but what legal scope and import it should bear (not whether the Parliament has actually legislated, but what consequence should be ascribed to that). Being not *empirical*, they involve *evaluations* of principle. Indeed, they depend on the ascription of different meaning and purpose to those *grounds of law* once factually identified. Accordingly, invoking some *different principles of political morality* (involving the identity, scope, and value of the institutional system as a whole) determines different interpretations of the *same* grounds of law and corresponding answers to the problem of what the law is, *ie* the truth of legal propositions⁴⁷.

Of course, from such a perspective, the positivist assumption of consensus on the (interpretation of) *grounds of law* is untenable. Scott Shapiro has nicely summarized the positivist puzzle to this regard: “... it is common ground between exclusive and inclusive legal positivists that the grounds of law are determined by convention. How can they account for disagreements about the legal bindingness of certain facts whose bindingness, by hypothesis, requires the existence of agreement on their bindingness?”⁴⁸.

Accordingly, if we do *not* wish to disregard the domain of IL, as a legal one, we cannot ignore the interpretive reading⁴⁹.

5. Multiple legalities, principles and exemplary case law.

5.1. After Dworkin’s explicit contribution to IL, one further aspect, however, is to be mentioned, one that, as I shall submit, belongs to the potentialities of

⁴⁶ R. Dworkin, *Law’s Empire*, supra n. 21, p. 4.

⁴⁷ It goes without saying here that Dworkin can hardly be isolated or sidelined to this regard, since as he knows, the post Hartian decades have shown the salience of this second view, in diverse ways upheld by positivist writings, from Coleman to Waldron, McCormick, Postema and Schauer (as Dworkin himself writes in his ‘Hart and the Concepts of Law’, 119 *Harvard Law Review Forum*, 95 (2006), at p. 104). And it is rather revealing even the “nuanced difference” as to the precise role of morality *vis à vis* law, that Waldron has recently noticed between the late Dworkin in *Justice for Hedgehogs* and the exclusive positivism of Joseph Raz (in his *Incorporation by Law*: J Raz, ‘Incorporation by Law’, in *Legal Theory* 1, (2004), 1: esp. p. 6). Cf. J. Waldron, ‘Jurisprudence for Hedgehogs’, *Public Law and Legal theory Research Paper Series Working Paper*, n. 13-45, NYU, pp.1-32, see pp. 16 ff.

⁴⁸ S. Shapiro, *The Hart – Dworkin debate: A short guide for the perplexed*, WP n. 77, March 2007, Michigan University, Public Law and Legal theory WP Series, p. 38.

⁴⁹ Ironically one can say that the autonomy of the theory *vis à vis* empirical facts is here to be invoked not in order for them to be disregarded (recall Hegel at the news of a new planet’s discovery: “Desto schlimmer für die Tatsachen”), but for them to be taken into account. It seems that Hegel said so when informed that a 7th planet had been discovered (by Herschel in 1781), after having based his dissertation, *De Orbitis Planetarum*, on the assumption that there could be no more than 6.

interpretivism within IL, although it is not either identified or elaborated upon by Dworkin himself. Because of IL being re-directed towards principles, they can also get to a function that legal positivism is hardly equipped to sustain or even admit. As I maintain, principles can be resorted to in order to explain and possibly solve disagreements on the valid rule to be applied, not only in those circumstances of routine, current in State legal orders (like gap-filling, rules interpretation, contrast among relevant principles, for example) but even, and all the more so, when divergences concern meaning, import, and scope of norms that, though controlling one single case at stake, might belong in *separate* legalities: the latter confront each other and each would lead to different legal outcomes, providing a different point of view as to validity. In other words, principles can have a further role in addressing disagreements arising from the segmented texture of supranational law and the issues covered, often divergently, by different legal institutional regimes. It can be argued that, on one side, disagreements about the valid rule to be applied *cannot* be overcome by reference to the criteria in the rule of recognition controlling the jurisdictional scope of one (among the) relevant legal regime(s). On the other side, judicial decision-making has (cf. sections below) deployed a principled-based reasoning in order to address problems located at the crossroads between different legal sub-systems. This move involves the turn to an *interpretative* notion of law, one which, among the rest, adds to the received dogmas of strict legal positivism, and makes the assessment of principles to appear as the actual frontier of law-findings in international law matters.

That shall be shown by referring to some recent decisions of the ECtHR (Al Jedda and Al Dulimi) whose reasoning treats divergence between the UN Security Council, Switzerland (the State involved) and the European Convention of Human rights. For convenience we can speak of a kind of *second level* disagreements.

Proliferation of orders and 'regimes' of law⁵⁰ generates some historical-institutional divergence, through self-referentiality, and implies that the practice of a rule of recognition cannot easily develop in place of the *multiplicity of relative* rules of recognition.

In the apparent inconclusiveness of "social sources based" law, divergence originates not within one single, self contained regime, but flows from the institutional, 'legally objective' otherness of one (sub)'legality' *vis à vis* the other.

Making sense of such a complex and heterogeneous setting *is* a constructive endeavour, ultimately prompted by the adjudicative questions: they generate, however, the need of relocating opposite claims within a kind contextual whole, as *mutually normative disagreements*.

⁵⁰ Fears are raised that further law would only express unilateral need of the most powerful to create their own institutions, or provide leeway through multiplication of routes of non-compliance, allow for sidestepping preexisting commitments, trigger the 'court choice' as a forum shopping, and so forth. For ex. Against constitutionalization process as an even process (or one that would freeze the existing power relations, regardless of their actual legitimacy-as it would be the case of WTO multilateral trading order's absence of democratic contestability and inclusiveness), see N. Krisch , 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order ' (2005) 16 *European Journal of International Law* 377 ; R. Howse and K. Nicolaidis , 'Enhancing WTO Legitimacy: Constitutionalism of Global Subsidiarity?' (2003) 16 *Governance: An International Journal of Policy, Administration, and Institutions* 73. And for the geopolitical related analysis, K Armingeon, K Milewicz, 'Compensatory Constitutionalism: A Comparative Perspective ' , (2008) 22 *Global Society* , pp. 179 –96.

5.2. After fragmented-law exemplary cases, like *Mox Plant* and others⁵¹, attention is to be brought to significant judicial decisions following some UN Security Council resolutions. Judicial cases have displayed different attitudes in a progress that goes from a self referential, or one-sided, to a whole-related, or comprehensive legal reasoning: that is, an argument that works through bridging or integrating, for the case at hand, the normative propositions belonging to different orders involved, that would claim for divergent outcomes.

After the milestone case, *Kadi*⁵², at the ECJ, others followed at the ECtHR. In *Kadi* the Court made an argument for European primary law to prevail over the obligations stemming from IL (art. 103 UN) to implement a resolution of the UNSC. The decision was widely welcome for its defence of fundamental rights, and also criticised because of withholding the EU from IL obligations (contrary to the advice of the Tribunal of First Instance in its own *Kadi* decision)⁵³, thus betraying true internationalism (like the US, in *Medellin*⁵⁴ and elsewhere): a kind of American style *exceptionalism*,⁵⁵ contradicting the original attitudes of compliance of the EC in the '50s⁵⁶. Actually, and beyond its many virtues (that such a criticism seems indeed to sideline), the ECJ (to day CJEU) reasoning amounted to a pronouncement shielded by self-reference to the *rule of law in its own jurisdiction*: accordingly, not an assessment about the infringement of fundamental rights in a supranational sphere where the two jurisdictions involved are interrelated⁵⁷. It settled not a question of *disagreement*, but a question of *primacy*. The two things are not compatible.

Rather different approach was displayed by the ECtHR in *Al Jedda* (2011) and in *Al Dulimi* (2012). The ECtHR decides to exceed the latitude of its own jurisdiction as defined by the rules of recognition of the Convention and resorts

⁵¹ I recall Martti Koskenniemi, on this case- among the most debated upon some years ago- to which three different regimes were applicable: "Let me quote the Tribunal [Arbitral Tribunal at the UNCLOS]: 'even if the OSPAR Convention, the EC Treaty and the Euratom treaty contain rights or obligations similar to or identical with the rights set out in [the UNCLOS], the rights and obligations under these agreements have a separate existence from those under [the UNCLOS]'. The tribunal then held that the application of even the same rules by different institutions might be different owing to the 'differences in the respective context, object and purposed, subsequent practice of parties and *travaux préparatoires*'. It is not only that the boxes have different rules. Even if they had the same rules, they would be applied differently because each box has a different objective and a different ethos, a different structural bias" (Koskenniemi, *International Law: between Fragmentation and Constitutionalism*, 2006: pp. 4-5 available at <http://www.helsinki.fi/eci/Publications/Koskenniemi/MC Canberra-06c.pdf> .However in the same line there had been equally famous cases like *Swordfish*: at WTO: Chile- WTO Doc. WT/DS193; at the ITLOS, Chile v. Eur. Com.(Mar. 15, 2001)(available www.un.org/Depts/los/ITLOS/Order1_2001Eng.pdf) (suspended). M. Orellana, "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO", *NORDIC Journal of International Law*, 71(1): 55 (2002). Also *Soft Drinks*: Panel Report, Mexico—Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R (Oct. 7, 2005).

⁵² ECJ, Joined Cases C-402/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council & Commission, 2005 E.C.R. II-3649, Judgment of 3 September 2008.

⁵³ CFI Kadi Case T-315/01, Kadi v. Council and Commission, 21 September 2005, [2005] ECR II-3649.

⁵⁴ *Medellin v. Texas*, 552 U.S. 491 (2008)

⁵⁵ G. de Búrca, "The European Court of Justice and the International Legal Order After Kadi", *Harvard International Law Journal*, 51, 1, 2010, 1-49.

⁵⁶ Id., "The Road Not Taken: The EU as a Global Human Rights Actor", in *American Journal of International Law*, 105, 2011, 649 ff.

⁵⁷The *Kadi* decision however can also be stretched to represent a pattern of *conditional* agreement, based on mutual respect *under conditions*, which mirrors the equal protection requirement, or the Italian doctrine of 'counter-limits', and similarly the "So-lange" reasoning from the German constitutional court. I took this line in my "The Rule of Law beyond the State: Failures, Promises, and Theory", in *International Journal of Constitutional Law*, Volume 7, Number 3, 442 – 467.

to wider principles reflecting the United Nation system and –as Dworkin would have it- the deeper political morality of international law as a whole.

The Grand Chamber found in *Al-Jedda v United Kingdom*⁵⁸, that indefinite detention without charge of Al Jedda (dual citizen British/Iraqi) by the UK in a Basra facility controlled by British forces was unlawful and infringed his rights to liberty under art. 5 of the ECHR. The ECtHR rejected the opinion upheld by the House of Lords in the UK (before Al Jedda's appeal to the ECtHR) that the indefinite detention of Al Jedda flowed from compliance with the UNSC resolution (n.1546), as requested by art. 103 of the UN Charter⁵⁹. That argument of conformity held by Lord Bingham amounts to a matter of hierarchy of rules in the international order⁶⁰; it does not contest the *existence* of HR law, but its import within the system of IL.

As an answer, the ECtHR walks a peculiar path: contrary to the ECJ in *Kadi*, it takes larger view than the scope of its own European Convention's regime, and even larger than the task of individual, human rights' protection. It takes into consideration the two orders' interplay and minds of the integrity of the frame of IL where the Convention's regime and the Security Council might sensibly concur, given general IL principles and those of the UN Charter, that is, the supranational and contextual legal setting (in which the Security Council is included). The argument does not touch the last word authority under art. 103 of the Charter, but first refuses to agree that the unlawful detention, without judicial review and lacking necessity, *was commanded or authorized* by the SC resolution. The normative context includes art 1 of the UN Charter entrenching 'respect for human rights and fundamental freedoms' and article 24(2) requiring the SC to 'act in accordance with the Purposes and Principles of the United Nations' "⁶¹. Within those premises, not even the imperative of peace and security can be held as unconditional.

According to the Court, since there must be "a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights"⁶², the interpretation must be chosen that "is most in harmony with the requirements of the Convention and which avoids any conflict of obligations"⁶³. Finally the Court concedes that it may still be possible that the SC would need to impose a rupture in the fabric of UN law, but then this should result only from "clear and explicit language" (§ 102)

⁵⁸ European Court of Human Rights, *Case of Al-Jedda v. The United Kingdom*, Application no. 27021/08, 7 July 2011 (*Al Jedda*).

⁵⁹ See the para 35 (Lord Bingham) of the House of Lords decision, as pasted in the ECtHR, *Al Jedda*, at 11 : "Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 [UN] to 'any other international agreement' leaves no room for any excepted category, and such appears to be the consensus of learned opinion". The same author, Tom Bingham, though, has written the important book, *The Rule of Law*, London, Penguin, 2011. Clearly, his idea of the Rule of law is different from mine: cf. G. Palombella, "The Measure of Law. Domestic to International Law (and from Hamdan to Al Jedda)", in J. Silkenat, J. Hickey, P. Barenboim, *The Legal State*, (American Bar Association), Leiden, Brill, 2014

⁶⁰ That kind of appeal to the RoL in the international legal order, resonates in the 2005 decision of the European Court of First Instance in the case *Kadi*, supra fn. 53.

⁶¹ ECtHR, *Al Jedda*, supra n. 58, para 102 (and the premised para 44).

⁶² Ibidem.

⁶³ Ibidem.

against international human rights law. As I have submitted elsewhere⁶⁴, such an argument hardly means that the Court is ready to forfeit its content based logic, and surrender to hierarchy; it hardly means that a ‘clear and explicit language’ would turn legitimate by source what is not (the violation of HR Convention, outside state of necessity) in the integrity frame that the Court itself has aptly drawn. In this picture, the Court has built on a notion of legality that is complex enough to ask that whatever ‘clear and explicit language’, a *proposition of law* be ‘true’ under an interpretation of the *grounds of law* that grants equal weight to HR in the pursuit of the fundamental objectives of the UN.

It is a subsequent decision, namely, *Al Dulimi*, to confirm that this interpretation of the import of *Al Jedda* is correct. The question would be, in fact, what should happen in case of ‘clear and explicit language’ against HR law? The Court has answered that question, overcoming the kind of acoustic separation between the involved legalities sharing a common terrain, upon which to settle a potential disagreement.

The ECtHR⁶⁵ deals with a UNSC 1483 (2003) resolution, which in “clear and explicit language” imposes to Switzerland, allowing to the State no discretion⁶⁶, the freezing of the assets of Al Dulimi, one of those blacklisted as suspected terrorist, who had been denied any rights to defence. Since Switzerland⁶⁷ had rejected Al Dulimi’s complaints and resolved to confiscate his assets, the Court decides that violation of art. 6 ECHR (access to justice) has taken place on behalf of the State, and that consequent responsibility falls on it as a member to the Convention, regardless of the duty to implement sanctions from the SC, and even in absence of any State’s discretionary power. In the reasoning of the Court, judicial review was not granted either at the UN or in the domestic procedure. Denial of access to justice, even in pursuing the legitimate ends of peace and security, is deemed *disproportionate* to achieve those objectives.

It is important that the Court, in the same vein as in *Al Jedda*, does not take a merely external attitude toward the normative corpus of the UN, assuming instead that it should be taken into consideration *qua normative* in its scope, meaning and aims. Accordingly its reasoning is not shielded in a self-referential closure, but pursues a comprehensive assessment. This is why it believes that apparently conflicting obligations from the UN Charter and the ECHR must be at their best harmonized and reconciled (Art. 31(3) lit. c) VCLT (para 112). The presumption according to which SC does not in principle mean to impose obligations contradicting international laws of human rights (formulated in its *Al Jedda* decision), is defeated. But it follows that, however commanded by the highest source in UN security purposes, not every behaviour can be deemed

⁶⁴ Cf. my *The Measure of Law*, supra fn 59..

⁶⁵ ECHR chamber judgment of 26 November 2013 in *Al-Dulimi*, No. 5809/08.

⁶⁶ The Court had already decided the case *Nada* where discretion was deemed existent (ECtHR (Grand Chamber), *Nada v. Switzerland*, No. 10593/08, judgment of 12 Sept. 2012).

⁶⁷ The Swiss Federal Tribunal ((BGE 2A.783/784/ 785 /2006; all of 23 January 2008) had maintained that it was not entitled to revise the legality of SC resolutions except in the event (that was not) of violation of a *jus cogens* rule (as in the reasoning of the Court of First Instance of the EU in *Kadi*). After allowing Al Dulimi more time for a (unsuccessful) further appeal to that Committee, the Tribunal concluded that Switzerland’s behavior was legitimate, and did not violate either domestic constitutional norms or Artt. 6 and 13 of the ECHR.

legitimate, just for that. The Court engages in a *proportionality* judgment, that is, a contextual evaluation between two divergent rules-principles, one that might exceed the strict limits of its own jurisdiction (such a judgment implies a revision of the legality of the Security Council resolution, that other Courts in the EU case had considered themselves not competent to pursue).

But such an assessment can only flow from taking the participant's point of view⁶⁸ in the interconnection of diverse international law regimes, prompted by the case under scrutiny. It requires bridging the gap that separates the two orders, that is, a deeper self understanding of one regime's role as an *agent of international law as a whole*, and a further insight into the purposes and meaning concerning the 'grounds' of those laws, the mutual relation between institutions, and the founding ideals of the diverse orders in their integrity. No place the Court merely resorts to 'formal' tools.

It has been from such an approach that the Court has chosen (right or wrong) to hold the State 'responsible', putting the State "caught between the obligation to carry out Security Council decisions under Art. 25 of the UN Charter and the obligation to respect international or regional human rights guarantees".⁶⁹ It is however preeminent point here that its reasoning implies a value choice, one that would be itself arbitrary, according to a positivist construction of the international system under a UN supremacy clause; this value choice opposes the assumption that absolute supremacy of Security Council would always fulfil its substantive *raison d'être*. The interplay between security and rights, viewed under a proportionality judgment, can basically depend on a further principle underlying the purpose of the international system. One could even submit that the argument here could easily conform to a general principle of power *mitigation*: in the sense that it both justifies the role of the Security Council *vis à vis* States arbitrary power and at the same time limits the Council itself in pursuing its tasks.

6. As a conclusion

The cases recalled above from *Kadi* to *Al Jedda* and *Al Dulimi* should also be taken to show that in the relations between separate regimes of law, and in the relations between State legal orders and international law, the 'plain fact view' and the only reference to the historical, social facts of rules-production by pre defined sources, leave inevitably, outside the State, a very ample room for disagreement: one that does not in fact concern the existence of documents, institutions and orders, but the import and meaning that should be ascribed to them either in isolation or *in the mutual relations* among legalities. Genuine disagreement originates here despite the very fact that no contestation arises as

⁶⁸ Recall the opening of Dworkin's *Law's Empire*, (being the role of 'participant' a premise to interpretive endeavour) supra fn 26

⁶⁹ So writes Anne Peters, "Targeted Sanctions after *Affaire Al-Dulimi et Montana Management Inc. c. Suisse*: Is There a Way Out of the Catch-22 for UN Members?," in *EJIL Talk*, <http://www.ejiltalk.org/author/anne-peters/> See the dissenting opinion of Judge Sajo: the complaint should have been dismissed, as "irrecevable" (inadmissible) *ratione personae*, because the State is not acting of its own but clearly under the order of the SC, which gave it no leeway. But he did join the majority in deciding that a violation of HR *occurred* due to the insufficient guarantees provided by the UN sanctions system. Read it *in coda* to *Al Dulimi* decision of the Court, supra fn 65.

regards the sources of the relevant rules (say, art 103 of the Un Charter, or any of the SC Resolutions). This not 'empirical' disagreement exceeds the range of control conceived through 'normal' legal positivism. Disagreements that Dworkin saw 'theoretical' are essentially involving different interpretations-understanding of the fundamental principles, in the political-moral sense, that institutions of law are meant to be *premised on*.

The key vault in the relations among mutually *external (or self-contained) legalities*, is the recognition of their being both relevant and thus equally *internal* to the case at stake. In such a context, different interpretations of respective *grounds of law* need to be further elaborated in the interplay among legalities (that actually escape a clear hierarchical systematization) endowed, in the global space, with distinctive rules of recognition. Given the angle of the case, the Court's reasoning might on one side be viewed as interpreting the rules and principles of each involved legal regimes, and on the other side arbitrating their interplay on a *proportionality* assessment. One possible argument to justify this latter move, that is, a kind of 'jurisdiction overstepping', requires appeal to further principle premised to supranational law, beyond States. A plausible candidate might be the Dworkinian principle of *mitigation* of States' power and of international organisations, one that justifies both positive and negative duties. It turns to the political morality of social communities under States purview. It substantively refers to the essential concern and respect for the *dignity* of citizens, asking that the exercise of power, from whichever actors, can only be legitimate under the limitations that such respect imposes to each concurring regime of law on a case by case basis. From the foregoing, the role and potential of 'principles' in the different guises and levels analysed in this article, can all the more be seen at the forefront of IL adjudication.