

DUE DILIGENCE AND THE LIMITATIONS OF A
POSITIVIST CONCEPTION OF GENERAL
PRINCIPLES OF LAW

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I. INTRODUCTION

Among the canonical sources of international law listed in Article 38 of the Statute of the International Court of Justice, General Principles of Law (GPLs) have long been the haziest. To some a mere gap-filler to avoid *non-liquet* and to others a common thread running through the world's legal systems, GPLs are one of the last vestiges of natural law within the broadly positivist world of international law. Recent efforts by the International Law Commission (ILC) to provide a framework for the identification and application of GPLs illustrate this dynamic. Yet even as the ILC attempts to wring out the last drops of natural law from the concept of GPLs, the cracks in the positivist approach to international law begin to show. This annotation examines the tension between natural and positive law in the development of international law, explores how this history has informed the ILC's attempts to address GPLs, and considers the specific GPL of due diligence as an example with stronger natural law roots than positive law grounding. Finally, it concludes that the ILC's positivistic

* This online annotation was written in the course of the author's tenure as a Staff Editor on the *N.Y.U. Journal of International Law & Politics*.

approach to GPLs gives short shrift to natural law.

II. NATURAL LAW AND LEGAL POSITIVISM IN INTERNATIONAL LAW

Natural law refers to the idea that all human beings are subjected to a transcendental body of law, historically tied to religious conceptions of right and wrong.¹ By contrast, legal positivism looks to specific sources for the authority underlying law.² Natural law theory has been influential both at the national level, such as in the development of the very idea of common law in the English legal system and its progeny,³ and in early writings on international law.⁴ However, over the course of the nineteenth and early twentieth centuries, legal positivism overtook natural law as the dominant conception of how the law functions.⁵ This sources-based view of international law culminated in Article 38 of the ICJ Statute.⁶ Positivism meshed better with Westphalian, consent-based notions of sovereignty by focusing on sources such as treaty law and the conduct of states that reflected the belief that states act in their own political, rather than moral, interests.⁷

However, much like the role of federal common law in the United States, natural law remains highly relevant in specific areas. Most notably within the international legal context, human rights law has drawn on natural law since its roots in the American and French Revolutions.⁸ With rights

1. *Natural Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

2. *Legal Positivism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

3. HEINRICH A. ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* 100–01 (Thomas R. Hanley trans., 1998) (1947).

4. See generally Jianming Shen, *The Relativity and Historical Perspective of the Golden Age of International Law*, 6 INT'L LEGAL THEORY 15, 28 (2000) (describing the field of international law during the Age of Enlightenment as “dominated by the teachings of naturalists”).

5. *Id.*

6. Statute of the International Court of Justice, art. 38, ¶ 1, June 26, 1945, 59 Stat. 1031.

7. OSCAR SCHACTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 35–37 (1991).

8. See, e.g., JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 166 (Ian Shapiro ed., Yale Univ. Press 2003) (1690) (describing the people's sovereignty over government as a “fundamental, sacred, and unalterable

flowing directly from the inherent dignity of the human person, the language of modern human rights treaties adheres more closely to older notions of universality than to the consent-based notion of sovereignty. Some rules of international human rights law (IHRL), such as universal jurisdiction over claims of genocide or *erga omnes* obligations escaping normal standing requirements,⁹ cut against the Westphalian system's emphasis on state sovereignty and thus reflect the particularity of the law in this area.¹⁰

While IHRL has continued to pay lip service to natural law, developments in other areas of international law have further diminished its role. For example, postwar international jurists believed foreign investment law (FIL) could be a possible venue for the development of a natural law of contract,¹¹ theorizing that as tribunals assessed various applicable legal rules, they would gradually develop a body of jurisprudence reflecting the best of the world's legal systems' rules related to contractual disputes.¹² This natural selection of legal rules, competing in the ecological niche of investment tribunals, would mean that only the most welfare-maximizing rules would constitute the natural law of contract. However, this is not how the last several decades have played out in international investment tribunals. Transnational rules have failed to play a major role and instead GPLs have provided a means to transpose national rules into international foreign investment jurisprudence.¹³ Nonetheless, as explored further in section IV, not all of those midcentury jurists' hopes have been dashed.

III. GENERAL PRINCIPLES OF LAW AS LEGAL POSITIVISM AT THE

law”).

9. See *Barcelona Traction case (Belg. v. Spain)*, Second Phase Judgment, 1970 I.C.J. Rep. 3, ¶ 33 (noting that “the obligations of a State towards the international community as a whole . . . are the concern of all States.”).

10. Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFS., Jul.–Aug. 2001, at 86, <https://www.jstor.org/stable/20050228?origin=crossref&seq=1>.

11. Lord McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1 (1957).

12. *Id.* at 2.

13. Tarcisio Gazzini, *General Principles of Law in the Field of Foreign Investment*, 10 J. WORLD INV. & TRADE 103, 114–15 (2009).

ILC

Born during the same critical midcentury period as the ICJ, IHRL, and FIL, the International Law Commission is tasked with codifying and progressively developing international law.¹⁴ Similar to reporters of the American Law Institute in the United States, members of the ILC undertake a mix of positivist (i.e., empirical) and naturalist (i.e., deductive) legal methods in their work. Having elaborated and effectively set the parameters for the interpretation of treaties¹⁵ and the identification of customary international law,¹⁶ the ILC has turned to one of the remaining sources of international law in Article 38, GPLs.¹⁷ The Commission's method for the identification of GPLs draws on the approach illustrated in many ICJ cases of examining the principal legal systems of the world, ascertaining an overarching principle, and verifying its applicability to the international sphere.¹⁸

This method, like many of the ILC's activities, takes a nebulous international legal concept and renders it more concrete and more purportedly scientific. However, in doing so, the ILC often fails to fully consider the historical importance of natural law to the development of international law, the role of GPLs in providing flexibility within the ICJ statute by avoiding *non-liquet*, and examples of GPLs applied by tribunals outside of the ILC's rigid framework.¹⁹ The duty

14. G.A. Res. 174(II), Statute of the International Law Commission, art. 1 (Nov. 21, 1947).

15. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

16. Int'l Law Comm'n, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10 (2018).

17. Marcelo Vázquez-Bermúdez (Special Rapporteur), *Second Rep. on General Principles of Law*, U.N. Doc. A/CN.4/741 (Apr. 9, 2020).

18. *See, e.g.*, Prosecutor v. Erdomovi, Case No. IT-96-22, Judgment (Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber, Oct. 7, 1997) (using the described method to determine that duress is not a complete defense to crimes against humanity).

19. *See* Shinya Murase, *Murase Comments on General Principles of Law at ILC* (2019-), ENVIRONS OF INT'L L. (Nov. 17, 2019), <https://s-murase.blog/2019/11/17/murase-comments-on-general-principles-of-law-2019/> (noting that courts and tribunals in the 1950s had no difficulty in applying private property rights as a general principle, despite those rights not being a part of the legal systems of socialist countries).

of due diligence is a prime example, emerging as a GPL from numerous areas of international law over the last half-century.

IV. DUE DILIGENCE AND THE CHALLENGES OF THE ILC'S APPROACH TO GENERAL PRINCIPLES OF LAW

The concept of due diligence has deep roots, first emerging 3,000 years ago.²⁰ Similarly to another ancient GPL, equity, due diligence manifests differently in different contexts.²¹ Historically, due diligence obligations rested on states, with modern examples including the prevention or mitigation of transboundary environmental harm²² and the duty under IHRL to protect against, prevent, minimize or rectify the violations of the human rights of any person within a state's jurisdiction.²³

However, due diligence is now a key concept in commercial law as well as in hybrid contexts such as FIL, where it applies to both private and state actors. Investors need only determine the extent of their risk and correspondingly set expectations reasonable to the circumstances, while states have a duty to physically protect investor assets, particularly from attacks targeting foreigners, which some claim has achieved customary international law status.²⁴

20. See Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence Under International Law*, 36 N.Y.U. J. INT'L L. & POL. 265, 265–66 (2004) (citing *The Journey of Wen-Amon to Phoenicia* (John A. Wilson trans.), in *THE ANCIENT NEAR EAST 16–18* (James K. Pritchard ed., 1958)) (explaining that due diligence arose from the ancient principle of *sic utere tuo ut alienum non laedus*, meaning “do not use your territory to harm another”).

21. See Francesco Francioni, *Equity in International Law*, in MAX PLANCK ENCYCLOPEDIAS INT'L L. (June 2013), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1399> (describing equity as a polymorphous concept).

22. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, ¶¶ 391–92 (2001).

23. See, e.g., Human Rights Council, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add. 1326 (Mar. 29, 2004) (noting that a state may violate the International Covenant on Civil and Political Rights by “failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by” acts impairing the enjoyment of Covenant rights”).

24. See, e.g., Elettronica Sicula S.P.A. (U.S. v. Italy), U.S. Memorial, at

The prevalence of due diligence across legal systems has led some to argue that it is an emerging general principle of law.²⁵ Because it arises inherently from an underlying duty or obligation, it could be seen as one of the GPLs intrinsic to legal systems as whole, similar to other fundamental international legal principles such as *pacta sunt servanda*.²⁶ Such GPLs “bear witness to the fundamental unity of law.”²⁷ Yet, under the ILC’s draft framework, each GPL must be identified by surveying the world’s legal systems, abstracting the principle to the level of generality, and then confirming the feasibility and desirability of its application within the international legal context.²⁸ This formula, a legacy of centuries of positivist thinking in international law, runs the risk of excluding principles like due diligence, whose universality is undermined by the way its form varies with the circumstance in which it is invoked.

V. CONCLUSION

Despite having largely given way to positivism, natural law still plays a limited role in some areas of international law, including IHRL and FIL. The ILC’s ongoing work to codify methods for the identification of GPLs draws, like most of its output, on a positivist, source-based theory of international law. The limits of that approach are shown by the emerging GPL of due diligence, which has deep historical roots but varies in its content across areas such as environmental law, IHRL and FIL. In over-emphasizing the source-based nature of law, a positivist view blinds itself to truly universal, if flexible, legal principles such as due diligence and ignores the vestigial

100 (May 15, 1987), <https://www.icj-cij.org/public/files/case-related/76/9679.pdf> (“One well-established aspect of the international standard of treatment is that States must use ‘due diligence’ to prevent wrongful injuries to the person or property of aliens within their territory.”).

25. *E.g.*, JOANNA KULESZA, *DUE DILIGENCE IN INTERNATIONAL LAW* (2016); ROBERT P. BARNIDGE, *THE DUE DILIGENCE PRINCIPLE UNDER INTERNATIONAL LAW* (2006).

26. Anthony Aust, *Pacta Sunt Servanda*, in *MAX PLANCK ENCYCLOPEDIAS INT’L L.* (Feb. 2007), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1449?rskey=z2MjWm&result=1&prd=OPIL>.

27. BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 390 (1987).

28. Vasqu ez-Berm udez, *supra* note 17.

remnants of a natural law conception of the world that remains more relevant than often perceived.