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Questionnaire on the subject of general principles

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Introduction

Article 38, paragraph 1, c) of the Statute of the International Court of Justice explicitly recognises “the general principles of law recognised by civilised nations” as a source of international law. It is widely acknowledged that they apply to international civil service disputes.ⁱ Marcelo Vázquez-Bermúdez, Special Rapporteur of the International Law Commission, writing in his “First report on general principles of law”, noted the distinction made in general international law between “general principles of law derived from national legal systems” and “general principles of law formed within the international legal system”.ⁱⁱ The former are typically referred to as “general principles of law” and the latter as “general principles of international law”.ⁱⁱⁱ For the sake of clarity, the term “general principles” will be used below to denote all such principles.

As a source of law, however, general principles raise many questions, not least because they are not written down. In effect, “*What the sources of law are, cannot be stated, it can only be discussed*”^{iv} and as Alain Pellet once remarked, “[t]his is even truer for general principles of law than for all other sources of the law of nations: they are basically what every lawyer carries within themselves.”^v

In international civil service law, the applicable written law varies from one organisation to another. While it may be extensive, it is not exhaustive. Yet “the law, like nature, abhors a vacuum”.^{vi} General principles can therefore play a key role in bridging gaps in written law and in shedding light on the meaning of provisions. At the same time, some general principles are reflected in international human rights conventions which are not usually applicable as such to international organisations. That raises the question of the relationship between these general principles – which are ultimately the guardians of human dignity, an inalienable right – and law derived from the instrument establishing the organisation.

A very helpful study on the general principles according to the Administrative Tribunal of the ILO (*Les principes généraux selon le Tribunal administratif de l'O.I.T.*) has already been carried out and published but it essentially concerns only the case law of a single tribunal;^{vii} another focuses on procedural rights, including in the light of the relevant general principles.^{viii} Although the general principles “pre-existed the body of work developed by the courts”^{ix} insofar as they must have been “recognised”,^x the courts still have a special responsibility to identify general principles and assess their applicability and scope. For these reasons, the Administrative Tribunal of the Council of Europe (ATCE) wishes to take the opportunity afforded by its 60th

anniversary to elucidate in a broader and more cross-cutting way the role played by general principles in the case law of international administrative tribunals (IATs).

Marcelo Vázquez-Bermúdez has done a great deal of work in his reports to the United Nations International Law Commission.^{xi} While we cannot aspire to such comprehensive research as that in the run-up to the 60th anniversary of the ATCE, the findings of these reports merit – at least some – scrutiny in international civil service law, too. To enable us to conduct this study, your tribunal is kindly requested to reply to the questionnaire below, indicating any case law from your tribunal that might be relevant to illustrate your answer.

I. Identification methods

- 1) On what legal basis (written rule, implied power, etc.) does your tribunal recognise the applicability of general principles?
- 2) Does your tribunal make a distinction between “general principles of law derived from national legal systems” and “general principles of law formed within the international legal system”, and perhaps other principles (e.g. the general principles of international civil service law, etc.)? If so, which ones, for what reason(s) and what are the implications?
- 3) How does your tribunal go about identifying a general principle?
 - a. By reference to national law? If so, which national law? Does your tribunal do a comparative law analysis, even if it is only a limited one? How are difficulties in translating legal concepts overcome?
 - b. By reference to your tribunal’s previous case law?
 - c. By reference to the case law of other international administrative tribunals? If so, which ones? Is this reference explicit in the judgments handed down or does your tribunal refer to such case law only when preparing judgments?
 - d. By explicit or implicit reference (please specify) to an international text, e.g. with regard to general principles relating to human rights? If so, which text(s)?
 - e. By some other method?

If more than one method is used, please number them in order of preference, if any.
- 4) Can your tribunal rely on a general principle *proprio motu*?

II. Relationship with other sources

- 5) What legal value does your tribunal attach to general principles in relation to the various types of secondary legislation produced by the organisation (decisions adopted by organs of the organisation, including organs composed of states - e.g. General Assembly of the United Nations - or representatives of states - e.g. the Committee of Ministers of the Council of Europe -), in relation to the instrument establishing the organisation and in relation to other sources of international law? Why?
- 6) Has your tribunal ever agreed to examine, if only by way of an objection, the legality of an act adopted by a body composed of states in relation to a general principle? If so, what were the implications, both legally (for the instrument in question) and politically (within the organisation)?
- 7) Could you give at least one example of a general principle in procedural matters, one example of a general principle in substantive matters (e.g. the principle of independence, the principle recognising acquired/essential rights, etc.) and one

example of a general principle in matters relating to human rights protection, regarding the status of the principle in the hierarchy of norms?

- 8) What function(s) does your tribunal assign to general principles? For example, are they intended to:
- fill gaps in written law?
 - facilitate the interpretation of written provisions, e.g. by interpreting written provisions in the light of general principles?
 - ensure substantive rule of law (*Rechtsstaatlichkeit*), for example pursuant to general principles relating to human rights, including within international organisations?
 - other?

III. Establishing the boundaries of principles

- 9) Where a general principle is applicable, how is it delimited? Have there been any cases where the general principle has been found to have been violated? Could you illustrate your answer, if applicable, with regard to the following areas:
- human rights principles;
 - procedural rights;
 - duty of care, i.e. positive obligations for the competent authority;
 - acquired/essential rights;
 - any other principle you wish to mention?

Thank you very much for your co-operation.

ⁱSee, for example, C. F. Amerasinghe, *The Law of the International Civil Service*, vol. 1, Oxford, Clarendon Press, 2nd ed. 1994, p. 151 s.; A. Plantey et F. Lorient, *Fonction publique internationale. Organisations mondiales et européennes*, Paris, CNRS éditions, 2005, p. 69 s.; G. Ullrich, *The Law of the International Civil Service. Institutional Law and Practice in International Organisations*, Berlin, Duncker & Humblot, 2018, p. 81 s.

ⁱⁱ UN, document A/CN.4/732, 5 April 2019, *First report on general principles of law*, § 22; §§ 188-253 and Draft conclusion 3.

ⁱⁱⁱ See, for example, H. Ascensio, “Principes généraux du droit”, *Répertoire de droit international*, February 2004, § 6, and the references cited therein.

^{iv} C. Parry, *The Sources and Evidences of International Law*, Manchester University Press, 1965, p. 27.

^v A. Pellet, *Recherche sur les principes généraux de droit en droit international public*, thesis defended at Paris II, 1974 (jury: S. Bastid, Chair, P. Reuter, M. Virally), p. 435.

^{vi} *Ibid.*, p. 1.

^{vii} L. Germond, *Les Principes généraux selon le Tribunal administratif de l'O.I.T.*, Paris, Pedone, 2009, 376 p.

^{viii} A.-M. Thévenot-Werner, *Le droit des agents internationaux à un recours effectif. Vers un droit commun de la procédure administrative internationale*, Leiden, Brill/Nijhoff, 2016, xxi-1405 p.

^{ix} H. Ascensio, op. cit., § 16.

^x ICJ Statute, Art. 38, paragraph 1, c).

^{xi} See documents A/CN.4/732, 5 April 2019, *First report on general principles of law*; A/CN.4/741, 9 April 2020, *Second report on general principles of law* and A/CN.4/753, 18 April 2022, *Third report on general principles of law*.