# What's Wrong with International Law?

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# Contents

CHAPTER 20

# Good Governance: A Principle of International Law

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## Introduction

In this contribution I want to show that international law is wrong when it ignores good governance as a principle of international law. The opinion that good governance is a principle of international law depends on the approach concerning international law in general, and the issue of principles of international law, in particular. The arguments for qualifying good governance as a principle, as a principle of law and as a principle of international law, need some further explanation. In an earlier work I argued that good governance constitutes a principle of law.[2] Due to their different legal roles and positions in national legal systems, there are indeed differences between the principles of national, domestic law and the principles of international law.[3] I also noticed the difference in German literature between "Grundregeln des Völkerrechts" and "Algemeine Rechtsgrundsatze."[4] The discussion here is, from my perspective, about good governance belonging to the second group of principles. In this article, I explore the meaning of the concept of good governance at a meta-conceptual level and the specification by the principle(s) of good governance in positive law. The topic of good governance as a principle of international law is very relevant, because it plays a role in many policy fields. In sources of international law and in decisions of international (judicial and dispute settlement) bodies we notice that these institutions are referring more and more to good governance principle(s). These sources are also important

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2 G.H. Addink, "Principles of Good Governance: Lessons from Administrative Law" in D.M. Curtin and Ramses A. Wessel (eds) *Good Governance and the European Union* (Intersentia, Antwerp-Oxford-New York: 2005) 21–48; G.H. Addink, *Good Governance: Concept and Context*, Chapter 1 (Oxford University Press, Oxford: 2015 forthcoming).

3 A. Cassese, *International Law* (Oxford University Press, Oxford: 2005) 46–64.

4 W. Graf Vitzthum (ed) *Völkerrecht* (De Gruyter Recht, Berlin: 2007) 33. „Grundregeln des Völkerrechts" which can be translated in basic rules of international law and "Algemeine Rechtsgrundsatze" in general principles of law.

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because based on these we find a better knowledge on and understanding of good governance as a principle of international law.

### *Interaction of Sources of (Inter)national Law*

We see, especially recently, that in the field of international law increasing attention is given to the interaction of different sources of international law, and especially to the interactions between international law and other fields of law. This complex synergy between the different sources of international law has very practical consequences.[5] A rather simple example at the procedural level can be found in international investment law. Investment treaties provide investors direct access to an international arbitral tribunal.[6] This is a major novelty in international law with respect to the fact that international law does not provide for such a mechanism. The use of the arbitration model is aimed at depoliticizing disputes, avoiding potential national court bias, and ensuring the advantages of confidentiality and effectiveness. Arbitral tribunals review state acts in the light of their investment treaties, and this review has been compared to a sort of administrative review. Authors postulate the existence of a global administrative space in which the strict dichotomy between domestic and international has largely broken down.[7] According to this theoretical framework, investor-state arbitration has been conceptualized as a global administrative law creature,[8] which impels states to conform to global administrative law principles and adopt principles of good governance.

### *An Instrumental and a Protection View on International Law*

Relevant is the way the concept of good governance is used by the different players in the field of international law. First this is achieved by introducing aspects of good governance in bilateral and unilateral treaties. This can be qualified as the more instrumental approach of international law.[9] Second,

5 M.A. Young (ed) *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, Cambridge: 2012); Christoph Schreuer *Sources of International Law: Scope and Application* Emirates Lecture Series 28 The Emirates Center for Strategic Studies and Research, 2000.

6 V. Vadi, *Culture Clash? Indigenous Heritage in International Economic Dispute*, 2013; http://www.cpsa-acsp.ca/papers-2013/Vadi.pdf.

7 N Krisch and B Kingsbury "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006) 17(1) *European Journal of International Law*.

8 G. van Harten and M. Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17 *European Journal of International Law* 121.

9 J. Wouters and C. Ryngaert, "Good Governance: Lessons from International Organizations" in D.M. Curtin and R.A. Wessel (eds) *Good Governance and the European Union* (Intersentia, Antwerp-Oxford-New York: 2005) 69–107.

there is the role of the international fora in controlling the implementation of these treaties by the member states and the protection of citizens. This is not confined to the context of human rights alone.[10] In relation to this situation I think the expression of the dichotomy of international law covers these two approaches in international law.[11] In literature the link between good governance and human rights seems obvious.[12] However, we can distinguish between the elements of human rights belonging to the principles of good governance and the right to good administration which is a specification of the right to good governance.[13] Within the international law context, due to the relevance of the unity of international law, these two approaches – the instrumental and the protection approach – should nevertheless be brought together again and allowed to interact.

### *Principle(s) of Good Governance in International Law from a Conceptual Perspective*

When we look at the development of the concept of good governance we can discern that, since the 1980s, international organizations have played and are still playing a vital role in this process. Such examples consist, particularly, of those international organizations that are active in the areas of development assistance, like the United Nations Development Programme, and in the field of public finance where especially the International Monetary Fund (IMF) and the World Bank are continuously playing a crucial role. These institutions have embraced the – at that moment – new creed of "good governance," as it was qualified in 2005 by Wouters and Ryngaert in their contribution to the book "Good Governance and the European Union."[14] The good governance concept is also

10 C. Forsyth et al. (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, Oxford: 2010). T. Zwart, *Good Governance as a Legal Concept with a Bite* (Paris: 2009) available at <www.sciencespo.fr/chaire-madp/sites/sciencespo.fr.chaire-madp/files/good_governance_as_a_legal_concept.pdf>.

11 I made a similar distinction in my (Dutch) publication: Goed Bestuur: een norm voor het bestuur of een recht voor de burger? (Good Governance: A Norm for the Administration or a Citizen's Right?), in G.H Addink et al. (eds) *Grensverleggend Bestuursrecht* (Kluwer, Alphen aan den Rijn: 2008) 3–25.

12 G.H. Addink et al. (eds) *Human Rights and Good Governance* (SIM, Utrecht: 2010) 15, 111–137.

13 Article 41 of the Treaty of Nice, which has had a treaty character ever since the Lisbon treaty has entered into force. See for the distinction between the terms "governance" and "administration": G.H. Addink, "Principles of Good Governance: Lessons from Administrative Law" in D.M. Curtin and Ramses A. Wessel (eds): *Good Governance and the European Union* (Intersentia, Antwerp-Oxford-New York: 2005) 28–30.

14 J. Wouters and C. Ryngaert, note 9.

linked to the functioning of international organizations in other publications as well. Furthermore, elements of good governance, like properness, transparency, participation, accountability and effectiveness can be found in several human rights treaties and declarations.[15]

I see important elements of the principles in decisions of international (judicial and dispute settlement) institutions like the International Court of Justice (ICJ), the East African Court of Justice (EACJ), the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACHR) and the World Trade Organization (WTO) Dispute Settlement Body. A few of them are discussed hereafter, but I would like to emphasize here already that the ECtHR extensively refers to the principle of good governance. As an example I quote here two central elements in one of the Court's decisions[16]

1. In the present case the State authorities, with a view to protecting the housing rights of others, corrected, what they considered to be, an erroneous interpretation of the law in force which occurred more than ten years earlier.
2. In this connection the Court reiterates the particular importance of the principle of "good governance." It requires that where an issue in the general interest is at stake, in particular when the matter affects fundamental human rights such as those involving property, the public authorities must act in good time and in an appropriate and above all consistent manner (see *Rysovskyy v. Ukraine*, no. 29979/04, §§ 70–71, 20 October 2011).

The use of the word "reiterate" in relation to the importance of the principle of good governance is very interesting. After that the Court concluded, as a general norm, as a general legal principle, that in situations where the public interest affects fundamental human rights, the public authorities must act: timely, appropriate and consistent.

Of course not all the courts and dispute settlement bodies use the same terminology but the concept of good governance can be recognized in the decisions of these (judicial and dispute settlement) bodies. For the International Court of Justice (ICJ) the use of the concept is incidental and with a focus on good administration, while the ECtHR uses the term "principle of good governance" rather frequently. The IACHR often refers to elements of good governance as laid down in international treaties. The WTO Dispute Settlement

15 G.H. Addink et al., note 12.

16 *Maksymenko and Gerasymenko vs Ukraine*, ECtHR May 16, 2013, no. 49317/07.

Body refers to the principle of effectiveness and the principle of legitimate expectations which both are principles of good governance.

Thus, the concept of good governance is present in the field of international law. The question is now: is good governance a principle of international law? I start with the (concept of) principles of international law and how these principles have been operationalized in positive international law and the discussions about the position of the principles of international law. Then I refer to the concept of good governance in international literature and in the practice of international law as mirrored in the instrumental, treaty approach, and in the protection, controlling approach of international law. Based on these two paragraphs I conclude: good governance is a principle of international law.

## Principles in International Law

### *Principles as a Source of International Law*

International law consists of the rules and principles of general application dealing with the conduct of States and international organizations in the international relations with one another, on the one hand, and with private individuals, minority groups and international companies on the other. The sources of international law are listed in Article 38 (1) of the Statute of the ICJ, which provides that the Court shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of rules of law. My focus here is on the qualification of principles of international law recognized by civilized nations. These are general principles that apply in all major legal systems. The reference to the principles as "general" signifies that, if rules were to be adapted from national, domestic law, they should be at a sufficient level of generality to encompass similar rules existing in many national systems. Principles of national, domestic law should be regarded as sources of inspiration rather than as sources of rules of direct application.[17]

17 *International Status of South-West Africa* (Advisory Opinion) [1950] International Court of Justice (ICJ) Reports 128 at 148.

### *Classical View on Principles of International Law*

From a more classical view on the qualification of the principles of international law, principles are usually invoked when no treaty provision or clear rule of customary law suffices. For that reason, principles are commonly understood as the third source of international law. It must be mentioned here that these principles need to be distinguished from the principles governing relations between states as these are set out in the UN General Assembly Resolution 2625. The principles of international law reflect the laws of most states. These principles are applied in different areas of international law such as those regarding the oceans, polar regions, airspace, outer space, global environment, global market, international crimes, terrorism, human rights and humanitarian intervention.

An important source of the principles of international law are those which were recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal in 1950, however these principles are also qualified as international customary law. These principles revolved around the prohibition of different types of crimes: against peace, war crimes and crimes against humanity. Important is that Article 38 (1) speaks about general principles "recognized" by states.

### *The Growing Importance of Principles of International Law*

The importance and the significance of general principles in the theory and practice of international law has developed since the second half of the last century because of the increased treaty-based and institutional relations between states. Also the ICJ speaks in the context of the principle of good faith as one of the basic principles governing the creation and performance of legal obligations.[18]

A few years ago a discussion was started in the doctrine under the title "the sources of law in transition" and with a special focus on the principles of international law.[19] One author wrote about the revision of general principles of international law. She wrote that the ambiguity that surrounds the interpretation of general principles of international law has resulted in a vivid dialogue. This concerns their legal nature and their use in contemporary judicial practice of domestic and international tribunals. Globalization and the ever-increasing complexity of international economics affected the position of general

18 *Nuclear Tests Cases* (*Australia v France; New Zealand v France*) [1974] ICJ Reports 253 at 268.

19 Maria Panezi "Sources of Law in Transition. Re-visiting General Principles of International Law" (2007) *Ancilla Iuris*, 66–79 available at <www.anci.ch/beitrag/principles>.

principles within the international legal system and resulted in their progressive consolidation in the area of international economic law. A similar line of thinking can be found in an article about international legal obligations in relation to good ocean governance.[20] Here we see in specific fields of international law there are developments which are relevant for the development of the general principles of international law. It is a kind of bottom up approach within the field of international law related to the principles of international law.

In the classical approach there is a preference for treaties and customary law over principles. This is perhaps because states wanted to avoid the unpredictability of the consequences that might arise. Four conditions are attached for the recognition of general principles of international law: (a) the principle must be general, (b) the principle, which is a norm, is neither a rule nor a general practice accepted as law, (c) chronologically, it must have already been recognized, (d) this recognition is attributed to civilized nations. Schlesinger defines General Principles as "a core of legal ideas which are common to all civilized systems."[21] But it is not a question of only ideas because (elements of) these ideas should be found in the practice of the states, that combination seems to be relevant.

### *Principles of International Law in Transition*

The approach of thinking about international law in transition and especially in the context of principles of international law can be found in a publication of 2008 of Christina Voigt.[22] Her approach concerning general principles is from three different directions or perspectives: (a) from acceptance, directly, in a high number of domestic legal systems from where they can be induced, (b) from acceptance directly in an international setting from where they can be deduced, and (c) from natural law arguments. All three arguments are based on a shared understanding that these general principles exist and what they imply based on an opinion juris communis. After that she analyses the different classifications of principles: fundamental principles, fall-back principles, dynamic principles or interpretation and conflict resolution principles. These classifications illustrate different functions of principles in the context of treaties and especially the dynamic element in international law. In her

20 Yen-Chiang Chang, International Legal Obligations in Relation to Good Ocean Governance, *Chinese Journal of International Law* (2010) 9 (3) 589–605.

21 R.B. Schlesinger "Research on the General Principles of Law Recognized by Civilized Nations"(1957) 51(4) *The American Journal of International Law* 734–739.

22 C. Voigt "The Role of General Principles in International Law and their Relationship to Treaty Law" (2008) 31 *RetfaerdArgang*, 2/121 3–25.

opinion general principles allow international law to grow and to respond to modern challenges.

There is suspicion towards general principles of international law in the narrow scope of these principles, but there are arguments for a broader and innovative approach. The first argument is that these principles create the possibility to introduce more international norms which clarify a direction of legal norms which that the states could or did not want to establish. The second argument is that the notion "civilized nations" implies a certain need for distance and objectivity in principles of international law. In the modern approach general principles of international law are not only filling gaps but they are also applying fundamental and conflict resolution notions. Due to these aspects, international law will become more dynamic and more linked to adequate responses which are needed for more and more globalized international problems.

## The Principles and Concept of Good Governance in International Law

During the nineties of the last century several articles on the principles and the concept of good governance in the context of specific policy topics were published. For instance the publications of Ginther[23] from 1995 about sustainable development and good governance and Bodansky[24] who wrote in 1999 about the legitimacy of international governance in the context of international environmental law are such examples. In 1995 there was the publication of Mutharika[25] about the African perspective on principles of good governance in relation to international law and in 1999 Pauly[26] wrote about good governance and bad policy in the context of international organizations. So we can conclude already at the end of the twentieth century that the concept has been applied in specific policy fields like environmental law and in the more general policy framework by the international organizations. The good

23 K. Ginther et al. (eds) *Sustainable Development and Good Governance* (Kluwer Academic, Boston: 1995).

24 D. Bodansky "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93(3) *American Journal of International Law* 596–624.

25 B. Mutharika, *One Africa, One Destiny: Towards Democracy, Good Governance and Development* (SAPES Trust, Harare: 1995).

26 L.W. Pauly "Good Governance and Bad Policy: The Perils of International Organizational Overextension" (1999) 6(4) *Review of International Political Economy* 401–424.

governance perspective has also been developed in the context of globalizing administrative law.[27]

### *Good Governance in International Organizations*

Wouters and Ryngaert wrote in their article that the twenty-first century could mark a turning point in the development of good governance by international organizations. They explain that the debate on good governance started in the 1980s, when the World Bank and the IMF stated that the growth and equitable development of many developing countries was frustrated by poorly functioning public sector institutions and weak governments. Then, these financial-economic institutions started to espouse and sometimes absorbed good governance claims as to their own functioning.[28] There are two tensions. The first was the restricted competence of these organizations to financial-economic aspects with respect to the broader scope of the concept of good governance. The second was the minimalistic economic approach of these institutions to good governance which was not accepted by the countries. After a description of good governance as used by other international organizations, it became clear that the concept was actually being used by many international organizations. The Organisation for Economic Co-operation and Development (OECD) found the following principles: respect for the rule of law, openness, transparency and accountability for democratic institutions, fairness and equity in dealing with citizens, efficient and effective services, clear, transparent and applicable laws and regulations, consistency and coherence in policy and high standards of ethical behaviour. These principles have become concrete in a tentative list of good governance requirements which have later been described by the World Bank, the IMF and the WTO.

Thus, good governance is increasingly being used by many international organizations. These organizations function in different contexts and settings, and their different uses of good governance developed accordingly with respect to the specific needs of the respective fields. The fields are much broader that the international development aid and international financial institutions. Also the OECD, WTO and UN use the concept of good governance, for example in the fields of social justice, sustainable development, deforestation, different aspects of environment policy and public health. I want to mention here a recent publication "International Legal Obligations in Relation to Good Ocean Governance,"[29] a

27 Daniel C. Esty "Good Governance at the Supranational Scale: Globalizing Administrative Law" (2006) 115 *Yale Law Journal* 1490.

28 I.F.I. Shihata, *The World Bank Legal Papers* (Kluwer Law International, The Hague: 2000), 245.

29 Y.C. Jang "International Legal Obligations in Relation to Good Ocean Governance" (2010) 9(3) *Chinese Journal of International Law* 589–605.

topic which has the special attention of my colleague to whom this book is dedicated. We can conclude that in most of the international policy fields the concept of good governance is well known and accepted. We can conclude that in the context of international relations, for international organizations and international treaties the concept of good governance has been fully accepted and sometimes qualified as globalizing administrative law.

***Good Governance in International Case Law***

More recently, good governance can be recognized in international case law. This means that the principle does not only function as a norm for national governments, but that it is actually being reviewed in judicial procedures. Sometimes it is the national courts that make use of an international norm of good governance while international courts sometimes use the principle of good governance as a review norm. Examples of such decisions belonging to international institutions can be found at the ICJ, the EACJ, the ECtHR, the IACHR and the WTO Dispute Settlement Body. Furthermore also national human rights commissions have worked on the further development of good governance in the context of human rights.[30]

The ICJ adheres to the principle of good administration instead of the principle of good governance. In two judgments the Court gave an interpretation to the good administration concept in the context of good governance. The first judgment concerned the case between the Republic of Guinea and the Democratic Republic of Congo. The second judgment centred around the conflict between the administrative tribunal of the ILO and the fund on international agriculture development.[31]

In Article 6 (d) of the Treaty establishing the East African Community we find fundamental principles intended to guide this institution as follows:

> [G]ood governance including adherence to the principles of democracy, the rule of law, accountability, transparency, **social justice, equal opportunities, gender equality,** as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the **African Charter on Human and Peoples' Rights**.

30 D. Horsten, *The Role played by the South African Human Rights Commission's Economic and Social Rights Reports in Good Governance in South Africa* (2006) 9(2) *Potchefstroom Electronic Law Journal* 1–21.

31 International Court of Justice, November 30, 2010; International Court of Justice, February 1st 2012.

In 2010, the East African Court of Justice (EACJ) further decided that the failure to extend the jurisdiction of the Court pursuant to Article 27 violated the applicant's legitimate expectations that the matter be expedited and that it contravened the principles of good governance stipulated in Article 6 of the Treaty.[32] In another case the EACJ decided that it had jurisdiction to interpret and apply the provisions of the EAC Treaty, including Articles 6 (d), 7 (2) and 8 (1) (c) of that Treaty. The Court decided that the failure pertaining to the appropriate authorities to charge the person with specific offences for his arrest and detention, as well as to inform him, his family or his lawyers of the time of his arrest/detention – for a period of five (5) months, during which time he was held incommunicado – was fundamentally inconsistent with Rwanda's express undertakings under Articles 6 (d), 7 (2) and 8 (1) of the Treaty, namely: to observe the principles of good governance, including in particular, the principles of adherence to the rule of law, and the promotion and protection of human rights. These failures, singly and collectively, constituted an infringement of the said provisions of the Treaty.[33]

We find different approaches with regards to the concept of good governance in the case law of the ECtHR. A recent case[34] concerned the European Convention on Human Rights Article 8 and Article 1 of the First Protocol. The Court has developed the principle of good governance in the context of violations of the right to property and the right to privacy. The court decided that there is a need for both timely and consistent action and that in the absence of these, an obligation to compensate would arise. In that judgment the Court reached the conclusion that there existed a breach of Article 1 of the First Protocol because, contrary to the principle of good governance, there was no reasonable and proportional relationship between the purpose envisioned and the means that had been used that could excuse a violation of a person's right to property.[35] The first paragraph of Article 1 of the First Protocol enshrines the principle of peaceful enjoyment of possession, with the conditions that may impair that principle being set down in the second sentence of the same paragraph. These conditions relate to expropriation and include the

32 *Sebalu v. The Attorney General of the Republic of Uganda*, Ref. No. 1 of 2010, Judgment (EACJ, June 30, 2011).

33 The Attorney General of the Republic of Rwanda, Appeal no. 1 of 2012, (EACJ, Appellate Division, June 2012).

34 ECtHR16 May 2013, nr.49317/07, (Villiger (President), Nußberger, Zupančič, Power-Forde, Jäderblom, Pejchal, Antonovych.

35 There is a very detailed and broad case law about the concept of property which has been discussed in literature.

requirement of a legal basis that the scope be in the general interest and in accordance with general principles of international law. The statement sets out, according to the Court, cumulative requirements, with the principle of proportionality set out in respect of the third condition. In determining whether the latter principle is violated when determining the means and purpose of the infringement, the Court has used the principle of good governance. It is interesting for several reasons to determine, with reference to this principle and within this specific context, which instances of government action the Court makes use of, and which aspects are brought to light by the Court. Regarding cases, the following decisions have to be distinguished: (a) decisions to refuse the recognition of property rights and their effect; (b) decisions on review of ownership due to an error being made in granting that right; (c) decisions to cancel the right to property because of an alteration in the applicable law with respect to the property in question. The process of taking these decisions must meet the requirement of the principle of good governance. That means, according to the Court, that there must be timeliness as well as an appropriate and most consistent way of government action. It is then added to the limitation that this general rule (the principle of good governance) ensures that government mistakes (even those caused by negligence) are corrected. When such a right to property is revoked due to erroneous ownership, the principle of good governance entails not only a correction of the mistake, but also necessitates the payment of an adequate compensation or any other form of appropriate repair, if the holder has acted in good faith. The principle of good governance is used here in the context of the review within the sphere of administrative action and then even more precise – or at least so it seems – in the ambit of proportionality. It seems to me that the Court establishes a balance between the promotion of the public interest (in this case of Article 8 ECHR, derived right of residence) and the special importance of the individual fundamental right of the person concerned (in this case ownership Article 1 of the First Protocol), in short, a balance between different fundamental rights. With this consideration, the principle of good governance, according to the ECtHR, is of particular significance and provides the Court with sufficient guidelines. It makes demands concerning the timeliness of government action and the method by which that government action should take place. Here we have the development of a new test principle derived from unwritten law, which is used to give different rights weight and that is a new line in applying the principles of good governance.

We can also discern shifts in the case law of the ECtHR with respect to the principle of good governance. About twenty years ago, in some cases that involved the Netherlands in particular, the terminology of "general principles of

good governance" or general principle of good governance was used.[36] It appears that at that moment the content of the principles of good governance is substantially one or some of the classical eight principles of proper administration. A more extensive approach of good governance was found in the judgment *Maritime vs. Finland*[37] where, citing the Finnish Constitution, the Court spoke of "guarantees of a fair trial and good governance." That broader approach and citing provisions of the Convention of the Council of Europe, one can conclude that good governance is used as a fundamental concept which must be met.[38] Yet recently, good governance was actively employed by the Court. The first example is the *Rysovsky* judgment.[39] In that case, the principle of good governance was used to assess whether management actions are in compliance with the treaty to which Article 1 of the First Protocol provides legal input. The requirement is made that the action of the board must be "in good time and in an appropriate and, above all, consistent manner." To this there are added the following elements: transparency, minimizing the risk of error, utmost care.

At present, the principle of good governance has a much broader meaning than it did twenty years ago. The concept is clearly in development and transition. Elements such as propriety, transparency, participation, accountability and human rights have been added to the concept. All these elements have been incorporated and have appeared in the course of time in several documents. Within the framework of the Council of Europe, the third line shows that the ECtHR has developed its own interpretation of the principle of good governance when reviewing government action. That interpretation is twofold and makes demands concerning the promptness with which an incorrect decision has to be corrected and may also require the administration to provide adequate compensation of payment or, alternatively, reparation. Another suitable form of recovery with the dual interpretation of the principle of good governance has been highlighted in this judicial review. This embodies a circumstance that deserves more attention than it has received so far. We see that the principles of international law have been applied by the WTO Dispute Settlement Body in the interpretation of the WTO agreements and customary international law as expressed in the Articles 31 and 32 of the Vienna Convention on the Law of Treaties. The interpretation is still not limited to what is expressed in the Vienna

36 Examples thereof are: *Nsona vs. Netherlands* (ECtHR November 28, 1996 No.23366/94); *Ahmut vs. Netherlands* (ECtHR November 28, 1996, No. 21702/93); *Squat vs. Netherlands* (ECtHR April 19, 1994, No. 16034/90); *Gasus Gmbh vs. Netherlands*, (ECtHR February 23, 1995, No. 15375/89).

37 ECtHR April 21, 2009, No. 19235/03.

38 *Guja vs. Moldova* ECtHR February 12, 2008, No. 14277/04.

39 *Rysovsky vs. Ukraine* ECtHR October 20, 2011, No. 29979/04.

Convention, as different principles of international law, like the principle of effectiveness and the principle of legitimate expectation are employed. This principle of effectiveness and the principle of legitimate expectations are also elements of the principles of good governance. These developments, due to the influence of the concept of good governance, have rendered not only new principles within the framework of good governance but also innovations concerning already existing principles of international law. This can be found in the decisions of the WTO Dispute Settlement Body.[40]

When comparing the courts in their use of good governance, it is clear that in spite of a difference in terminology there is yet a common idea of good governance. The ICJ incidentally uses the term in the context of good administration, but for example the ECtHR employs the terminology principle of good governance. The IACHR refers to different elements of international human rights treaties which can be qualified as principles of good governance. The WTO Dispute Settlement Body refers to the principle of effectiveness or the principle of legitimate expectations which both are principles of good governance.

We can conclude that the principle of good governance can be found, from a horizontal perspective, in a lot of policy fields of international law. The (mention of the) concept can be found in many treaties in these fields. Important is to remark that it can be found in many international treaties on human rights. As such it has been qualified as a right for the people.

## A Modern View on Principles of International Law and Good Governance

The concept of good governance has grown into the system of international law as a consequence of developments in both international law and national legal systems. This concept has clear links with the concepts of the rule of law and democracy.[41] And in these concepts also links are made with good governance.[42]

40 J. Cameron and K.R. Gray "Principles of International Law in the WTO Dispute Settlement Body" (2001) 50 *International and Comparative Law Quarterly* 248–298.

41 G.H. Addink, *Good Governance: Concept and Context*, Chapters 5 and 6 (Oxford University Press, Oxford: 2015 forthcoming).

42 M. Zum, A. Nollkaemper, R. Peerenboom, *Rule of Law Dynamics. In an Era of International and Transnational Governance*, (Cambridge University Press, Cambridge: 2014); M.A. Orellana, WTO and Civil Society, in D. Bethlehem et al. (eds): *Oxford Handbook of International Trade Law* (Oxford University Press, Oxford: 2009), 671–694.

At the grassroots of international law, good governance has been accepted as a principle of law in national legal systems first, and from there in regional institutions as well. Important to mention is that though the concept is not related to a few policy-fields only, neither is it implemented in all policy fields. Sometimes this concept is included in general regulations but most of the times only some aspects of good governance are actually included in the law and in practice these principles are developed by administrative authorities and the judiciary. So their function as a norm for the administrative authorities and the judiciary uses elements of the principle in its review. The concept is applied as such and in different policy fields.

The concept is made concrete in different types of norms. In policy papers this notion can be found, but in different types of directives and regulations the concept is worked out at the EU-level. Other regional (economic) organisations are frequently working with this concept. Notably, at the EU-level a right to good administration has been elaborated and concretely applied in judicial procedures. Lastly, at the EU-level it is not only about one or two policy fields as it has been used in several policy fields by both administrative authorities and judiciary.

At the international level, the concept of good governance has been accepted and further developed in different treaties related to economic and environmental issues. Both courts and dispute settlement institutions have applied the principle of good governance.

The question then relates to the two approaches – narrow and broader – of principles of international law. From the narrow scope, four conditions are linked to general principles of international law: (a)the principle must be general, (b) the principle, which is a norm, can be neither a rule nor a general practice accepted as law (c) chronologically, it must have already been recognized, (d) this recognition is attributed to civilized nations.

In describing these conditions related to the principles of good governance the following aspects are relevant. We speak about general principles of good governance because these principles are not restrictive to one or two policy-field; these principles are applied in the broader framework of the administrative authorities and the judiciary. These principles are norms, legal norms in the sense that though sometimes elements have indeed been codified in the law, in other situation these still represent unwritten norms. These principles are recognized in a broad sense, so that this condition has been fulfilled. Finally, these principles are accepted by civilized nations. Therefore, from the broader perspective, and keeping in mind the different functions of principles, the principles of good governance should be recognized as principles of international law.

## Conclusion: A Modern View on Good Governance as a Principle of International Law

In international law we see a growing interaction between the sources of national and international law in both the instrumental as well as the protection aspects of international law: the principle(s) of good governance have been discovered.

As a consequence of internationalization and globalization the importance of the principles of international law increases; the principles of international law are in transition. In the more classical approach of the principles, in cases when no treaty provisions or clear rule of customary law exists, the additional role of principles of international law may be clearly observed. From a more modern view, these principles of international law have more than only these two functions. Therefore, it can be concluded that the concept of principles of international law is changing especially in relation to the more general principles which are accepted by many countries at the national as well as regional level.

In that changing role of principles of international law we notice that good governance principles are increasingly applied by general and specific international organizations. Some aspects of the principles of good governance are codified in international (human rights) treaties. Lastly, the principle(s) of good governance has been applied by the (inter)national courts of justice and dispute settlement bodies.

The principles of good governance have a general character, as we have shown, and are not (yet) accepted neither as rules nor as general practice. At the same time, the concept of good governance has, chronologically, already been recognized by civilized nations as has been explained in this article. It is a core legal idea which is common to all civilized systems, as Schlesinger wrote in 1957 and I would add here that the concept of good governance is more than a legal idea. Good governance is a promising principle of international law.