Chapter 3: Historical Perspectives on article 38 PCIJ Statute

A. Introduction

This chapter approaches the interrelationship of sources in the context of the drafting[1] of article 38 PCIJ Statute. This chapter will first illuminate the doctrinal (B.) and institutional (C.) background of the drafting of article 38 PCIJ Statute. The chapter will then delve into the drafting of article 38 and demonstrate how the members of the Advisory Committee of Jurists discussed the interrelationship of sources (D.). Subsequently, the chapter will turn to the reception of sources set forth in article 38 in the jurisprudence of the PCIJ, in a codification setting and in scholarship with a particular focus on the interwar period (E.).

B. The positivist climate: the doctrinal interest in treaties and general conceptions of law

Even prior to the adoption of article 38 PCIJ Statute, a certain triad of sources or forms of international law can be depicted in the work of certain scholars when discussing the distinction and relationship between natural and positive international law.[2] For instance, Christian Wolff distinguished "the voluntary, the stipulative and the customary law of nations (which forms the positive law of nations) from the natural or necessary law of nations"[3]. The voluntary

1 See for a detailed treatment Spiermann, ''Who attempts too much does nothing well': The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice' 187 ff.

2 The following is not a comprehensive treatment of international legal history. Cf. recently in particular Valentina Vadi, *War and Peace. Alberico Gentili and the Early Modern Law of Nations* (Brill Nijhoff 2020) 108-115, 159-179; Francesca Iurlaro, 'Grotius, Dio Chrysostom and the 'Invention' of Customary ius gentium' (2018) 39 Grotiana 15 ff.

3 Christian von Wolff, *Jus gentium methodo scientificia pertractatum* (vol 2, Clarendon Press 1934) 19 para 26. See also Thomas Kleinlein, 'Christian Wolff. System as an Episode' in Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (eds), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (Oxford University Press 2017) 230 ff.

law was derived from the necessary law and was "considered to have been laid down by its fictious ruler and so to have proceeded from the will of nations."[4] Stipulations were said to "bind only the nations between whom they are made"[5] and therefore led only to particular law. The customary law of nations "rests upon the tacit consent of nations, or [...] a tacit stipulation, and it is evident that it is not universal, but a particular law, just as was the stipulative law."[6] All forms of positive law rested on a form of consent, namely presumed consent, express consent and tacit consent.[7] Wolff stressed that the stipulative and the customary law "are by no means to be confused with the voluntary law."[8] The true *lex generalis* then was not customary law but the voluntary law and the necessary law.

A similar distinction can be found in the work of Emer de Vattel.[9] Like Wolff, he distinguished between the necessary law and the positive law. The necessary law comprised an immutable law which is "founded on the nature of things, and particularly on the nature of man"[10] and which "is necessary because nations are absolutely bound to observe it"[11]. According to Vattel, "the necessary law is always obligatory on the conscience, a nation ought

4 Wolff, *Jus gentium methodo scientificia pertractatum* 18 para 22.
5 ibid 18 para 23.
6 ibid 18-19 para 23.
7 ibid 19 para 25.
8 ibid 19 para 26.
9 See also Degan, 'General Principles of Law (A Source of General International Law)' 19; on inspirations Vattel took from Wolff see Francis S Ruddy, *International law in the enlightenment: the background of Emmerich de Vattel's Le droit des gens* (Oceana-Publ 1975) 77-123; Alexander Orakhelashvili, 'Natural Law and Customary Law' (2008) 68 ZaöRV 72-73; recently: Francesca Iurlaro, 'Vattel's Doctrine of the Customary Law of Nations between Sovereign Interests and the Principles of Natural Law' in Simone Zurbuchen (ed), *The Law of Nations and Natural Law 1625-1800* (Brill 2019) 280-300. A similar approach was advocated by Henry Wheaton, *Elements of International Law: with a Sketch of the History of the Science* (Carey, Lea & Blanchard 1836) 47-48, distinguishing between the natural law and the positive law, consisting of three branches, namely the voluntary law, the conventional law and the customary law of nations. These were derived from the presumed consent, the express consent and the tacit consent. But see William S Dodge, 'Customary international law, Change, and the Constitution' (2018) 106 The Georgetown Law Journal 1573 on Wheaton changing his position in his posthum published edition.
10 Emer de Vattel, *The Law of Nations; or Principles of the Law of Nature, applied to the conduct and affairs of nations and sovereigns* (6th American edition, TJW Johnson 1844) LVIII para 8.
11 ibid LVIII para 7.

never to lose sight of it", but states may demand from other states only compliance with the positive law of nations, which included the voluntary, the conventional and the customary law, "for they all proceed from the will of nations, - the voluntary from their presumed consent, the conventional from an express consent, and the customary from tacit consent".[12]

August Wilhelm Heffter presented three forms of "European international law" which resemble the later triad of sources when he argued that European international law consisted of consensual agreements, abstractions of the essence of commonly used institutions and the concordant practice of nations.[13] At the same time, however, he emphasized that treaties and custom were only individual forms of the formal appearances of international law and that there was also international law which did not require an expressive recognition by states.[14]

The doctrinal scientific climate leading to article 38 became that of voluntarist positivism and legal conceptualism in the work of authors at the end of the 19th century who were committed to positivism and to the enterprise of constructing international law scientifically.[15]

---

12 ibid LXV para 27; on the discussion of the relationship between the necessary and the positive law see Amanda Perreau-Saussine, 'Lauterpacht and Vattel on the Sources of International Law: the Place of Private Law Analogies and General Principles' in Vincent Chetail and Peter Haggenmacher (eds), *Vattel's international law in a XXIst century perspective* (Martinus Nijhoff Publishers 2011) 174. See Andrew Clapham, *Brierly's Law of Nations* (Oxford University Press 2012) 36 ("exaggerated emphasis on the independence of states").

13 August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (vol 5, first publ. 1844, Schroeder 1867) 16-17.

14 ibid 4-5.

15 Cf. on the construction of positivism Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford University Press 2013); see for instance Karl Bergbohm, *Jurisprudenz und Rechtsphilosophie: kritische Abhandlungen* (vol 1, Duncker & Humblot 1892) 90 (on general legal concepts); but see also Miloš Vec, 'Sources of International Law in the Nineteenth-Century European Tradition: The Myth of Positivism' in *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 121, pointing out that naturalist thinking was not completely abandoned; see for instance Robert Phillimore, *Commentaries upon international law* (vol 1, T & J W Johnson, Law Booksellers 1854) 86 and 64, listing as sources "1. The Divine law [...] 2. Revealed Will of Good [...] 3. Reason, which govern the application of these principles to particular cases [...] 4. The universal consent of nations, both as expressed (1) by positive compact or treaty, and (2) as implied by usage, custom, and practice."

One example is Georg Jellinek[16], who argued that if a state was capable of binding herself internally, in the context of constitutional law, the state must be able to do so internationally as well.[17] His objective was a "juristic construction" of international law that emphasized the character of international law as *legal* order. Just like domestic law, international law was said to be based on the will of the state;[18] by entering into other relations with states, a state accepted those rules which regulated the objective living conditions of states.[19] The treaty was objective law, as opposed to a bilateral legal relation[20], since it was governed by norms of positive law which states recognized implicitly when they concluded treaties.[21] Jellinek was confident in that this juristic construction of an objective law on treaties would provide guidance for states in international affairs and even permit the "public opinion of the civilised world" to legally evaluate states' conduct.[22] Yet, the regional and cultural scope of this international law thusly constructed was far from being universal and was said to apply only to those states outside Europe which had recognized it.[23]

16 Georg Jellinek, *Die rechtliche Natur der Staatenverträge: ein Beitrag zur juristischen Construction des Völkerrechts* (Hölder 1880); on Jellinek see Jochen von Bernstorff, 'Georg Jellinek and the Origins of Liberal Constitutionalism in International Law' (2012) 4(3) Goettingen Journal of International Law 659 ff.

17 Jellinek, *Die rechtliche Natur der Staatenverträge: ein Beitrag zur juristischen Construction des Völkerrechts* 1, 8; von Bernstorff, 'Georg Jellinek and the Origins of Liberal Constitutionalism in International Law' 669 ff.

18 Jellinek, *Die rechtliche Natur der Staatenverträge: ein Beitrag zur juristischen Construction des Völkerrechts* 46.

19 ibid 48-49.

20 Cf. Ernst Meier, *Über den Abschluss von Staatsverträgen* (Duncker & Humblot 1874) 36.

21 Jellinek, *Die rechtliche Natur der Staatenverträge: ein Beitrag zur juristischen Construction des Völkerrechts* 51-52.

22 ibid 65.

23 Cf. Georg Jellinek, 'China und das Völkerrecht' (1900) 5(19) Deutsche Juristen-Zeitung 402-404 where Jellinek wrote on the relationship between international law based on a European culture and China; for a survey of the use of the term civilized nations in this period see Masaharu Yanagihara, 'Significance of the History of the Law of Nations in Europe and East Asia' (2014) 371 RdC 293-316; Jakob Zollmann, ''Civilization(s)' and 'civilized nations' – of history, anthropology, and international law' in Sean P Morris (ed), *Transforming the Politics of International Law: The Advisory Committee of Jurists and the Formation of the World Court in the League of Nations* (Routledge 2021) 11 ff.

Another prominent example is the work of Otto Nippold. Cautioning against a private law analogy to a contract, Nippold argued that a treaty in the international legal order could constitute a source of law and create objective law.[24] The treaty's validity would not derive from external norms but from the will of the states concluding the treaty.[25] As the will of the states could find its expression not only in treaties but also in custom, all positive international law would be traced back to the will of states, and both should be recognized as objective law.[26] Nippold had reservations against domestic law analogies which could jeopardize the independence of the international legal order.[27] He stressed, however, the importance of a general doctrine of law (*allgemeine Rechtslehre*) and general legal concepts (*juristische Grundbegriffe*) which may functionally resemble general principles of law.[28] According to Nippold, private law concepts such as contracts were just like international treaties a sub-category of the category of agreement with respect to which general concepts and principles would apply.[29] The accuracy of general concepts would depend on their accordance with positive law.[30] While the application of such general legal concepts would support the juristic character of international law as law, the special characteristics of the international legal order needed to be taken into account as well.[31] Nippold argued, for instance, that the international treaty would be governed by the general norms which would follow from general concept of treaty.[32] These general norms would also constitute positive norms of the international legal order as they could be based on the will of states when those conclude treaties.[33] At the same time, the treaty in the international legal order would possess special characteristics which distinguish it from contracts and which would give rise to

24 Nippold, *Der völkerrechtliche Vertrag Seine Stellung im Rechtssystem und seine Bedeutung für das internationale Recht* 35 ff.

25 ibid 37.

26 ibid 51, 53, 57-58.

27 ibid 80 ff.

28 Cf. also Lauterpacht, 'The mandate under international law in the Covenant of the League of Nations' 51-56.

29 Nippold, *Der völkerrechtliche Vertrag Seine Stellung im Rechtssystem und seine Bedeutung für das internationale Recht* 84-85.

30 ibid 86.

31 ibid 87.

32 See for instance ibid 168, arguing that it was a general principle of contract law applicable to both private law contracts and international treaties that the conclusion of agreements was based on the free will of states instead of on coercion.

33 ibid 88.

particular norms of the international legal order.[34] Nippold concluded that the international legal order therefore possessed its own norms on treaties which would not depend on private law analogies.[35]

Heinrich Triepel made a distinction between *Vertrag* and *Vereinbarung*. The *Vertrag* could only accommodate conflicting interests without producing a common will (*Gemeinwille*).[36] Only a *Vereinbarung* which expressed a common will as opposed to the single wills of the parties could produce objective law (*objektives Recht*).[37] The *Vereinbarung* would apply only *inter partes*, which is why, in his view, there was only particular international law; general law (*allgemeines Recht*) could only be formulated by way of comparison of particular legal rules.[38] A majority rule could only exist to the extent that it had been agreed on.[39] States' *Vereinbarung* could encompass explicitly agreed rules (*Rechtssätze*), as well as those necessary or latent rules (*latente Rechtssätze*) which were implied or required by the agreed rule.[40] States could agree not only expressively on a *Vereinbarung*, but also tacitly through their acts: "An important part of international law has been created in this fashion; it is usually called customary international law."[41] Triepel argued that customary international law could not be produced by the recurrence of similar treaty provisions, as a treaty could only bind parties, unless a priorly agreed rule provides otherwise, in which case, however, it would not be the treaty which creates objective law.[42]

---

34 Nippold, *Der völkerrechtliche Vertrag Seine Stellung im Rechtssystem und seine Bedeutung für das internationale Recht* 89-90, arguing also that those norms would be based on the objective nature of the relationship between states, with reference to Jellinek, and on the will of states.

35 ibid 90, in Nippold's view, those norms did not need to be explicitly laid down, even though he considered their codification in a treaty as possible).

36 Heinrich Triepel, *Völkerrecht und Landesrecht* (Hirschfeld 1899) 46. He borrowed the distinction from Karl Binding, *Die Gründung des norddeutschen Bundes. Ein Beitrag zur Lehre von der Staatenschöpfung* (Duncker & Humblot 1889) 69, 70.

37 Triepel, *Völkerrecht und Landesrecht* 70.

38 ibid 83-84.

39 ibid 83, 87.

40 ibid 94-95; on custom and *Gemeinwille*, see ibid 95 ff.

41 ibid 95; the English translation is borrowed from Raphael M Walden, 'The Subjective Element in the Formation of Customary International Law' (1977) 12 Israel Law Review 349.

42 Triepel, *Völkerrecht und Landesrecht* 98; cf. for an earlier held different position Heinrich Triepel, *Die neuesten Fortschritte auf dem Gebiet des Kriegsrechts* (C L Hirschfeld 1894) 4-5.

Lassa Oppenheim, in contrast, rejected the conceptualization of custom as treaty.[43] Whereas treaties would require explicit consent, custom could be based on a "common consent" of a majority which could be expressed tacitly.[44] Oppenheim recognized only two sources of international law, namely treaty and custom, and he rejected to regard reason to be a source of law.[45] Even though Oppenheim was sympathetic to the idea of codification, he argued that customary law would remain relevant to a greater extent than in municipal law and retain the capacity to derogate from treaties.[46]

---

43 Lassa Francis Lawrence Oppenheim, 'Zur Lehre vom internationalen Gewohnheitsrecht' (1915) 25 Niemeyers Zeitschrift für internationales Recht 12.

44 Lassa Francis Lawrence Oppenheim, *International Law* (vol 1, Longmans, Green 1905) 15 describing "common consent" as "the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance whatever and disappear totally from the view of one who looks for the will of the community as an entity in contradistinction to its single members." On treaties, see ibid 23-24, distinguishing between universal, particular and general international law created by a lawmaking treaty and arguing that "General International Law has a tendency to become universal because such States as hithereto did not consent to it will in future either expressly give their consent or recognise the respective rules tacitly through custom." On common consent see also John Westlake, *Chapters on the Principles of International Law* (University Press 1894) 78: "When one of those rules is invoked against a state, it is not necessary to show that the state in question has assented to the rule either diplomatically or by having acted on it, though it is a strong argument if you can do so. It is enough to show that the general *consenus* of opinion within the limits of European civilisation is in favour of the rule." William Edward Hall, *Treatise on International Law* (4th edn, Clarendon Press 1895) 5 ("general consent"); see also Dodge, 'Customary international law, Change, and the Constitution' 1572-1574; see also Stern, 'Custom at the heart of international law' 95-99, describing a shift of vocabulary from consent to *opinio juris* and explaining that general consent has been argued to entail "the presumption of a universal acceptance" (98).

45 Oppenheim, *International Law* 21 and 22: "[...] there must exist, and can only exist, as many sources of International Law as there are facts through which such a common consent can possibly come into existence. Of such facts there are only two." For a rejection of legal science as a source see also August von Bulmerincq, *Das Völkerrecht oder das internationale Recht* (2nd edn, Mohr 1889) 188, who recognized only treaties and custom as a source; Franz von Holtzendorff, 'Die Quellen des Völkerrechts' in Franz von Holtzendorff (ed), *Handbuch des Völkerrechts. Einleitung in das Völkerrecht* (Habel 1885) vol 1 109-112, rejecting legal science as a source as well, counts to the sources among treaties and custom also domestic statutes insofar as they address and regulate international legal relations.

46 Oppenheim, 'Zur Lehre vom internationalen Gewohnheitsrecht' 10 ("Die Macht des Gewohnheitsrechts ist eine elementare und spottet jeder Eindämmung.").

With the rise of positivism, there was a tendency to construct international law scientifically by rooting its sources or forms of law in the consent of states and to minimize the role of natural law or necessary law also by expanding the scope of general principles of law and customary international law.[47] Customary international law became less regarded as a tacit treaty[48] or another form of special law, and increasingly regarded as general law, in contradistinction to special treaty law.[49]

C. Institutional Background: The Hague Conferences of 1899 and 1907

The Hague Conferences of 1899 and 1907[50] to some extent foreshadowed the triad of sources that would be reflected in article 38 PCIJ Statute. This section will first illustrate the background of these conferences before approaching in particular article 7 of the Prize Court Convention which inspired the later discussions in the Advisory Committee of Jurists when drafting article 38 PCIJ Statute.

---

47 Cf. Lauterpacht, *The Function of Law in the International Community* 7 on the development of the doctrine of non-justiciable disputes. As argued by Perreau-Saussine, 'Lauterpacht and Vattel on the Sources of International Law: the Place of Private Law Analogies and General Principles' 174-175, Vattel was for Lauterpacht "the *wrong kind* of natual lawyer. Vattel draws the line between the voluntary law and the necessary law in the wrong place, treating too much of the 'necessary' law as a matter of conscience *rather than law.*"

48 On the recent debate on the possibility of a state to withdraw itself from custom and the interpretation of Vattel's work see Curtis A Bradley and Mitu Gulati, 'Withdrawing from International Custom' (2010) 120 Yale Law Journal 215 ff.; Edward T Swaine, 'Bespoke Custom' (2010) 21 Duke Journal of Comparative & International Law 208 ff.; Stacey Marlise Gahagan, 'Returning to Vattel: A Gentlement's Agreement for the Twenty-First Century' (2012) 37 North Carolina Journal of International Law 853-873.

49 See also Yasuaki, *International Law in a Transcivilizational World* 152 ff.

50 Betsy Baker, 'Hague Peace Conferences (1899 and 1907)' [2009] Max Planck EPIL para 28; see also David D Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference' (2000) 84 AJIL 4 ff.; Christian J Tams, 'Die Zweite Haager Konferenz und das Recht der friedlichen Streitbeilegung' (2007) 82 Friedenswarte 119 ff.; Calvin DeArmond Davis, *The United States and the First Hague Peace Conference* (Cornell Univ Press for the American Historical Association 1962).

I. The background of the conferences

These conferences took place against the background of the so-called peace movement[51] and the enthusiasm for arbitration as means to achieve the peaceful settlement of disputes.[52] They gave rise to the hope of the existence of a world federation.[53] Yet, the conferences revealed existing differences between the participating nations. In particular the proposal to establish a mechanism for compulsory arbitration was met with resistance, in particular by Germany.[54]

Recent research draws an ambiguous picture as to the universality of these conferences. Whereas in 1899 only 24 stated had participated in the conference, more countries were invited to the second conference, convened by the Russian Czar in 1907; 44 states participated at a time when 57 states were claiming to be independent states.[55] Opinions differ as to the extent of true representativeness. For Augusto Cançado Trindade, the 1907 conference "marked the beginning of a long journey" towards a new *Jus Gentium*, as "by the end of the Second Hague Peace Conference of 1907 the universalist

---

51 Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference' 8.

52 ibid 10; Mark W Janis, 'North America: American Exceptionalism in International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 535; Tom Bingham, 'The Alabama Claims Arbitration' (2005) 54 ICLQ 1 ff.; Georg Schwarzenberger, *William Ladd: An examination of an American proposal for an international equity tribunal* (2nd edn, London, 1936) 37; Alfred Zimmern, *The League of Nations and the Rule of Law 1918-1935* (Macmillan 1936) 103.

53 Walter Schücking, *Der Staatenverband der Haager Konferenzen* (Duncker & Humblot 1912) 27; William Isaac Hull, *The two Hague conferences and their contributions to international law* (repr. orig. publ. 1908, Kraus 1970) 496 ff.; Thomas Joseph Lawrence, *International Problems and Hague Conferences* (London, 1906) 42 ff.

54 Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference' 16; see also Shabtai Rosenne, *The World Court: what it is and how it works* (4th edn, Nijhoff 1989) 6-8 on the problem of selection of judges.

55 Vladlen S Vereshchetin, 'Some reflections of a Russian scholar on the legacy of the Second Peace Conference' in Yves Daudet (ed), *Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la paix/ Topicality of the 1907 Hague Conference, the Second Peace Conference* (Martinus Nijhoff Publishers 2008) 46, also noting that "[r]egrettably, African and some Asian delegates were not invited [...]".

outlook of international law had gained considerable ground."[56] Vladlen Vereshchetin stresses that "the Hague Conferences gave a great impetus for further consolidation and development of universal international law [...]".[57] On the other side of the spectrum, Shinya Murase is more critical: "From the Asian Perspective, the centennial of the Second Hague Conference is not something to be celebrated. At best, it should be simply commemorated."[58] He spoke of a "non-Presence of Asia"[59]: neither China nor Persia participated due to internal struggles, Siam participated but regarded the invitation and its participation as mere symbolic, and Japan participated since it sought international recognition and wanted to block compulsory jurisdiction after a defeat before the PCA.[60] Furthermore, Asian delegations were in part represented by US-American lawyers, with the extent to which states like the US exercised direct or indirect influence over the delegations of other countries being subject to debate.[61]

II. The provisions on applicable law and the recognition of three sources

Even prior to the conferences, arbitral tribunals had referred to maxims of Roman law and principles derived from municipal legal orders[62] for necessity

56 Antônio Augusto Cançado Trindade, 'The presence and participation of Latin America at the Second Hague Peace Conference of 1907' in Yves Daudet (ed), *Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la paix/ Topicality of the 1907 Hague Conference, the Second Peace Conference* (Martinus Nijhoff Publishers 2008) 78, 80, 82. He also emphasized the innovations, allowing individual complaints to the Prize Court, and the progressive developments on the Latin-American Level, consisting for instance in the Permanent Central American Court of Justice (72).

57 Vereshchetin, 'Some reflections of a Russian scholar on the legacy of the Second Peace Conference' 46.

58 Shinya Murase, 'The presence of Asia at the 1907 Hague Conference' in Yves Daudet (ed), *Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la paix/ Topicality of the 1907 Hague Conference, the Second Peace Conference* (Martinus Nijhoff Publishers 2008) 101.

59 ibid 89.

60 ibid 87-90.

61 ibid 107, 113, on the role of the lawyer Henry W. Denison who advised Japan; for a nuanced assessment of Japan's skeptical attitude towards international adjudication: Yanagihara, 'Significance of the History of the Law of Nations in Europe and East Asia' 416-417.

62 See *Antoine Fabiani Case* France. v. Venezuela (31 July 1905) X RIAA 98 for an invocation of the "principes généraux du droit des gens"; Verdross and Simma,

as defence[63], the obligation to pay interests as implication of the general principle of the responsibility of states and default rule[64], the limitation of this obligation to pay interest to an amount which does not exceed the amount due according to the Roman law principle *ne ultra alterum tantum*[65], the principle of prescription as a general principle of law.[66] Moreover, a draft on procedural regulations for international courts of arbitration prepared by Levin Goldschmidt and adopted by the Institute de Droit International provided that a judge, in the translation of Goldschmidt's commentary by James Brown Scott, "will apply to the international points in dispute the international law existing between the parties by virtue of treaties or custom; in the second place, general international law; to disputed points of another kind, in the matter of public or private law, the national law which appears to be applicable according to the principles of international law".[67]

The documents produced at the conferences confirmed this trend. For instance, the Martens clause referred to the 1899 convention, to "principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the dictates of the public

---

Universelles Völkerrecht Theorie und Praxis 380-382; Pellet and Müller, 'Article 38' 923 with further references; Alfred Verdross, 'Les principes généraux du droit dans la jurisprudence Internationale' (1935) 52 RdC 209 ff.; Marro, *Allgemeine Rechtsgrundsätze des Völkerrechts* 44 ff.

63 *Affaire du Neptune* Great Britain v. U.S.A., Gr. Brit.-U.S. Arb. Trib. 1797 Recueil des arbitrages internationaux Tome 1 (de Lapradelle / Politis, Paris 1905) 137 ff.

64 *Russian Indemnities Case* Russia v. Turkey (11 November 1912) XI RIAA, in this case Turkey could not convincingly demonstrate a contrary rule of customary international law.

65 *Yuille Shortridge & Company* Great Britain v. Portugal, (21 October 1861) XXIX RIAA 68 (obligation to pay interests limited to the due amount according to "le droit commun, seul applicable à cette question"; Fabián Omar Raimondo, *General principles of law in the decisions of international criminal courts and tribunals* (Martinus Nijhoff Publishers 2008) 11.

66 *Gentini* Italy v. Venezuela, Award (1 July 1903) X RIAA 551 (claims which originated 30 years ago no longer enforceable because of prescription as a general principle of law).

67 Levin Goldschmidt, 'International arbitral procedure. Original project and report of Mr Goldschmidt, June 20, 1874' in James Brown Scott (ed and tr), *Resolutions of the Institute of International Law* (James Brown Scott tr, Oxford University Press 1916). For the original French text see Levin Goldschmidt, 'Projet de réglement pour tribunaux arbitraux internationaux (session de Genève, 1874)' (1874) 6 Revue de droit international et de législation comparée 445; for a recent summary see Saunders, *General Principles as a Source of International Law* 23 ff.

conscience". Of particular significance in terms of resemblance with article 38 PCIJ Statute was article 7 of the Prize Court Convention which was based on a proposal by Germany and the United Kingdom to establish a Prize court for maritime warfare at the second Hague Conference.[68] Article 7 of that convention provided:

> "If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions in the said treaty.
> In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity."

According to Louis Renault's report, this provision was a "solution, bold to be sure but calculated considerably to improve the practice of international law."[69] The Prize Court was "called upon to *create the law* and to take into account other principles than those to which the national prize court whose judgement is appealed from was required to conform."[70] This task should be executed by the judges "with moderation and firmness"[71]. Renault emphasized that the proposed solution was informed by experiences in domestic law:

> "To sum up, the situation created for the new Prize Court will greatly resemble the condition which long existed in the courts of countries where the laws, chiefly customary, were still rudimentary. These courts made law at the same time that they applied it, and their decisions constituted *precedents*, which became an important source of law."[72]

At that time, however, article 7 of the Prize Court Convention, and in particular the reference to general principles of justice, was quite disputed which became one reason why the convention would not be ratified by states other than Nicaragua.[73] The British government attempted to address the uncertain-

68 Davis, *The United States and the First Hague Peace Conference* 222-223; Paul Heilborn, 'Les Sources Du Droit International' (1926) 11 RdC 16-17.

69 Louis Renault, 'Report to the Conference from the First Commission on the draft convention relative to the establishment of an International Prize Court' in James Brown Scott (ed) (Clarendon Press Oxford University Press 1917) 769.

70 ibid 769.

71 ibid 769.

72 ibid 769.

73 Manley O Hudson, *The Permanent Court of International Justice 1920-1942: a treatise* (Macmillan 1943) 76; James Brown Scott, 'The Declaration of London of February 26, 1909: a collection of official papers and documents relating to the International Naval Conference held in London, December, 1908 - February, 1909'

ties as to the applicable law and proposed the London naval conference "with the object of arriving at an agreement as to what are generally recognized principles of international law within the meaning of paragraph 2 of article 7 of the Convention, as to those matters wherein the practice of nations has varied, and of then formulating the rules which, in the absence of special treaty provisions applicable to a particular case, the court should observe in dealing with appeals brought before it for decision".[74] The first world war prevented a third Hague Conference. This experience was part of the background against which the discussions in the Advisory Committee of Jurists took place. In particular Elihu Root emphasized that the draft would have to receive the support of states and work in practice in order avoid the fate of article 7 of the Prize Court convention.[75] At the same time, it is noteworthy, as illustrated in the next section, that several drafts submitted by states included a similar reference to general principles.

(1914) 8(2) AJIL 280 (stating that article 7 was "bitterly criticized"); for a positive evaluation see Henry B Brown, 'The Proposed International Prize Court' (1908) 2 AJIL 485. Walther Schücking saw in article 7(2) nothing else than the "recognition of a modern law of nature", the usefulness of which for the task for the judge he deemed to be self-evident given the unready state of international law on naval warfare, Schücking, *Der Staatenverband der Haager Konferenzen* 138. He maintained that the states still possessed the monopoly on international lawmaking, ibid 139-140, 146. In contrast, Franz von Liszt hoped that because of the lawmaking powers of the Prize Court international law would no longer remain dependent on states' recognition, Franz von Liszt, 'Das Wesen des völkerrechtlichen Staatenverbamdes und der internationale Prisenhof' in *Festgabe der Berliner juristischen Fakultät für Otto Gierke zum Doktor-Jubiläum 21. August 1910, Dritter Band Internationales Recht. Strafrecht. Rechtsvergleichung* (Marcus 1910) 42.

74 British Parliamentary Papers 1905, Cd. 4555, cited after Hersch Lauterpacht, 'History of International Law' in Elihu Lauterpacht (ed), *International Law Being also the Collected Papers of Hersch Lauterpacht, Vol. 2, The Law of Peace, Part 1, International Law in General* (Cambridge University Press 1975) 140.

75 Permanent Court of International Justice – Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920* 108, 133, 137, 286-287 (referring to the Prize Court experience which would indicate that states will not submit themselves to non-positive law); de Lapradelle (287, 314), Loder (311-312), Hagerup (317) and Descamps (310) evaluated the experience with article 7 differently. Whereas de Lapradelle and Loder stressed that the Prize Court convention failed because of lack of public support in the United Kingdom and lack of general agreement as to the convention as a whole, Loder and Descamps regarded article 7(2) of said convention as recognition of the importance of principles.

D. The drafting of article 38

I. Triad of sources in the preparatory work

The fact that several proposals on a provision of applicable law resembled the ultimate wording of article 38 suggests a certain agreement on the sources to be applied by the court. The proposal put forward by Denmark, Norway and Sweden referred to agreements, "established rules of international law" and "in default of generally recognised rules, the Court shall base its decision upon the general principles of Law". An alternative version replaced the reference to general principles of law with a provision according to which "the Court will decide according to what, in its opinion, should be the rules of International Law".[76] The plan of the five neutral powers (Netherlands, Switzerland, Denmark, Norway, Sweden) proposed that the Court should apply applicable treaties, and in the absence of such treaty provisions the court should apply the recognized rules of international law, or, should no rules exist, shall enter judgment according to its own opinion of what the rule of international law should be.[77] The German proposal of 1919 stipulated that the court should pass judgments according to "international agreements, international customary law and according to the general principles of law and equity (*allgemeine Grundsätze von Recht und Billigkeit*)".[78]

---

76 Hudson, *The Permanent Court of International Justice 1920-1942: a treatise* 113, Draft Scheme of a Convention Concerning an International Judicial Organisation Drawn up by the three Committees nominated respectively by the Governments of Denmark, Norway and Sweden, para 27, in Permanent Court of International Justice – Advisory Committee of Jurists, *Documents presented to the Committee relating to existing plans for the establishment of a Permanent Court of International Justice* (1920) ⟨https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_documents_to_comm_existing_plans.pdf⟩ accessed 1 February 2023 179.

77 Hudson, *The Permanent Court of International Justice 1920-1942: a treatise* 113; a similar proposal was submitted by the Brazilian Clovis Bevilaqua, Mohammed Shahabuddeen, *Precedent in the world court* (Cambridge University Press 1997) 52.

78 David Hunter Miller, *The Drafting of the Covenant* (2, orig. published 1928, Vol 2, New York, 1969) 748, 752-753.

II. The discussion in the Advisory Committee of Jurists

The failure of the 1907 Codification Conference to establish an international prize court led to an institutional self-restraint on the part of the Committee of Jurists and to a separation of the codification project from the project of an international court.[79] The committee made a decision to define the sources,[80] it did not follow a suggestion made by de Lapradelle who preferred a brief reference to "law, justice and equity" since he regarded any definition of the law and its sources "interesting but useless".[81] In the following, this section will first focus on the inclusion of the general principles of law. While in relation to this source reference has been made to natural law in scholarship,[82] the arguments in favour of the inclusion of general principles in the Advisory Committee also show that general principles of law were linked to the judicial interpretation and application of law and could therefore be regarded as a concept that applies in relation to, rather than as an alternative to, the other sources. This section will then turn to the discussion of the interrelationship of sources in the committee.[83]

1. General principles of law

In the 13th meeting, Baron Descamps introduced a draft which resembled previously submitted drafts as well as article 38 in its present form. The draft referred to conventional international law, international custom and in the third place to "the rules of international law as recognised by the legal

79 Pellet and Müller, 'Article 38' 826 para 16; d'Aspremont, *Formalism and the Sources of International Law* 149, stating that article 38 was not intended to serve as a model for law-ascertainment.

80 Pellet and Müller, 'Article 38' 828 para 23; see Permanent Court of International Justice – Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920* 293 (Root), establishing the actual rules would exceed the committee's mandate.

81 ibid 295.

82 Cf. Cançado Trindade, 'International Law for Humankind: Towards a New Jus Gentium (I)' 157.

83 This study will quote the members of the committee mainly in the official English translation, it shall be acknowledged here, however, that, with the exception of Elihu Root, all members spoke in the French language, Permanent Court of International Justice – Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920* IV.

conscience of civilized nations"[84], the draft became subject to a debate within the committee.

Elihu Root did "not understand the exact meaning of clause 3" and raised the question of whether this clause referred "to something which had been recognised but nevertheless had not the character of a definite rule of law".[85] As Root had remarked earlier, "[n]ations will submit to positive law, but will not submit to such principles as have not been developed into positive rules supported by an accord between all States."[86] He expressed doubts on whether states would submit to compulsory jurisdiction of a court "which would apply principles, differently understood in different countries".[87] Loder, however, defended Descamps' proposal, and argued that the third clause referred to "rules which were, however, not yet of the nature of positive law" and that "it was precisely the Court's duty to develop law, to 'ripen' customs and principles universally recognised, and to crystallise them into positive rules."[88] Lord Phillimore supported the mention of customary law next to written law with reference to the "Anglo-Saxon conception of law"[89] and expressed the view that customary international law encompassed both clause 3 and international jurisprudence to which clause 4 referred.[90] In Hagerup's view, principles were necessary to fill the gaps in positive law and "to avoid the possibility of the Court declaring itself incompetent (*non-liquet*) through lack of applicable rules".[91]

In response to the criticism in particular by Root, Baron Descamps explained in a longer speech the significance of a reference to principles of

84 Permanent Court of International Justice – Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920* 306: "The following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the undermentioned order: 1. conventional international law, whether general or special, being rules expressly adopted by the states; 2. international custom, being practice between nations accepted by them as law; 3. the rules of international law as recognised by the legal conscience of civilised nations; 4. international jurisprudence as a means for the application and development of law."

85 ibid 293-294, he also criticized the fourth clause.

86 ibid 287.

87 ibid 308; but see Hagerup at 311, arguing that one should keep the question of compulsory jurisdiction and the question of sources separate.

88 ibid 294.

89 ibid 295.

90 ibid 294.

91 ibid 296, 307-308; see also de Lapradelle at 313; but see Ricci-Busatti, 314, referring to the principle that whatever is not forbidden is allowed.

"objective justice", disregard of which would imply "a misunderstanding of present conditions, of international law, and the duties of a judge."[92] In his view, it "would be a mistake to imagine that nations can be bound only by engagements which they have entered into by mutual consent."[93] Judges had always applied objective justice and it would be "absolutely impossible and supremely odious" to require the judge to "take a course amounting to a refusal of justice" in a situation where a just solution is possible but "no definite convention or custom appeared" (*"sous prétexte qu'on ne trouve pas de convention out de coutume déterminées"*).[94] Rather than leaving the judge "in a state of compulsory blindness", Baron Descamps wanted to allow the judge "to consider the cases that come before him with both eyes open".[95] In his experience "it is impossible to disregard a fundamental principle of justice in the application of law, if this principle clearly indicates certain rules, necessary for the system of international relations, and applicable to the various circumstances arising in international affairs."[96] Justice was an element for progress and "an indispensable complement to the application of law, and as such essential to the judge".[97]

It emerges from the foregoing that Descamps' invocation of "objective justice" was not concerned with an abstract discussion of the value of natural law or positivism, it was primarily concerned with the practical task of the judge, with the interpretation and the application of international law.[98] He called these justice considerations "objective", as they should not be mere subjective considerations of the judge but be rooted in "concurrent authors whose opinions have authority" and "the legal conscience of civilised nations" to which also the Martens clause referred.[99] This may also indicate that he might not have only principles linked to domestic legal systems in mind.[100] He repeated this point in the discussion. The reference to the conception of justice of civilised nations would in fact "impose on the judges a duty which would prevent them from relying too much on their own subjective

92 ibid 322.
93 ibid 323.
94 ibid 323.
95 ibid 323.
96 ibid 324.
97 ibid 325.
98 ibid 324.
99 ibid 323-324.
100 This argument has been made by Saunders, *General Principles as a Source of International Law* 40.

opinion"[101], which was also a response to the concerns expressed by Root and Ricci-Busatti, namely that the court must not become a lawmaker.[102] The different views bring to fore the dual nature of legal principles, as on the one hand the legal operator enjoys a certain liberty, on the other hand, legal principles discipline the legal operator's reasoning.

As requested by Hagerup, Root drafted for the 15th meeting a provision which became article 38 and referred to the general principles recognised by civilized nations.[103] Lord Phillimore opposed Ricci-Busatti's proposal to include a reference to principles of equity within the reference the general principles of law as he and Root "had gone as far as they felt they could on the subject of the liberty to give the judge."[104] Phillimore pointed out that general principles "were these which were accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of res judicata etc." and that they should be understood as "maxims of law".[105]

2. The discussion of the interrelationship of sources

The interrelationship of the sources was discussed only to a certain extent. The original draft prescribed that the sources "will be considered in the undermentioned order" (*"dans l'ordre successif oú elles s'imposent à son examen"*). Ricci-Busatti opposed the formula and its implication that the "judge was not authorised to draw upon a certain source, for instance point 3, before having applied conventions and customs".[106] A reference to any order of application did not become part of article 38.

101 Permanent Court of International Justice – Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920* 311; see also at 318, where he agreed with Root "that it would be dangerous to allow the judges to apply the law of right and wrong exclusively according to their own personal understanding of it."

102 ibid 314.

103 ibid 344.

104 ibid 333.

105 ibid 335.

106 ibid 337. While Descamps defended the classification as "natural" since a treaty should not be neglected by applying customary law, Ricci-Busatti claimed that the proposed expression "seems to fail to recognise that these various sources may be applied simultaneously" in relation to one another. Hagerup and De Lapradelle considered the phrase "*ordre succesif*" to be superfluous, 338.

Lord Phillimore criticized the distinction between custom and general principles of law introduced by the proposed draft[107] which can be understood against the background of his socialisation in a legal system in which, since Blackstone, maxims of law and customary law had been assimilated within the concept of common law.[108] Also de Lapradelle wondered as to the relationship between the two.[109] This indicated, however, that both Phillimore and de Lapradelle did not reject the existence of norms which the other members associated to the concept of general principles of law, rather, they adopted a broader understanding of customary international law than other members of the Advisory Committee.[110]

Even though the interrelationship of sources was not subject to detailed discussions, it is possible to draw a number of conclusions from the text itself. Article 38 is illuminating as to differences between the sources by referring to "rules *expressly recognized*", "a general practice *accepted* as law" and "general principles of law *recognized* by civilized nations". Thus, the text indicates the different degrees of (individual) state consent. This point is further illustrated by way of a comparison between article 38(1) and article 38(2) PCIJ Statute. Article 38(1) PCIJ Statute referred to rules "expressly

---

107 ibid 295: "International custom, that is, a general practice accepted as law by nations, constitutes in the main international law. Under these conditions clause 3 and 4 either came within the limits of clause or else were additions to this clause", the latter of which he opposed. See also 311: Lord Phillimore "pointed out that points 3 and 4 of the project were included [in custom]". See also 334: The "sources mentioned in point 3 might be included in point 4, because it was through custom that general principles came to be recognised, and on the other hand, custom is formed by the usage followed in various public and formal documents, and from the works of writers who agree upon a certain point."

108 See also Kleinlein, 'Customary International Law and General Principles Rethinking Their Relationship' 146.

109 Permanent Court of International Justice – Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920* 335 ("how were general principles obtained, unless it was from custom. Point 2 and 3 ought to change place. If customary law had already been dealt with, from whence could general principles be derived, unless it were from the reading of judicial decisions and writers?").

110 See also Cheng, *General Principles of Law as applied by International Courts and Tribunals* 11-12, arguing that Baron Descamps' understanding of custom was more restrictive than Phillimore's, since Baron Descamps stressed the importance of the existence of both practice and *opinio juris* and proposed for certain rules which rather could be based on "juridical conscience" the general principles of law.

recognized *by the contesting States*".[111] The original draft of article 38(2) referred to "*la coutume internationale, comme attestation d'une pratique commune des nations, acceptée par elles comme loi*".[112] In Haggenmacher's view, already this draft rejected the idea of custom as tacit agreement or a mere analogy to treaty law, since the term "nations" referred to the international community as a whole, in contradistinction to "the contesting states".[113] His interpretation is supported by the fact that a proposal of Ricci-Busatti was not adopted, which described custom as "common practice among *said* States, accepted by them as law" ("*d'une pratique commune des dits Etats, acceptée par eux comme loi*").[114] The final version also supports Haggenmacher's reading, since article 38(2) PCIJ Statute did not include any reference to states or nations.

Whereas general principles of law which needed to be "recognized" might appear closer to natural law than the other two sources,[115] the reference to general principles of *law*, rather than of equity[116] supports the view that the general principles of law were considered as normative, legal concept.[117] The examples discussed by the committee illustrate that general principles can encompass rather broad legal concepts, such as the principle of good faith, and also quite specific concretizations, such as the principle of *res judicata*. The discussions highlighted that general principles were deemed to be important for the application of international law in order to avoid a

111 Italics added.

112 Permanent Court of International Justice – Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920* Annex 306, italics added.

113 Haggenmacher, 'La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale' 27-28; see also Pellet and Müller, 'Article 38' 909 para 226, stressing that article 38(1)(b) refers to an acceptance, rather than to the will, of states.

114 Permanent Court of International Justice – Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920* 351 (italics added); Haggenmacher, 'La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale' 27.

115 ibid 21, 26.

116 The text of article 38 distinguishes between the sources of law, the subsidiary means for the determination of law and a decision *ex aequo et bono.*

117 See also Pellet and Müller, 'Article 38' 925 para 257; for the view that general principles cannot be rigidly distinguished from the other sources on the basis that general principles would be non-consensual Elias and Lim, ''General Principles of Law', 'Soft' Law and the Identification of International Law' 3 ff., and 35 and 49.

non-liquet. They were intended to foster judicial creativity and preclude a premature conclusion that no definite rule of treaty or custom would govern the situation before the court. At the same time, the recognition-requirement requires the judge not to make simply a subjective determination but to strive for an objective assessment. It must not go unnoticed that right from the beginning the reference to "civilized nations" was controversial and partly regarded unnecessary since, in the words of de Lapradelle, "law implies civilisation".[118] Today, there is wide agreement that the historical connotation of the term which in fact had been used to exclude so-called non-Western states[119] deprived this formulation of any meaning.[120] In the context of the recent ILC project on general principles, it is proposed to use the term "general principles recognized by the community of nations"[121], which is inspired by article 15(2) ICCPR.

---

118 Permanent Court of International Justice – Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920* 335.

119 *North Sea Continental Shelf* [1969] ICJ Rep 3 Sep Op Ammoun 132 ff.; Jochen von Bernstorff, 'The Use of Force in International Law before World War I: On Imperial Ordering and the Ontology of the Nation-State' (2018) 29(1) EJIL 238; Weil, 'Le droit international en quête de son identité: cours général de droit international public' 144.

120 On the "'archaic' requirement" Pellet and Müller, 'Article 38' 927 para 262; Herczegh, *General Principles of Law and the International Legal Order* 39-41; Béla Vitanyi, 'Les Positions Doctrinales Concernant Le Sens de la Notion de "Principes généraux de Droit Reconnus Par Les Nations Civilisées"' (1982) LXXXVI RGDIP 54; on the different meanings of civilisation see Liliana Obregon, 'The Civilized and the Uncivilized' in Bardo Fassbender and Anne Peters (eds), *Oxford Handbook of the History of International Law* (Oxford University Press 2012) 917 ff.; but see Tomuschat, 'Obligations Arising For States Without Or Against Their Will' 318-319, arguing that "the qualification 'civilized' is an essential screening element which permits distinction between States, departing from formalistic reliance on sovereign equality" and which permits to exclude states "whose policies and practices are bent on ethnic cleansing, flat neglect of any humanitarian rules of warfare and massive discrimination on ethnic or religious grounds."; cf. also Hugh W Thirlway, *The law and procedure of the international court of justice: fifty years of jurisprudence* (vol 1, Oxford University Press 2013) 243-244; Antoine Favre, 'Les Principes Généraux Du Droit, Fond Commun Du Droit des Gens' in *Recueil d'études de droit international en hommage à P. Guggenheim* (Faculté de Droit de l'Univ de Genève 1968), 370-371.

121 *ILC Report 2019* at 336, 338; *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)* UN Doc A/77/10 317 (draft conclusion 7).

E. Constructing the Interrelationship in the interwar period

Article 38 is said to have led to a consolidation of the language with respect to the sources.[122] At the same time, different source preferences and understandings of the interrelationship were developed during the interwar years. This section will examine how and to what extent the interrelationship of the sources was discussed and constructed subsequent to the adoption of the PCIJ Statute in the jurisprudence of the PCIJ (I.), in the codification setting of the League of Nations (II.) and in international legal scholarship (III.).

I. The PCIJ

The PCIJ did not explicitly comment on the interrelationship between sources.[123] The Permanent Court of International Justice affirmed in the famous *Lotus* case a consensual-positivist construction of international law:

> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."[124]

This *dictum* has given rise to different interpretations today: one interpretation equates the absence of a prohibition with the existence of a permission, in

122 Thomas Skouteris, *The notion of progress in international law discourse* (TMC Asser Press 2010) 93, 98 ff.; see also Max Sørensen, *Les sources du droit international: étude sur la jurisprudence de la Cour Permanente de Justice Internationale* (Munksgaard 1946) 40.

123 On the sources of international law in the jurisprudence of the PCIJ see Akbar Rasulov, 'The Doctrine of Sources in the Discourse of the Permanent Court of International Justice' in Christian J Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Martinus Nijhoff Publishers 2013) 300 ff.; see also Robert Kolb, 'The Jurisprudence of the Permanent Court of International Justice Between Utilitas Publica and Utilitas Singulorum' (2015) 14 The Law and Practice of International Courts and Tribunals 17 ff.; Ole Spiermann, *International legal argument in the Permanent Court of International Justice: the rise of the international judiciary* (Cambridge University Press 2005).

124 *The Case of SS Lotus: France v Turkey* Merits [1927] PCIJ Series A No 10, 18.

the sense that what is not prohibited by international law is permitted.[125] According to a different interpretation, the PCIJ merely stated that what was not prohibited by law, was not prohibited by law - the ensuing factual freedom would not constitute a legal norm.[126] Reading the *Lotus* judgment as a whole, the argument could also be made that the Court did not decide just on the basis of silence of international law: Turkey, it could be argued, had a reasonable connection to the case of the collision between a Turkish and a French vessel and, according to the Court, the territoriality of criminal law was "not an absolute principle of international law" as "all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them".[127] In addition, the PCIJ in fact did consider an argument based on a principle of law derived from different conventions

125 Cf. *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 425-426 para 57, the International Court of Justice had been asked by the General Assembly whether Kosovo's unilateral declaration of independence was "in accordance with" international law; according to the Court, the "answer to that question turns on whether or not the applicable international law prohibited the declaration of independence [...] The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence."; critical of the Court's approach: ibid Decl Simma pp. 478-479 (the Court "could also have considered the possibility that international law can be neutral or deliberately silent on the international lawfulness of certain acts"); but see Anne Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom?' (2011) 24 Leiden Journal of International Law 99, noting that the Court phrased its answer in terms of a "non-violation" without declaring the declaration to be "in accordance with" international law, cf. *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* [2010] ICJ Rep 403, 453; recently the UK Court of Appeals rejected in the context of international humanitarian law the view that the lack of a prohibition equals a permission: *Mohammed (Serdar) v Ministry of Defence, Qasim v Secretary of State for Defence, Rahmatullah v Ministry of Defence, Iraqi Civilians v Ministry of Defence* [2015] EWCA Civ 843 paras 195 ff.

126 Kammerhofer, 'Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice' 343, 357: "If there is no law, there is no law."

127 *The Case of SS Lotus* PCIJ Series A No 10, 19, 20. A different rule is provided in Article 11 of the Convention on the High Seas (signed 29 April 1958, entered into force 30 September 1962) 450 UNTS which accords the criminal jurisdiction to the flag State of the State of which the person concerned is a national; according to Crawford, 'Change, Order, Change: The Course of International Law General Course on Public International Law' 55, this was "a rare case of a treaty overruling a decision by the Court on custom."

which, "whilst [...] permitting the war and police vessels of a State to exercise a more or less extensive control over the merchant vessels of another State", expressly reserved jurisdiction to the flag state.[128] In the end, the Court held that it was "not absolutely certain that this stipulation is to be regarded as expressing a general principle of law rather than as corresponding to the extraordinary jurisdiction which these conventions confer on the state-owned ships of a particular country in respect of ships of another country on the high sea".[129] The rejection, thus, was based on reasons relating to the substance of the treaties, rather than on a categorical rejection of the mere possibility to derive principles from conventions. In this context, the Court indirectly expressed doubts on whether the principle enshrined in these conventions lent itself to general application beyond the specific contexts regulated by said conventions and on whether such principle was applicable to a situation "which concern two ships and consequently the jurisdiction of two different States."[130]

Whatever interpretation one adopts, the *Lotus* judgment, if interpreted as confirmation of strict voluntarism, is not representative of the overall case-law of the PCIJ.[131] One year after *Lotus*, in 1928, the PCIJ declared that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[132] The PCIJ recognized general principles such as the prohibition of abuse of rights and the principle of good faith[133], it considered third states' treaties in the interpretation of the law of neutrality and the construction of provisions of the Treaty of Peace of Versailles relating to the Kiel canal[134],

128 *The Case of SS Lotus* PCIJ Series A No 10, 26.

129 ibid PCIJ Series A No 10, 27.

130 ibid 27.

131 See also Kolb, 'The Jurisprudence of the Permanent Court of International Justice Between Utilitas Publica and Utilitas Singulorum' 34, concluding that it would be "mistaken to consider the PCIJ as being the champion of the singular utility rooted in the sovereignty of States, i.e. in the 'Lotus society'. The only judgment, which can be mobilized unreservedly in this direction, is precisely the Lotus case of 1927."

132 *Case Concerning the Factory at Chorzow: Germany v. Poland* Judgment of 13 September 1928 [1928] PCIJ Series A 17, 29.

133 *Certain German Interests in Polish Upper Silesia: Germany v. Poland* Judgment [1926] PCIJ Series A 7, 30.

134 *Wimbledon: UK et al v. Germany* Judgment of 17 August 1923 [1923] PCIJ Series A 01, 15, 25-8.

and it assumed the existence of an international minimum standard.[135] As Lauterpacht demonstrated[136], the interpretation of international treaties was guided by general principles of law, such as the principle according to which no one shall be judge in his own case.[137]

The PCIJ based its decisions in several cases on one source and explored the relation to other sources only to a certain extent. In the *Wimbledon* case, the PCIJ did not accept Germany's argument that article 380 of the Treaty of Versailles, according to which the Kiel canal "shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality", had to be interpreted restrictively, in light of Germany's rights and obligations under the law of neutrality.[138] In particular, the Court saw no problem of sovereignty as "the right of entering into international engagements is an attribute of State sovereignty".[139] Rather, the Court interpreted the law of neutrality in light of other international agreements on the Suez and Panama Canals which served as "illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole word [...] even the passage of a belligerent man-of war does not compromise

135 For a treaty-based international minimum standard, see *Certain German Interests in Polish Upper Silesia* PCIJ Series A No 07, 33; see also *Minority Schools in Albania* Advisory Opinion of 6 April 1935 [1935] PCIJ Series A/B 64, 18 ff., distinguishing between equality in law and equality in fact.

136 Hersch Lauterpacht, *The development of international law by the International Court* (Stevens 1958) 158 ff. For a recent analysis of *dicta* associated with general principles in PCIJ decisions and individual opinions see Saunders, *General Principles as a Source of International Law* 52 ff.

137 *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne: Advisory Opinion of 21 November 1925* [1925] PCIJ Series B 12, 29 ff.

138 This argument was supported by Judges Schücking, Anzilotti, and Huber, see *Wimbledon* 01 Diss Op Schücking 43 ff.: "The right to take special measures in times of war or neutrality has not been expressly renounced ; nor can such renunciation be inferred [...]"; Joint Diss Op Anzilotti and Huber 39-40.

139 ibid 25. For a critique of the Court's textual approach without establishing a relationship to other rules of international law see Sheila Weinberger, 'The Wimbledon Paradox and the World Court: Confronting inevitable conflicts between conventional and customary international law' (1996) 10 Emroy International Law Review 423 ff.; see also Clemens Feinäugle, 'The Wimbledon' [2013] Max Planck EPIL paras 15-6.

the neutrality of the sovereign State under whose jurisdiction the waters in question lie."[140]

The PCIJ ruled in the *Turkish Lighthouse* case solely on the basis of a treaty and did not find it necessary to consider whether "according to the general rules of international law, the territorial sovereign is entitled, in occupied territory, to grant concessions legally enforceable against the State which subsequently acquires the territories it occupies, [which] was debated at some length between the Parties."[141] In contrast, the PCIJ decided the *Eastern Greenland* case between Denmark and Norway on the basis of the general concept of title to sovereignty over Greenland based on a continued display of authority, instead of, as suggested by Judge Anzilotti, focusing the analysis on an agreement reached between Denmark and Norway.[142] As concluded by Sørensen in his extensive study on the PCIJ's jurisprudence, the wording of article 38 of the Statute neither posed a practical difficulty to the Court, nor was it particularly impactful in the settlement of disputes.[143]

II. The 1930 Codification Conference and the discussion of the sources

Even though the 1930 Conference was no success in general with respect to the codification of the three topics which had been deemed "ripe" for codification, namely the responsibility of states for damage caused in their territory to the person or property of foreigners, the rules concerning nationality and the law relating to territorial waters,[144] it was of legal-political importance as it ultimately indicated support in favour of the triad of sources.

---

140 *The Case of SS Lotus* Series A No 10, 28; see also Lazare Kopelmanas, 'Custom as a Means of the Creation of International Law' (1937) 18 BYIL 136.

141 *Lighthouse Case between France and Greece: France v Greece* Judgment of 17 March 1934 [1934] PCIJ Series A/B 62, 25.

142 *Legal Status of Eastern Greenland* Series A/B No 53, 23, 45 ff. and Diss Op Anzilotti 76 and 94: "It is consequently on the basis of that agreement which, as between the Parties, has precedence over general law, that the dispute ought to have been decided."

143 Sørensen, *Les sources du droit international: étude sur la jurisprudence de la Cour Permanente de Justice Internationale* 250-251.

144 In the following, this section refers to the documents and protocols compiled in Shabtai Rosenne (ed), *League of Nations Conference for the Codification of International Law (1930)* (vol 4, Dobbs Ferry, NY: Oceana 1975).

The sources discussion started in the context of the Basis of Discussion No 2 on the responsibility for injuries committed to aliens with the question whether the draft should speak of "international obligations" or rather refer explicitly to the sources of international law, and if so, to which one. Three camps can be identified in this debate.

One camp sought to avoid defining "international obligations" and thereby any discussion of the sources and substantive obligations. Cavaglieri opposed the Preparatory Committee's suggestion to speak of international obligations "resulting from treaty or otherwise" and expressed sympathy for simply speaking of "international obligations".[145] The phrase "or otherwise" appeared to Cavaglieri as too vague, and he argued that in case that the reference to treaties would be retained one should rather say "resulting from treaties or from recognised principles of international law".[146] The proposal to speak of international obligations reflected the understanding of international responsibility as an objective regime that presupposes an international wrong, regardless of the source. Cavaglieri placed importance on the distinction between substantive obligations and the law of responsibility and emphasized that the content of the obligations "is not ripe for codification".[147]

In contrast, a second camp stressed the need to be as precise as possible with respect to the origin of international obligations. This camp was skeptical towards any references to unwritten international law which needs to be seen against the background of the discussions of the contested international minimum standard and the question of whether equal treatment of aliens sufficed for compliance with this standard.[148] José Gustavo Guerrero from El Salvador[149], who would later became the last president of the PCIJ and the first president of the ICJ, argued that international obligations should be defined as "resulting from treaties and from the provisions of the present Convention".[150] Mr Sipsom from Roumania endorsed this proposal, arguing that custom itself was (in part) uncertain and that the conference should therefore frame rules and state cases which by legal practice or custom are recognised

145 ibid 1455; ibid 1459.

146 ibid 1456.

147 ibid 1464.

148 On this discussion see below, p. 564.

149 On Guerrero's role in the context of international responsibility for injuries to aliens see below, p. 566; Alan Nissel, 'The Duality of State Responsibility' (2013) 44(3) Columbia Human Rights Law Review 815 ff.

150 Rosenne, *League of Nations Conference for the Codification of International Law (1930)* 1456.

as cases of responsibility of an extra-contractual nature.[151] In response to a British delegate's criticism that Guerrero's proposal would exclude customary international law,[152] Guerrero suggested to add "well-defined international custom" from which international obligations might emerge.[153] The reference to custom should restrictively include only customary international law that was indisputably recognized by the contracting states.[154] According to Guerrero, the codification conference should not focus too much on article 38 PCIJ Statute which was intended to "supply indications and guidance for the Court in reaching its decisions, [...] [whilst in codification] we are in no way concerned with giving guidance, but with laying down the law. The two things are quite different."[155] Sipsom from Roumania added that "[t]he judge's duty is one thing; the legislator's duty is another", as the latter should make and state the law precise terms, while the former would still be able to find reasons not in the written law if inadequate but "but in custom, in general principles, in legal doctrine and in judicial decisions."[156]

---

151 Rosenne, *League of Nations Conference for the Codification of International Law (1930)* 1457.

152 See for instance the British delegate, Mr Becket from Great Britain argued that Guerrero's formulation would exclude and thus miss customary international law. One should not limit oneself to conventions since "there will still remain a considerable amount of customary law which will impose obligations upon States and to which this principle must apply. [...] it is clear, I think, that we cannot limit the obligations to those resulting from international conventions.", ibid 1457.

153 ibid 1461. Sipsom suggested inserting a provision to the effect that obligations "may arise not only from treaties but from customary law which is indisputably established and recognised by all the contracting States" (1464). d'Avilla Lima from Portugal supported Sipsom's idea since in this way "the text would certainly be more definite" (1465).

154 See Mr d'Avilla Lima from Portugal opted for Sipsom's amendment, "custom indisputably recognised by the contracting States" since in this way "the text would certainly be more definite." Buero from Uruguay strongly emphasized that "[f]rom our point of view, customary law in general is inacceptable, particularly as regards international law [...] we know that customs are established through the domination of certain States, and we cannot now recognise those customs that we have not definitely accepted."

155 ibid 1467 (Guerrero); see also Mr Sipsom from Roumania, according to whom there is no international custom recognised by the whole world; a custom might be imposed on states by judges in litigation, 1474.

156 ibid 1475-1476; cf. on a similar distinction between lawmaker and adjudicator recently Onuma Yasuaki, 'The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International

A commitment to article 38 PCIJ may be said to characterize the position of a third camp. Castberg from Norway argued that one should not "lay down any rule concerning sources of international law other than those mentioned in Article 38".[157] In particular, under this provision rules would arise "not only from treaties and from custom but from 'the general principles of law recognised by civilised nations', from judicial practice and from doctrine."[158]

In the end, the view prevailed that a decision to base the codification on a different understanding of sources might create unnecessary tensions.[159] After a draft committee had proposed a formula which deliberately did not copy article 38 in order to avoid the impression that the final result of the codification conference would in any way impair or impact article 38,[160] several delegates argued that the question of the sources of obligations was already decided by the international community and referred to article 38.[161]

Law' in Nisuke Ando and others (eds), *Liber amicorum Judge Shigeru Oda* (Kluwer Law Internat 2002) vol 1 192 ff.; cf. also Jan Hendrik Willem Verzijl, *International Law in Historical Perspective. General Subjects* (vol 1, AW Sijthoff 1968) 30 (critical of references in codification conventions to "other rules of international law").

157 Rosenne, *League of Nations Conference for the Codification of International Law (1930)* 1464. In a similar sense Dinichert from Switzerland (1458).

158 ibid 1465. According to Politis, a qualification of customary international law to the effect that it must have been accepted by all states was unnecessary since "[b]y its very definition, custom is a rule accepted by all the States" (1466). Abd el Hamid Bdaoui Pacha from Egypt (1466, 1467) and Dinichert from Switzerland (1467) disagreed. As put by Dinichert: "I cannot accept this formal statement that custom has the force of law, only when the principle in question is recognised by all countries without exception."

159 See ibid 1468, Mr Limburg from the Netherlands; Abd el Hamid Bdaoui Pacha from Egypt, 1477.

160 ibid 1472: "The international obligations referred to in the present Convention are those resulting from treaty or customary law which have for their object to ensure for the persons and property of foreigners treatment in conformity with the principles recognised to be essential by the community of nations."

161 ibid 1480 (Dinichert): "Great and small States are now subject to precisely the same law-the one that we hammered out, the on that exists, the one we intend to develop and not to destroy. That is what I wanted to say. It will explain why the Swiss delegation will very regretfully be unable to support any proposal that does not confirm the existing law." Mr Nagaoka from Japan argued that the general principles of law should be included to avoid an *a contrario* conclusion by which general principles of law would be excluded (1481). Also Mr. Erich from Finland regretted that so far general principles of law were not contemplated in detail, since the discussion concerned only treaty and custom. Furthermore, he made the strong claim that other bases of discussions would rely or include general principles of law, for instance

The Chairman's proposal to establish a sub-committee was accepted and the sub-committee reached unanimous agreement on the following formula which emphasized all three sources:

> "The expression 'international obligations' in the present Convention means obligations resulting from treaty, custom or the general principles of law, which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations."[162]

Even though the 1930 Codification Conference was no success according to its own standards as it failed in achieving agreement on general rules, it was of legal-political significance for the triad of sources. The very idea to maintain three sources in international law was neither uncontroversial nor unchallenged. At the same time, this critique could not assert itself, as the sub-committee's formula indicates. That the project of codification may not necessarily lead to the elimination of unwritten international law will become even clearer in the work of the ILC.[163]

III. The inter-war scholarship on the interrelationship of sources

1. Overview

The inter-war years witnessed lively debates on the sources of international law. In particular, article 38(3) PCIJ Statute gave rise to several monographs and articles.[164]

---

if liability was excluded for reasons of (financial) necessity or if the amount of damage was not further defined (1481). Mr Urrutia from Colombia also opted for continuity to the former conferences. Texts such as the Statute should be considered (1481-1482); see also Rosenne, *League of Nations Conference for the Codification of International Law (1930)* 1473, Castberg from Norway, Nagaoka from Japan on the importance of general principles of law for state responsibility.

162 ibid 1535; in other parts of the 1930 codification, the draft article was aligned with article 38 . In the Nationality committee, the Chairman defended the general reference to other sources, also as placeholder allowing to take account of future developments in international law (see 1087).

163 See below, p. 317.

164 Jean Spiropoulos, *Die allgemeinen Rechtsgrundsätze im Völkerrecht: eine Auslegung von Art. 38,3 des Status des ständigen Internationalen Gerichtshofs* (Verlag des Instituts für Internationales Recht an der Univ Kiel 1928); Elfried Härle, *Die allgemeinen Entscheidungsgrundlagen des Ständigen Internationalen Gerichtshofes: eine kritisch-würdigende Untersuchung über Artikel 38 des Gerichtshof-Statuts* (Vahlen

It is difficult to structure the general debate in terms of classifications such as natural law or positivism for several reasons. Authors' nuanced positions often escape a clear classification. Also, there is a risk to attribute a meaning to each concept which would not necessarily correspond to the historical meaning during the inter-war years. If one attempted to construct these categories according to the meaning of that time, one would be surprised of the way these categories were used. For instance, the Greek international lawyer Jean Spiropoulos declared in his German monograph on general principles the "orthodox international law positivism" to be a deadly born child. As he regarded general principles to be legal ideas which, by virtue of their general

---

1933), Pierre Grapin, *Valeur internationale des principes généraux du droit: contribution à l'étude de l'article 38, § 3 du Statut de la Cour permanente de Justice internationale* (Domat-Montchrestien 1934); see furthermore Arrigo Cavaglieri, 'Concetto e caratteri del diritto internazionale generale' (1922) 14 Estratto dalla Rivista di diritto internazionale 289 ff., 479 ff.; Charles de Visscher, 'Contribution à l'étude des sources du droit international' (1933) 14 Revue de Droit International et de Legislation Comparee 395 ff.; Lazare Kopelmanas, 'Essai d'une Théorie des Sources Formelles de Droit International' (1938) 1 Revue de droit international 101 ff.; Rudolf Aladár Métall, 'Skizzen zu einer Systematik der völkerrechtlichen Quellenlehre' (1931) 11 Zeitschrift für öffentliches Recht 416 ff.; Giorgio Balladore Pallieri, *I "principi generali del diritto riconosciuti dalle nazioni civili" nell' art. 38 dello statuto della Corte permanente di giustizia internazionale* (Istituto giuridico della R università 1931); Georges Scelle, 'Essai sur les sources formelles du droit international' in *Recueil d'études sur les sources du droit en l'honneur de François Gény* (Recueil Sirey 1934) vol 3 400 ff.; Kopelmanas, 'Custom as a Means of the Creation of International Law' 127 ff.; Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (Mohr Siebeck 1923); Verdross, 'Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle Zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts'; Heydte, 'Glossen zu einer Theorie der allgemeinen Rechtsgrundsätze' 289 ff.; Karl Strupp, *Das Recht des internationalen Richters, nach Billigkeit zu entscheiden* (Noske 1930); Sørensen, *Les sources du droit international: étude sur la jurisprudence de la Cour Permanente de Justice Internationale*; Nicolas Politis, *The new aspects of international law: A Series of Lectures Delivered at Columbia University in July 1926* (Carnegie Endowment for International Peace 1928); Edwin M Borchard, 'The Theory and Sources of International Law' in *Recueil d'études sur les sources du droit en l'honneur de François Gény* (Recueil Sirey 1936) vol 3 328 ff.; Louis Le Fur, 'La coutume et les principes généraux du droit comme sources du droit international public' in *Recueil d'études sur les sources du droit en l'honneur de François Gény* (Recueil Sirey 1934) vol 3 362 ff.; George A Finch, *The Sources of Modern International Law* (Carnegie Endowment for International Peace 1937); John Chipman Gray, *The Nature and Sources of the Law* (2nd edn, The MacMillan Company 1931).

character, can claim general application and can be regarded as integrating part of any legal order, he classified them, as natural law ("*Naturrecht*").[165] He did so in explicit contradistinction to Hersch Lauterpacht and what he regarded to be Lauterpacht's "positivist" approach. Lauterpacht himself, however, is on record for having characterized general principles as "*un coup mortel au positivisme*".[166]

Notwithstanding, it is possible to identify certain strands. There is a group of authors who were closer to voluntarism or placed greater hopes in the prospect of codification. Karl Strupp is one example, maintaining that only treaty and customary international law would be true sources and that more international law should be achieved through codification. Article 38(3) and similar provisions of other arbitration agreements constituted a *lex arbitri* which addressed solely the applicable law of the PCIJ.[167] Other scholars stressed the importance of general principles for the interpretation and application of treaties and customary international law[168] which could be

165 Spiropoulos, *Die allgemeinen Rechtsgrundsätze im Völkerrecht: eine Auslegung von Art. 38,3 des Status des ständigen Internationalen Gerichtshofs*, preface, 67, and 9: "Rechtsgedanken [...], die infolge ihres allgemeinen Charakters Allgemeingültigkeit haben und deshalb auch als integrierender Bestandteil einer jeden Rechtsordnung betrachtet werden müssen."; see Walter Küntzel, *Ungeschriebenes Völkerrecht Ein Beitrag zu der Lehre von den Quellen des Völkerrechts* (Gräfe u Unzer 1935) 36 ff. who by and large is in line with Spiropoulos, except for his classification as "natural law"; likewise Härle, *Die allgemeinen Entscheidungsgrundlagen des Ständigen Internationalen Gerichtshofes: eine kritisch-würdigende Untersuchung über Artikel 38 des Gerichtshof-Statuts* 112-116; as Spiropoulos later remarked, ultimately it depends on one's understanding of the terms positivism and natural law, Jean Spiropoulos, *Théorie générale du droit international* (Pichon et Durand-Auzias 1930) 107.

166 Hersch Lauterpacht, 'Règles générales du droit de la paix' (1937) 62(IV) RdC 164; see also Visscher, 'Contribution à l'étude des sources du droit international' 405-406.

167 Strupp, *Das Recht des internationalen Richters, nach Billigkeit zu entscheiden* 85-86. Strupp is ready to admit that certain characteristics of the treaty might belong to general principles of law.

168 Georges Ripert, 'Les règles du droit civil applicables aux rapports internationaux: (contribution à l'étude des principes généraux du droit visés au statut de la Cour permanente de justice internationale)' (1933) 44 RdC 573-575, 577, 579 (principles are a category distinct from custom and from natural law, they must be found in positive legislation); Leibholz, 'Verbot der Willkür und des Ermessensmißbrauches im völkerrechtlichen Verkehr der Staaten' 77 ff.; Visscher, 'Contribution à l'étude des sources du droit international' 406, 412; see also Sørensen, *Les sources du droit international: étude sur la jurisprudence de la Cour Permanente de Justice*

ascertained not only in municipal law but also in international law where principles were implied in treaties and customary international law.[169] If one attempts to systematize the scholarly discussion, several greater streams can be identified, although one must be aware that there are many authors escaping a clear classification. Anzilotti's voluntarism (2.), Scelle's *droit objectif* (3.), Kelsen's positivism (4.), Verdross' doctrine of principles (5.) and Lauterpacht's study of the judicial function (6.) exemplify that different perspectives on the relationship of sources were connected to different perspectives on the law.

2. Dionisio Anzilotti

Dionisio Anzilotti's approach in scholarship and on the bench of the PCIJ is characterized by dualism and voluntarism.[170] As international law and municipal law did not share a common basic norm from which each system derived its legal force, neither system could establish by itself norms valid for the other one or even determining the validity of the other system's rules.[171] Therefore, normative conflicts were precluded:[172] Violations of international

Internationale 241; cf. Arrigo Cavaglieri, 'Concetto E Caratteri Del Diritto Internazionale Generale' (1921) 14 Rivista Di Diritto Internazionale 504-505 footnote 3 (on merging customary international law and general principles); Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* 67.

169 Basdevant, 'Règles générales du droit de la paix' 498-503 (on the technique of extrapolation of principles from treaties and custom, principles more as technique than as a source); Frede Castberg, 'La méthodologie du droit international public' (1933) 43 RdC 370-372; Charles Rousseau, *Principes généraux du droit international public. Introduction. Sources* (vol 1, Pedone 1944) 901; Cf. Visscher, 'Contribution à l'étude des sources du droit international' 406-407 (distinguishing general principles of law and general principles of international law by their origin); Kopelmanas, 'Custom as a Means of the Creation of International Law' 136.

170 For an overview see Giorgio Gaja, 'Positivism and Dualism in Dionisio Anzilotti' (1992) 3 EJIL 123 ff.; on Anzilotti's opinions and his references to general principles of law see José Maria Ruda, 'The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice' (1992) 3(1) EJIL 103 ff.

171 Dionisio Anzilotti, *Corso di Diritto Internazionale* (vol 1, Athenaeum 1912) 35; see also Dionisio Anzilotti, *Cours de droit international 1: Introduction, théoriés, générales* (Gilbert Gidel tr, Sirey 1929) 51 ff.

172 Dionisio Anzilotti, *Lehrbuch des Völkerrechts* (Cornelia Bruns and Karl Schmid trs, de Gruyter 1929) 38. The work was translated by Cornelia Bruns and Karl Schmid, the translation was supervised and authorised by Anzilotti.

law by domestic statutes were considered as "facts",[173] and resolved by the rules of international responsibility.[174]

Anzilotti's understanding of sources is characterized by voluntarist positivism. Both treaties and customary international law were rooted in the explicit respectively tacit consent of states, both sources of law were equally ranked, capable of mutual derogation; the relationship between norms (of different sources) was governed by the *lex posterior* principle and the *lex specialis* principle.[175] The only difference between both sources was the function of customary international law as general international law.[176] Furthermore, as he regarded treaties to be rather static and rigid and difficult to formally change, customary international law was said to better meet with its inherent flexibility the needs of the international community.[177]

---

173 See already *Certain German Interests in Polish Upper Silesia* PCIJ Series A No 07, 19: "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention." It would be misleading to assume on this quotation that the PCIJ was not willing to appreciate and interpret domestic law as "law", see for instance *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France: France v The United States of Brazil* Judgment of 12 July 1929 [1929] PCIJ Series A 21, 124-125: "Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. [...] Of course, the Court will endeavour to make appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law."; Anzilotti, *Cours de droit international 1: Introduction, théoriés, générales* 57; see also Jean d'Aspremont, 'The Permanent Court of International Justice and Domestic Courts: A Variation in Roles' in Christian J Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Martinus Nijhoff Publishers 2013) 226 ff.

174 Anzilotti, *Lehrbuch des Völkerrechts* 42.

175 ibid 48-49; 69-70, 74-76. Anzilotti conceded that by this mutual derogability the relation of sources in international law differed from the relation in municipal law; on mutual derogability, see also Heilborn, 'Les Sources Du Droit International' 29.

176 Anzilotti, *Lehrbuch des Völkerrechts* 65.

177 ibid 60-63.

Anzilotti recognized next to treaty and custom "constructive norms" which, it is submitted, functionally resemble general principles of law.[178] These constituted the "necessary logical premises" and prerequisites without which rules explicitly agreed on by treaty or custom would make no sense. In Anzilotti's view, these structural norms were an essential element of any legal order.[179] Article 38(3) of the PCIJ Statute not only encompassed these constructive norms but also authorized the Court to resort to rules and principles belonging specifically to municipal law for analogical application. Therefore, reasoning by analogy should foster the productivity of the sources and avoid a *non-liquet* situation. In Anzilotti's opinion, however, article 38(3) constituted a deviation from general international law, as far as these analogies were concerned.[180]

Similar to Kelsen, Anzilotti regarded *pacta sunt servanda* as basic norm[181]. At the same time, he accepted the concept of necessary premises of law and, in line with Georges Scelle, he stressed the role of customary international law as a corrective to the allegedly less flexible and more static treaty law. To him, customary international law was more than just the practice of states and fulfilled a constitutional function in the international legal order.[182]

178 See also Degan, 'General Principles of Law (A Source of General International Law)' 64; it is noteworthy that the PCIJ within one year held in Lotus that rules must stem from treaty or custom, and in Chrozow, that legal responsibility was a general conception of law, see *The Case of SS Lotus* PCIJ Series A No 10, 18; *Case Concerning the Factory at Chorzow* PCIJ Series A No 17, 29.

179 Anzilotti, *Lehrbuch des Völkerrechts* 49; Anzilotti, *Cours de droit international 1: Introduction, théoriés, générales* 68.

180 Anzilotti, *Lehrbuch des Völkerrechts* 85-87; see also Ernst Rabel, 'Rechtsvergleichung und internationale Rechtsprechung' (1927) 1 Zeitschrift für ausländisches und internationales Privatrecht 18 according to whom general principles of law become law through the judge.

181 Anzilotti, *Lehrbuch des Völkerrechts* 50; Anzilotti, *Cours de droit international 1: Introduction, théoriés, générales* 44 f.

182 As it was pointed out by Gaja, 'Positivism and Dualism in Dionisio Anzilotti' 128 with reference to a note written by Anzilotti, the late Anzilotti suggested to embrace "a broader concept of custom - and perhaps use a different term - in order to accommodate what is true in the so-called necessary and constitutional law of international society."

3. Georges Scelle

Georges Scelle's work stood under the intellectual influence of the teachings of French constitutional legal scholar Leon Duguit who regarded the interdependence of human-beings and intersocial solidarity as basis of law.[183] Scelle's legal monism was not confined to the epistemological perspective of legal cognition.[184] Legal monism implied a normative hierarchy according to which higher ranked norms (of international law) prevailed over lower ranked norms (of domestic law) and addressed not only states but also extrastate groups such as international workers or churches.[185] One aspect of his monism was institutional pluralism. In contrast to a hierarchically organized superstate-system, institutions were by and large missing in the interstate system. This observation led to the introduction of the concept of *dedoublement fonctionnel*[186], according to which national officers had a dual function: they were agents of national law when acting in the national order and agents of international law when acting in the international order. Scelle spoke of

183 Léon Duguit, *Traité de Droit Constitutionnel La régle du droit: le probléme de l'Etat* (vol 1, Ancienne Libr Fontemoing 1921) 1-110; on Duguit's influence on Scelle see Robert Kolb, 'Politis and Sociological Jurisprudence of Inter-War International Law' (2012) 23(1) EJIL 237; Oliver Diggelmann, *Anfänge der Völkerrechtssoziologie Die Völkerrechtskonzeptionen von Max Huber und Georges Scelle im Vergleich* (Schulthess 2000) 170-173; see generally Lazare Kopelmanas, 'La pensée de Georges Scelle et ses possibilités d'application à quelques problémes récents de droit international' [1961] Journal du Droit International 350 ff.

184 On Kelsen see below, p. 195.

185 Georges Scelle, 'Règles générales du droit de la paix' (1933) 46 RdC 351-352, 360; see also Hubert Thierry, 'The Thoughts of Georges Scelle' (1990) 1 EJIL 200; for a discussion of Scelle by the late Kelsen, published post mortem, see Hans Kelsen, *Auseinandersetzungen zur reinen Rechtslehre: kritische Bemerkungen zu Georges Scelle und Michel Virally* (Kurt Ringhofer and Robert Walter eds, Springer 1987) 26-60, 58.

186 See also Scelle, 'Essai sur les sources formelles du droit international' 410; Georges Scelle, 'Le phénomène juridique du dédoublement fonctionnel' in Walter Schätzel and Hans-Jürgen Schlochauer (eds), *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Klostermann 1956); according to Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law' (1990) 1 EJIL 213, 215, Scelle himself recognized after the Inter-War years the suprastate society only as an ideal, and the concept of dedoublement fonctionnel only as tool to overcome current deficiencies of the international legal order, a tool that needs itself being overcomed.

the fundamental law of *dedoublement fonctionnel*, which indicated that this concept was a normative, rather than an empirical, concept.[187]

Within Scelle's conception, law was subordinated to the social purpose, it was the "outcome of the solidarity created by social needs" and served the general interests of the community.[188] The function of positive law was said to give expression to the *droit objectif* which was preexisting and yet dependent on the historic state of the respective society.[189] Lawmakers' focus on the *droit objectif* should prevent what otherwise could be considered to constitute "arbitrary" lawmaking.[190] According to Scelle, it must be presumed, unless proven otherwise, that positive law coincided with objective law, otherwise positive law would be deprived of binding force.[191]

By postulating the existence of only one legal order, this monist strand regarded general principles of law and customary international law to be closely connected, in fact, general principles of law constituted a general custom, whereas customary international law was a more special custom that was based on the practice at the international level only.[192]

Similar to the work of Anzilotti, treaty and customary international law were of equal validity, each capable of overriding the other.[193] However, it was the overriding capacity of customary international law which assumed an important, if not constitutional function in Scelle's model. Custom required

187 Scelle, 'Règles générales du droit de la paix' 357-358, see also at 150 for the view that national courts would act as international agents when applying private international law; but see Kelsen, *Auseinandersetzungen zur reinen Rechtslehre: kritische Bemerkungen zu Georges Scelle und Michel Virally* 42, and 49-59 (criticizing Scelle's understanding of the relationship between the international legal order and the domestic legal order).

188 See Politis, *The new aspects of international law: A Series of Lectures Delivered at Columbia University in July 1926* 3, 15; Scelle, 'Règles générales du droit de la paix' 349-350.

189 ibid 428; see also Visscher, 'Contribution à l'étude des sources du droit international' 402-403.

190 Politis, *The new aspects of international law: A Series of Lectures Delivered at Columbia University in July 1926* 15-16.

191 Scelle, 'Règles générales du droit de la paix' 349.

192 ibid 436-437; Kolb, *La bonne foi en droit international public Contribution à l'étude des principes généraux de droit* 32-33; cf. for a similar view on the relationship Härle, *Die allgemeinen Entscheidungsgrundlagen des Ständigen Internationalen Gerichtshofes: eine kritisch-würdigende Untersuchung über Artikel 38 des Gerichtshof-Statuts* 301, who regards general prinicples as *lex generalis* and customary international law as *lex specialis*.

193 Scelle, 'Règles générales du droit de la paix' 435.

concordant legal acts and a collective consensus, rather than unanimity.[194] The treaty, in contrast, was just a contractual *instrumentum*, a formal act,[195] which had an objective value when complying with objective law and the social need.[196] Customary law and general principles of law such as *rebus sic stantibus* ("*un principe general du droit*") constituted the means for keeping the positive law updated and in accordance with the *droit objectif*.[197] Should rules no longer meet the social needs and necessities, they must be modified or repelled since there could be no permanent contradiction between the *droit objectif* and positive law. As Scelle put it,[198] the legal dynamic must follow the social dynamic, and the positive law must follow the objective law.

Given this role attributed to customary international law and general principles of law, it is not surprising that Scelle had reservations about codification. In his view, codification had a tendency to become too conservative, to call into question existing law, and to lead to a form (treaty) which was fragile, slow, risky and in need of revision from time to time.[199]

Scelle's scholarship approached the interrelationship of sources from the perspective of the *droit objectif*. Its universalist tones and optimism may have overestimated the solidarity and underestimated conflicting interests which law has to reconcile.[200] It assumed law and its sources only as confirmation of social needs, as a harmonious whole. The idea that law will not exert obligatory force when being considered out of touch with what is regarded as social needs is not so different from Fuller's theory mentioned in the

194 Scelle, 'Règles générales du droit de la paix' 383, 421, 434.

195 ibid 446.

196 ibid 454 on third-party effects.

197 ibid 476.

198 ibid 477; Scelle, 'Essai sur les sources formelles du droit international' 402.

199 Scelle, 'Règles générales du droit de la paix' 466-467. For a different view of a scholar of the sociological view see Politis, *The new aspects of international law: A Series of Lectures Delivered at Columbia University in July 1926* 70. He rejected both extremes: the establishment of a complete system of codes and the mere confirmation of existing rules "without adding to them anything new". "The middle way is a work both of confirmation and of reshaping. This is the sense in which the codification of international law is generally understood."

200 Cf. Thierry, 'The Thoughts of Georges Scelle' 204-205; see also Kopelmanas, 'Essai d'une Théorie des Sources Formelles de Droit International' 110; Kopelmanas, 'La pensée de Georges Scelle et ses possibilités d'application à quelques problémes récents de droit international' 373; Kolb, 'Politis and Sociological Jurisprudence of Inter-War International Law' 241.

previous chapter,[201] or Ago's theory of spontaneous law which emphasized the significance of the needs felt by a legal community.[202] Yet, a difference that notably exist today in comparison to Scelle's time and which may affect the relationship of sources is a more developed doctrine of treaty interpretation which allows the legal operator to adapt the interpretation of the treaty to changing circumstances without having to take recourse to customary international law.[203]

4. Hans Kelsen

The Vienna school, the pure science of law, developed an approach which attempted to base international law on an objective grounding, thereby divorcing it from the will of states.[204] Being a general theory of law, the pure science of law concerned both domestic law and international law.[205] It postulated a monism which integrated domestic law and international law within one legal theory.[206] With respect to international law, this school aimed at establishing an objective understanding of the concept of customary international law and the concept of treaty law with important repercussions on the interrelationship of sources. The following lines focus on the work of Hans Kelsen, being aware of the fact that Kelsen was only one proponent of the Vienna school the members of which influenced and partly departed from each other by developing different approaches.[207]

---

201 See above, page 118.

202 See below, p. 639.

203 For examples in legal practice in the context of the ECHR and of international investment law, see below, p. 403, and p. 557.

204 Josef L Kunz, 'The "Vienna School" and International Law' (1933) 11 New York University Law Quarterly Review 370 ff.

205 Josef L Kunz, 'Völkerrechtswissenschaft und reine Rechtslehre' (1923) 6(1) Zeitschrift für öffentliches Recht 1 ff.

206 On the systemic character see Georges Abi-Saab, 'Cours général de droit international public' (1987) 207 RdC 108: "Kelsen est peut-être l'auteur qui a plus contribue à asseoir la vision du droit comme système au cours du XXe siècle."

207 It shall be briefly noted that this section focuses not only on Kelsen's scholarship produced in the interwar period but also on his scholarship after the second world war which confirmed, explained or modified earlier held views.

a) Legal-theoretical overview

The monism of the Vienna School rejected a voluntaristic model and proposed a norm-focused positivist approach instead. The idea of monism in this context did not imply that international law and municipal law would not constitute different legal systems. Rather, international and municipal law were linked from the epistemological perspective of legal cognition.[208]

Central to Kelsen's account is the so-called *Stufenbau* of the legal order, the chain of delegations or the "gradual concretization of the law"[209], which Kelsen had borrowed from Adolf Julius Merkl[210]. According to this model, the validity of a norm is determined by whether it constitutes a lawful delegation from a higher norm. A domestic statute owes, for instance, its validity to the higher-ranked constitutional norm. Within this chain of delegations, the law becomes concretized and individualized. The court, by applying a general norm to a particular case, creates an individual norm, the validity of which rests on the statute that had been applied. If the statute allows for different interpretations, it is for the court to make a decision and to determine

208 Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts Beitrag zu einer reinen Rechtslehre* (Mohr Siebeck 1920) 123. This monism did not necessarily suggest the primacy of international law. Kelsen argued that either system, the municipal and the international law, could reasonably claim hierarchy from the perspective of legal cognition and that the decision in favour of one system would not be predetermined by legal logic but would constitute a political value judgment or decision, ibid 314-317. For an overview see Jochen von Bernstorff, *The public international law theory of Hans Kelsen: believing in universal law* (Thomas Dunlap tr, Cambridge University Press 2010) 104 ff. and 246: "In a paradoxical way, Kelsen's formal understanding of legal scholarship, which sought to expel the political from the realm of legal cognition, generated in the choice hypothesis the far-reaching theoretical concession that legal cognition in international law at its basis was also subjective and political in character."

209 Hersch Lauterpacht, 'Kelsen's pure science of law' in Elihu Lauterpacht (ed), *International Law Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press 1975) vol 2 411.

210 Adolf Merkl, *Die Lehre von der Rechtskraft entwickelt aus dem Rechtsbegriff* (Franz Deuticke 1923) 201-228.

the meaning of the rule for the concrete case.[211] It is against this background that Kelsen said that

> "[c]reation and application of law are only relatively, not absolutely, opposed to each other. In regulating its own creation, law also regulates its own application. By 'source' of law not only the methods of creating law but also the methods of applying law may be understood."[212]

If the court got the law wrong and the individual norm therefore did not constitute a lawful delegation from the higher norm, the consequence would depend on whether the judgment still met the minimum conditions of the legal order in order to be valid and, depending on the appellate procedure, voidable. This rule of the legal order which establishes minimum conditions and maximum conditions is called "error-calculus"[213] ("*Fehlerkalkül*").[214] In reaction to this doctrine of Merkl, Kelsen developed the idea of an alternative authorization according to which courts are authorized by the legal order

---

211 Hans Kelsen, *Reine Rechtslehre Studienausgabe der 1. Auflage 1934* (Matthias Jestaedt ed, Mohr Siebeck 2008) 100-116; cf. also von Bernstorff, 'Specialized Courts and Tribunals as the Guardians of International Law? The Nature and Function of Judicial Interpretation in Kelsen and Schmitt' 11-14; von Bernstorff, 'Hans Kelsen on Judicial Law-Making by International Courts and Tribunals: a Theory of Global Judicial Imperialism?' 36: "hyper-realistic general theory of court decisions as individualized lawmaking"; cf. also Jörg Kammerhofer, 'Taking the Rules of Interpretation Seriously, but Not Literally? A Theoretical Reconstruction of Orthodox Dogma' (2017) 86(2) Nordic Journal of International Law 136-138.

212 Kelsen, *Principles of International Law (1952)* 304; Hans Kelsen, 'Contribution à la théorie du traité international' (1936) 10 Revue internationale de la théorie du droit 254; Kelsen and Tucker, *Principles of International Law (1967)* 437; see also Kelsen, *Reine Rechtslehre Studienausgabe der 1. Auflage 1934* 73 ff.

213 Christoph Kletzer, 'Kelsen's Development of the Fehlerkalkül-Theory' (2005) 18(1) Ratio Juris 48, 50: "A Fehlerkalkül is a rule in the positive law that distinguishes minimum from maximum conditions in relation to the creation of law; it is a positive rule that renders all conditions other than the minimum conditions irrelevant for the creation of law—sometimes simply by declaring them relevant for the destruction of law via appeal."

214 Merkl, *Die Lehre von der Rechtskraft entwickelt aus dem Rechtsbegriff* 277, 291-300, 293: "Fehlerkalkül ist jene positivrechtliche Bestimmung, die es juristisch ermöglicht, dem Staat solche Akte zuzurechnen, die nicht die Summe der anderweitig positivrechtlich aufgestellten Voraussetzungen ihrer Entstehung und damit ihrer Geltung erfüllen, die es erlaubt, solche Akte trotz jenes Mangels als Recht zu erkennen."

alternatively to create a norm which either constituted a delegation of a higher norm or met the minimum conditions of the legal order.[215]

b) The interrelationship of sources within the *Stufenbau*

Kelsen integrated the sources of international law into this *Stufenbau*.[216] In Kelsen's words:

> "The law created by international agencies, especially by decisions of international tribunals established by treaties, derives its validity from these treaties, which, in their turn, derive their validity from the norm of customary international law, pacta sunt servanda. The norms of customary international law represent the highest stratum in the hierarchical structure of the international legal order. The basis, that is the reason of validity, of customary international law, is, as pointed out, a fundamental assumption that international custom established by the practice of states is a law-creating fact. It is the norm presupposed by a juristic interpretation of international relations: that states ought to behave according to custom established by the practice of states."[217]

Within this chain, two orders existed, one of validity which was just mentioned, and one of application. Within that latter order, the "particular conventional (or particular customary) law precedes general customary law. If there is no treaty (or particular customary law) referring to the case, rules of general customary law apply."[218] Against the background of this theoretical

215 Hans Kelsen, *Reine Rechtslehre* (2, orig. publ. 1969, Verlag Franz Deuticke 1967) 267, 272-273; Kletzer, 'Kelsen's Development of the Fehlerkalkül-Theory' 53; cf. also for the idea that an alternative authorization belongs to a separate normative order Jörg Kammerhofer, *Uncertainty in international law: a Kelsenian perspective* (Routledge 2011) 188-93; Kammerhofer, 'Positivist Approaches and International Adjudication' paras 26-33.

216 Kelsen, *Reine Rechtslehre Studienausgabe der 1. Auflage 1934* 129-130; von Bernstorff, *The public international law theory of Hans Kelsen: believing in universal law* 166.

217 Kelsen, *Principles of International Law (1952)* 366-367; Kelsen and Tucker, *Principles of International Law (1967)* 508; see also Métall, 'Skizzen zu einer Systematik der völkerrechtlichen Quellenlehre' 424, according to whom only custom (and general principles of law) would constitute constitutional sources (*völkerverfassungsrechtunmittelbare Rechtsquellen*) whereas treaties should be regarded as delegation (*volkerverfassungsrechtsmittelbar*).

218 Kelsen, *Principles of International Law (1952)* 305; Kelsen and Tucker, *Principles of International Law (1967)* 438.

construction, three aspects concerning the interrelationship of sources raised by Kelsen shall be discussed briefly: the function of customary international law, the so-called third-party effects of treaties and general principles of law against the background of the formal completeness of the legal order.

aa) Customary international law

Customary international law was the basis on which the validity of treaties rest, it was therefore, as described by von Bernstorff, "not on the same level as international treaty law but was seen as a normative layer above it."[219] Kelsen regarded customary international law as a mode of law-creation, of "unconscious and unintentional lawmaking" and of being a "law-creating fact", also binding on states which had not participated in its creation.[220]

Kelsen used to reject the usefulness of the subjective element *opinio juris*, in the sense of a legal conviction to be bound by an already existing *legal* norm. In Kelsen's view, if one accepted *opinio juris* as necessary element, new customary international law would then only be possible in cases of a legal error in which states wrongly regard themselves to be bound by a non-existing legal norm.[221] In Kelsen's view the judicial practice did not prove the existence of any subjective element.[222] Within Kelsen's theoretical model, courts and tribunals assumed a very important role in creating norms of customary international law.[223] As von Bernstorff has pointed out,[224] there is a circularity in the "hierarchical logic of the law-generating sources" when courts on "the lower law-generating levels" not just apply preexisting customary international law but create the norm of custom which should have authorized courts in the first place. Kelsen's model undoubtedly put courts in a strong lawmaking position. This model faced limitations, though, as the

219 von Bernstorff, *The public international law theory of Hans Kelsen: believing in universal law* 166.

220 Kelsen, *Principles of International Law (1952)* 308 (quote) 311.

221 Kelsen, 'Théorie du droit international coutumier' 262.

222 ibid 264.

223 ibid 268; von Bernstorff, *The public international law theory of Hans Kelsen: believing in universal law* 170-172.

224 See von ibid 171: "The hierarchical logic of the law-generating sources becomes circular, however, if the lower law-generating levels become the most important proof of the highest normative level, that is, customary law."

hopes for a general centralised system of compulsory judicial settlement did not become reality.[225] Later, Kelsen considered *opinio juris* as an element of customary international law on the basis of which a law-creating custom is distinguished from mere usage.[226]

bb) Treaties as a product of the international community

Owing its validity to general international law, a treaty was an application of general international law and, therefore, an objective product of the international legal community rather than a product only of the contracting states:[227]

> "By concluding a treaty the contracting states apply a norm of customary international law- the rule pacta sunt servanda- and at the same time create a norm of international law, the norm which presents itself as the treaty obligation of one or of all of the contracting parties, and as the treaty right of the other or the others. [...] The term 'norm' designates the objective phenomenon whose subjective reflections are obligation and right. The statement that the treaty has "binding force" means nothing but that the treaty creates a norm establishing obligations and rights of the contracting parties. Thus, the treaty has a law-applying and at the same time a law-creating character."[228]

While Kelsen accepted that, as a general rule, "treaties impose duties and confer rights only upon the contracting states"[229], he also acknowledged the possibility that a treaty may claim to be applied in relation to third states,[230] which Kelsen discussed in relation to article 17(3) of the Covenant of the League of Nations and to article 2(6) UNC.

Article 17(3) of the Covenant addressed conflicts between a member state of the League of Nations and a non-member state. For cases in which a non-

225 Cf. also Kelsen and Tucker, *Principles of International Law (1967)* 452.

226 See Kelsen, *Principles of International Law (1952)* 307; Kelsen and Tucker, *Principles of International Law (1967)* 440; see furthermore Josef L Kunz, 'The Nature of Customary International Law' (1953) 47 AJIL 665 on the distinction between practice that is relevant for customary international law and courtesy.

227 Kelsen, 'Contribution à la théorie du traité international' 263-264.

228 Kelsen, *Principles of International Law (1952)* 319; Kelsen and Tucker, *Principles of International Law (1967)* 456.

229 Kelsen, *Principles of International Law (1952)* 346.

230 In Kelsen's view, the legal doctrine stressed the *pacta tertiis* doctrine for political reasons without acknowledging that exceptions can be found in positive law, Kelsen, 'Contribution à la théorie du traité international' 265.

member state refused to accept the invitation by the Council to temporarily accept obligations under the dispute settlement mechanism under the League of Nations and resorted to war against a member state, article 17(3) of the Covenant stipulated that article 16 of the Covenant should apply and that the state's resort to war against one member should be deemed to be an act of war against all members of the League. In Kelsen's view, the Covenant intended to be applicable to third states.[231]

According to article 2(6) UNC, "[t]he organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." In an early comment on the UN Charter, Kelsen expressed the view that article 2(6) UNC "claims to apply" to third states which was "not in conformity with general international law as prevailing at the moment the Charter came into force. [...] Whether the provision of Art. 2, par. 6 will obtain general recognition remains to be seen. If so, the Charter of the United Nations will assume the character of general international law."[232] In his commentary, he noted that the charter would "indirectly" impose obligations upon all states "provided that it may be interpreted to mean that the Organisation is authorized to react against a non-Member state [...] If the Charter attaches a sanction to a certain behaviour of non-Members, it establishes a true obligation of non-Members to observe the contrary behaviour."[233] The Charter therefore "shows the tendency to be the law not only of the United Nations but also of the whole international community" which he regarded to be "revolutionary".[234]

Kelsen's interpretation according to which article 2(6) UNC could have a third-party effect did not prevail, however. Instead, it has been argued that article 2(6) imposes only obligations on Member States to induce third states

231 ibid 281-283; see also Hans Kelsen, *Legal Technique in international law: a textual critique of the League Covenant* (Geneva Research Centre 1939) 139-140: article 17(3) of the League of Nations by which sanctions may be imposed on an aggressive third state "constitutes an attempt to introduce a new juridico-political principle into international law".

232 Hans Kelsen, 'Sanctions in International Law under the Charter of the United Nations' (1946) 31 Iowa Law Review 502, adding that the centralisation of procedure under the Charter would be "the most striking difference between the old and the new general international law."

233 Hans Kelsen, *The Law of The United Nations A Critical Analysis of Its Fundamental Problems* (Stevens 1950) 106-107.

234 ibid 109-110.

to comply with rules and principles which are part of binding customary international law.[235] In other words, the concept of customary international law did not make it necessary to extend the treaty to third states; in this sense, it preserved the consensual character of the concept of treaty.

cc) General principles of law

Kelsen had reservations about general principles of law as source and as positive law.[236] Because of the "fundamental principle that what is not legally forbidden to the subjects of the law is legally permitted to them"[237], "gaps in the law" could not explain the need for general principles of law the existence of which he doubted in light of the ideological differences between communist and capitalist countries.[238] Based on this understanding, there are no gaps unless in the sense that judges do not deem the solution they arrived at by applying treaty and custom as satisfactory.[239] Kelsen did, however, recognize the potential of general principles of law in the application of law. The authorization in article 38(3) PCIJ Statute to apply general principles of law would allow the Court "to adapt positive international law to the particular circumstances of a concrete case according to the demands of justice and equity."[240] Based on this reading, article 38(3) PCIJ Statute and article 38(1)(c) ICJ Statute exceptionally empowered the judges to create law by resorting to

235 Tomuschat, 'Obligations Arising For States Without Or Against Their Will' 252; Stefan Talmon, 'Article 2 (6)' in Bruno Simma and others (eds), *The Charter of the United Nations A Commentary* (3rd edn, Oxford University Press 2012) vol 1 255-256 paras 4-6.

236 See also above, p. 146.

237 Kelsen, *Principles of International Law (1952)* 306; Hans Kelsen, 'Théorie du droit international public' (1953) 83 RdC 122.

238 Kelsen, *Principles of International Law (1952)* 393; Kelsen, *The Law of The United Nations A Critical Analysis of Its Fundamental Problems* 533.

239 Kelsen, *Principles of International Law (1952)* 305.

240 Hans Kelsen, 'Compulsory Adjudication of International Disputes' (1943) 37 AJIL 406, arguing that "equity is a general principle of law recognized at least by the Anglo-Saxon nations" and that article 38(3) PCIJ Statute thus implies "the power to decide a case *ex aequo et bono*"; but see later *North Sea Continental Shelf* 48 para 88, on the distinction between equitable principles and a decision *ex aequo et bono*, arguing that "it is precisely a rule of law that calls for the application of equitable principles." See also von Bernstorff, 'Specialized Courts and Tribunals as the Guardians of

this "supplementary source", when the judges deemed the solution provided for by custom and treaty law as "politically not satisfactory"[241]. While Kelsen must conclude that article 38(1)(c) of the Statute "evidently presupposes the idea that there are gaps in international law", he nevertheless considered it "doubtful whether the framers of the statute really intended to confer upon the Court such an extraordinary power."[242]

Kelsen's focus on the *formal* completeness of the legal system and his position that courts engage in an act of lawmaking that cannot be further controlled by normative concepts distinguished his approach from the approach adopted by Hersch Lauterpacht who examined the completeness of a legal order not only from a formal but also from a substantive perspective and who developed a different normative framework for the judicial interpretation, application and development of the law.[243]

5. Alfred Verdross

One influential proponent of the general principles of law was Alfred Verdross who very early advocated in favour of the primacy of international law over

International Law? The Nature and Function of Judicial Interpretation in Kelsen and Schmitt' 16.

241 Kelsen, *The Law of The United Nations A Critical Analysis of Its Fundamental Problems* 543; Kelsen, *Principles of International Law (1952)* 393.

242 ibid 393.

243 See below p. 210; von Bernstorff, 'Specialized Courts and Tribunals as the Guardians of International Law? The Nature and Function of Judicial Interpretation in Kelsen and Schmitt' 16 footnote 39; Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' 269.

domestic law.[244] Verdross (together with Josef Kunz[245]) intended to counter the criticism directed at the Vienna school, according to which the Vienna school was a cold science without any historical and cultural basis through his studies of state practice, legal philosophy and the classics of international law[246] since he considered a synthesis between philosophy and sociology important for understanding international law.

Verdross differed from Kelsen as to the ultimate *Grundnorm* and proposed the general principles of law as *lex generalis* to the extent that states did not enact a more special rule by way of custom or treaty.[247] Originally, however, Verdross based the validity of the source "general principles of

244 Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* 83-84 (positive international law according to which a successor state would continue to be bound by international obligations of its predecessor state can only be explained by the primacy of international law); on the "quarrel over the Wahlhypothese" see instructively von Bernstorff, *The public international law theory of Hans Kelsen: believing in universal law*; Josef L Kunz, 'Alfred Verdross, Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung' (1924) 7 Archiv des öffentlichen Rechts 123; see also on Verdross Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 EJIL 37, 42; on the development of Verdross' evolving understanding of the relationship between municipal law and international law see Alfred Verdross, *Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten* (Hans Robert Engelmann 1920) 42-43; for an overview of his moderate monism see Anke Brodherr, *Alfred Verdross' Theorie des gemäßigten Monismus* (Herbert Utz Verlag 2005) 27-75.

245 Kunz, 'Alfred Verdross, Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung' 121.

246 Verdross, 'Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle Zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts' 358; Alfred Verdross and Heribert Franz Köck, 'Natural Law: The Tradition of Universal Reason and Authority' in Ronald Saint John MacDonald and Douglas Miller Johnston (eds), *The structure and process of international law: essays in legal philosophy doctrine and theory* (Martinus Nijhoff Publishers 1983) 42: "it will not be possible to solve the present and acute problems of the international community, especially the problems of maintaining world peace and bringing about the necessary development of the Third World, without having due regard to the principles and norms of natural law to which the long tradition of universal reason and authority refers us."; cf. von Bernstorff, *The public international law theory of Hans Kelsen: believing in universal law* 82-84, 113-116, 251, describing Verdross' approach as "synthesis of natural-law concepts and actual utterances of state representatives".

247 See Verdross, 'Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle Zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts' 362; see later also Verdross and Simma, *Universelles Völkerrecht Theorie und Praxis* 59 f.

law" on customary international law,[248] which encompassed a wide variety of formation of norms.[249] Consequently, article 38(3) of the Statute was thought to constitute a codification of customary international law.[250] For Verdross, this customary international law did not require a universal practice of states, it sufficed that a specific rule had asserted itself in the adjudication of several disputes in a way that the rule's application can be expected in future disputes as well as states expressed not opposition to this norm.[251] Subsequently, Verdross renounced this position and reversed it.[252] General principles were understood as distinct source which did not depend on custom or treaty[253] but directed other sources. He regarded treaties to be null and void when they violated the integrity of the juridical order and the ethics of the respective community.[254] Verdross was also convinced that, without the inspiring potential of general principles for the construction and interpretation

(speaking of a set of originary norms which states had to presume in order to create international law).

248 Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* 59.

249 ibid 56; Alfred Verdross, 'Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts' (1969) 29 ZaöRV 642 ff.

250 Similar Borchard, 'The Theory and Sources of International Law' 354-355.

251 Verdross, 'Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle Zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts' 359.

252 ibid.

253 Article 38(1)(c) of the Statute was to Verdross of declaratory nature, Verdross, 'Les principes généraux du droit dans la jurisprudence Internationale' 199.

254 Verdross, 'Forbidden Treaties in International Law' 575: "[...] each treaty presupposes a number of norms necessary for the very coming into existence of an international treaty. [...] These principles concerning the conditions of the validity of treaties cannot be regarded as having been agreed upon by treaty; they must be regarded as valid independently of the will of the contracting parties [...] [*jus cogens*] consists of the general principle prohibiting states from concluding treaties contra bonos mores. This prohibition, common to the juridical orders of all civilized states, is the consequence of the fact that every juridical order regulates the rational and moral coexistence of the members of a community." For an emphasis on the public order function of general principles of law that could void treaties, see also Louis Le Fur, 'Règles générales du droit de la paix' (1935) 54 RdC 211-213; *Oscar Chinn* Judgment of 12 December 1934 [1934] PCIJ Series A/B 63 Diss Op Schücking 149-150 (on treaty-based *jus cogens* and nullity as legal effect); see also *Rights of Minorities in Upper Silesia (Minority Schools): Germany v. Poland* Judgment of 26 April 1928 [1928] PCIJ Series A 15, 31 on the "intangibility" of certain treaty provisions.

of customary international law, the latter would have experienced an infant death.[255]

The function of general principles of law was that of a true *lex generalis*. Verdross did not regard general principles to be only necessary to prevent a *non liquet*, since every dispute could be settled on the basis of custom or treaty in an adjudicatory context.[256] Rather, and more importantly, the legal operator should render a decision in accordance with general principles of law, instead of blindly applying treaty law or customary international law. Yet, in spite of his interest in natural law, Verdross was careful to stress that general principles of law would not be just natural law, as article 38(3) PCIJ Statute referred to a necessary "recognition".[257] To him, they were positive principles in the sense that they could be found in municipal legal orders, principles of general importance which the shared legal conscience of the modern civilized nations considered to be a necessary part.[258] In his 1935 Hague lecture, he distinguished three groups of principles: principles which were directly connected to the idea of law, such as the principle of effective interpretation; principles which were implicit in or presupposed by a specific legal institution, for instance *pacta sunt servanda* with respect to the treaty; and principles which were affirmed in the positive laws of states and which could therefore be presumed to reflect general principles linked to the idea of law. Thus, principles and positive law were connected, as one would have to go through positive law or legal institutes to the general principles.[259]

255 Verdross, 'Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle Zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts' 361.

256 Similar Guggenheim, *Lehrbuch des Völkerrechts: unter Berücksichtigung der internationalen und schweizerischen Praxis* 140.

257 Being anchored in municipal law, these principles would be positive law, Verdross, 'Les principes généraux de droit comme source du droit des gens' 290.

258 Verdross, 'Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle Zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts' 363-364.

259 Verdross, 'Les principes généraux du droit dans la jurisprudence Internationale' 204-206; on derogability see Verdross, 'Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle Zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts' 363; Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* 67; Verdross, 'Les principes généraux de droit comme source du droit des gens' 292 (on derogation by way of *lex specialis*).

6. Hersch Lauterpacht

Hersch Lauterpacht's thinking with respect to municipal law analogies evolved over the years of the 1920s. In his Vienna dissertation of 1922, he rejected domestic private law analogies, as they would would "[endanger] the independence of international law and [fail] to recognize its peculiarity [...] [t]he differences between legal systems are disregarded and the fact forgotten that legal institutions must be construed within the context of their own legal systems."[260] A few years later, Lauterpacht reversed his position in his London dissertation on private law analogies (1927), since "the use of private law analogies exercised, in the great majority of cases, a beneficial influence upon the development of international law."[261] Article 38(3) PCIJ Statute would confirm that "there is no need of justification for divorcing international law, a still undeveloped law of co-ordinated entities, from a system of law, equally governing relations of co-ordinated entities, in which the ideals of legal justice and of the sovereignty of law are admittedly realised in a very high degree."[262]

It deserves to be noted that Lauterpacht's "private law" was not necessarily in opposition to "public law" in principle. It seems plausible, as suggested by Perreau-Saussine[263] and Koskenniemi[264], that Lauterpacht, when he wrote both *Private Law Analogies* and *The Function of Law*, was influenced by English skepticism against the French *Droit Administratif*[265] and by the debate on differences between public law and private law in Germany.[266] He

260 Lauterpacht, 'The mandate under international law in the Covenant of the League of Nations' 57-58. He accepted recourse to private law concepts where an international treaty, by referring to agreements for purchase, lease or pledges "enriches itself directly [...] from private law" (58-59).

261 Lauterpacht, *Private Law Analogies* viii.

262 ibid 305.

263 Perreau-Saussine, 'Lauterpacht and Vattel on the Sources of International Law: the Place of Private Law Analogies and General Principles' 176-177.

264 Martti Koskenniemi, 'The Function of Law in the International Community: 75 Years After' (2009) 79 BYIL 355-356.

265 Albert Venn Dicey, *Introduction to the study of the law of the constitution* (Macmillan 1915) 189-190.

266 See Hans Kelsen, *Allgemeine Staatslehre* (Springer 1925) 80-91 (rejecting a distinction between private law and public law when it comes to judicial review); critical on a categorical distinction between private law and public law as well: Lauterpacht, 'Kelsen's pure science of law' 412-413; for a historical analysis of the meaning of the terms *ius publicum* and *ius privatum*, see Max Kaser, ',Ius publicum' und

deemed private law analogies in search of "legal thought and legal experience"[267] more fitting to the individualistic structure of international law, but he acknowledged explicitly the possibility to borrow from public law as well.[268] In a sense, his private law had a what could be described as a "public" dimension of subordination: "Both international and private law are composed of external rules of conduct which, once given their formal existence as law, are independent of the will of the parties, and, as such, above the subjects of law."[269]

In his 1927 monography, Lauterpacht understood general principles of law to be a "subsidiary source" which applied when the "primary source" of international law, the "will of states as expressed in treaties, or, failing that, international custom" was silent, in order to prevent a court from declaring itself incompetent or a *non liquet*.[270] In *The Function of Law*, Lauterpacht further developed his view on the prohibition of *non-liquet* and the role of general principles of law. He distinguished between the completeness of the rule of law (in a formal sense) and the completeness of individual branches of

---

‚ius privatum'' (1986) 103(1) Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung 97 ff., concluding that the term of "ius publicum" was used for the body of law from which ius privatum may not derogate; on the historical development of the separation between public and private law cf. Dieter Grimm, 'Zur politischen Funktion der Trennung von öffentlichem und privatem Recht in Deutschland' in Walter Wilhelm (ed), *Studien zur europäischen Rechtsgeschichte: Helmut Coing zum 28. Februar 1972* (Klostermann 1972) 224.

267 Lauterpacht, *Private Law Analogies* 50-51.

268 ibid 82 footnote 2: "However, it is probable that with the legal development of international organisation and the creation of central authoritative institutions, a body of rules will evolve, which, as regulating the relations between individual States and the authoritative organs of the international community, will closely correspond to public law within the municipal sphere, for instance, to constitutional and administrative law. In fact, there are already now rudiments of international rules of this kind."

269 ibid 82. In later years, he reevaluated this citizen-state analogy and rejected an anthropomorph understanding of the state, Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 BYIL 27 ("The analogy - nay, the essential identity - of rules governing the conduct of states and of individuals is not asserted for the reason that states are like individuals; it is due to the fact that states are composed of individual human beings; it results from the fact that behind the mystical, impersonal, and therefore necessarily irresponsible personality of the metaphysical state there are the actual subjects of rights and duties, namely, individual human beings.").

270 Lauterpacht, *Private Law Analogies* 69.

international law in a material or substantive sense.[271] Lauterpacht regarded the completeness of the legal system as "general principle of law"[272], an "*a priori* assumption of every system of law"[273]. Therefore, "[a]s a matter of fundamental legal principle, no express provision of the positive law is necessary in order to impose upon the judge the duty to give a decision, for or against the plaintiff, in every case before him."[274] Thus, there would be a prohibition for courts to declare a *non-liquet*, to declare themselves incompetent, as matter of custom and as a general principle of law.[275] However, Lauterpacht emphasized that the "principle of the formal completeness [...] is not always calculated to yield results satisfactory from the point of view of justice and of the wider purpose of the law."[276] Formal rules such as the Lotus presumption according to which everything what is not prohibited is permitted for states secured "formal justiciability [...] [b]ut at the same time it may make us forget that the necessary aim of any legal system is also material completeness."[277] He asserted that "there do exist gaps in law - material gaps in the teleological sense [...] as distinguished from formal gaps."[278] Therefore, it was a sign of "intellectual inertia or short sightedness" if the judge regarded any silence of international law as having a "negative effect on the claim."[279] The judge must "go behind the formal completeness of the law"[280] and would then recognize that "even a most obviously novel

271 Lauterpacht, *The Function of Law in the International Community* 64.
272 ibid 60.
273 ibid 64.
274 ibid 71-72.
275 ibid 65-66; Hersch Lauterpacht, 'Some observations on the prohibition of 'non liquet' and the completeness of the law' in Frederik Mari van Asbeck (ed), *Symbolae Verzijl: présentées au professeur J. H. W. Verzijl à l'occasion de son 70-ième anniversaire* (Nijhoff 1958) 205: general principles of law "added to the reality of the prohibition of *non-liquet* "in two ways: "by making available without limitation the resources of substantive law embodied in the legal experience of civilized mankind - the analogy of all branches of municipal law and, in particular, of private law - it made certain that there would always be at hand, if necessary, a legal rule or principle for the legal solution of any controversy involving sovereign States. Secondly, inasmuch as the principle of the completeness of the legal order is in itself a general principle of law, it became on that account part of the law henceforth to be applied by the Court."
276 Lauterpacht, *The Function of Law in the International Community* 77.
277 ibid 86.
278 ibid 86; ibid 109.
279 ibid 86.
280 ibid 97.

case is typical when we consider that law is originally and ultimately not so much a body of legal rules as a body of legal principles."[281]

Lauterpacht articulated a decidedly interpretative substantive approach to the interrelationship of sources.[282] His writings display an immense trust in the capacity of law to adjudicate disputes and in the capacity of judges to resort to legal creativity to the extent such creativity remains possible within the legal confines, not unlike Roscoe Pound and Benjamim Cardozo to whom Lauterpacht briefly but approvingly referred.[283] For Lauterpacht, judicial legislation amounted "not to a change of the law, but to the fulfilment of its purpose - a consideration which suggests that the border-line between judicial legislation and the application of the existing law may be less rigid than appears at first sight."[284]

Insofar as he recognized the importance of judicial application, Lauterpacht has been described as operating "within a Kelsenite framework"[285], and similar to Kelsen he assumed the completeness of the legal order. But where Kelsen understood this completeness in a formal way, Lauterpacht postulated a substantive unity.[286] Also, where Kelsen's model deliberately refrained from explaining of how judges should interpret a rule and decide between different equally possible interpretations,[287] Lauterpacht emphasized the importance of legal principles for the exercise of the judicial function.[288]

He concluded that the debate as to whether a judge discovers or makes law

281 Lauterpacht, *The Function of Law in the International Community* 110.

282 See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument - Reissue With New Epologue* (2nd edn, Cambridge University Press 2007) 53, comparing Lauterpacht and Dworkin.

283 Cf. the index, Lauterpacht, *The Function of Law in the International Community* 461 f. See above, p. 113

284 Lauterpacht, *The development of international law by the International Court* 161.

285 Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' 269.

286 See von Bernstorff, *The public international law theory of Hans Kelsen: believing in universal law* 259.

287 See above, p. 196: von Bernstorff, 'Specialized Courts and Tribunals as the Guardians of International Law? The Nature and Function of Judicial Interpretation in Kelsen and Schmitt' 15-16.

288 Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' 269, describing Lauterpacht's account as "legislation within limits"; for a critique see Julius Stone, 'Non Liquet and the Function of Law in the International Community' (1959) 35 BYIL 133-137, arguing that Lauterpacht's postulate of a prohibition of *non-liquet* required Lauterpacht to admit the lawmaking activity of the judge. On the Lauterpacht-Stone debate see Scobbie, 'The Theorist as

> "becomes somewhat unreal. It is futile to maintain that in 'making' law the judge is as free of the existing legal materials as is the legislator; he is bound by the existing principles of law; he is bound by them even, to take the extreme case of his giving a decision apparently contra legem, when he finds that the major purpose of the law compels him to have regard to its spirit rather than to the letter and to disregard its express words. On the other hand, it is futile to assume that the process of 'discovery' of the pre-existing law is a mechanical function of human automata. [...] In recognizing this, one need not go to the extreme point of urging a view which makes of the judge a legislator, instead of seeing in him the servant of the existing law."[289]

Like Verdross, Lauterpacht departed from Kelsen's view on the strict distinction between law and morals.[290] Unlike Verdross, Lauterpacht did not take recourse to "foundational religious principles"[291] and stressed instead that both positivism and natural law belong to the phenomenon of law as "positive law has always incorporated and does incorporate ideas of natural law and justice".[292]

F. Concluding Observations

This chapter illustrated the context in which article 38 PCIJ originated and zeroed in on the triad of sources in earlier writers' work, the positivist climate in the 19th century as well as the Hague conferences, in particular article 7 of the Prize Court Convention.[293] Subsequently, this chapter analyzed the discussion within the Advisory Committee of Jurists[294] and it examined the extent to which the interrelationship of sources was addressed in the

---

Judge: Hersch Lauterpacht's Concept of the International Judicial Function' 285-289; von Bernstorff, 'Specialized Courts and Tribunals as the Guardians of International Law? The Nature and Function of Judicial Interpretation in Kelsen and Schmitt' 16 footnote 39; see also above, p. 146.

289 Lauterpacht, *The Function of Law in the International Community* 110-111.

290 See von Bernstorff, *The public international law theory of Hans Kelsen: believing in universal law* 251.

291 On the difference between Verdross and Lauterpacht: ibid 252.

292 Lauterpacht, 'Kelsen's pure science of law' 429, see also at 425 for a reference to article 1 of the Swiss Civil Code and at 429: "There would, on our part, be no difficulty in admitting that natural law thus incorporated has ceased to be an independent system and has become part and parcel of positive law. We do not mind if natural law has served a good cause at the expense of its separate existence."

293 See above, p. 157.

294 See above, p. 170.

interwar period by the PCIJ, at the 1930 Codification Conference and in international legal scholarship.[295] The selected scholars' work illustrated how, only a few years after the adoption of article 38 PCIJ Statute, different legal theoretical perspectives on the law translated into different source preferences and interpretations of article 38.[296]

It is noteworthy that the recognition of general principles of law as a source in arbitration jurisprudence and in treaty law occurred at a time when positivism was on the rise.[297] The discussions in the Advisory Committee of Jurists illustrate that the members of the Committee were well aware of the need to propose a draft which would find the acceptance of states. This did not, however, lead to the exclusion of general principles of law which were considered to be important for the PCIJ to fulfil its functions. It is also noteworthy that Baron Descamps emphasized the function of general principles to limit judges' discretion[298] and that later Hans Kelsen's refusal to recognize general principles of law as legal norms can be seen against the background of his emphasis on courts' lawmaking capacity.[299] This indicates that general principles of law were interrelated with treaties and customary international law and that one's attitude towards this source also depends on the extent to which one seeks to impose normative limits on the judicial function.

---

295 See above, p. 178.

296 Cf. also the different evaluations of the chapeau of article 38(1) ICJ Statute, according to which the ICJ's function is to decide "in accordance with international law": Alfred Verdross, 'General International Law and the United Nations Charter' (1954) 30(3) International Affairs 343, interpreting this formula as indication that the general principles of law "form an integral part of general international law"; Hans Kelsen, *On the issue of the continental shelf: two legal opinions* (Springer 1986) 45: "[General principles of law,] in order to be applicable by the International Court of Justice, must be part of existing international law, and they can be part of existing international law only if they are incorporated either by a general convention or by a general custom."; Karol Wolfke, *Custom in present international law* (Zaklad Narodowy im Ossolínskich 1964) 110; for an overview of similar and further views cf. Vitanyi, 'Les Positions Doctrinales Concernant Le Sens de la Notion de "Principes généraux de Droit Reconnus Par Les Nations Civilisées"' 56 ff.

297 See above, p. 157. Cf. on general concepts in the work of Nippold above, p. 160; on Anzilotti's constructive norms see above, p. 190.

298 See above, p. 172.

299 See above, p. 146, p. 202 and p. 210 (on the difference between Lauterpacht and Kelsen in this regard).

Moreover, the text of article 38 subtly recognizes the differences between the sources and justifies a reading according to which customary international law is not an unwritten treaty.[300] Several scholars emphasized the community aspect of customary international law which explained the legal bindingness of treaties and kept the written law up to date. As the following chapters will demonstrate, certain scholars continue to emphasize these functions of customary international law, whereas other scholars suggest that a doctrine of treaty interpretation may suffice for the purpose of keeping the written law up to date.[301]

As far as international institutions were concerned, the interrelationship of sources was arguably not a central topic in the brief jurisprudence of the PCIJ.[302] The desirability of references to customary international law and general principles of law was discussed in the context of the codification conference in 1930.[303] Even though there was no majority for eliminating such reference in the context of obligations of states with respect to aliens, the debate indicated the existence of different regional views.

The fifth chapter and the sixth chapter will study international institutions in greater detail, delve into the jurisprudence of the ICJ[304] and revisit the discussion of the interrelationship of sources in a codification context when addressing the International Law Commission.[305] Also, this study will contextualize the different views at the 1930 Codification Conference by way of reference to the debate on the protection of aliens.[306]

300 See above, p. 175.
301 See below, p. 694.
302 See above, p. 178.
303 See above, p. 182.
304 See below, p. 221.
305 See below, p. 343.
306 See below, p. 564.