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The essence of general principles of international law and international court judgments as sources of international law

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1. Introductory remarks

Present-day international practice provides a basis for deriving international law from an array of sources not covered by Article 38 of the ICJ Statute. In line with the assumption adopted for this project, contesting the voluntary consent of a state as the sole and exclusive basis for international legislation today opens the way for reflections on the essence of present-day sources of international law as well as allows thereby for a discussion of the very nature of the international order and of the character of the international community as a whole together with its respective constituent components.

Therefore, the scope of research covers "special", untypical sources of international law in which simple consent-based justification is not obvious and may be extended to include additional themes. For the present argument, it is essential then to set out

a model of reasoning in a manner which draws on the system of international law, and by which it would be possible to prove the applicability of international legal norms through their link with the category of special sources of international law. It is key from that point of view to refer to the notion of consent of subjects and its effectiveness, as well as considerations of international law's systemic conditions and their impact on the sphere of rights and obligations. This part of the work will address itself to general principles of (international) law and international court case-law, in particular as seen from the perspective of the institution of judicial precedent.

2. Justification of the applicability of international law

The significance of general principles of law (including general principles of international law) and international court judgments as sources of international law depends on the answer given to the question of whether the international legal order allows for deriving legal norms from other factors than the consent of the subjects of international law. This forms the core issue in the present text. To the extent that it were possible to confirm that we can prove the applicability of norms to the international legal order based on other than consent-based justification, the role of general principles and case-law as a separate category of that legal order's sources would grow accordingly, if perhaps indirectly. The link between reflections on general principles and those on case-law may be found in the search for a justification traceable to elsewhere than the coordinated intent of the subjects. The legal order is the sum total of norms arranged into specific contingencies, relations and hierarchies. Once they meet specific (eligibility) criteria for inclusion in a given legal order, these norms comprise the legal system.

Owing to the character of the international law system, it remains an open question whether it is at all effective and desirable to seek justification of the applicability of norms elsewhere than in positive law. In order to settle the matter conclusively, it is necessary first to determine which general theory of international law will provide the framework for the following discussion. This is a key condition from the point of view of the role of general principles and case-law, as discussed in this part of the paper, to the extent that these relate to the sources of international law. This is also a basis which allows either for verification of the proposed approach to the problem within a specific theory of sources of international law, or for reconsidering the matter in a conceptually different framework. Embedding the considerations within the framework of positive law is strongly related to a sense of legal security. This means that a comprehensive model approach provides the subject of international law with the fullest extent of knowledge of both the possible bases for settling a dispute within the limits of the international legal order to-

gether with methods of safeguarding rights and obligations, as well as the associated paths of legal reasoning. However, in considering phenomena occurring within the international legal order, it is sometimes difficult to accept that their essence proceeds solely from the positive-law justification of the validity of international law. The following questions force themselves: how to establish the source of special values, directions organizing thoughts or directives of conduct, which permeate the system of international law but do not stem from positive-law justifications? how do these factors contribute to the creation, interpretation and application of legal norms? are the general principles of (international) law together with judicial case-law the vehicle for special values and contents and, if that is indeed the case, how do they express these?

Answering such questions demands reference to a number of key issues. First of all, it would be appropriate to explain terminological issues prior to elaborating upon the topic of searching for the origins of the need to refer to general principles and international court case-law; these considerations may then serve to derive the necessary generalizations related to the theory of sources of international law and the meaning accorded to the general principles of (international) law and rulings of international judicial bodies.

3. Methods of understanding general principles of law

In the case of general principles of law, it should be emphasized that the possibility of utilizing diverse terminology does not facilitate the task of correctly interpreting the role that these principles play in the international legal order[1]. Article 38 of the ICJ Statute mentions "general principles recognized by civilized nations", while there are also in use such expressions as "general principles of law" and "general (basic, fundamental) principles of international law"[2]. It would be necessary to consider whether these terms denote the same concept, whether the concept expresses any normative value and whether the source of these principles is identical.

Without going too far into the already identified nature of Article 38 of the ICJ Statute[3], it is useful just to indicate what appear to be the key points of reference. The assumption is that general principles recognized by civilized nations are an emanation

[1] See S. Besson, *General Principles in International Law – Whose Principles?*, (in:) Collection dirigeé par Samantha Besson et Nicolas Levrat, *Les principes en droit européen/Principles in European Law*, Ouvrage édité par Samantha Besson et Pascal Pichonnaz avec la collaboration de Marie-Luise Gächter-Alge, Fondements du droit européen, Genéve, Zurich, Bâle 2011, p. 33.

[2] See G. Gaja, *General Principles of Law*, Max Planck Encyclopedia of Public International Law, 2013, points A-D (www.opil.ouplaw.com), 10 June 2016. Also J. A. Vos, *The Function of Public International Law*, Springer 2013, pp. 109-134.

[3] More on the subject in: G.J.H. Van Hoof, *Rethinking the Sources of International Law*, Kluwer Law and Taxation Publishers 1983, pp. 131-151.

of norms generalized by comparative means and found in specific orders (or types) of domestic law as well as having a form, substance, role and meaning which are sufficiently consistent with the determinants of the essence of the international legal order to be applied therein as general principles and in so doing, to testify to the shared normative values and serving as one of many possible instruments of legal reasoning. The phrase "civilized nations" may not result today in any discriminatory consequences. Approaching the matter systemically, this should be assumed to refer to the legal systems of the countries forming the international community. Owing to the legal nature of Article 38 of the ICJ Statute, general principles recognized by civilized nations should, on one hand, express something that would be formally common to all currently existing domestic legal orders; on the other hand, owing to its importance for litigation law, it allows for accepting the proposition that the lowest level of "generality" admissible under Article 38 is when a given principle figures in the legal orders of two contestant countries engaged in a dispute before the International Court of Justice. It seems that in the case of doubts pertaining to the generality or acceptability of a specific principle, its applicability in a proceeding pending before the ICJ would be decisively determined by that principle's conformity with the general determinants of the essence of international law as envisioned by positive law, or – in other words – conformity with those of its constitutive features compliant with the "constitution" of the international legal order, which improve its coherence, sense of legal security as well as opportunities for harmonious development within the boundaries delimited by a systemic understanding of the international order of law. It is only by understanding the general principles of law in such a way that systemically recognizable and acceptable judgments are guaranteed.

Therefore, deriving a general principle of law from domestic legal orders is, first of all, burdened with the need for examining the principle for compliance with the essence of the international law system as well as safeguards protecting the identity of "codes" and values. An attempt to recognize as a source of law, i.e. a source of rights and obligations, a principle which aspires to the status of general principle but which fails in its form or substance to improve systemic consistency and legal security would be an ineffective measure. In judicial reasoning, such a principle would in the long term invariably lead to numerous paradoxes, a mismatch between proffered resolutions and the international legal order's systemic requirements as well as intellectual overkill outgrowing the realistic, or systemically appropriate, limits of international law. Thereby, applying general principles of law as one of the bases upon which to resolve a contentious issue, rather than contribute to the growth of international law by supplying successive pieces to form its grand normative scheme, would instead each time necessitate a specific conceptual reduction, resulting in another dispute on the necessity of removing

the consequences of applying an erroneous general principle or an incorrect interpretation of its meaning.

It appears to be a safe linguistic convention to label general principles recognized by civilized nations as general principles of law[4]. The conceptual scopes of these terms are identical. Things are different in the case of general principles of international law *sensu stricto*. It is accepted that a general principle of international law is a norm which in its substance refers to elements which thanks to their attributes constitute international law as a separate legal order[5]. These elements are constituent parts containing directives which allow international law to be organized in a systemic fashion. As such, they accentuate the features which may be considered to be characteristic of or specific to the international legal order. For that reason, the concepts of general principle of law and general principle of international law are sometimes sharply distinguished[6]. In addition to recognizing a general principle of international law as a normative generalization stemming from the sum total of particular norms present in the international legal order, some opinions can be found which trace the origin of general principles of international law directly to international custom. In such an approach, however, it would have to be accepted that customary law takes precedence over other formal sources of international law such as, for example, international agreements, and that it is immutable in respect of general principles, unless the notion of general principle of international law were to be fully equated with *ius cogens*. In such a case, it would be the sole prerogative of peremptory norms to be labelled as general principles of international law[7].

Despite the emphasis on the differences of origin between general principles of law and general principles of international law, they are also tied together by certain relations. For example, these principles may be identical as to content. Also, some of them may arise from others. Therefore, a general principle of law may be identical as to its

[4] See S. Besson, *op. cit.*, p. 33.

[5] *Ibidem*: "General principles of international law, by contrast, are principles that are fundamental to the international legal order itself. They stem from regular sources of international law, such as general treaties and customary international law. They include structural and founding principles of the international legal order such as the principles of territorial integrity, sovereign equality, primacy of international law or *pacta sunt servanda*".

[6] For example, Ian Brownlie in his analysis treats these two notions as formally separate objects (*Principles of Public International Law*, 6th ed., Oxford 2003, pp. 15-19). At the same time, he observes certain connections.

[7] G. Guillame, *Can Arbitral Awards Constitute a Source of International Law under Article 38 of the Statute of the International Court of Justice*, (in:) *The Precedent in International Arbitration*, E. Gaillard, Y. Banifatemi (eds), „International Arbitration Institute", Series on international arbitration, no 5, p. 106: "While general principles of Public International Law are enshrined in international custom, and for advocates of *jus cogens*, may even be considered as "peremptory norms of international law", general principles of law are common to national legal systems and transposable to Public International Law".

object with a general principle of international law[8]. Theoretically, there may be an evolution from a general principle of law towards a general principle of international law[9]. The *pacta sunt servanda* principle's substance refers to justifications which illustrate the foundations of both international law and a developed order of national law. The link between these two concepts is their normative character. Each of these principles expresses a legal norm. The differences spring from the different sources, from which the norms arise. As stressed before, general principles of law have their origin in the domestic legal systems analysed from a comparative perspective, whereas general principles of international law are predominantly considered to take root directly from international law.

4. A general principle of international law as an expression of norms and values

General principles of international law express norms[10]. These are the normative constituents of the international legal order. They were not explicitly spelled out in Article 38 of the ICJ Statute. Their relationship with the elements listed therein may therefore be analysed from the perspective of indirect links only. It is easy to imagine a situation in which a conventional or customary norm expresses values and a degree of normativity consistent with the characteristics specific to a particular general principle of international law. However, this type of inference is not very productive. It does not say too much about the essence of normativity of general principles of international law.

The mechanism that led to the formation of general principles of international law may be illustrated in two ways. The first way is through international practice and custom to generalization, a kind of abstraction within international law, where it is not necessary to constantly prove the relationship with practice as a prerequisite of upholding

[8] Thus in I. Brownlie, *op. cit.*, p. 18: "The rubric may refer to rules of customary law, to general principles of law as in Article 38 (1) (c), or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies)".

[9] Cf. S. Besson, *op. cit.*, p. 35: "Thus, in what follows, I will distinguish between general principles as a source of general principles of international law, on the one hand, and as a type of legal norms that stem from other sources of international law, on the other. […] First of all, Article 38 par. 1 lit. c ICJ Statute turned or imported a type of domestic legal norms into one of the formal sources of general principles of international law, thus clearly indicating that the reference community for the kind of general, fundamental, abstract and indeterminate norms that are general principles of international law remains the domestic one".

[10] *Ibidem*, p. 32: "General principles of international law are a kind of international legal standards and more particularly of international legal norms. They share the main characteristics of general principles of domestic law presented above: they are general and abstract, but also fundamental and indeterminate legal norms. Thus they are general not particular legal norms in the sense that they apply to all situations covered by the legal order".

the normative value of the principle[11] (dominant view on the problem); the second way is through the use of an axiological source, formally separate from the international legal order but effective within that order's limits for reasons determined by the essence of international law[12]. Therefore, the domain of international law is a source supplying either the substance from which to develop specific principles or the substance and abstractions attracting external ideas and associated principles[13].

It appears that the mechanism of development of general principles of international law should be directly associated with their normativity. This normativity may be shown in two ways. First: general principles of international law form a common element which features in each of the most essential norms belonging to the system of international law. Therefore, their derivation would require analysing the respective norms of international law in such a way as to establish, in line with the general characteristic of international law, the existence of an objectifiable common element, feature or rule of conduct for the entire system. General principles of international law would emerge from the sum total of all norms together comprising the international legal order. This would be their common denominator. It follows that general principles as herein understood would be an indirect consequence of coordinated actions of subjects of international law. Legal norms sharing a common element would arise from their consensual arrangements. The common elements would form a source of a series of general principles of international law. However, adopting such a model necessitates accepting a number of related legal consequences. The above seems to suggest that any change in particular legal norms automatically puts general principles at risk of change and transformation. The change would be consequent to the coordinated intent of the subjects of international law. Thus, action taken by the subjects under positive law would culminate in a series of norms sharing a normative code susceptible to change as a result of successive actions under positive law. Were a general principle of international law to be the end-result of generalization within the sum total composed of all norms present in the system of international law, then each change in a partial norm would transfigure the general principle. In that sense, the source of general principles would lie in the system of international law itself envisaged as a functional entity. General principles would have an intra-systemic nature, for

[11] I. Brownlie, *op. cit.*, pp. 18-19: "In many cases these principles are to be traced to state practice. However, they are primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer directly connected with state practice".

[12] More on the subject in point 5 below.

[13] Cf. J. A. Vos, *op. cit.*, p. 134: "At the same time, the concept of general principles of law and the concept of (general) principles of international law may be seen as forming and informing the constituting of international society by the members of international society, on the basis of considerations taken from the structure of international society or inferred from principles or rules of conventional international law or customary international law".

they would always follow from, adhere to and be identical with that system. Consequently, such an understanding of general principles of international law as related to the international legal order would exclude the *contra legem* formula. The legal order could transform and expand in line with its essence only under the influence of *infra legem* or *praetor legem* inference. Such transformations of general principles of international law would change their substantive scope, with each principle remaining at the same time in concord with the system of international law. This view on the problem would eliminate, if only in theory, any potential conflicts and contradictions between particular norms and the resulting general principles of international law. Once accepted, this approach would reduce the need for seeking justification for the applicability of international law outside the positive-law conception.

Another view on the origin of general principles of international law and their source of normativity presumes that general principles of international law are external to the system of international law, with their origins lying beyond the international legal order. Their justification would relate to values desirable for one reason or other in international law[14]. The rights and obligations of subjects of international law would be established with respect to general principles so conceived in such areas as are not covered by their coordinated intent or as have been modified by pre-existing particular norms whose applicability is justified under international law. Following the need for specific norms to be applied, the rights and obligations of the parties would be modelled in line with directives arising from general principles of international law so conceived. As a result of such reasoning, the scope of rights and obligations would be set out in line with the need for respecting values protected by means of the form of a general principle. In the extreme variant, it could be pondered whether a particular norm following from the consent of the parties concerned should, in the case of conflict, yield in precedence of application to a general principle of international law. It seems that the primary concern in scores of international disputes is ultimately to settle the question of priority of norms which express higher-order values but which have a somewhat shaky foothold in positive law.

[14] S. Besson, *op. cit.*, p. 32: "As to their fundamental nature, general principles of international law are fundamental legal norms in the sense that they capture one or many moral and political values, on the one hand, and contribute to the axiological foundations and justifications of the legal order and/or of other legal norms within the legal order, on the other. They are therefore 'fundamental' both in their content and, this is connected, in their prior nature to other legal norms". *Ibidem*, p. 45: "The material source of general principles of international law are moral values and principles as in the domestic context". This is not to say that values have no role to play in the first view on the source of general principles of international law. The role is, however, limited. Value is a characteristic protected by means of normative generalization arising from the sum total of all norms or a designated parts thereof which form the international legal order or – in the words of S. Besson – a material source of general principles of international law (*ibidem*, p. 41-45).

5. General principles of international law and the "new *ius gentium*"

Tying general principles of international law to the sphere of values may produce far-reaching consequences. The principles come to express and formally guarantee these values. A focus on their essence, including also the source from which they arise, may lead to radical changes in the perception of international law. The view presented by ICJ judge Antonio Augusto Cançado Trinidade especially deserves to be highlighted as an example[15]. General principles are not an end in themselves here. Rather, they are treated as a useful instrument to realize universal justice which cannot ignore the sphere of public international law. They specifically guarantee that the goal is achieved in the process. It is also to be stressed that general principles of public international law seen in this way serve to protect the international community as a whole rather than individual states[16]. They consolidate the entire system of international law. They also ensure that it is consistent to a necessary extent. They intertwine with the basic assumptions for an international legal order, thereby lending it a trait of universality, which in turn is a source of benefits for a broadly conceived human community (humankind)[17]. It should be pointed out that Cançado Trindade considers these principles to originate from human conscience which co-forms the universal legal consciousness attaining the rank of ultimate substantive source of all laws, including also the international legal order[18]. Therefore, the essence of a source would be the ability to select one from a se-

[15] For the basic elements of that concept, see (in:) A. Kozłowski, *The normative dimension of the conception of the individual presented in opinions of judge Antonio Augusto Cançado Trinidade of the ICJ – fundamental elements*, WRLAE, vol. 6 (2016), issue 1, p. 1 and following

[16] Separate opinion in the matter of *Questions relating to the Obligation to Prosecute or Extradite* (Belgium *v.* Senegal), ICJ Reports 2012, p.556, par. 177: "Furthermore, it transcends the inter-State dimension, as it purports to safeguard not the interests of individual States, but rather the fundamental values shared by the international community as a whole".

[17] Separate opinion in the matter of *Pulp Mills* (Argentina *v.* Uruguay) ICJ Reports 2010, p. 214, par. 217: "It is not surprising to find that voluntarist-positivists, who have always attempted to minimize the role of general principles of law, have always met the opposition of those who sustain the relevance of those principles, as ensuing from the idea of an objective justice, and guiding the interpretation and application of legal norms and rules. This is the position that I sustain. It is the principles of the international legal system that can best ensure the cohesion and integrity of the international legal system as a whole. Those principles are inter-twined with the very foundations of international law, pointing the way to the universality of this latter, to the benefit of humankind".

[18] *Ibidem*: "Those principles emanate from human conscience, the universal juridical conscience, the ultimate material "source" of all law". Also *ibidem*, par. 201: "Every legal system has fundamental principles, which inspire, inform and conform to their norms. It is the principles (derived etymologically from the Latin *principium*) that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (*prima principia*) which confer to the legal order (both national and international) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves. This is how I conceive the presence and the position of general

ries of values, which in the form of a general principle of international law could supply the formal basis for adjudication, leading to the fullest realization of justice and equitability for the individual and being its source and measure[19]. It is difficult to decide from that perspective whether general principles as understood by Cançado Trindade have source within the system or whether they come from a sphere external to the international legal order. The present concept seems to suggest that they form a common and immanent trait of all legal orders and as such, they permeate the law as a uniform phenomenon. They are a unique attribute without which no legal order is able to exist[20]. Such an approach to the essence of general principles of law would deliver another proof that the essence of a source of law lies in the law's systemic organization. One could venture to say these connections would not be merely ones of formal logic. The legal system is constituted by a specific order to the extent that the former is organized through the instrumentality of general principles by the universal awareness of seeking for equitable and just resolutions.

In the presented approach, general principles act as a counterweight to legal positivism[21] in that they are not statutory, but rather arise from subject's general awareness of a given legal order. On the other hand, such an approach does not directly exclude a normative meaning of general principles, because Cançado Trindade allows for the possibility utilizing them under Article 38 of the ICJ Statute for interpreting and validat-

principles in any legal order, and their role in the conceptual universe of law". Consistently in: Dissenting opinion in the matter of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v*. Russian Federation), ICJ Reports 2011, p. 322, par. 213: "These are some of the true prima principia, which confer to the international legal order its ineluctable axiological dimension. These are some of the true prima principia, which reveal the values which inspire the corpus juris of the international legal order, and which, ultimately, provide its foundations themselves. Prima principia conforms the substratum of the international legal order, conveying the idea of an objective justice (proper of natural law)".

[19] Cf. S. Besson, *op. cit.*, p. 33: "As a result, the formally foundational or original nature of general principles in the international legal order has been more contested than their materially fundamental nature or priority. Arguably, of course, with the development of direct international rights and obligations for individuals, individuals become subjects of legitimation and this in turn confirms the importance of the moral foundations of international law". On the impact of the individual on legal transformation, see also G. Hafner, *Some Thoughts on the State-Oriented and Individual-Oriented Approaches in International Law*, Austrian Review of International and European Law, vol. 14 (2009), p. 27 and following

[20] Separate opinion in the matter of *Interpretation of Judgment in the case of the Temple of Preah Vihear* (Cambodia *v.* Thailand), ICJ Reports 2013, p. 345, par. 66: "Without them, there is ultimately no legal system at all".

[21] Separate opinion in the matter of *Obligation to Negotiate Access to the Pacific Ocean* (Bolivia *v.* Chile) (Preliminary Objection), p. 13, par. 40 in connection with separate opinions in (par. 20, par. 25-27) appeals to the ICJ in the matter of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *v.* Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua *v.* Costa Rica): "Despite the characteristic attitude of legal positivism to attempt, in vain, to minimize their role, the truth remains that, without principles, there is no legal system at all, at either national or international level". <*http://www.icj-cij.org/docket/files/153/18750.pdf*>, 7 January 2015.

ing the applicability of specific norms[22]. It is characteristic of the present conception that general principles of law are identified with necessary law – an indispensable, lasting and necessary component of the legal order (*ius necessarium*) extending beyond the voluntarist justification of the applicability of legal norms[23]. The essence of a source therefore would lie in the legal consciousness, a lasting element taking centre stage in the form of general principles of law. The aim of these principles is to model the legal system in order to obtain just decisions. Justice is determined by the needs of an individual who affirms in this way its own significance as a measure of all things. According to Cançado Trindade, a study of general principles operates reciprocally by allowing for the identification of those values which by supporting the sense of equitability and justice show their full worth in connection with the need for protecting the individual[24]. This is a state of objective justice which flows out of general, fundamental principles (*prima principia*). It seems that the currently discussed approach to the problem of the essence of a source, the notion of objective justice is identical in objective terms with necessary law. With this assumption, it should come as no surprise that the intent of states is incapable of overcoming objective justice, must therefore submit to it, recognize the primacy of higher, humanist values forming an integral element of, among others, international law. In this way, the justification of the applicability of general principles of law to the international legal order would come decidedly closer to a model, in which general principles of law are tied with the sphere of values proper to and characteristic of each legal order rather than being just a generalization or common denominator for all particular statutory norms present in international law.

Judge Cançado Trindade formulates a catalogue of general principles intended as instruments for exercising objective justice which reaches its fullest extent when it protects and is compatible with human conscience. His catalogue includes, *inter alia*, the principles of *pacta sunt servanda*, no discrimination, equality of arms and humanity, which is a generalization of the law on human rights or international humanitarian law,

[22] Separate opinion in the matter of *Interpretation of Judgment in the case of the Temple of Preah Vihear* (Cambodia *v.* Thailand)*, op. cit.*,p. 337, par. 42: "It is, ultimately, those principles that inform and conform the applicable norms".

[23] Separate opinion in the matter of *Obligation to Negotiate Access to the Pacific Ocean* (Bolivia *v.* Chile) (Preliminary Objection), *op. cit.*, p. 13, par. 40: "General principles of law inform and conform the norms and rules of legal systems. In my understanding, sedimented along the years, general principles of law form the substratum of the national and international legal orders, they are indispensable (forming the '*jus necessarium*', going well beyond the mere *jus voluntarium*), and they give expression to the idea of an objective justice (proper of *jus naturalis* thinking), of universal scope".

[24] Separate opinion in the matter of *Interpretation of Judgment in the case of the Temple of Preah Vihear* (Cambodia *v*. Thailand), *op. cit.*, p. 337, par. 42: "The necessary attention to those principles brings us closer to the domain of higher human values, shared by the international community as a whole".

dignity of the human person and a series of general principles of international law set out in Article 2 of the United Nations Charter[25].

In this light, it comes as no surprise that Cançado Trindade does not include the principle of state consent as a general principle[26]. This is a simple consequence of the previously adopted assumption that the consent formula only presumes the articulation of fundamental values organizing the international legal order in a way that allows justice to be served, without pronouncing any special immanent relationship between consent and a sense of equitability. The expression of fundamental values is tantamount to a meta-norm which gives rise to a general systemic need for realizing justice. Of course, the principle of state consent may enhance this effect, although in this particular case it does not meet the criteria of a *sine qua non* condition. In this way, Cançado Trindade seems to try to keep within the limits of statutory law, if perhaps indirectly, especially when he refers to the need for judicial review in international disputes, i.e. a situation where an international court is appointed to deliver a judgment based on a law acceptable to the contesting parties. However, this leaves open the question of finding an acceptable normative basis for dispute settlement in the event of a divergence of consent and basic values serving to realize justice as understood from the perspective of protecting fundamental individual rights. In such a case, nothing can be done except to adopt a solution applying general principles of international law but disregarding the consequences arising from the consent principle.

It is worth noticing in what other ways Cançado Trindade utilizes established notions and uses them to create a picture of a system combining the requirements of a formal-positive legal order with references to a source whose essence is out of line with that assumption. As the present conception is characteristic in linking the legal status of an individual with the need for realizing justice by means of general principles of law, the notion of mandatory law comes to be its natural extension (*ius cogens*). To sum up, the basic aim of international law as understood herein is to realize justice in a way as to guarantee the highest degree of individual protection by means of the formal instrument of general principles of law embodying values crucial to that aim. The journey to-

[25] Dissenting opinion in the matter of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v*. Russian Federation), *op. cit.*, p. 322, par. 212: "Fundamental principles are those of *pacta sunt servanda*, of equality and non-discrimination (at substantive law level), of equality of arms (*égalité des armes* — at procedural law level). Fundamental principle is, furthermore, that of humanity (permeating the whole corpus juris of international human rights law, international humanitarian law, and international refugee law). Fundamental principle is, moreover, that of the dignity of the human person (laying a foundation of international human rights law). Fundamental principles of international law are, in addition, those laid down in Article 2 in the Charter of the United Nations".

[26] *Ibidem*, par. 213: "In turn, State consent does not belong to the realm of the prima principia; recourse to it is a concession of the *jus gentium* to States, is a rule to be observed (no one would deny it) so as to render judicial settlement of international disputes viable".

wards that aim is naturally facilitated by imperativity, especially of the fundamental principle determining any legal order. The imperativity strengthens the process of "constitutionalization" of international law, while also serving in the first place its fundamental purpose[27]. It is no wonder then that Cançado Trindade claims that the property of *iuris cogentis* should be combined with the need for realizing justice[28]. It remains an open question whether that characteristic should be extended over all consequences arising from this meta-principle[29]. All things considered, one may conclude that the status of mandatory law should be definitely attributed to those general principles of law which express common and supreme values for the international community as a whole. Such a vision of *ius cogens*, says Cançado Trindade, acts to strengthen the ethical aspect of international law interpreted as the "new *ius gentium*", or the international legal order in service of the human person and, by extension, of humankind at large[30]. Also, according to Judge Cançado Trindade, classifying a given general principle (e.g. principle of no torture) into the category of mandatory law is related to acknowledging obligations necessarily of result rather than merely obligations of means and conduct[31]. Adopting such a perspective obviously reinforces the effectiveness of the concept of the "new *ius gentium*" and heightens the importance of general principles of international law.

It might be useful to illustrate by way of example the potential normative impact of the general principles of international law on certain key spheres of the international legal order in line with the present conception. Construed as strengthening the normative effect of general principles in cases of gross human rights violations or infractions of the

[27] G.J.H. van Hoof, *op. cit.*, p. 151: "International *jus cogens*, of course, belongs to the „material constitutional provisions" of international law".

[28] Separate opinion in the matter of *Ahmadou Sadio Diallo* [Compensation] (Republic of Guinea *v.* Democratic Republic of the Congo), ICJ Reports 2012, p. 382-383, par. 95: "The realization of justice is of key importance to the victims, and belongs, in my understanding, to the domain of *jus cogens*. Without it, the right of access to justice '*lato sensu*', there is no legal system at all".

[29] Cf. *ibidem*, p. 378, par. 81: "The '*reparatio*' for damages comprises distinct forms of compensation to the victims for the harm they suffered, at the same time that it re-establishes the legal order broken by wrongful acts (or omissions) — a legal order erected on the basis of the full respect for the rights inherent to the human person. The observance of human rights is the 'substratum' of the legal order itself. The legal order, thus re-established, requires the guarantee of non-repetition of the harmful acts. The 'realization of justice' thereby achieved (an imperative of 'jus cogens') is in itself a form of reparation (satisfaction) to the victims".

[30] Separate opinion in the matter of *Questions relating to the Obligation to Prosecute or Extradite* (Belgium *v.* Senegal), *op. cit.*, p.557-558, par. 182: "Identified with general principles of law enshrining common and superior values shared by the international community as a whole, *jus cogens* ascribes an ethical content to the new *jus gentium*, the international law for humankind. In prohibiting torture in any circumstances whatsoever, *jus cogens* exists indeed to the benefit of human beings, and ultimately of humankind".

[31] *Ibidem*, p. 555-556, par. 175: "[T]he obligations under a "core human rights Convention" of the United Nations such as the Convention against Torture are not simple obligations of means or conduct: they are, in my understanding, obligations necessarily of result, as we are here in the domain of peremptory norms of international law, of *jus cogens*, generating obligations *erga omnes partes* under the Convention against Torture".

international humanitarian order, *ius cogens* enables Judge Cançado Trindade to elucidate themes related to state responsibility to an individual and to the need for restricting state immunity as long as that immunity impedes the realization of a permanent ingredient of every legal order, which this conception refers to as rectitude[32]. Cançado Trindade's views on the legal nature of state immunity are unambiguous. In his dissenting vote on the advisory opinion concerning Kosovo's declaration of independence, this ICJ judge left no doubt as to the scope of impact of mandatory legal standards on the efficacy of a legal defence applied by a state invoking state immunity. Cançado Trindade is of the view that a peremptory norm intended to protect the individual from suffering severe lawlessness overrides any privileges and prerogatives inherent in the institution of state immunity, including above all state impunity and denial of justice[33]. Two elements in this line of reasoning require close scrutiny. Firstly, the protection provided by state immunity is not meant to safeguard state interests where the state in question has perpetrated crimes against its own or a third state's people[34]. Secondly, international crimes perpetrated by states are not covered by *iure gestionis* nor *iure imperii.* These are a separate category of *delictae imperii*, which are not covered by any form of immunity[35]. From this presumption follows a clear conclusion that the right of recourse to international justice must be available to an individual against whom grave human rights violations have been committed or where standards of international humanitarian law have been disobeyed, whereby this right is effective against the country of origin in that it leaves the offending state no option to avail itself of remedies preventing justice from being realized in its simple form[36]. Such an approach illustrates the normative primacy of general principles of international law, in particular *iuris cogenti*s, over the legal consequences arising from the principle of consent. It is worth noting that this line of argu-

[32] Dissenting opinion in the matter of *Jurisdictional Immunities of the State* (Germany *v*. Italy: Greece intervening), ICJ Reports 2012, p. 290, par. 313: "Grave breaches of human rights and of international humanitarian law amount to breaches of *jus cogens*, entailing State responsibility and the right to reparation to the victims. This is in line with the idea of rectitude (in conformity with the *recta ratio* of natural law)".

[33] *Ibidem*, p. 286, par. 299: "[State immunity] is not to stand in the way of the realization of justice. The pursuit of justice is to be preserved as the ultimate goal; securing justice to victims encompasses, inter alia, enabling them to seek and obtain redress for the crimes they suffered. *Jus cogens* stands above the prerogative or privilege of State immunity, with all the consequences that ensue therefrom, thus avoiding denial of justice and impunity".

[34] *Ibidem*, p. 288, par. 305: "When a State pursues a criminal policy of murdering segments of its own population, and of the population of other States, it cannot, later on, place itself behind the shield of sovereign immunities, as these latter were never conceived for that purpose".

[35] *Ibidem*, par. 306: "International crimes perpetrated by States are not acts *jure gestionis*, nor acts *jure imperii*; they are crimes, *delicta imperii*, for which there is no immunity".

[36] *Ibidem*, par. 307: "In case of grave violations of human rights and of international humanitarian law, the direct access of the individuals concerned to the international jurisdiction is thus fully justified, to vindicate those rights, even against their own State".

mentation is supported by the institution of customary law invoked as a secondary source of law in order to affirm that primacy[37].

General principles of international law have therefore an essential role to play in Cançado Trindade's conception. For they would embody a special manner, in which the essence of a source of international law is understood. The substance of general principles of law and, by extension, of international law would be determined by a sense of equitability, a need for realizing justice on behalf of the individual. These principles would also leave room for circumstances which are not fully identical to the consequences of a positive view on international law. As to their rank, they would have the form of a primary source of law in that they would have the power under specific circumstances to overrule or suspend the consequences of the intent of subjects of international law. On the other hand, the general principle form guarantees that these "non-positive" values will be incorporated among the generally applicable norms, for example, for the purpose of invoking Article 38 of the ICJ Statute. Therefore, the essence of a normative source would also in this case lie outside the positive-law international order. However, it is only within the limits of the positive-law construal of the international legal order that the source in question would be able to produce consequences. An international judge would still rule based on a construal of law which accords with the essence of the legal order. This essence would be identical with that of a primary source of international law, that essence being in this particular theory the need for the realization of justice interpreted as appropriate. The need stems in turn from a sense of rectitude (*ratio recta*), whose origins are traceable to natural law. However, such an approach may diminish the positive-law value of legal consequences implied by that assumption. This is because the approach implies the need to follow imperatives (*ius necessarium*) which do not necessarily correspond to model positive law (*ius voluntarium*). This narrative may be salvaged, however, by the conventional usage of general principles of international law. For these principles are the vehicle for systemic values; they represent an effort to transpose the values into the system. They may act as a buffer against head-on criticism levelled at the essence of international law as conceived by Cançado Trindade, while providing a way of framing the essence of a source of international law in terms of their intrinsic value as a form of expressing norms[38]. Another way to shore up this conception embedded within expressly or tacitly created international law is to refer to the customary confirmation of this vision of international law. Then, even if values

[37] *Ibidem*, p. 289, par. 311: "The State's duty to provide reparation to individual victims of grave violations of human rights and of international humanitarian law is a duty under customary international law and pursuant to a fundamental general principle of law".

[38] At this point, it would be appropriate to draw attention to the comparative manner of presenting the essence of a source of general principles set out in Article 38 paragraph 1 letter c of the ICJ Statute.

intended to realize justice had their source outside the limits of positive international law, their acceptance within that order would proceed in a form consistent with its human made nature.

The above approach to the essence of the international legal order is burdened with a number of risks and uncertainties related to its systemic adaptation. Meanwhile, the fundamental value lies in the organizing directive *pro persone humane* and related hierarchization of international law to provide a greater degree of protection for the individual to the detriment of a conflicting state interest.

6. Normative bases for adjudication

A normative sense accompanying general principles of law demonstrates itself the most clearly in connection with settling disputes under judicial review. The connection of general principles of law with the essence of the international court's decision allows, among others, for elaborating on the role of a court judgment as a source of international law. It is to be assumed at the outset that an international court, which operates within the law, must in passing judgment indicate the substantive grounds for settling the matter pending before it. In that sense, the court is driven by the need to establish the applicable law. It is bound by that law for the purpose of settling a dispute. In striving to settle a dispute placed before it, the court establishes a normative basis for adjudication. The decision of an international court, as a result of the need to establish its normative value, gains a special significance especially where the parties disagree as to the normative bases for dispute settlement. A situation where the court in accordance with the principle of opposability delivers a judgment by reference to norms uncontested and accepted by the parties is more comfortable for the judge and fits in well with the systemic conditions of international law. Such a situation does not lead to tensions or any particular problems. The consent is bilateral, thereby lending the norm unquestionable systemic support.

The situation is far more complicated when it comes to searching for the essence of a judgment as a source of international law when the burden of applying the law rests on the court, but the required norms are questioned by the parties or the court itself is in doubt as to their applicability or relevance. Then, the need arises to settle the dispute by reference to norms derived from a system of international law in connection with the case at hand[39]. For a court judgment to be effective, it must be embedded in the law. The search for the appropriate legal basis for dispute settlement also determines the signifi-

[39] Of course, this takes place within the limits of competence of the relevant court. For the ICJ, these limits are set by the Statute (Article 38). That is why reflections on the topic of sources of law and jurisdiction of international courts are inextricably connected but do not form equivalent notions. See O. Yasuaki, *The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and*

cance of the judgment as one of the elements specifying the essence of a source of international law and, by extension, also the nature of the international legal order. To go further, the search for a legal basis for dispute settlement forces the court to favour one of the concepts of a source from which the norms of the international legal order flow. An investigation of the subject-matter forming a potential source of norms should be sufficiently lucid to clearly confirm the existence or non-existence of a specific norm. Striving for unambiguity is one of the elements determining a correct reading of the normative significance of a judgment and by extension also its essence as a source of international law.

7. *Non liquet* situation

Striving for an unambiguous legal basis for adjudication opens the door to reflections on the role played in the present context by a judicial ascertainment of the impossibility of indicating such a basis. The *non liquet* situation[40], where a real normative basis for dispute settlement is lacking, is at the least a formal alternative to adjudication on normative bases. As to the need for specifying the essence of a source of international law, the question which requires highlighting is guidance directives, which should be called on when needed in order to conduct the judge's reasoning in such a way as to, firstly, decide whether it is at all possible to adjudicate the matter and, secondly, to ensure that the resulting judgment is compatible with the systemic character of the international legal order.

In a theoretical view, the admissibility of *non liquet* should be analysed in the context of the systemic completeness of international law[41]. It seems that the completeness of the international system of law is one of the concept which when analysed allows grasping at the essence of a source of international law. It should be emphasised that if the nature of the international legal order lies only in the consent of the subjects of international law, then it is all the easier to invoke a *non liquet* situation as a way to mark the normative limit of the system. A *non liquet* situation means that a specific circumstance examined during a judicial hearing is not covered by any of the applicable norms, because it is not supported by the consent of subjects of international law. In that sense, the

the Sources of International Law, (in:) N. Ando, E. McWhinney, R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, vol. 1, 2002, p. 201.

[40] D. Bodansky, *Non liquet and the incompleteness of international law*, (in:) L. Boisson de Chazournes, Ph. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, CUP 1999, p. 154: "Today, *non liquet* refers to insufficiency in law: specifically, a finding by a court that the law does not permit a conclusion one way or the other concerning the issue in question".

[41] See C. Focarelli, *International Law as Social Construct: The Struggle for Global Justice*, Oxford University Press, Oxford 2012, p. 327: "Legal theorists tend to deny *non liquet* on the ground that it undermines the systemic unity of law and ultimately law in its very essence".

limits of the system of international law are predictable and tangible. Every legal order has outer limits, for it is impossible to draw an infinite number of derivatives from a given norm *x*. Theoretically speaking, this set is always limited. Of course, a judge or legal theorist may use his expertise to stretch out a chain of reasoning and thereby to enlarge the normative field. But the limit is an immanent concept related to the system of law. Where the limit is drawn depends on the question of where the essence of international law lies. The unambiguity and tangibility of international law is brought about through emphasis on its consensuality. It is then at arm's length. However, it is sometimes true that by the addition of successive assumptions to the reflections on the essence of international law and its sources, that essence – though logically reaffirmed and necessary – fades beyond the horizon.

In the light of the above, it seems that analysing the essence of a *non liquet* situation can provide a large amount of key information on the essence of a source of international law. As it is necessary for the court to resolve the dispute pending before it, there exists a relationship between the sought-after truth about the essence of a source and a declaration that no settlement can be reached for lack of adequate legal basis. The invocation of *non liquet* must determine a specific conception of a source of international law. When the court ascertains that no normative bases exist upon which to settle the dispute at issue[42], this certainly implies that the adopted conception of a source theoretically allows using the concept of a limit of the international legal order without stating with any degree of clarity, however, how the essence of such a source demonstrates itself. This means certain systemic barriers exist which cannot be transcended without violating that essence[43]. In that sense, the portfolio of legal norms would be limited with the limitation emerging as a consequence of the assumed essence of a source of international law. Judges by the power of reasoning would be capable of developing international law, in accordance with the system's principles, through deriving, from the existing norms, new norms of the international legal order as approved by the consent of subjects of international law interpreted jointly with its systemic consequences. The court's recourse to *non liquet* would mean that, in their reasoning, the judges have reached a conclusion which cannot be derived from the consent of subjects of interna-

[42] *Ibidem*, p. 327: "In international practice *non liquet* is quite unpopular".

[43] *Ibidem*: "First, it is argued that *non liquet* in inconsistent with the judicial function since it allows the court not to do what is expected to do, namely, deliver justice to the parties in the proceedings. Secondly, it is assumed that international law is a complete legal system and thus the court can always find the rule to decide the case. Advocates of *non liquet* retort that international courts (unlike domestic courts) lack legitimacy and should avoid the quasi-legislative task of fillings the gaps. Moreover, international law (unlike, once again, domestic courts) is far from envisaging mechanisms entrusted to correct unsatisfactory rulings. They also claim that international courts should avoid intruding in political questions and the *non liquet* is a helpful tool to this end".

tional law[44]. In a sense, this is the prelude to reflections on language and linguistic ability as used by judges to persuade, mainly the parties to a dispute, but also indirectly other members of the international community, about the validity of their normative conclusions.

Deliberations on a *non liquet* are a natural extension of the question of properly defining the normative bases for settling a legal dispute; therefore, they share a subject-matter affinity with the problem of general principles of international law examined in what is here the obvious context of sources of international law. That affinity admits of questions about the limits of the international legal order and about the truthfulness of the dictum that what is not expressly forbidden is allowed in international law[45]. In the present considerations of the essence of a source of international law and in relation to general principles of international law, it should be reminded that a solid legal basis for settling a dispute exists only where a general principle of international law expresses a legal norm and the norm is shown to be systemically acceptable (systemically recognizable). It should be said therefore that, in theory, a *non liquet* would apply only where it were proved that, in a specific case, no general principle of international law exists upon which to deliver a normative judgment. However, pursuant to Hans

[44] Of course, adopting an assumption other than the voluntary theory of international law would modify the concept itself to a certain extent. Ascertaining a *non liquet* situation where international law is assumed to stem from natural law would lead to the conclusion that the judges lack competence or adequate intellectual prowess to effect a normative reading of Nature, from which the source every order, including that of the international legal order, springs forth. Cf. W. Czapliński A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, edition 3, C.H. Beck, Warszawa 2014. p. 810: "It is impossible in principle for an international court to declare non liquet, that is a lack of norm applicable to the dispute as a cause of inability to solve the matter unless the referral of the matter to the Tribunal expressly restricts the possibility of selecting applicable legal norms. In practice, no international court has been known to deny jurisdiction over a dispute even when doubts existed as to the basis for settlement. The rules of interpretation have so far allowed finding a solution". Such an understanding of the issue offered by the authors begs the question about the systemic limits of judicial interpretation. It cannot be assumed that interpretation delivers only systemically acceptable outcomes. It should be stressed, however, that ascertaining a *non liquet* should come as a result of applying elaborate reasoning utilizing all appropriate methods, rules, directives and interpretations. See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua *v*. Honduras), Judgment, ICJ Reports 2007, p. 704, par. 145: "A claim was also made during the oral proceedings by each Party to an island in an entirely different location, namely, the island in the mouth of the River Coco. For the last century the unstable nature of the river mouth has meant that larger islands are liable to join their nearer bank and the future of smaller islands is uncertain. Because of the changing conditions of the area, the Court makes no finding as to sovereign title over islands in the mouth of the River Coco". The tribunal decided that there is no norm of international law (legal title) which could be related to the facts of this part of the case. Similar evaluations are related to the purport of the ICJ's advisory opinion on the legality of threat or use of nuclear weapons (see K. Oellers-Frahm, *Lawmaking Through Advisory Opinions*, (in:) A. von Bogdandy, I. Venzke (eds.), *International Judicial Lawmaking*, Springer 2012, p. 82.

[45] See S. C. Neff, *In Search of Clarity: Non Liquet and International Law*, (in:) K. H. Kackobad, M. Bohlander (eds), *International Law and Power Perspectives on Legal Order and Justice. Essays in honour of Colin Warbrick*, Martinus Nijhoff Publishers, Leiden, Boston 2009, p. 66-67.

Kelsen's formalized analysis, the existence of at least one, hypothetical principle determining the existence and development of an entire legal order could be confirmed in line with the rules of inference[46]. It seems that the principles of trust and confidence or good faith have the potential of becoming fundamental, founding principles. Based on that potential, it can be said that any bilateral or multilateral relation is ultimately subject to the principles of trust and confidence or good faith and, as such, gives the green light to normative evaluations of all phenomena occurring within the international legal order and, by extension, to utilizing these evaluations in the formulation of legally binding resolutions.

In that context, the question may arise of whether the general principle of international law prohibiting an international judge from invoking a *non liquet*[47] belongs to the system of international law. If the need for protecting trust and confidence, legitimate expectations and good faith and its consequences is the overarching value within international law, then these values should in each position and at every level be protected by the system, making a *non liquet* difficult if not impossible. Adopting the view in which each bilateral or multilateral relation or unilateral attitude resulting in the presumption of good faith in the international community must lead to the conclusion that protection of good faith is necessary in every case where such a relation or attitude occurs. This would mean that a *non liquet* situation does not occur at all in the international legal order, for the primary concern of every legal dispute is with issues arising from relations or attitudes matching the above description, necessitating therefore the protection of good faith. This approach would limit *non liquet* to cases in which the mutual bilateral or multilateral relations of subjects are not characterized by good faith. Then, the court could declare a *non liquet* situation only where it has been ascertained that the consequences of the subjects' relations do not stem from good faith.

[46] H. Kelsen, *Principles of International Law*, The Lawbook Exchange, Ltd., 2003, p. 303: "The norm which regulates the creation of other norms is "superior" to the norms which are created according to the former. The norms created according to the provisions of another norm are "inferior" to the latter. In this sense, any superior legal norm is the source of the inferior legal norm". These statements mark the trail leading to the "Grundprinzip" theory. This being said, the "what is not forbidden is allowed" principle is said by Kelsen to have a vital organizing function in the international system of law" ("That there is no rule referring to the case can only mean that there is no rule imposing upon a state (or another subject of international law) the obligation to behave in this case in a certain way. He who assumes that in such a case the existing law cannot be applied ignores the fundamental principle that what it is not legally forbidden to the subjects of the law is legally permitted to them").

[47] Cf. S.C. Neff, *op. cit.*, p. 83: "[T]here remains doubt about the validity of Lauterpacht;s strongest contention: the existence of an overriding general principle of law actually prohibiting judges from ever pronouncing a *non liquet*, that is, requiring judges to exercise whatever degree of creativity is necessary to fill any provisional gap that arises.

8. Binding judgment versus precedent

The ICJ Statute makes the rulings of the court binding upon the parties only in a specific case. It seems that Article 59 of the ICJ Statute leaves no doubt in this matter. An analysis of it leads to largely clear-cut conclusions[48]. However, the binding power is formally effective for the resolution of the dispute alone. It appears unlikely that from the literal wording of the above provision it might be inferred that the parties to a dispute are bound by such a reading of the law as has been applied by the judges. The parties to a dispute are bound by international law because they expressed their consent to be bound by it. It is far easier to accept that it is judges who are bound to some extent in subsequent proceedings by a reading of law they have applied themselves to the matter which has been resolved previously. In that sense, it would be detrimental to the legal system to infract the principle of certainty of law. This would in turn foreshadow a kind of estoppel, i.e. an impediment preventing the judge from availing himself of legal reasoning contrary to a previously applied inference in cases of an identical legal nature[49]. This approach to the question of an international court being bound by its judgment would not derail the systemic essence of a source of international law. On the contrary, it would draw strength from being interpreted in the context of the principles of confidence and certainty of law. In addition, the judgment would become normatively significant without conflicting with the formal limitations under Article 59 of the ICJ Statute, on the nature of a legal ruling[50]. An international court judgment would not restrict the parties to a proceeding in their original ability to define what international law is. The court itself would be bound by a previously adopted interpretation of international law, as any departure from that interpretation would be legally detrimental and contrary to the principle mandating such a manner of legislation, interpretation and legal practice as to increase the sense of certainty and confidence in the legal order in those for whom the norms are intended. Without trust and certainty, any legal order, including also interna-

[48] M. Jacob notes the possibility of exceptions to the prevailing view on this point by distinguishing the procedural and jurisdictional aspects of the norm referred to in Article 59 of the ICJ Statue (*Precedents and case-based reasoning in the European Court of Justice*). *Unfinished Business*, CUP 2014, p. 238-243).

[49] "In a nutshell, my view on this question is that the Court itself, and not the Respondent, is precluded now from taking a different position at this stage which would be diametrically opposed to the one that the Court itself is deemed in law to have so definitively determined in the present case. The principle of consistency as an essential prerequisite for the stability of legal relations should support such an approach" (Judge Owada, Separate opinion in the matter of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v*. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 297, par. 37).

[50] If we assume that the international judiciary is voluntary in principle and its effectiveness is conditional upon the consent of the concerned parties, the unconditional acceptance of the significance of the judgement as a source of international law would be contrary to this fundamental assumption, in particular where no systemic contraindications prevent both contesting parties from unanimously rejecting the judgment.

tional law, loses its systemic character, becoming a formless entity without any organizing principle whatsoever. If a judge deems it pointless to be bound by a previously applied reasoning, by doing so, he creates a situation in which the very essence of law is defeated. Requiring judges to be bound by a previously applied judicial reasoning is another consequence of the systemic character of international law and an effect of a systemic understanding of the essence of a source of international law. In this case, the judgment forms a legal basis for the court to rule in subsequent proceedings without necessarily confining the contesting parties in the future within any abstract legal framework transcending the context of the original matter. At this point, it would be useful to touch upon the notion of precedent. It remains to be explained to what extent the usage of the notion of precedent allows for a detailed definition of the essence of a source of international law.

An examination of Article 38 paragraph 1 letter d) provides clear-cut conclusions. G. Guilaumme emphasizes that international law does not confer binding force upon precedent, in disregard of *stare decisis*. The conclusion therefrom is that no ruling of an international court, not even one of the International Court of Justice, may be seen as a formal source of international law[51].

Although a court judgment is not a formal source of international law, it frequently provides a normative model to which other international courts may refer[52]. The justifi-

[51] G. Guilaumme, *Can Arbitral Awards Constitute a Source of International Law under Article 38 of the Statute of the International Court of Justice,* (in:) Y. Bonifetami (ed.), *Precedent in International Arbitration*, New York, Juris Publishing, Inc., 2008, p. 107; further quoted as G. Guillaume, *Can Arbitral Awards...* . To be sure, this does not invalidate considerations of the impact of case-law on trends in the respective branches of international public law, even when such trends are unconnected with the notion of precedent as such (see Ch. J. Tams, *The ICJ as a 'Law-Formative Agency: Summary and Synthesis*, (in:) Ch. J. Tams, J. Sloan, *The Development of International Law by the International Court of Justice*, OUP 2013, p. 377-396).

[52] For example, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua *v*. Colombia), ICJ, Preliminary Objections, Judgment, p. 18, par. 35: "That question has to be answered by the application to the relevant provisions of the Pact of Bogotá of the rules on treaty interpretation enshrined in Articles 31 to 33 of the Vienna Convention. Although that Convention is not in force between the Parties and is not, in any event, applicable to treaties concluded before it entered into force, such as the Pact of Bogotá, it is well established that Articles 31 to 33 of the Convention reflect rules of customary international law (Avena and other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), p. 48, para. 83; LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 502, para. 101; Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 812, para. 23; Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 21, para. 41; Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991, p. 70, para. 48). The Parties agree that these rules are applicable. Article 31, which states the general rule of interpretation, requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", http://www.icj-cij.org/docket/files/155/18948.pdf, 20 June 2016. In this case, a series of judgments acts to support the conclusion that a legal basis for judicial settlement arises from a formal source of international law, with the judges presumed to identify that source correctly.

cation of this process must bypass the formal conditions of a precedent[53]. This is obvious for the ICJ in view of its Statute. It seems that the essence of international law may be partially revealed by tracing the origins of re-enacting previous judgments together with the accompanying legal inferences. One of the possible justifications is the legal certainty which accompanies the application of a specific rule of law. This is therefore a sort of appeal for a stable approach to specific legal institutions[54]. The recurring dilemma, which appears also in this case, is whether legal certainty demonstrates any intra-systemic phenomenon reducible to a normative dimension or whether it is an external idea applicable within the scope of the international legal order in line with a specific model of reasoning. Understanding this model is facilitated by an explanation of the very essence of a source of international law. Such an approach envisages an international court judgment as a source of international law, as this mode of treatment of earlier judgments imposed on other courts would arise from the need to guarantee legal certainty. With that said, the certainty of law should be regarded as an immanent value of the law as such. So, where there is law, there is also a systemic need for its certainty. Legal certainty is a systemic property which does not necessarily come as a consequence of the orientated intent of states. Legal certainty as a systemic directive involves a series of consequences, including the instruction to consider prior judgments of international courts[55].

[53] The preceding footnote discusses the situation referred to by the ICJ in a series of its own rulings, in which the ICJ persuasively confirmed, for example, the customary nature of the rules of interpretation set out in articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties. However, this situation differs from a case in which judicial reasoning and results therefrom are not rooted in a formal source of law, but affirmatively in their earlier decisions. Cf. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua *v*. Colombia), ICJ, Preliminary Objections, Judgment, *op. cit.*, p. 19, par. 37: "An *a contrario* reading of a treaty provision – by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded – has been employed by both the present Court (see, e.g., Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II), p. 432, para. 29) and the Permanent Court of International Justice (S.S. "Wimbledon", Judgment, 1923, P.C.I.J., Series A, No. 1, pp. 23-24). Such an interpretation is only warranted, however, when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case". Marc Jacob draws attention to argumentative burdens that disregard the formal ramifications of precedential burdens (*Precedents: Lawmaking Through International Adjudication*, (in:) A. von Bogdandy, I. Venzke, *op. cit.*, p. 58: "Precedents in international law are best thought of not as normative obligations but as argumentative burdens on the party seeking a different result from that reached in a pertinent previous decision. Arguments from precedent are independent from the status of precedent as a formal source of law or any express denial of bindingness)".

[54] G. Guillaume, *Can Arbitral Awards...*, p.107: "Still, as provided by Article 38(d), judicial decisions are a 'subsidiary means for the determination of rules of law'. Recognizing this role means in reality that, while settling disputes, a judge applies and interprets a rule of law. He is not compelled to follow the same solution that justified the decision he had previously made, but he will be inclined to do so in order to ensure legal certainty through 'consistency with its own past case law'".

[55] A considerable dose of skepticism is expressed on this point by Marc Jacob (*op. cit.*, p. 59): "A parting thought on precedents and the coherence and integrity of the international legal system: a precedent is only

From this perspective, the essence of a source would again be found in a systemic organization of norms (in this case, of international law), which would lead, as far as the notion of judicial precedent is concerned, to a systemic presumption in favour of reference by international courts to prior rulings. Exceptions to this presumption would be possible only where it has been clearly ascertained that failure to apply a previous ruling to a specific case will provide a better guarantee of enhancing legal certainty[56].

9. The extent of effectiveness of a judicial precedent

It should be remarked that the precedent in the sense established herein exhibits a normative value irrespective of the court which has set it[57]. In that sense, ICJ judges, in order to comply with the systemic requirements of the international legal order, should have no hesitation in applying, for example, a judgment of an arbitration court in respect of the reasoning expounded therein or as an independent normative source in so far as such application is a necessary condition to remain true to the systemic essence of international law[58]. Specialization of international courts does not act to the detriment of this principle in relation to the system of international law as a whole, although practice may suggest that courts are more likely to draw upon their own previous judgments. Previous judgments may be called on in matters which are similar, identical as to subject-matter or compatible with the essence of the legal order. From that perspective, there should be no doubts regarding ICJ judges' practice of limiting their references to judgments of arbitration courts in international cases and omitting arbitration court judgments delivered in settlement of investment or commercial disputes or of litigation involving not only states but also natural or legal persons[59]. The identity of contesting parties as to their essence determines the adequacy of the norm sought for. This is a strong presumption[60].

one small stone in a larger mosaic, which in the end does not necessarily have to amount to a coherent picture, let alone one that is pleasing to behold. An acknowledgement of precedents as constraining and thereby system-building devices does not commit one to a particular view of the legal system as a whole".

[56] Cf. G. Guillaume, *Can Arbitral Awards...*, p.107: "From this perspective, the Court has expressly pointed out that if '[t]here can be no question of holding [a State party to the dispute] to decisions reached by the Court in previous cases", [t]he real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases'".

[57] *Ibidem*, p. 109: "The ICJ, as well as the Permanent Court of International Justice, nevertheless made general reference to their previous decisions on several occasions, as well as to decisions of arbitral tribunals, to international arbitrators or to international jurisprudence" [footnotes omitted].

[58] See M. Sourang, *Jurisprudence and Teachings*, (in:) M. Bedjaoui (ed.), *International Law*: *Achievements and Prospects*, Martinus Nijhoff Publishers 1991, p. 286.

[59] G. Guillaume*, Can Arbitral Awards...* , p. 111: "In the first place, arbitral awards that have been mentioned by the Court have always been rendered in intergovernmental disputes. The Court has never made reference to arbitral awards issued in other domains, such as commercial arbitration or investment arbitration".

[60] However, this is not a condition of considering a judgment of an international court as a precedent as such. It seems that this effect may also hold for a third state as long as the systemic adequacy conditions

Adopting a different approach, provided that no definitive systemic grounds can be found for exemption from a general rule, would have to give rise to subsequent judgments being frequently paradoxical. Of course, this does not exclude mutual normative effectiveness of judgments delivered by different arbitration courts under international investment law or international commercial law. Moreover, G. Guillaume underlines that the effectiveness of court judgments, including those of an arbitration court, as precedents is conditional upon their publicity and jurisprudential consistency[61].

On the question of judicial decisions setting precedents, it is useful to consider whether reference to an earlier judgment exemplifies the application of a norm or an inference which leads to articulating a specific contractual or customary norm. If it is assumed that a prior judgment forms in its own right a source of dispute resolution in another matter, this would be justified by articulating a legal gap, a lack of relevant, appropriate norm upon which to resolve the dispute, with the simultaneous systemic necessity of handing down a decision[62]. The use of the sole term "solution" to refer to a sought-after legal basis for dispute resolution is not very intelligible in this case[63].

The award of an international court regarded as a precedent-setting source of international law may also be considered against the backdrop of the relationship of the judgment and a separate or dissenting opinion. In relating the problem to the ICJ, Hugh Thirlway says that judicial activism is a luxury in which individual judges may indulge, but which the court as a whole cannot afford[64]. In connection with analyses of adjudication by international courts in the light of the essence of a source of international law, it has been underlined earlier in this work that the impact of a decision as a source depends on the interplay of the judgment with the systemic requirements of the international legal

of a judicial decision in relation to that state are met. See M. Sourang, *op. cit.*, p. 287. On one hand, the author relates an ICJ judgment in the matter of Aegean Sea continental shelf, in which the judges declared that their deliberations concerning the nature of the agreement of 1928 may be applicable not only to Greece and Turkey (*Aegean Sea Continental Shelf* (Greece *v*. Turkey), ICJ Reports 1978, p. 17). On the other hand, he claims that although judicial decisions may be regarded as sources of international law, their opposability is limited to the states which are parties to the proceeding.

[61] G. Guillaume, *Can Arbitral Awards...*,p. 112: "The situation might be the same for arbitral jurisprudence, both in commercial and investment domains, if or when it attains a sufficient degree of publicity and consistency". Cf. Th. Walde, *Confidential Awards as Precedent in Arbitration. Dynamics and Implication of Award Publication*, (in:) Y. Bonifetami (ed.), *op. cit.*, p. 113 and following.

[62] G. Guilaumme, *Can Arbitral Awards*..., p. 111: "Thus, for the Court, there is no doubt. There are some arbitral awards which merits mention as establishing rules of law".

[63] G. Guillaume (*Can Arbitral Awards...*, p. 112) quotes the Louis Renault's opinion (A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*, tome premier 1798-1855, (A. Pedone, 1905), p. VII: "When a controversial question has been decided in the same way by a number of arbitral tribunals, one realizes what authority will be attached to a solution given several times in total independence by highly qualified judges of various nations... . The solution will enter then into the body of international law...".

[64] H. Thirlway, *Judicial Activism and International Court of Justice*, (in:) N. Ando, E. MacWhinney, R. Wolfrum (eds), *Liber Amicorum. Judge Shigeru Oda*, vol. 1 (2002), p. 104: "Judicial activism is the luxury of the individual Member of the Court".

order. If the question is looked upon from that angle, it is of no essential consequence whether the supporting or complementing element of the system is consequent to the operative part of the judgment or the view expressed in the dissenting opinion. Admittedly, from a formal point of view, in a proceeding pending here and now, the judgment will have the effect of binding the parties (Article 59 of the ICJ Statute). If it clearly articulates the legal basis, it has the power, or at least the systemic potential, to produce a substantive precedent in the future, i.e. to form a source of resolution to the extent of the defined norm or utilized method of reasoning, in a subsequent proceeding, without the need for the parties to that proceeding to be the same as to identity[65]. A separate or dissenting opinion should in no way whatsoever be construed as binding on the parties to a specific dispute. The same applies in terms of normative value to an advisory opinion of the ICJ[66]. On the other hand, there is nothing to prevent the content of the dissenting opinion from producing a precedent in the future by direct reference or approximation[67]. As long as the reasoning it offers complements the picture of the international legal order, it becomes virtually compulsory for the system to make use of it. Compulsory in relation to the international community[68]. Rejecting such a basis may only have the effect of aggravating legal disagreement and give rise to more paradoxes undermining the community's confidence in the permanence, recognisability and predictability of a given legal order[69]. The acceptance thereof will as a matter of course help to improve the rule of law.

[65] C. Parry, *The Sources and Evidences of International Law*, Manchester University Press 1965, p. 94: "Firstly, it should be noted that the circumstance that such a decision as the Anglo-Norwegian Fisheries case cannot practically be ignored in relation either to other irregular coasts inhabited by fishermen besides the Norwegian, or by other States than the United Kingdom, involves that such decisions, to whatever extent they are held to be sources of international law, are sources of which not only courts but other organs of international community must take note". The character of the judgment does not prevent the norm identified in the precedent as understood herein from being construed under certain conditions as being effective *erga omnes*.

[66] See K. Oellers-Frahm, *op. cit.*, p. 88-90.

[67] Cf. F. Berman, *The International Court of Justice as an 'Agent' of Legal Development*, (in:) Ch. J. Tams, J. Sloan, *op. cit.*, p. 13: "On the other hand, there is the fact – once again I try to put it delicately – that the individual opinions tend to generate more excitement among the professoriate than they do in the hard, cold world. [...] All that said, it can also be said with confidence that an ICJ bench tried to be too adventurous would find its judgment encircled by an array of trenchant separate or dissenting opinions that would weigh in as a useful corrective in the process of absorbing the judgment into the international bloodstream".

[68] Cf. K. Oellers-Frahm, *op. cit.*, p. 90: "All these statements underline the fact that the advisory function is conceived, or at least presented, by the courts themselves as a means of merely giving guidance to the requesting organ in the particular circumstance on the basis of the existing law, and that the impact of the opinions depends on the reception and acceptance by the international community". K. Oellers-Frahm also speaks in this context of the international community expectations (*ibidem*, p. 98). Of course, this is understandable where the community is aware of its own expectations. It seems that this formula should also be used for persuading the international community to adopt a specific normative attitude.

[69] Cf. *ibidem*, p. 94: "Only in the presence of compelling reasons would the court depart from its earlier ruling, because advisory opinions, as judgements, are authoritative statements of law in equal degree. From

10. Logic as an element of judicial reasoning

If systemicity is of such crucial importance, another issue remaining to reflect upon in the light of the above conclusions is the role of legal logic applied to determine the essence of a source through judicial reasoning. To what extent is legal logic binding upon the subjects who in respect of the capacity conferred to them may voluntarily impact on the shape of international law? So, is logic one of the elements defining the essence of a source of international law and, if this is answered in the affirmative, to what extent are judges at liberty to accept logical inferences as a necessary element in defining the essence of a source of international law?

The principles of legal logic are one of the modes of communication in general, including in particular for legal entities. The existence or meaning of a legal norm cannot be confirmed other than with the accompaniment of a set of legal inferences. There remains to be established the degree of the binding force, firstly, on the subjects responsible for the existence of a norm, and secondly, on the judges appointed to reproduce a legal norm in connection with a need to resolve a contentious issue. Operating within the framework of a voluntarist concept of international law, one might venture to claim that it is possible to reject the rules of logic and adopt a legal norm whose substance rejects logical constraints. However, following Ludwik Ehrlich, who allowed for rejecting the principle of good faith but interpreted this as indicative of a withering away of international law in its accepted form so far[70], it should be said that rejecting the rules of logic as a natural background for the operation of law, though formally conceivable, would lead to rejection of the law itself through negating its systemic character. The discussion of the above problems can be reduced to establishing to what extent legal logic is necessary for communication between the legislator and the intended recipient of the law. It seems that there is a strong systemic presumption in that respect. This means that for reasons of communication the normatively effective intent of a subject only gains its systemic sense when reference is made to the rules of logic. The law, in order to produce the intended effect, should be comprehensible as to its subject-matter and purpose. That comprehensibility is guaranteed by relating law to the notion of a system. The notion of a system entails in turn the necessary degree of order[71]. The order is a consequence

this perspective, advisory opinions constitute precedents. They do not legally bind the court, however, for the sake of consistency and predictability of jurisprudence, the law stated to exist in an advisory opinion will be upheld unless compelling reasons require the court to decide otherwise".

[70] L. Ehrlich, *Prawo międzynarodowe publiczne*, 4th ed., Warszawa 1958, p. 15.

[71] Por. *Brierly's Law of Nations*, A. Clapham, OUP 2012, s. 53: "The ultimate explanation of the binding force of all law is that individuals, whether as single human beings, or whether associated with others in a state, are constrained, in so far as they are reasonable beings, to believe that order and not chaos is the governing principle of the world in which they have to live".

of logical reasoning being implemented. Logical reasoning may be identified for the purpose of the presented model with adopting a rational approach to the legal norm construed as an instrument for regulating social relations.

In international law, consent constitutes a norm but does not condition its binding force comprehensively. The norm becomes binding by its membership in a system, which in this case is the international legal order. An international judge in resolving a dispute must refer only to the law, i.e. a set of norms consolidated into a system, as the norm becomes binding only through membership in the system. The existence of a norm is conditional upon consent from the subjects; the system is a field, in which the norm's binding force applies[72]. As the judge seeks a legal basis upon which to resolve the dispute before him, he interprets the law. For that reason, the first thing he must do is to determine whether a norm exists, i.e. whether it is backed up by the consent, expressed in one way or another, of the parties concerned. Next, he relates the norm to the system and thereby he confers to it a meaning comprised by its applicability and substance, or in other words, the resulting scope of rights and obligations. The judge subjects the normative matter to specific measures. As emphasized earlier, he is bound by earlier judgments in respect of the reasoning applied therein as a source of comprehension of the law, to the extent that reproducing in time and space a prior reasoning under the specific conditions of the dispute at hand conforms to the systemic requirement that legal certainty should be ensured. One of the ways in which the sense of legal certainty can be strengthened is by referring to the rules of legal logic, including also the presumption of rational conduct which should accompany the judge in affirming the existence of a specific norm as well as when attributing binding force and proper meaning to it. In that sense, legal logic is a component of the essence of a source of international law. The judge must make reference to legal logic by presumption, as only then can he start, in accordance with the adopted assumptions, to fulfil the fundamental goal of settling disputes on the basis of the applicable system of norms realizing the requirement of certainty of law and confidence in the legal order that comes with it. In this way, legal reasoning which

[72] Cf. G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, The Modern Law Review, vol. 19 (1956), p. 11: "The principle involved can be stated as follows: a juridical answer to the question why any rule of law is binding, presupposes the existence of a fully-fledged juridical system in terms of which that answer can be given. Thus, to ask this question, not as regards a particular rule of law, but with reference to the concept of law itself, is necessarily fruitless, for unless law already exists and is valid, no juridical answer to the question can be given; while if law does already exist and is valid, no answer is necessary. In order to give legal reasons why law is valid and binding, it is necessary to assume the validity and obligatory character of law, or the legal reasons will themselves have no juridical force". Fitzmaurice appreciates the system's role as an essential factor in determining the nature of a legal norm. However, she does not treat it as a definitive source of applicability. In this category, she includes extra-systemic facts (p. 12): "And the ultimate source of the validity of this law is and must be extra-legal. Of the various possible ultimate but non-legal sources of the validity of the law, the most satisfactory may well lie in a concept very close to that of law, though not itself specifically juridical-namely that of justice".

at a critical juncture in dispute resolution assumes its fundamental meaning in terms of existence, applicability and understanding of a norm, may be placed on a par with the elements which combine to form a source of international law. The judge is obliged to acknowledge legal inferences as components consistent with the essence of a source of international law, because the systemic dimension of existence, applicability and understanding of the law as such cannot be erected and realized without applying the rules of legal reasoning as a necessary condition.

11. Judicial reasoning in the light of mutual relations between legal (argumentative) logic and rhetoric (persuasion)

In practice, the rules of legal logic do not provide the complete apparatus for determining the essence of a source of international law. For a judge to resolve a particularly elaborate and complex matter as to the facts, he may have to make recourse to the principle of legal rhetoric as well. At this point, it remains to be decided in what way legal rhetoric can be identified with the essence of a source of international law. While logic is usually thought to operate on a binary true / false basis, seeking to determine whether a norm exists or not, whether a norm is valid or not, whether a norm means *x* or not, rhetoric is embedded and develops within the domain of probability[73]. As a result, the judge faces the task of convincing the parties that the award is lawful with a probability close to certainty and is not just manipulation and illegal action taken to influence the litigants. Resolving a legal dispute with complex factual circumstances forces the judge to transition through successive levels of inference in order to make a final decision. The respective contentious issues are resolved in the course of that process with the use of instruments for logical reasoning and persuasion. Persuasion should draw upon the store of knowledge, skills and competence (including linguistic[74]) forming the judge's entire expertise. It is to be hoped the risk of a miscarriage of justice decreases as the size of that expertise grows. From the perspective of the systemic operation of international law, there are certain safeguards in place to eliminate the consequences of erroneous deci-

[73] M. Korolko, *Retoryka i erystyka dla prawników*, Wydawnictwo Prawnicze PWN, Warszawa, 2001, p. 12: „The realm of rhetoric is verisimilitude (Gr. *doxa,* Lat. *verisimilium*). The Greek notion of *doxa* encompasses presumption, opinion, judgment, etc. The opposite of verisimilitude is other verisimilitude, just as logical truth has its opposite in falsity (logic knows no "half-" or "quarter-truths")".

[74] The power of precedent in the light of the language in which it is expressed has been highlighted by M. Jacob (*op. cit.*, p. 63): "Public international law is thus not only shaped by the will of the states, but can also be manipulated decisively by the creative use of the French and English language. [...] Thirdly, if language can impose its own constraints, then multilingualism and looser social and cultural ties weaken these constraints on account of diluting linguistic precision and reducing the common conceptual repository. This perhaps offers an explanation why precedent thrives in the fertile soil of highly homogenous legal system (e.g. Victorian England) and habitually has a looser hold on heterogeneous orders (e.g. public international law)".

sions. All in all, the parties to a proceeding can together effectively dismiss the court's judgment and resolve the dispute by other means even though they may have initially agreed to institute the proceeding. Such an approach is compatible with the fundamentals of the international legal order[75]. The basic organizing and corrective directive is furnished by the principle of effectiveness accompanied by the principle of consent. Due to the specific nature of the system of international law, no judicial decision may override this basic feature of the international legal order. Therefore, in settling a dispute on the basis of international law, the judge by means of reasoning intended to reach a final decision resolves successive alternatives by reference to the legal basis for the judgment, by means of logical inferences, with the aid of the rules of construal as well as through rhetorical persuasion. By doing so, he is finally able to grasp the norm, its validity and significance. At the same time, he keeps in mind the need for balance between his actions and the fundamental principles of international law. This is condition for successfully navigating through the system of international law, all the while remaining within its limits, with the ultimate aim of comprehending that system's essence. Adopting an erroneous assumption always produces the wrong conclusion despite appearances to the contrary, especially when the adopted assumption and the final conclusion which follows therefrom are accompanied by elaborate, multifaceted reasoning[76]. The wrong approach opens the way for the system to produce more or less noticeable paradoxes and contradictions, preventing the law from being applied correctly; it is to be doubted whether it makes any sense for the law to exist in such a faulty form. The situation is aggravated when the conclusions following from erroneous assumption provide assumptions for further judicial reasoning, from which to draw conclusions.

In practice, it is sometimes difficult to draw a line between the scopes of logic and rhetorical persuasion[77]. The line between these scopes becomes more blurred in proportion as the facts of the case are more complex and the legal issues more troublesome. In such a case, it is worth calling upon a few organizing directives. For example, the recipient's lack of preparation cannot be used to persuade him to accept a conclusion. Also, the proportions in which legal logic and rhetoric are to be used should be carefully weighed. At this point, the question forces itself whether it is possible for a judgment

[75] Of course, taking into account both the role played by the peremptory norms (*ius cogens*) and the competences of the Security Council under the Chapter VII of the UN Charter.

[76] A classic example of an erroneous assumption being adopted together with the associated problems is the contention that the European Union law, thanks to its autonomy, no longer has the nature of international law and is immune to the influence of certain organizing and corrective general principles of the international legal order. In that sense, norms arising from a regulation still have the traits of international law if for the purpose of resolving a specific legal dispute, the autonomous EU regulation is used as a source of law.

[77] M. Korolko, *op. cit.*, p. 12: "It is known that the realm of truth is logic whose predecessor was dialectics. For these reasons, any knowledge of rhetoric should be strictly correlated with logic, that is – obviously – with binary logic described by Aristotle in Prior and Posterior Analytics".

to rely solely on persuasion? It seems that we are dealing with a borderline value here. The *non liquet* does not provide an opening for rhetorical or persuasive appeals. If the ascertainment of a *non liquet* does not throw us back on pure rhetoric, what can be a source of added value which is the mainstay of the international legal order? It has been stated that its sources lie in the norms themselves, which naturally, that is systemically, organize themselves, paving the way in the process for formulating new norms. As we will attempt to prove here, judges play an essential role in this process. However, the act of organizing must originate from the sphere of argumentation. A model consideration suggests that embedding the entire process only in the sphere of judicial persuasion will by definition engender numerous paradoxes or situations out of line with the very essence of the legal system, unless such an attitude from the judges furnishes conclusions accepted by the original subjects and thereby the capacity for automatic, natural (systemic) self-organization. The *non liquet* situation is a borderline condition for applying judicial persuasion. It marks out an area in which logical inferences intertwine with rhetorical interactions[78].

Having considered the questions of logic, rhetoric and the basic relationship they share, it is advisable to examine the adequacy of Ch. Perelman's view on legal logic in relation to the search for the essence of a source of international law. The contention that legal logic, especially in its judicial version, is "argumentation contingent upon the manner, in which legislators and judges comprehend their own pronouncements and on the views they entertain with respect to the law and its functioning in society"[79] forecasts a series of conclusions. One of the admissible conclusions seems to be that an international judge's impact on the sphere of sources of international law by reading normative added value, which remains in a direct and simple relationship with the essence of a source of international law, is exercised through *ad hoc* generalization rather than a static conceptualization of international law[80]. A judge's opinion depends on his personal preferences and the stability of his view mays also be tested. The adoption by a judge of a specific role opens the way, in that sense, for applying a reasoning which corresponds to the functions accepted by him of international law within the limits of the international community. The degree of certainty as to the manner in which the essence

[78] J. L. Goldsmith and E. A. Posner (*The Limits of International Law*, Oxford University Press 2005, p. 184) seem to suggest that this effort is each time directed towards establishing the meaning of words and exercising control over the consequences following from declarations made. In that sense, linguistic (logical and rhetorical) prowess would be a source of mandatory (prevailing) meanings, including also a source of understanding of norms. So, when a judge is ill-equipped to display such prowess, this spells an erroneous judgment.

[79] Ch. Perelman, *Logika prawnicza. Nowa retoryka*, Warszawa 1984, p. 232.

[80] This would forestall the near-sacrilegious contention that there are as many pictures of international law as there are situations, in which the appropriate basis for resolving a specific legal dispute is defined.

of a source of international law, at least with respect to judge-made law, is in proportion with the degree of consistency in the approach to understanding the role and function of international law. However, in the case of the international legal order, the chances that such a degree of uniformity in the approach understanding the essence of the sources of international law will be achieved are systemically limited owing to a lack of a hierarchically organized international judiciary. There is a risk that international courts may interpret the essence of a source of international law within a certain range without indicating a specific level. The value of such case-law for the interpretation of the essence of a source of international law is relative and should be confronted with the original "instinct" of the original subject of international law. If a judge in his reasoning on the essence of a source of international law makes a statement in much the same way as a state does, the practice stands a chance of being preserved and actually equated with the essence. In that respect, the logical and rhetorical impact of the judge will resonate more widely and produce broader legal effects to the extent that the judge through his reasoning and process of thought is successful in finding a solution to the dispute, which best fits each particular case under the same circumstances[81]. Striving to obtain each time the fairest judgment possible is one of the ways to arrive at an enduring reading of the essence of a source of international law in a way that serves to realize justice as envisioned by international law. Such a reading of the essence would very well reflect the role of legal logic as an instrument provoking to "reflect upon what should be done when one reasonably wants – as far as possible – to obtain (…) legal judgments" which are fair, equitable and reasonable[82]. Therefore, having regard to this factor, it should be underscored that striving for justice and equity through logic is the simplest way to read the essence of international law by correctly understanding the essence of its source.

There is one hurdle on this road, however. The selection of reasoning techniques is driven by the adopted conception of the law. So, striving for justice and equity through logic requires adopting a preliminary assumption. It seems that this may act to weaken the unambiguity of considerations on the essence of the source, for each adoption of a fundamental assumption would determine the result of inference. For example, assuming a natural-law concept of the law would have a clear-cut impact on the understanding of the essence of a source of international law. The solution of this paradox expressed in the statement that legal logic is the simplest way to realize justice through an unambiguous reading of the legal essence of a given system by means of a proper understanding of the essence of the source within the limits of a preferable concept, lies in the fact that in the case of international law, a fair and equitable resolution within the meaning

[81] Cf. Ch. Perelman, *op. cit.*, p. 36.

[82] See *ibidem*, p. 34.

of international law is possible subject to adopting such an appropriate assumption on the essence of the source of international law which envisions the acceptance of that essence by the original subjects of international law. Only then can a judge, by applying legal reasoning, that is by reference to legal logic, obtain a result consistent with the intra-systemic conceptualization of equity and justice. Then, the most equitable solution for each particular case would mark a specific precedent for successive decisions, because equal treatment of cases similar as to subject-matter is equally felt as more fair.

Consequently, judicial analyses and considerations leading to a fair resolution cannot avoid a correct rendering of the essence of a source of international law. Intra-systemic justice is guaranteed when the essence is grasped properly. Again, this creates in turn a specific need for reference to the institution of precedent, as fair resolution within that meaning entails a further resolution referring to the essence of the source. In this manner, a precedent becomes an intra-systemic direction arising from the need for fair resolution of disputes, while a correct reading of that direction is a vested privilege and obligation of the judge. A precedent is, then, systemic consistency. The judge is directed to strive for a fair solution. The use of a precedent follows from this direction. This principle does not arise from a specific norm but follows from the fact that the judge moves within the limits of the system of international law. The system holds within itself fundamental information on the essence of a source of international law. As long as the judge reads the essence correctly, his analyses and reasoning will lead to a fair judgment. Issuing a single fair judgment brings with it a further systemic consequence in the form of the need for issuing another fair judgment drawing its specific systemic justification from a prior award. As emphasized earlier, this means that if the role of precedent in international law in the sphere of resolution of international disputes has been reduced by the ICJ Statute dating back in its origins to 1922, the effectiveness in terms of substantive law of falling back on earlier judicial awards has a very good systemic and logical justification which stands firm even in the face of Article 38 paragraph 1 in connection with Article 59 of the Statute.

There are certain doubts in this regard; these, however, relate to the process of international law fragmentation and multiplication of the international judicature.

Again, there emerges the question of whether courts hearing matters within their specialty are bound by the inferences of judges whose jurisdiction arises from a different set of regulations.[83] It seems that the above-mentioned reasoning is fully applicable here as well. Regardless of the area of specialization within which a given international court

[83] See G. Guillaume, *The Use of Precedent by International Judges and Arbitrators*, Journal of International Dispute Settlement, vol. 2 (2011), p. 5 and following; further quoted as G. Guillaume, *The Use of Precedent …* .

operates, it should draw upon the arguments contained in the award of a different court due to the fact that the entire system of international law has a body of shared features. Even if the judgment is passed within a subsystem of international law, then still – owing to this system belonging to the common international legal order – there appear certain fixed points of reference. In that sense, judgments should definitely draw upon the arrangements made in other areas of reasoning, whose subject-matter is composed of precisely these points of reference, leading in the process to the formation of a consistent grand scheme of international law. The consistency is meant as the possibility of reproducing the reasoning contained therein in subsequent situations, factual circumstances and related disputes due to their compatibility with the essence of the international legal order. Judge Guillaume has found that precedent in international litigation law should be neither too much admired nor too hastily bypassed in the literature[84]. Considering the factors discussed above, it would seem that the point is not to treat each judgment necessarily as a formal precedent. In that sense, the award of international court does not require any extraordinary treatment. However, the omission of a reasoning contained in an award, which correctly renders the essence of a source of international law and thereby also relates to the nature of international law as a legal system, would be contrary to the requirement of developing the legal order in a consistent manner in such a way as to realize justice. Dropping that requirement as well as the associated reasoning would generate a number of paradoxes, leading eventually to a weakened sense of equitability for the subjects of international law and – in extreme cases – making judicial resolution and the inferences contained therein powerless to fulfil this requirement.

12. The scope of freedom in judicial reasoning

Relating Ch. Perelman's view on the essence of legal logic to the deliberation on the impact of the application of law by judges on the definition of the essence of a source of international law, it should be conceded that it is, firstly, dependent on the manner, in which the judge understands his tasks and, secondly, on the adopted view on the law and its functioning within the international community.[85] These are borderline conditions. The choice of argumentation is governed therefore by various factors; the model is not static and may be subject to transformations. The array of tracks along which reasoning may proceed is wide. However, it is key from that point of view to know what international law is for the international community. Information on this subject is furnished by the observation of behaviours and attitudes. The essence of a source of inter-

[84] *Ibidem*, p. 5.
[85] See Ch. Perelman, *op. cit.*, p. 232.

national law in that sense would boil down to a reading of the essence of the legal order itself. In an effort not to cross the limits of the international legal order and simultaneously not to distort its legal nature, the judge chooses the appropriate directives on interpretation and argumentative chains to settle the matter laid before him. In ruling on the basis of the law, he expounds an understanding of the law compatible with the essence of the legal order. Where the essence of the international legal order lies depends on the expectations of the international community which accepts the applicability of specific principles governing the mutual relations between the members of that community. Therefore, the understanding of the essence of international law, which has an impact on the essence of a source of international law and, as a result, on determining a number of specific attitudes and behaviours in judges may change in time and space. The points of emphasis might be distributed differently here. It is important for the essence to be identified in a specific proceeding in such a shape and form as would be acceptable in a given time and space. Hence, the understanding of sovereignty as a building block of international law, though crucial and indispensable, may in specific court proceedings be read in a slightly different manner to ensure a more nuanced understanding and significance in order to cater for the requirements of a specific legal dispute to be settled[86].

The diversity and apparent contradiction of certain decisions awarded by international court poses no impediment in itself to the correct functioning of the system of international law in so far as it is ensured each time that each individual reasoning retains a relationship with the properly understood essence of the international order considered for the purpose of a specific dispute. From that perspective, it would be worth considering the sense and significance of judgments in which the courts made reference to the question of premises of state responsibility (exercise of control in the Nicaragua (ICJ) or Tadić (the Yugoslav tribunal) cases)[87]. The issues related to the jurisdictional immunity of a state and its representative may be considered in a similar spirit[88]. In the light of this relativization, the systemic requirement of certainty as to the law would be identical with the need for preserving correct references to the essence of international law, in practical terms meaning that the adoption of correct assumptions and applying appropriate systemic interpretations of terms. The sense of equity and justice will be preserved

[86] See ICJ judgment in the matter of *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia *v*. Singapore), ICJ Reports 2008, pp. 31-40, par. 46-80.

[87] See the argumentation on this subject in the judgment in the matter of *Prosecutor v. Duko Tadić*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, The Appeals Chamber, 15 July 1999, p. 40-62, par. 99-145; http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf, 15 January 2016.

[88] For example, ICJ judgments in the matters of *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo *v*. Belgium), Judgment, ICJ Reports 2002, p. 3 and following as well as *Jurisdictional Immunities of the State* (Germany *v*. Italy : Greece intervening), Judgment, ICJ Reports 2012, p. 99 and following.

if individual proceedings apply references to the essence of international law understood in the context of a specific case. As a result, the understanding of the essence may change depending the nature of the case, whereas certainty of law will remain intact to the extent that it can be shown that in that proceeding the essence formed a point of reference for elaborating the relevant argumentation to allow the judge to infer the sought normative basis for the resolution of the case before him from the essence of international law. The potential multiplicity of the ways in which the meaning of the essence of international law can be determined is by no means at odds with the sense of justice and certainty of law nor does it rule out the possibility that the judge in a case similar or identical as to subject-matter will be bound by the argumentation used, if not formally by the judgment itself, and the normative conclusion following from it as long as the case being heard is of a particular nature.

Therefore, in connection with the above statement, it should be said that the use of the potential of the essence of international law is a standing direction and a necessary component of each inference, intended to resolve the matter on the basis of the law. The essence of the international legal order consists of a set of systemic determinants. These have specific meanings which may be subject to the process of abstraction. However, owing to the need for their systemic use and the overlapping of disputes under international law, it is frequently, if not always, true that the need for their *ad-hoc* use in a form relativized to the specific circumstances of contentious issues and other legal principles applicable to a given case. The following question may arise: does such a view of the problem allow at all for certain argumentative chains to develop with the use of notional elements comprising the essence of the international legal order, whose full range could be applied in a simple manner in later proceedings. Thanks to the assumed character and multi-level form of international disputes and the underlying legal issues, this is impossible in practice. That is why it is far more frequently the case that only certain fragments of conclusions are later exploited and juxtaposed to complement each other, provided that the particular case reproduces the essence of the source of international law. The requirement for the judge to correctly reproduce the essence of the source of international law is a fixed component of inference. The substance of the essence, however, is susceptible of transformation. Still, it is important that each emerging solution can be inscribed into the systemic nature of international law.

The concern for ensuring legal certainty and a degree of flexibility at the same time is in no way at odds with the significance of lasting reference to those components of reasoning which reflect the essence of international law. The essence of a source of international law is defined in the "here and now" formula; therefore, it can evolve, but whether such evolution is effective depends on whether international law evolves in line with

its systemic characteristics. In other words, it is impossible for the international legal order to evolve in violation of its systemic characteristics. Consequently, the judge is free to take account of the aspect of evolution and change without undermining equitability and justice, as within the meaning of international law, the evolution and change, which conform to the acceptability criterion and thereby that of equitability and justice, are only that change and that evolution which take place in compliance with the systemic nature of international law. It may be claimed again with Ludwik Ehrlich that one of the characteristics is respect for the principle of good faith. Its rejection would mean the emergence of a new phenomenon which would not deserve to be labelled as international public law[89]. In that sense, evolution may also affect the essence of the source of international law.

Similarly, the above-mentioned multiplication of international judicature or the process of fragmentation of law does not pose a threat to the significance of a judicial precedent interpreted in that manner. For regardless of the jurisdictional bases of individual international court or their specialization, the link between their activities with the requirement of realizing equitability by means of reproducing the essence of a source of international law in the judgment is provided by the concept of general principles of international law. These are the common denominator for the entire legal order regardless of the nature of the international court, including its subject-matter jurisdiction reserved for a specific subsystem of international law. In this way, the concept of general principles of international law would cumulate within itself all those components of reasoning which are capable of ensuring – in the quickest and complete manner – that judicial reasoning reproduces the essence of a source of international law. This has the effect of consolidating case-law with the understanding of general principles of international law. At the same time, an international judge through reference to general principles of law gives a guarantee for a consistent understanding of international law through a correct reading of the essence of a source of international law, thereby providing a wider scope for the application of a specific precedent formula within the meaning as set out hereinabove.

In the light of the above, the judge's freedom to evaluate applicable law forming the basis upon which to render a judgment may not overstep the limit marked by the systemic characteristics of the international legal order. In that sense, Judge Guillaume is right in claiming that an award may not be arbitrary[90]. Guillaume says that each system needs a minimum of certainty, that in similar cases the court will rule in a manner similar or identical as to the essence (source) but not necessarily as to the letter. This need may

[89] L. Ehrlich, *op. cit.*, p. 15.
[90] G. Guillaume, *The Use of Precedent …*, p. 6.

be identified with a systemic requirement. The requirement is not a phenomenon external to international law but its immanent feature. It will not be going too far to recognize this need as being expressive one of the general principles of international law. Its practical application means that the rule of precedent binding upon the judge within the established meaning follows from a general principle of international law and its fundamental systemic role compels references to a number of further general principles of international law. This chain of reasoning brings the judge closer to reproducing the essence of a source of international law.

13. Conclusions. A model of reasoning deriving international law from international court judgments and general principles of international law

A. The judgment (award) of a court (tribunal) as a source of international law

To sum up the previous thoughts on the significance (essence) of general principles of (international) law and awards of international courts and tribunals in the context of determining the essence of a source of international law, related directly to the nature of international law, it is necessary to propose the appropriate components allowing for the construction of a model of reasoning. The emerging doubts as to the existence and understanding of a norm, including a general principle of law, eventually give rise to the need for advocating a specific vision of the nature of the legal order. In this case, the key role is to be played by the judge. He is charged with the task of reading the essence of international law, yielding a specific understanding of the essence of a source of international law. Apart from the considerations of the formal role of precedent in international law, it seems that the judge's core mission is fundamentally to strive in the course of his judicial duties to perform his tasks and functions to establish a systemically acceptable normative value which is a component of further general principles. Judicial reasoning is the source from which follow the contentions that shape these principles. They can be systemically verified by the subjects of international law. However, logical agility and rhetorical persuasion in a judicial pronouncement may play a decisive role. The award of an international court may form a source of international law and so it is law-forming in nature in so far as it defines in a systemically pertinent way the substances and forms characterizing general principles of law as a vehicle for values which underlie the norms or their further development derived inferentially in accordance with the essence of the international legal order.

The essence of international law lies in the sum total of its constituent norms, taking into account the factor thanks to which human pronouncements have a *per se* tendency

to put themselves in a system-like order, which gives rise to further normative consequences. In consideration of the above meaning, the source of international law lies in the mentioned factor. That factor determines the existence, applicability and meaning of a norm of international law. The practical significance of the essence of a source is reduced at a critical moment to the adoption by a judge of such a combination of reasoning and interactions as not lead to paradoxes undermining the consistency of the system or disrupting the sense of certainty of law. It seems that within the boundaries delimited by that expectation lies the acceptance of the potential multiplicity, diversity and somewhat surprising mutability of judicial attitudes, methods of interpretation or final conclusions. What joins all potential solutions that could be proposed under a particular set of circumstances is their capacity for systemic adaptation. Relating the surveyed judicial attitude to the efforts to determine the essence of a source of international law, it should be said that the added value being discussed is determined to a large degree by the judge's labour. Admittedly, the value is conditioned in an objectified way by the characteristics of the system itself, as its essence gives rise to the consequences which combine to create the value[91]. However, in practice, thanks to the human dimension of the application of law, the role of the judge is inestimable. In the event of a dispute, especially in the so-called hard case condition, or borderline situations involving the need for reference to prime elements forming the essence of a given legal order, the judge makes a construal of the legal order and its individual constituent ingredients. All these efforts combine to outline a system consisting of norms affirmed by the intent of subjects, norms which exist but which are, for the purposes of a particular case, read in the context of other norms, added norms derived from the essence of a systemic organization. It is up to the judge's discretion to indicate the legal bases for dispute resolution in a manner that is acceptable under international law in order to further organize and develop it in line with its essence. If these systemically determined limits are not crossed, the subsequent judgments should embody a lasting or objectively verifiable in the long term and confirming the understanding of a given norm. When the limit is overstepped, the resolution must be systemically rejected, sooner or later, due to its inadequacy in relation to the basic determinants of the international legal order. The essence of a source of international law lies in its systemic

[91] B. Cheng, *On the Nature and Sources of International Law*, (in:) B. Cheng (ed.), *International Law: Teaching and Practice*, London, Stevens and Sons 1982, p. 218: "Secondly, to say that international law depends on the consent of States does not mean that every rule of international law has to have the active consent of every State, and that before a rule can be applied to a State, it must be established first that the latter has previously consented to it". J. I. Charney, International Lawmaking – Article 38 of the ICJ Statute Reconsidered, (in:) J. Delbruck (ed.), *New Trends in International Lawmaking – International „Legislation" in the Public Interest*, Berlin 1997, p. 177: "A review of the traditional doctrine of sources demonstrates, however, that, even historically, sovereign state consent was not as salient for all sources of international law as many assume".

organization. The existence, applicability and meaning of a specific norm is confirmed by the appropriate judicial activity. It is of no importance whether judges' attitudes are expressed through *judicial activis*m or *judicial restraint*. Neither judicial activism and judicial abstention from adopting an active attitude do not by themselves determine their role in the reading of the essence of the international legal order. Both active and passive attitudes may be interpreted as compatible with the scope of judicial freedom or violating that freedom by positing the existence, applicability or meaning of a norm despite the essence of the legal order, of which that order is composed.

Even if the source of applicability of a norm is state consent, then a reading of its meaning within the limits of the system is the responsibility of the judge. In extreme cases, this may mean deriving further norms from the absence of other, confirmed norms from the system. However, the system is not created by judges, who merely navigate within or mark its limits, with the decisive vote being cast by the original sovereign subjects. The norm as a component of the system emerges in connection with subjects of international law expressing their will. Its application under amicable conditions clears any doubts as to its applicability or meaning and shortens the entire course of reasoning related to the essence of a source. The existence of a norm depends on the intent of the subjects, but its normative sense is the result of belonging to the system. Intent is a necessary, causative component but it is insufficient from the perspective of complete normativity. The norm applies through the system. That is why in an extreme case the norm may exist but its normative sense may be insignificant or none (*desuetudo*), which is tantamount to a fading of the norm.

Because the legal system is a set of norms with systemic organizing value, then the key task is to determine the essence of that value, as it gives an idea of the essence of the source and nature of international law. The role of the judge who reads norms in relation to the essence of their source and the nature of the system which they form is fundamental in that regard. The reading of the essence is a consequence of judicial reasoning, while the reasoning itself is delimited by the acceptability of the judgment under international law. What is acceptable is decided eventually by states, i.e. the only subjects of international law endowed with sovereignty. The decision makes an impact in turn on the contents of individual norms. The content of the norms determines the way in which they are organized. The way in which norms are organized within the system is consequent to the essence of a source of international law. Its proper reading is a task for the judge. In this way, the entire process is reciprocal.

The above systemic role is fulfilled by the judge through the **institution of legal (substantial) precedent**. Understanding precedent within the meaning as hereinabove established should in no way be associated with the legislative function. Both judicial

activism and judicial restraint from extensive action must have regard to the systemic limitations. The boundaries of the international legal order determine the role of the judge and scope of his actions. The judge's reference of an earlier award made in his own court or a court with a specific jurisdiction will produce lasting legal effects in terms of the international legal order only in so far as this correctly renders the systemic characteristics of international law, including mainly the essence of a source of international law. In that sense, judicial reference to an earlier award in the form of a quasi-precedent does not fulfil the legislative function. The judge does not create a norm for a specific case but reads its contents out of elements provided to him by the system of international law. A correct reading of the norm determines its strength and allows for re-use in subsequent proceedings. The notion of consistency of jurisprudence[92] should not be understood as a call to respect a separate principle expressing a distinctive substance in isolation from the meanings here discussed. This is a judicial formulation whose normative sense is gained only in connection with the above meaning attributed to general principles and case-law in relation to determining the essence of a source of international law. Consistency of jurisprudence does not express an autonomous general principle of consistency *per se*. The consistency of jurisprudence has a deeper meaning only when it reflects the nature of its source in a way consistent with the systemic characteristics of international law. References to earlier awards may not effectively safeguard international law when separated from these characteristics. The consistency and uniformity of jurisprudence are a systemically acceptable value, a value which expands and organizes the system of international law only provided that the essence of a source of international law is correctly rendered in the court judgments. Otherwise, the consistency of jurisprudence whose value would be expressed only in constancy seen in isolation from the essence of the international legal order would be a source of lasting inconsistency, i.e. a state which in the long term would have to reject such jurisprudence as an element unable to organize the international legal order in a proper (acceptable) way.

It should be underlined that the role of precedent within the meaning as established hereinabove does not have to be limited by the jurisdictional basis of the operation of a specific court[93]. This means that ICJ judges are not particularly entitled nor systemically obliged to stick firmly to their earlier decisions. It should be noted that the value of judicial rulings depends solely on the subject-matter and personal pertinence of reference to elements of legal reasoning applied in any of the earlier judgments of an international court. Pertinence is defined in line with the nature of the international

[92] See a joint declaration by seven judges of the ICJ in the matter of Kosovo – *Legality of Use of Force* (Serbia and Montenegro *v*. Portugal), Preliminary Objections, Judgment, ICJ Reports 2004, p. 1208.

[93] See G. Guillaume, *The Use of Precedent* ..., p. 7 and following.

legal order, in particular the essence of a source of international law. So, due to jurisdictional limitations, the desired value is gained by those legal pronouncements which remain in concord with the essence. The jurisdictional basis for a specific court to take action determines only its competence to issue a binding decision in the matter it is seized of. If the matter pertains to international law, the reasoning that leads to its resolution pursuant to international law must be informed by such a circumstance. That is why it seems that an ICJ judge is obliged to take advantage in an on-going proceeding of certain elements of reasoning applied, for example, in a proceeding before the competent organs of WTO if only the reasoning concerns the personal or subject-matter aspects considered by the ICJ, whose application requires a higher degree of consistency. In that sense, the ICJ and any other international court are bound by this reasoning stemming from successive courts, as their rejection (by applying different inference and conclusions following therefrom) or omission logically forestall a growing inconsistency. An example may be provided by the understanding of state liability related to overall or effective control over individuals whose actions or omissions give rise to liability[94]. When allowances are made for divergent or mutually exclusive conclusions, this situation is contrary to the systemic organization of the norms of international law discussed earlier. A natural state of the system is an intra-systemic effort to bring the constituent elements under control rather than break apart and atomize them. The judge in expounding his reasoning contributes to a lasting resolution of the dispute provided that consistency with the natural state of the legal system is maintained. This is the only solution to guarantee the systemic acceptability of the award.

The consequences of waiving a precedent should be outlined against this backdrop, within the meaning as established hereinabove, following from an award of a specific international court[95]. The systemic justification of this is quite simple. The court wishes to bring its reasoning into line with the essence of the international legal order, including mainly the essence of a source regardless of whether this constitutes a precedent or waiver thereof in a particular dispute. Both solutions are equally valid in systemic terms. Consistency and predictability related to rendering the essence of international law rather than just reproducing it half-automatically for each subsequent case. That is why, as far as a fixed jurisprudential strategy of an international court is concerned, this may consist of both judgments supporting a prior precedent and those which negate earlier decisions, i.e. new precedents. The common denominator is represented by a search for a systemically acceptable solution, for only an outcome of that sort is capable of making

[94] See A. Cassese, *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, "European Journal of International Law", vol. 18 (2007), p. 649 and following.

[95] See G. Guillaume, *The Use of Precedent …*, p. 10.

an impact on the attitudes of the contesting parties, or subjects of international law. The jurisprudential strategy of the court is perpetuated in its tendency and effect of rendering the essence of international law, including that of its source[96]. Therefore, waiving a previous award or jurisprudential strategy is merely a way of finding a fair resolution of a legal matter in line with the essence construed for a specific dispute, having regard to those systemic ramifications of international law which determine that essence. The court on announcing its decision may declare its wish to follow its previous rulings in the cases that may happen to come within its purview[97]. This does not constitute a precedent within the meaning considered herein. It may give rise to an obligation binding the court internally, effective also with respect to the parties in subsequent proceedings, particularly where the parties may happen to be the same persons. However, the value of such decisions in terms of a substantial precedent relies on the judges correctly rendering the essence of a source of international law rather than their assurances that they will be guided by their previous pronouncements in the future. The situation in question should not be construed as a possibility of a judicial organ ruling at first instance with the awards issued at second instance[98]. The systemic purpose is to resolve the matter in conformity with all systemic ramifications, including a systemically acceptable rendering of the essence of a source of international law. A court appointed by subjects of international law does not become autonomous in respect of the fundamental goals it is intended to aim

[96] G. Guillaume (*The Use of Precedent …*, p. 11) lists ICJ awards to exemplify a change in its jurisprudential strategy in international law, here illustrated by the principles of delimitation of maritime areas: *North Sea Continental Shelf* (Judgment) [1969] ICJ Report 3, 53, p. 101; *Continental Shelf* (Tunisia *v*. Libyan Arab Jamahiriya) (Judgment) [1982] ICJ Report 18; *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Judgment) [1993] ICJ Report 38; *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Judgment) [1984] ICJ Report 299-300, p. 112; *Continental Shelf* (Libyan Arab Jamahiriya *v*. Malta) (Judgment) [1985] ICJ Report 13.

[97] Cf. Article 21, par. 2 of the Roman Statue of the International Criminal Court: "The Court may apply principles and rules of law as interpreted in its previous decisions". Likewise, the appellate body of WTO: "Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring „security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case" (United States – Final Anti-Dumping Measures on Stainless Steel from Mexico), par. 156-158, 160-162, WT/DS344/AB/R). See also G. J. Spak, G. Kapterian, *The World Trade Organization*, (in:) Ch. Giorgetti (ed.), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*, Martinus Nijhoff Publishers 2012, p. 143-147.

[98] G. Guillaume (*The Use of Precedent*…, p. 12) quotes Article 30 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which stipulates that where one of the chambers wishes to depart from the Court's jurisprudential strategy, or where this is necessitated by important points of interpretation, the matter should be referred to the Grand Chamber ("Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects").

for. This is the reason for numerous problems related to evaluating the role of the EU Court of Justice which acting as an international court and despite having a broad range of competence which prevent a factual assessment of its work as an international court, should strive to constantly reflect the essence of a source of international law, while also working to maintain a correctly defined relationship between a source of international law and a source of EU law. So, any tasks outside its fundamental function are secondary and subordinate. The role of a quasi-constitutional court, if seen as essential, would by definition prevent a correct reading of the essence of a source of international law which also contributes to the essence of EU law.

The argument concerned principally the relationship between judgments delivered by permanent international courts with the attempt to address the questions of establishing the essence of a source of international law. It should be considered whether the present conclusions could be safely related to the awards of arbitration courts. With regard to the adopted assumptions and the nature of conclusions following therefrom, the answer seems obvious. Despite differences of opinion relating to the construction of permanent international courts and international arbitration, in particular in forms other than state arbitration[99], a uniform approach to the essence of a source of international law seems fully justified. This is because separate bases for operation, methods of appointing the bench or determination of legal bases for delivering judgments are of no importance to the connection between the award of an arbitration tribunal and the essence of a source of international law through the institution of substantial precedent. To the extent that a judgment of an arbitration court operates in the public domain, it may produce effects proper to a precedent within the meaning as herein established, once specific conditions are met. If the arbitral award correctly reflects the respective constituent elements of the essence of a source of international law, then the jurisdiction of individual arbitration tribunals or the legal bases defined for them are of no importance to the essence. Such an award should produce the effect of a substantial precedent provided the essence is reflected in it. The point is to contribute to the erection of a consistent picture of the system of international law through reasoning contained in the arbitral awards referring in parts to the essence of a source of international law, rather than simply ensure consistency between the awards of individual arbitration courts. This kind of consistency is not a value in itself. It emerges as a secondary consequence of consistency in the international legal order. A practical conclusion follows from this. The arbitrator is systemically obliged to construe the rules of law established in a compromise agreement in accordance with the determinants of a correct construal of the essence of a source of international law, following from earlier judicial decisions by arbitration courts, to the extent that they are adequate

[99] See *ibidem*, p. 14 and following

as to subject-matter in that respect. In that sense, substantial precedent as discussed here is present even though its constituent elements in the case of international arbitration are strongly decentralized and scattered between individual benches.

It should be stressed that construing a precedent through its consistency with the essence of a source of international law may to some extent resemble a hermeneutic spiral. The bonding of reasoning with the essence of a source and thereby the formation of true precedents in substantive law may only take place by successive approximations. In other words, a great number of decisions delivered by international or arbitration courts and tribunals may precede precedent-like resolutions. In the meantime, a great number of decisions may emerge which only seemingly follow the essence. Only time will tell which of them are ineffective as substantial precedents and contribute no lasting value to the system.

It should be specified that an international court decision in terms of its impact on the sources of international law may be evaluated in two ways. Firstly, a decision may provide indirect information on the formal sources of international law evaluated from the standpoint of research on the essence of a source of international law. Secondly and most importantly, a judgment delivered by an international court may be regarded as providing information on the essence of a source of international law itself but not necessarily useful as an argument focusing on aspects of international law norms being expressed formally. Of course, it could be useful in that respect. At that point, judicial reasoning becomes rounded off and places itself within a string of inferences ensuring the systemic consistency of international law, including those identical to the essence of a source of international law. The second approach is decisive for an assessment of a given judgment's precedential importance. It is inadequate to base the process of determining the essence of a source of international law based solely on the first approach.

B. The systemic role of general principles of international law

A tool which helps an international court to reflect the essence of a source of international law in its case-law, thereby also to produce the consequences of a substantial (normative) precedent, is provided by general principles of international law. Seen in this light, they constitute a systemic value. Also, some of them are vehicles for values which compel an explanation of the relation between the sphere of values and the consent-based nature of the international legal order. A certain paradox emerges as a result of an evaluative understanding of the essence of general principles of international law. It is seen on one hand in the need for salvaging higher-order values and on the other, in the atomization of the international legal order and weakening of its unambiguity, intelligibility and acceptability by facing subjects of international law with having to respond to questions about the point of taking their consent as the ultimate criterion of nor-

mativity and confronting them with the contention that their objectively expressed intent is not the sole source of rights and obligations.

However, there does seem to be a way out of this predicament. It is to read the essence of international law in such a way as to frame the legal order in a manner which reconciles apparently divergent justifications and to establish the meaning of a source of international law that is compatible with the so conceived essence of the international legal order. According to Hersch Lauterpacht, international law is comprised of both norms recognized and accepted in various ways by subjects of international law as well as legal norms arising from its very essence or nature[100]. Thus, the system of international law would be constructed partially from norms arising from a justification under positive law and partially by norms which are systemically necessary but not always describable by simple organizational rules[101]. This is how the question arises about the point of the essence of international law which is a source in itself from which norms forming the system of international law arise. One of the possible explanations is by acknowledging that organizing norms into a legal system gives rise to a series of systemic criteria for the operation of a given legal order, which determine the existence of a series of norms and without which no legal system would exist. In such a case, the nature of international law would be reduced to its special systemic form. Norms in every legal order tend to organize themselves internally in a way compatible with an imperative reflecting the essence of that order. Legal norms are incapable of operating outside the system. The natural cost of the norms functioning within the limits of the system is the acceptance of a series of systemic consequences of the existence of law in such a form. Of course, the manner in which norms are organized within the limits of the legal system does contain certain constants and variables that reflect its normative nature. Therefore, in such a view on the problem, international law would consist of norms consequent to the consent of subjects of law and norms resulting from a systemic organization of international law, without which, firstly, the system itself would not be able to exist, operate or develop and, secondly, without which the normative effect of the concerned

[100] H. Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration*, The Lawbook Exchange, Ltd., New Jersey 2002, p. 203.

[101] Cf. M. N. S. Sellers, *Republican Principles in International Law. The Fundamental Requirements of a Just World Order*, Palgrave Macmillan 2006, p. 44: "The primary source of international law has always been the law of nature, applied to nations. Conventions, custom, legal principles, and the opinions of publicists all seek to articulate preexisting realities, or new elaborations of what justice requires, made salient by historical circumstances. […] To justify international law its proponents have always assumed an underlying community of humanity. Grotius and Vattel supposed that the world's peoples would act through states. But states are means towards the realization of a just society, not ends in themselves". Also J. A. Vos, *op. cit.*, p. 134: "Correspondingly, the members of international society are situated as having a power to act, but not an unlimited freedom to act, by virtue of which they act so as to constitute (the common good of) international society pursuant to practical reasoning".

parties' consent would be cancelled out. The law is a system. When we talk about a system we relate this concept to norms existing and organized in accordance with the system's nature. On the other hand, the nature of international law cannot be analysed without reference to consent as the basic, necessary but incomplete source of normativity. The key aspect is that each normativity is determined by its dependence on the system. The normativity of international law, which arises from the consent of subjects, depends on the system; for without any systemic frames or references, the consent of subjects would be powerless to produce effects, consequences; it would be an empty set. That is why, at the level where successive norms are shown to be applicable, the systemic consequences are unavoidable. The law as such is unable to operate outside the limits of the system. The remaining open question is that of determining the value which arises from the recognition that the essence of law, including that of international law, lies in its systemic nature. The essence is comprised of certain constants, which are characteristic of each legal system, and variables which reflect the nature of a given legal system. In the case of international law, the constant is represented, for example, by normative consequences arising from the need to apply the rules of interpretation in general or rules of inference as such. The variables would include contents, entitlements and directions arising from the application of specific directives on interpreting or rules of inference.

This systemic organization of norms is guaranteed, among others, by principles of international law. They are a systemic necessity, which is formal aspect. On the other hand, in the substantive sphere, they express a series of systemically crucial values. For the system to be operational, it has to be evaluated. This valuation may theoretically be two-fold. If a general principle is derived directly from and within the limits of a given legal system, it reflects values interpreted intra-systemically. This is called justice or equity within the meaning of and for the purposes of international law, coordinated or systemically relativized with all shortages which may appear when this understanding of equity is juxtaposed against an abstract notion which does not relate directly to international law. Such an understanding of the systemic role of the international legal order would be a source of all directives organizing the international legal order, including issues related to interpreting the essence of a source of international law, the form and meaning of general principles. It would act as the beginning and end of all normativity within the limits of international law. General principles of international law would be a derivative of the values construed from the level of the system of international law by fulfilling all the typical roles and functions which are associated with the application of general principles of law. However, if we accept that international law forms part of a larger order, then – at the level of application of specific norms underlain by the consent of subjects of international law, then it might turn out that from the perspective

of a general sense of justice or equity, not every norm that has been agreed upon by the subjects of international law corresponds to this model. Then, the need would arise for a joint construal of such norms with desirable values which could be represented within the limits of international law by means of general principles. In that sense, it would be possible that not all norms of international law seen from that perspective are fair or equitable. Hence, the need for "equitable" adjustment by means of general principles that bring with it a store of values situated beyond the limits of international law. Normative added value would be embodied in the sum total of borrowed general principles operating as a safety mechanism and derivative of these values. The related danger would lie in the ways of interpreting desirable values and thereby in the ways of including within the limits of international law of successive general principles. The resource would have to be verified, systemically indispensable and acceptable.

Each legal system's essence generates a need for realizing good and equitable things[102]. The point of reference is the proper context comprised of the community within which the law is to operate. These values can be found either inside or outside the system's limits. These needs are realized at the level of legislating, interpreting and applying of the law by the subjects concerned. Erroneous approaches are verified by means of the effectiveness principle. So, in a long-term perspective, the ability to survive is only found in a normative situation which is supported by a dose of effectiveness necessary within the meaning of international law. To the extent that in the first, intra-systemic case, the form and substance of general rules would follow from the sum total of constituent norms comprising the international legal order, the second understanding going beyond the limits of the system reduces the search for values extending beyond consensual justification to individual decisions and resolutions agreed upon by the subjects and judges aiming to strengthen the norms of international law by lending them support in the sphere of values necessary from the point of view of decision-makers to create or maintain a sense of equitability of justice. The risk inherent in this approach is mainly related to the fact that sometimes an objective, systemically adequate approach is replaced by subjective emotions felt by the individual subjects or judges, which are initially out of step with the assumptions of the international legal order. This approach would result in a temporary dissonance seen in the existence of normative situations not supported by a dose of systemic acceptability. A lasting lack of acceptability means a misreading of the essence of the international legal order. At times, the adjustment may be time-consuming although it is firm as long as it conforms to the nature of international law and its source.

[102] *Ius est ars boni et aequi* (D. 1,1,1).

The essence of international law is embodied in its systemic nature. The systemic nature entails the use of the notion of general principles of law. The general principles of international law organize international law by means of values inherent in them. The award of an international court becomes a component of the international legal order if it is its necessary complement resulting from the need for realizing systemic justice interpreted in accord with the nature of international law.3 In that sense, a judgment of an international court can operate as a precedent.