Part C.

Institutional Perspectives

Chapter 5: The International Court of Justice

A. Introduction

The purpose of this chapter is to trace the interrelationship of sources as a *motif* in the Court's jurisprudence and to examine whether specific approaches and judicial policies can be identified. Like any other court, the ICJ is at a certain liberty in deciding on which legal concepts it bases its decision or to which legal concepts it gives support, even when those may not be strictly relevant to the particular case.[1] Also, the Court can explore a treaty's relationship to other sources when interpreting and applying that treaty. In *Tehran Hostages*, for instance, the Court noted that "the obligations established by the Vienna Conventions of 1961 and 1962 [...] [are] also obligations under general international law"[2], and in *Diallo* the Court confirmed the convergence of regional human rights instruments.[3] In 2016, the Court held that the Articles 31 to 33 VCLT (and not only Articles 31-32) "reflect rules

1 For instance, the Court emphasized the *jus cogens* character of the prohibition of torture, even though this was not strictly decisive for the outcome of the case, unless one adopts the view that standing in an *erga omnes partes* case requires the obligation to be of peremptory character. Cf. *Questions relating to the Obligation to Prosecute or Extradite* [2012] ICJ Rep 422, 457 para 99. Sometimes, the Court decided not to distinguish between legal concepts. For instance, the Court decided that the sovereignty over Pedra Branca was passed from Singapore to Malaysia by way of tacit agreement "or" by way of acquiescence, without making a choice between the two, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/Singapore*) (Judgment) [2008] ICJ Rep 50 ff. paras 120 ff., crit. Joint Diss Op Simma and Abraham para 3. In a subsequent case, the majority of the Court based its reasoning on a tacit agreement instead of, as a minority suggested, engaging in an interpretation of a written agreement in light of subsequent practice, *Maritime Dispute* (*Peru v. Chile*) (Judgment) [2014] ICJ Rep 38-39 paras 90-91, Joint Diss Op Xue, Gaja, Bhandari and Judge *ad hoc* Orrego Vicuña, paras 2, 35.

2 *United States Diplomatic and Consular Staff in Tehran* (*United States of America v. Iran*) (Judgment) [1980] ICJ Rep 31 para 62.

3 *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (Merits, Judgment) [2010] ICJ Rep 664 para 68. On the *erga omnes* character of the rights and obligations enshrined in the Genocide Convention see *Armed Activities on the Territory of the Congo (New Application: 2002)* [2006] ICJ Rep 6, 31 para 64 (before concluding that this character does not lead to the Court having jurisdiction).

of customary international law".[4] The way in which the Court approaches the interrelationship of sources of international law is also a question of judicial policy and based on the choices of the Court.[5]

When tracing the interrelationship of sources as a *motif* in the Court's jurisprudence, one must be mindful of the institutional conditions under which the Court operates. This appears particularly pertinent since the question has been raised whether the institutional setting of the Court impacted the Court's take on the interrelationship of sources to the detriment of general international law, customary international law and general principles. For instance, Judge Weeramantry raised the question of whether the adversarial *inter partes* proceedings before the Court can do "justice to rights and obligations of an *erga omnes* character."[6] In a similar fashion, Martti Koskenniemi

4 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* [2016] ICJ Rep 100, 116 para 33; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* [2016] ICJ Rep 3, 19 para 35. After having referred to its jurisprudence, the Court noted that the parties to the case agreed "that these rules are applicable". As far as article 33 VCLT is concerned, the statement was arguably an *obiter dictum*; on the question of whether it would be good legal policy to declarare article 31-33 VCLT to reflect customary international law, see the exchange of views prior to the decision, *Comment by Georg Nolte, Summary record of the 3274th meeting, 22 July 2015* UN Doc A/CN.4/SR.3274 (PROV.) at 8 and *Comment by Judge Ronny Abraham, Summary record of the 3274th meeting, 22 July 2015* UN Doc A/CN.4/SR.3274 (PROV.) at 8-9, also available in *ILC Ybk (2015 vol 1)* 232. See now also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine/Russian Federation*) (Preliminary Objections, Judgment) [2019] ICJ Rep 598 para 106; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections) https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf para 87.

5 See also Pellet and Müller, 'Article 38' 935 ("[...] the Court enjoys (or recognizes itself as enjoying) a large measure of appreciation in the choice of the sources of the rules to be applied in a particular case."); Kearney, 'Sources of Law and the International Court of Justice' 697 ("the absence of priorities among the sources of law in Article 38(1)(a), (b), and (c) has afforded a valuable degree of flexibility in the preparation of judgments.").

6 *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Judgment) [1997] ICJ Rep 7, Sep Op Weeramantry, pp. 117-118. For recent obligations *erga omnes inter partes* cases, see *Questions relating to the Obligation to Prosecute or Extradite* [2012] ICJ Rep 422, 449 para 68; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2020] ICJ Rep 3, 17 para 41. Since the Court had no jurisdiction in the proceedings initiated by the Marshall Islands, the Court did not have to address

has argued that the effect of the Court's restrictive policy as to judicial intervention would be "that the Court defines itself unable to pronounce anything on matters of general law."[7] Since the cases that led Koskenniemi to this conclusion were decided prior to the first edition of From Apology to Utopia in 1989, the question deserves to be re-examined in light of the judicial practice which has originated since then (B.). Subsequently, the chapter turns to the question of whether the jurisdictional basis of the Court shapes the way in which the interrelationship of sources is discussed by the Court (C.).[8] It will be demonstrated that the Court emphasizes the distinctiveness of treaty and custom for jurisdictional purposes insofar as the applicable law is concerned, while at the same time acknowledging the interrelationship when it comes to interpretation. This chapter will explore the normative considerations and the legal craft employed by the Court when identifying, interpreting and applying customary international law and the function of general principles as a bridge between custom and treaties (D.). Finally, the chapter will present concluding observations (E.).

B. Third-party intervention and the interrelationship of sources

This section will first explain the general framework in which third-party interventions are embedded. Subsequently, the chapter will explore how the Court approached third-party interventions in particular under article 62 ICJ on interventions to disputes which do not concern multilateral conventions. This section concludes with an evaluation of the intervention system from the perspective of the interrelationship of sources.

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the question of standing in relation to obligations under customary international law in the proceedings involving India and Pakistan which were not, unlike the UK, parties to the Non-Proliferation Treaty, cf. *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* [2016] ICJ Rep 255, 277 para 56; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* [2016] ICJ Rep 552, 573 para 56.

7 Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument - Reissue With New Epologue* 463, footnote 277.

8 Christian J Tams, 'The Continued Relevance of Compromissory Clauses as a Source of ICJ Jurisdiction' in Thomas Griegerich (ed), *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conferenc* (2009) 491, arguing that compromissory clauses favour treaty claims over general international law, with the exception of so-called interstitial norms.

I. The general regime: Articles 59, 62, 63 and 66 ICJ Statute

According to article 59 ICJ Statute, decisions are only binding *inter partes* (*ratione personae*) for the specific dispute (*ratione materiae*). They can serve as subsidiary means for the determination of rules of law (article 38(1)(d) ICJ Statute). If the subject-matter of a dispute concerns third states, the Court will decline to exercise its jurisdiction.[9] Articles 62 and 63 ICJ Statute govern the interventions by other states to existing disputes.[10]

Article 62 stipulates that a state "may submit a request to the Court to be permitted to intervene", "[s]hould a state consider that it has an interest of a legal nature which may be affected by the decision in the case".[11] In contrast, article 63 applies to a dispute concerning a multilateral convention and provides the other parties to the convention with a right to intervene.[12] The letter of article 63 does not require a legal interest; according to the jurisprudence of the Court, a legal interest is presumed to exist in cases where other states are bound by the specific provision of a multilateral convention in question.[13] References by intervening states to principles and rules of

9 *Case of the monetary gold removed from Rome in 1943* (*UK v. Albania*) (Preliminary Question) [1954] ICJ Rep 19; on this doctrine, see Tobias Thienel, *Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs: die Monetary Gold-Doktrin* (Duncker & Humblot 2016) 26 ff.

10 This section focuses on intervention in contentious proceedings, excluding therefore the participation in Advisory Opinion proceedings governed by article 66 of the Statute. As the provision states, international organizations may be admitted to advisory proceedings if the Court decides to do so. The Court in its Kosovo Advisory Opinion even admitted Palestine and Kosovo both of which were not generally recognized states. On article 66, see Andreas L Paulus, 'Article 66' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: a commentary* (3rd edn, Oxford University Press 2019) para 14.

11 Article 62 reads: "l. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2 It shall be for the Court to decide upon this request."

12 Article 63 reads: "1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it."

13 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*) (Order of 5 June 2023) (2023) ⟨https://www.icj-cij.org/sites/default/files/case-related/182/182-20230605-ORD-01-00-EN.pdf⟩ accessed 5 June 2023 para 27 and paras 93-97, as decided by

international law outside the multilateral convention will be considered by the Court to the extent that they can be taken into account in the interpretation of the convention according to customary international law as reflected in article 31(3)(c) VCLT.[14]

Since article 63 governs interventions only to multilateral conventions, "the only opportunity provided by the Statute and Rules for a State which is not a party to the proceedings to express its views on an issue of general international law is to intervene under Article 62".[15] As it emerges from the plain wording of both provisions, states parties to a multilateral convention have a *right* to intervene. In contrast, states do not have such right when the situation is governed by article 62. At first sight, the intervention regime leads to a different treatment of conventions and customary international law.[16] The plain wording of article 62, however, does not exclude the possibility of requesting permission to intervene if the Court were to interpret and apply a rule of general international law.[17] Nor does it indicate how the Court should treat a request to intervene. Therefore, a study of the Court's practice is important.[18]

In 1978, the Court revised its Rules on interventions and introduced article 81(2)(c) according to which it is required for the request to intervene to set

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the Court, a reservation entered by the United States to the compromissory clause of the Genocide Convention led to the result that the presumed interest did not exist in relation to article IX of the Genocide Convention and that the US intervention in the preliminary objections phase was inadmissible.

14 ibid para 84.

15 *Jurisdictional Immunities of the State* (*Germany v. Italy*) (Application for Permission to Intervene, Order of 4 July 2011) [2011] ICJ Rep 494, Decl. Gaja 531 para 1.

16 Doubting the wisdom of such discrimination, Shigeru Oda, 'The International Court of Justice viewed from the Bench (1976-1993)' (1993) 244 RdC 85: "If an interpretation of a multilateral convention given by the Court is necessarily of concern to a State which is a party to that instrument, though not a party to the case, there seems to be no convincing reason why the Court's interpretation of the principles and rules of international law should be of less concern to a State."

17 *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*) (Application to Intervene, Judgment) [1984] ICJ Rep 3, Diss Op Schwebel 144 ff. As noted it was noted in *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Application for Permission to Intervene, Judgment) [2011] ICJ Rep 348 Diss Op Al-Khasawneh 375 para 5, the wording of article 62 is "plainly liberal".

18 As explained by Alina Miron and Christine Chinkin, 'Article 62' in *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 1688 para 3: "This deliberate choice of the drafters leaves to the Court the cumbersome responsibility of filling in *lacunae* in the Statute."

out "any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case."[19] Against the background of the Court's approach to interventions at that time, the article could be understood in the sense that intervening states under article 62 would require a jurisdictional basis, which would have considerably restricted the mechanism under article 62. It is also noteworthy that article 82 of the Rules on interventions under article 63 ICJ Statute does not include a similar jurisdictional requirement. Since 1978, however, the jurisprudence has begun to change and the Court has adopted the distinction between intervention as a party to the proceeding and intervention as a non-party, which would not require a jurisdictional basis.[20] The following lines will trace this development and analyze its implications for the interrelationship of sources.

II. The Court's practice to interventions under article 62 ICJ Statute: from a restrictive to a more inclusive approach?

The Court had more experience with requests based on article 62 than with requests based on article 63.[21]

Most of the cases touching on article 62 of the Statute concerned maritime boundary disputes,[22] but not all cases belong to this field of law as it is demonstrated by the *Jurisdictional Immunities* case, in which Greece suc-

19 ICJ, 'Rules of the Court (1978) Adopted on 14 April 1978 and entered into force on 1 July 1978' ⟨https://www.icj-cij.org/en/rules⟩ accessed 1 February 2023.

20 Miron and Chinkin, 'Article 62' 1704 para 44.

21 Cf. *Asylum Case* (*Colombia/Peru*) (Judgment of 20 November 1950) [1950] ICJ Rep 266; *Whaling in the Antarctic* (*Australia v. Japan: New Zealand intervening*) (Judgment) [2014] ICJ Rep 226. Recently, the Court decided that the declarations of intervention under article 63 ICJ Statute submitted by 32 states in the Dispute Relating to the Allegations of Genocide (Ukraine v Russia) were admissible, while the declaration of the USA was inadmissible, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Order) https://www.icj-cij.org/sites/default/files/case-related/182/182-20230605-ORD-01-00-EN.pdf para 102; see also ICJ, 'Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) - Latest Developments' ⟨https://www.icj-cij.org/en/case/182⟩ accessed 1 February 2023.

22 See generally Taslim O Elias, 'The Limits of the Right of Intervention in a Case before the International Court of Justice' in Rudolf Bernhardt (ed), *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte Festschrift für Hermann Mosler* (Springer 1983) 159 ff.; Eduardo Jiménez de Aréchaga, 'Intervention under Article 62 of the Statute of the International Court of Justice' in Rudolf Bernhardt

cessfully intervened,[23] and the *Nuclear Tests* cases, in which the application to intervene by the government of Fiji was found to have lapsed as the cases had become moot.[24]

1. The development of the restrictive approach

In the first series of cases, the Court rejected interventions of third states which had sought to intervene to boundary disputes. In the continental shelf case between Tunisia and Libya, the Court did not regard Malta's interest "in the legal principles and rules for determining the delimitation of the boundaries of its continental shelf"[25] to be sufficient and expressed a disinclination to allow a state like Malta to communicate its views without being bound by the decision in the case.[26]

In a different proceeding concerning the delimitation of the continental shelf between Libya and Malta, Italy requested permission to intervene since it considered that both states' claims to areas of the continental shelf "in the central Mediterranean [...] extend to areas which would be found to appertain to Italy if a delimitation were to be effected between Italy and Libya, and between Italy and Malta, on the basis of international law."[27] By way of

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(ed), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Springer 1983) 453 ff.; Deepak Raju and Blerina Jasari, 'Intervention before the International Court of Justice - A Critical Examination of the Court's Recent Decision in Germany v. Italy' (2013) 6 NUJS Law Review 63; Serena Forlati, *The International Court of Justice An Arbitral Tribunal or a Judicial Body?* (Springer 2014).

23 *Jurisdictional Immunities of the State* [2011] ICJ Rep 494.

24 See *Nuclear Tests Case* (*Australia v. France*) (Application to Intervene, Order of 12 July 1973) [1973] ICJ Rep 530; *Nuclear Tests Case* (*New Zealand v. France*) (Application to Intervene, Order of 12 July 1973) [1973] ICJ Rep 324; *Nuclear Tests Case* (*Australia v. France*) (Judgment) [1974] ICJ Rep 272; *Nuclear Tests Case* (*New Zealand v. France*) (Judgment) [1974] ICJ Rep 478; *Nuclear Tests Case* (*Australia v. France*) (Application to Intervene, Order of 20 December 1974) [1974] ICJ Rep 531; *Nuclear Tests Case* (*New Zealand v. France*) (Order of 20 December 1974, Application by Fiji for Permission to Intervene) [1974] ICJ Rep 536.

25 *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*) (Application to Intervene, Judgment) [1981] ICJ Rep 8-9 para 13.

26 ibid 18-19 paras 32-33.

27 *Continental Shelf (Libya/Malta Application to Intervene)* [1984] ICJ Rep 3, 10-11 para 15.

intervention, specified to geographical coordinates, Italy wanted to protect its sovereign rights of exploitation as recognized by customary international law and the Geneva Convention on the Continental Shelf[28]. Both parties had opposed the intervention, and the Court decided to reject the request. The Court argued that this intervention was an attempt to introduce a new dispute[29] and that the function of article 62 ICJ Statute was not to serve as an additional basis for the Court's jurisdiction.[30] The Court stressed that Italy would not suffer from any disadvantages because of its non-participation:[31] the judgment would be binding only on the parties, and the Court would not have to "decide in the absolute" but rather "which of the Parties has produced the more convincing proof of title".[32] At the merit stage, the Court then limited its judgment to an area with respect to which Italy had claimed no interest.[33]

Based on both judgments, the impression could emerge that the intervention system under article 62 was doomed to fail: when a state seeking to intervene framed its interest too broadly, as Malta did, the Court rejected the application, and when the interest was narrowed down as in the case of Italy, the Court suspected the introduction of a new dispute.[34] The strategy of a bilateralization of the dispute expressed itself in several ways: The emphasis on party consent to the jurisdiction of the Court favoured a restrictive judicial

28 Convention on the Continental Shelf (signed 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

29 *Continental Shelf (Libya/Malta Application to Intervene)* [1984] ICJ Rep 3, 20-21 para 32.

30 ibid 22 para 35.

31 ibid 25 para 40, the Court denied that "assuming Italy's non-participation, a legal interest of Italy is en cause, or is likely to be affected by the decision" or that a legal interests of Italy would even "form the very subject-matter of a decision."

32 ibid 26-27 para 43. Interestingly, the Court also stated, citing the decision in the Minquiers and Ecrehos case: "The future judgment will not merely be limited in its effects by Article 59 of the Statute : it will be expressed, upon its face, to be without prejudice to the rights and titles of third States. Under a Special Agreement concerning only the rights of the Parties, 'the Court has to determine which of the Parties has produced the more convincing proof of title'".

33 *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*) (Judgment) [1985] ICJ Rep 26 para 22.

34 *Continental Shelf (Libya/Malta Application to Intervene)* [1984] ICJ Rep 3 Diss Op Ago 130: "The decision on the present case may well sound the knell of the institution of intervention in international legal proceedings [...]"; cf. on this jurisprudence Miron and Chinkin, 'Article 62' 1710-1711.

policy as to interventions under article 62. In turn, the Court protected third states by stressing the *inter partes* nature of judgments[35] and by excluding areas with respect to which third states could have claims. From the perspective of the dissenting judges, this exercise of judicial self-restraint in order to protect Italy's arguable rights came at the expense of rendering a full and complete decision.[36]

2. Tendencies of a more inclusive approach

A Chamber of the ICJ[37] composed of three judges who had dissented from the Court's restrictive approach in earlier cases and of two judges *ad hoc* granted for the first time permission to intervene under article 62 ICJ Statute.[38] A mere general interest in sovereignty was still not in itself sufficient.[39] In the specific case however, Nicaragua was found to possess a restricted legal interest[40] and thus a legal interest affected by the outcome of the case.[41] In attempting to reconcile the general principle of consent to jurisdiction with the institute of intervention, the Chamber emphasized that its competence "in this matter of intervention is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case, but from the consent given by them in becoming parties to the Court's Statute [...]".[42] In its view, there was a difference in kind between intervention and participation as a party.[43] Neither the statute nor the rules would require

35 See also *Frontier Dispute* (*Burkina Faso/Republic of Mali*) (Judgment) [1986] ICJ Rep 576-579 paras 44, 46-49.

36 See *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13 Diss Op Mosler 116-117, Diss Op Oda 131 para 11 and Diss Op Schwebel 172, 174.

37 According to article 26 ICJ Statute, the Court may form chambers. According to article 27 ICJ Statute, a judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court.

38 *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras*) (Application to Intervene, Judgment) [1990] ICJ Rep 116 para 56.

39 ibid 119 para 66.

40 ibid 121-122 paras 72-73, 124 para 76, 126-127 para 82. Nicaragua itself had argued that its interests would concern the subject-matter of the dispute, implying that the Court would have to refuse exercising jurisdiction if it did not grant Nicaragua permission to intervene according to the Monetary Gold principle.

41 ibid128 para 85.

42 ibid 133 para 96.

43 ibid 133-134 para 97.

a jurisdictional link.[44] The Chamber adopted a proposal which had been suggested earlier by Judge Oda and by Italy, namely to distinguish between intervention as a non-party, where no jurisdictional basis would be necessary, and intervention as a party.[45]

The Court followed the Chamber's more inclusive approach. In a subsequent dispute between Cameroon and Nigeria, the Court even invited states to intervene in the proceedings.[46] Subsequent judgments since then, however, have fallen short of explicitly renouncing the earlier restrictive jurisprudence. The Court has continued to affirm that the interest in legal principles or the "wish of a State to forestall interpretations by the Court [...] is simply too remote for the purposes of Article 62."[47] Furthermore, the bilateralization strategy was continuously pursued: as third states were protected by the *inter partes* effect of article 59 of the Statute, Costa Rica's request to intervene was rejected by a narrow majority of 9:7.[48] The dissenting judges continued to speak in favour of a less restrictive approach to article 62, pointing out that such an approach was not excluded by the wording of article 62.[49] Diminishing the difference between articles 62 and 63[50] would put treaty obligations and obligations under customary international law on equal footing, as far as

44 *Land, Island and Maritime Frontier Dispute* 135 para 100.

45 *Continental Shelf (Tunisia/Libya, Application to Intervene)* [1981] ICJ Rep 3 Sep Op Oda 30-31.

46 *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon/Nigeria*) (Preliminary Objections, Judgment) [1998] ICJ Rep 324 paras 115-116; Equatorial Guinea successfully requested permission to intervene, restricting the scope of its intervention, see *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon/Nigeria: Equatorial Guinea intervening*) (Order of 21 October 1999) [1999] ICJ Rep 1029.

47 *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Indonesia/Malaysia*) (Application for Permission to Intervene, Judgment) [2001] ICJ Rep 603-604 para 83.

48 *Territorial and Maritime Dispute* [2011] ICJ Rep 348, 363 para 51, 368 para 67, 369 para 71, 471-372 paras 85-86.

49 ibid Decl Al-Khasawneh para 5.

50 ibid Diss Op Abraham, para 4; see also ibid Diss Op Al-Khasawneh, paras 10-14; Joint Diss Op Cançado Trindade and Yusuf, paras 6, 24, 28 (all on rejecting the solution based on article 59 ICJ Statute), and para 27 for the importance of article 62 in times of multilateralization of international relations; Diss Op Donoghue, para 6; Judge *ad hoc* Gaja suggested to establish a new procedural mechanism for interventions, ibid Decl Gaja 417-418.

the institution of intervention is concerned.[51] So far, however, the Court has continued to emphasize the difference between articles 62 and 63.[52]

3. A paradigm shift? Interventions in matters of customary international law - The *Jurisdictional Immunities* case

The question of judicial interventions is raised not only in the context of maritime boundary delimitations but also in the context of general international law. The success of such interventions varied. When New Zealand requested an examination of the situation addressed in the *Nuclear Tests* judgment of 20 December 1974[53], the Australian government and the governments of Samoa, Solomon Islands, the Marshall Islands and the Federal State of Micronesia filed applications to intervene.[54] The governments argued that they had a legal interest with respect to the *erga omnes* rights claimed by New Zealand, for instance a right that no nuclear tests that could give rise to radioactive fallout would be conducted and a right to the preservation from unjustified artificial radioactive contamination of the environment.[55] The

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51 In this sense *Continental Shelf (Libya/Malta Application to Intervene)* [1984] ICJ Rep 3 Diss Op Oda 104-105.

52 *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Application for Permission to Intervene, Judgment) [2011] ICJ Rep 433-434 para 35, see also 434-435 para 38 reference to Pulau litigation for that the legal interest can aim not only at the dispositif but also at the reasoning; for a different view: ibid Diss Op Abraham para 2. See also paras 12-13 for arguing, contrary to the Court, in favour of a right to intervene under article 62; Diss Op Donoghue, para 2, see also para 50: in case of doubts, states should be allowed to intervene as a non-party. She also suggested to establish a new mechanism, paras 58-59.

53 See *Nuclear Tests Case* [1974] ICJ Rep 457, 477 para 63.

54 See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case)* (*New Zealand v. France*) (Order of 22 September 1995) [1995] ICJ Rep 288 Diss Op Koroma 379-380, regretting that the intervening states were not granted the opportunity to present their views. Whereas Australia relied solely on article 62, the governments of Samoa, Solomon Islands, the Marshall Islands and the Federal State of Micronesia relied on both article 62 and article 63.

55 All applications can be found here: ICJ, 'Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case - Intervention' ⟨https://www.icj-cij.org/en/case/97/intervention⟩ accessed 1 February 2023.

Court dismissed New Zealand's request and, therefore, also the applications to intervene.[56]

A successful intervention to a dispute on customary international law can be found in the *Jurisdictional Immunities* case. The Court permitted Greece to intervene to the proceedings between Germany and Italy which concerned, inter alia, the enforcement of Greek judgments in Italy rendered against Germany in violation of Germany's state immunity.[57] Greece modified over the course of the proceeding its application. First, it seemed as if the intervention was motivated by "Germany's purported recognition of its international responsibility *vis-à-vis* Greece".[58] Greece no longer relied on this ground in the written proceedings and rather focused on Germany's third claim according to which Italy violated Germany's immunity by declaring Greek judgments against Germany enforceable. Even though Greece wished to inform the Court of "Greece's approach to the issues of State immunity, and to developments in that regard in recent years", Greece argued that this would only be an illustration of the context, as the interest concerned the Greek judgments.[59] The Court decided in favour of the Greek application: The Court "might find it necessary to consider the decisions of Greek courts" and "this is sufficient to indicate that Greece has an interest of a legal nature which may be affected by the judgment in the main proceedings".[60]

Judge Cançado Trindade welcomed Greece's intervention not only because of Greece's interest in the enforcement of Greek judgments:

> "Unlike land and maritime delimitation cases, or other cases concerning predominantly bilateralized issues, the present case is of interest to third States — such as Greece — other than the two contending parties before the Court. The subject-matter is closely related to the evolution of international law itself in our times, being of relevance, ultimately, to all States, to the international community as a whole, and,

56 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case)* [1995] ICJ Rep 288, 307 para 68.

57 *Jurisdictional Immunities of the State* [2011] ICJ Rep 494, on the aspect of intervention: Forlati, *The International Court of Justice An Arbitral Tribunal or a Judicial Body?* 200-201.

58 *Jurisdictional Immunities of the State* [2011] ICJ Rep 494, 499 para 16.

59 ibid paras 17-18.

60 ibid 501-502 para 25, 503 para 32. ibid Diss Op Gaja, according to whom Italy was under no legal obligation to enforce Greek judgments which is why the question of a breach of international law would be a concern to Italy and Germany alone.

> in my perception, pointing towards an evolution into a true universal international law."[61]

Greece interpreted the scope of the intervention broadly in the oral proceedings, commenting on the dispute's history, the municipal judgments, general questions of state immunity and state responsibility as well as on an individual right to compensation for violations of international humanitarian law.[62] Neither the Court in its judgment nor individual judges commented on the scope of intervention.[63] Whether this order by which Greece was permitted to intervene as a non-party will, in hindsight, constitute a case-law shifting precedent for disputes on customary international law remains to be seen.

III. Evaluation

As has been demonstrated above, the intervention system, as interpreted by the Court, differentiates between sources in that parties to a multilateral treaty have a right to intervene and their legal interest is presumed because they are bound by the multilateral treaty which will be interpreted by the Court. In contrast, interested states are granted permission to intervene under article 62 of the Statute only in narrow circumstances.

The Court's restrictive policy can be explained by reference to the jurisdictional structure. The lack of a comprehensive compulsory jurisdiction can cause the concern that states would be deterred from submitting disputes to the Court by the possibility that third states could join the dispute by way of intervention.[64] The Court protected third states in the merits by compartmen-

61 ibid Sep Op Cançado Trindade para 58. In a similar sense: Christine Chinkin, 'Article 62' in *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 1546, 1558, 1569.

62 See in particular *Public sitting held on Wednesday 14 September 2011, at 10 am, at the Peace Palace, Verbatim Record* 14 September 2011 CR 2011/19 paras 50-120; but cf. Miron and Chinkin, 'Article 62' 1708 para 54, according to whom "Greece changed tack during the oral hearings, in order to concentrate on how the application of the general rules might affect its legal obligations."

63 Solely Koroma pointed in his separate opinion to the individual compensation argument, cf. *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*) (Judgment) [2012] ICJ Rep 99 Sep Op Koroma 159 para 8.

64 In the end, however, it is convincing to say that, when it comes to ruling on applications to intervene, "opposition of the parties to a case is, though very important, no more than one element to be taken into account by the Court.", *Land, Island and Maritime Frontier Dispute* [1990] ICJ Rep 92, 133 para 96.

talizing and bilateralizing the dispute;[65] it excluded certain geographical areas from further judicial consideration and examined which of the two parties had a better title.[66] In this sense, one can say that the restrictive policy as to judicial interventions under article 62 ICJ Statute may have confined the judicial perspective. Not only does it make interventions to disputes on customary international law more difficult, it also led to judgments which adopted a more bilateral perspective than a perspective on general international law.[67]

Yet, one should not overstate this claim. The next sections will illustrate how the wider normative environment has informed the Court's interpretation of the law and that the Court's jurisprudence contributed to the clarification of the general law. Also, it is hard to predict whether a less restrictive approach to interventions under article 62 would favour a greater willingness on the part of the Court to comment on matters of general international law. Contentious proceedings are, of course, not the only possibility, the advisory opinion procedure may also be considered as procedure in which questions of general international law and of abstract relationships between different fields of law could be discussed.[68] Whether states would use the opportunity to intervene if the Court adopted a less restrictive approach is difficult to evaluate, and one cannot fail to note that interventions under article 63 ICJ Statute have not occurred frequently. It remains to be seen whether the recent interventions by states to the ongoing proceedings between Ukraine and Russia[69] under

65 Abi-Saab, 'Cours général de droit international public' 261, speaking of an arbitralisation of the Court after 1966 during the 1970 and 1980s which was reflected in a restrictive policy as to judicial interventions.

66 *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13, 25 para 21.

67 Cf. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument - Reissue With New Epologue* 463 footnote 277.

68 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 240 para 25 on the relationship between human rights law and international humanitarian law; *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 178 para 106. For contentious proceedings see *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*) (Judgment) [2005] ICJ Rep 242-243 para 216 in which the Court recalled its approach in the Wall-Opinion; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Judgment of 3 February 2015) [2015] ICJ Rep para 474, holding that a certain conduct may be "perfectly lawful under one body of legal rules and unlawful under another [...] However, it is not the task of the Court in the context of the counter-claim to rule on the relationship between international humanitarian law and the Genocide Convention."

69 See the references above in Fn. 21.

article 63 of the ICJ Statute will be indicative of a development that will be characterized by a greater interest of states to articulate their views on international law in specific disputes and whether that will influence the future interpretation of article 62. Of course, states have ample ways to let their view on a certain legal question be known to the public and to the Court.[70] While informal *amicus curiae* briefs could reduce the pressure on the intervention system, it appears to be worth considering whether one should not formalize the ways to communicate information to the Court by taking a less restrictive approach to article 62.

C. Jurisdiction and the interrelationship of sources

This section will first lay out the impact of jurisdictional clauses on how the Court addresses the interrelationship of sources (I.). It will then examine how the Court's jurisdiction based on a specific treaty can also encompass general international law in the sense of a "general part" (II.). Subsequently, the section will address the relationship between the jurisdictional clauses and "substantive" international law which does not belong to the just mentioned "general part" (III.). In this context, the section will, in particular, focus on

70 Cf. on this topic also Miron and Chinkin, 'Article 62' 1740 para 147; as it has been pointed out, even an unsuccessful application to intervene achieves the objective to inform the Court of one's legal views, see Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (Cambridge University Press 2015) 504; *Continental Shelf (Libya/Malta Application to Intervene)* [1984] ICJ Rep 3 Sep Op Nagendra Singh 32 ("The purpose of warning the Court as to the area of Italian concern has indeed been totally fulfilled"); but see also ibid Diss Op Ago 29-30, who criticized "a tendency of the Court [...] to feel convinced that the aims which the procedure of intervention properly so called was intended to achieve, would in fact already be practically attained by the mere holding of the preliminary proceedings on the question of admission of the intervention." Cf. for a recent critique of a "mass intervention strategy" under article 63 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Order) https://www.icj-cij.org/sites/default/files/case-related/182/182-20230605-ORD-01-00-EN.pdf Decl Gevorgian paras 7, 9; Diss Op Xue para 28 (both on the possibility that such interventions could create political pressure on the Court); on the idea of the establishment of an *amicus curiae* proceeding before the Court see Paolo Palchetti, 'Opening the International Court of Justice to Third States: Intervention and Beyond' (2002) 6 Max Planck Yearbook of United Nations Law 165 ff.

the relationship between applicable law and the doctrine of interpretation and on the way in which the Court addresses the jurisdiction under the Genocide Convention. In its concluding observations, this section will highlight that recent decisions confirm the Court's tendency to emphasize the distinctiveness of sources when it comes to the Court's jurisdiction (IV.).

I. Jurisdiction clauses and their impact on the interrelationship of sources

This subsection concerns the question of whether the Court's jurisdictional regime impacts the way in which the interrelationship of sources is addressed. Article 36 of the Statute governs the question of jurisdiction. According to article 36(1) ICJ Statute, jurisdiction can be based on special agreements or on general treaties providing for dispute settlement and specialized treaties with compromissory clauses.[71] When a state had applied for proceedings against another state without a previous agreement, the latter could consent to the Court's jurisdiction (*forum prorogatum*).[72] According to article 36(2) ICJ Statute, states can submit unilateral declarations by which they recognize the Court's jurisdiction as compulsory in advance.[73] The Court then will have jurisdiction in a dispute between two states which accepted "the same obligations". The declarations can be subject to reservations and withdrawal.[74] Being bound by its Statute, the Court cannot recognize bases of jurisdiction outside article 36; therefore, two states cannot confer on the Court jurisdiction outside the Statute.[75] Concepts such as *jus cogens* or *erga omnes* obligations have so far not altered the consensual equation. The Court rejected the argument that it would automatically have jurisdiction in case of

71 For an overview see Peter Tomka, 'The Special Agreement' in *Liber amicorum judge Shigeru Oda* (Kluwer Law International 2002) 553 ff.

72 *Corfu Channel Case* (*UK v Albania*) (Preliminary Objection) [1948] ICJ Rep 27; *Haya de la Torre Case* (*Colombia/Peru*) (Judgment of June 13th, 1951) [1951] ICJ Rep 78; *Anglo-Iranian Oil Co* (*United Kingdom v. Iran*) (Judgment of July 22nd, 1952) [1952] ICJ Rep 114; *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*) (Judgment) [2008] ICJ Rep 203 para 60.

73 For an overview see ICJ, 'Declarations recognizing the jurisdiction of the Court as compulsory' ⟨https://www.icj-cij.org/en/declarations⟩ accessed 1 February 2023.

74 France withdrew its declaration after the Nuclear Test cases (907 UNTS 129), the United States of America withdrew its declaration after the Nicaragua decision (1408 UNTS 270).

75 Robert Kolb, *The International Court of Justice* (Alan Perry tr, Hart 2013) 297 ff.

an alleged violation of *jus cogens* or *erga omnes* obligations.[76] In particular, the Court held that the *jus cogens* nature of an obligation would not render a reservation to a jurisdictional clause invalid; five judges, however, would have preferred if the Court had examined the admissibility of such reservation with the Genocide Convention's object and purpose.[77]

Both titles of jurisdiction, article 36(1) and article 36(2), are distinct. Failures by one party to meet the procedural obligations under a treaty's compromissory clause do not exclude the Court's jurisdiction under article 36(2).[78] Whereas this was controversial in 1939 when a minority of judges had argued that the more burdensome procedural obligations under a treaty with a compromissory clause would determine jurisdiction under article 36(2) as well,[79] the majority's view was confirmed by subsequent judgments.[80]

Also, reservations attached to a unilateral declaration under article 36(2) ICJ Statute, by virtue of which a specific treaty is excluded from the Court's jurisdiction, do not affect functionally equivalent obligations under customary

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76 *East Timor* (*Portugal v. Australia*) (Judgment) [1995] ICJ Rep 102 para 29; *Armed Activities on the Territory of the Congo (New Application: 2002)* (*Democratic Republic of the Congo v. Rwanda*) (Provisional Measures, Order of 10 July 2002) [2002] ICJ Rep 245 para 71; *Armed Activities on the Territory of the Congo (New Application: 2002)* [2006] ICJ Rep 6, 32 para 64 and 35 para 78.

77 ibid 33 para 69; ibid Joint Separate Opinion by Judges Higgins, Kooijmans, Elaraby, Owada and Simma 65. See also Christian Tomuschat, 'Article 36' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 733-734, 758-759; Dapo Akande, 'Selection of the International Court of Justice for Contentious and Advisory Proceedings (Including Jurisdiction)' (2016) 7 JIDS 326, arguing that "[...] that the Court's decision in these cases is sufficiently well reasoned that it will not yield easily to alternative analysis."

78 See already *Electricity Company of Sofia and Bulgaria: Belgium v Bulgaria* Judgment of 4 April 1939 Preliminary Objection [1939] PCIJ Series A/B 77, 76.

79 ibid 77 Diss Op Hudson 131 ff., Anzilotti Sep Op 90 as well as Diss Op Urrutia 105 and Diss Op Jonkheer van Eysinga 112.

80 *Land and Maritime Boundary between Cameroon and Nigeria* [1998] ICJ Rep 275, 321-322 para 109, the obligations under UNCLOS would not apply to art. 36(2); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*) (Judgment) [2007] ICJ Rep 702 paras 136-137 (distinct bases of jurisdiction); *Border and Transborder Armed Actions* (*Nicaragua v. Honduras*) (Jurisdiction and Admissibility, Judgment) [1988] ICJ Rep 88 para 41 (reservation to the declaration under article 36(2) not applicable to the compromissory clause).

international law.[81] In the *Nicaragua* case, the United States of America invoked the *Vandenberg* reservation entered to the 1947 declaration by which the USA accepted the Court's jurisdiction under article 36(2). This reservation excluded disputes "arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction".[82] The United States contended that this reservation precluded recourse to "general and customary international law" as well,[83] whereas Nicaragua argued that "general international law" had a bearing independent from the Charter, and that any arguments as to the state of the former would not be mere reiterations of the latter.[84] The Court sided with the legal position advanced by Nicaragua:

> "Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated."[85]

In particular, the Court did not adopt Judge Schwebel's line of reasoning who would have applied the reservation to customary international law as well insofar as the latter was "essentially the same" as the multilateral treaty obligations.[86] This distinctiveness between sources, however, concerns applicability for jurisdictional purposes. It does not concern the substantive interrelationship between customary international law and other sources in relation to the interpretation and application of norms.[87]

For the purposes of this section, compromissory clauses are of particular interest. On the one hand, they are often intended to confine the dispute which states would like the Court to adjudicate[88], and the Court may be well advised to respect the confinement and not undermine it by an extensive

81 Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005* (4th edn, vol 2, Martinus Nijhof Publishers 2006) 648-649.

82 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Jurisdiction and Admissibility, Judgment) [1984] ICJ Rep 421-422 para 67.

83 ibid 423 para 69.

84 ibid [1984] ICJ Rep 392, 423-424 para 71.

85 ibid 424 para 73.

86 *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, Diss Op Schwebel 303-306; ibid 392, Diss Op Schwebel 614-616.

87 On this aspect, see in this chapter below, p. 258.

88 On the function of confinement of the dispute by compromissory clauses see William Michael Reisman, 'The Other Shoe Falls: The Future of Article 36 (1) Jurisdiction in the Light of Nicaragua' (1987) 81 AJIL 170 ("presumption of confinement").

interpretation and application of the general rules of interpretation[89] and by considering all international law to be "relevant" for the purposes of article 31(3)(c) VCLT.[90] Disregarding the confinements may lead to a decline of the adoption of new compromissory clauses.[91]

On the other hand, treaties can leave many questions open: they do not set forth, for instance, rules governing the interpretation or the consequences of a breach of the treaty, certain terms in the treaty may explicitly or implicitly invoke or rely on a concept of general international law. Moreover, a treaty is part of the international legal order which is why applicable rules and principles shall be taken into account (article 31(3)(c) VCLT).[92] Parties cannot compartmentalize the law for the administration of which the Court is ultimately responsible according to the maxim *iura novit curia*. As Robert Kolb has argued, compromissory clause in fact "pursue a double aim, that of strengthening a particular treaty by providing a means to better guarantee its proper application (legal security *inter partes*), and that of promoting the rule of law international society in general (legal security *inter omnes*)."[93]

Judicial policy thus is of utmost importance and the way in which the Court reconciles the possible tension between respect for the confinement

89 *Oil Platforms* [2003] ICJ Rep 161 Sep Op Buergenthal para 22.

90 As Simma and Kill remarked, "[a]lmost any rule of international law will be 'relevant' when considered with the proper degree of abstraction", Simma and Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' 696.

91 Cf. Akande, 'Selection of the International Court of Justice for Contentious and Advisory Proceedings (Including Jurisdiction)' 324, noting an "appreciable decline in the number of treaties which include compromissory clauses [...] apparently, no treaty with such a clause has been concluded since 2006. This is a worrisome trend [...]". It is open to question whether this decline is a reaction to the jurisprudence of the Court or rather the sign of *Zeitgeist* which is less enthusiastic with respect to judicial settlement of disputes before the Court than it used to be. Recently, Colombia denounced the Treaty of Bogota "specifically because of its compromissory clause", Tomuschat, 'Article 36' 749.

92 Cf. Enzo Cannizzaro and Beatrice Bonafé, 'Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case' (2005) 16(3) EJIL 495: "[...] the mere inclusion in a treaty of a compromissory clause cannot, by itself, have the effect of fragmenting the unity and the coherence of international law."

93 Robert Kolb, 'The Compromissory Clause of the Convention' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2009) 413.

and recognizing that the treaty is anchored in the international legal order may vary over time and must, therefore, be subject to constant examination.[94]

II. The application of general international law as general part in relation to a specific rule

1. The uncontroversial cases: validity, interpretation, responsibility

According to the Court's jurisprudence, the jurisdiction based on a compromissory clause of a treaty encompasses jurisdiction for general international law on the validity and interpretation of a treaty as well as on the law of international responsibility. One could speak in this regard of a "general part" or of "interstitial norms" or "meta-norms", in other words, rules on rules.[95]

The PCIJ already rejected the view that "jurisdiction to assess the damages and to fix the mode of payment does not, in international law, follow automatically from jurisdiction to establish the fact that a treaty has not been applied".[96] Instead, the PCIJ argued:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which

94 As Robert Kolb, 'The Scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2009) 454-455 rightly stated principally with respect to the interpretation of compromissory clauses, "[t]he answer given to these questions depends largely on considerations of legal policy, and are thus variable in time."

95 Cf. Tams, 'The Continued Relevance of Compromissory Clauses as a Source of ICJ Jurisdiction' 491: "Of course, interstitially, general international law remains crucial in many cases, including those under compromissory clauses: remedies depend on the customary rules of State responsibility, as do questions of attribution; and treaties may have to be interpreted in the light of general international law. But the number of compromissory clause cases centring on violations of customary international law is very limited indeed."; Papadaki, 'Compromissory Clauses as the Gatekeepers of the Law to be 'used' in the ICJ and the PCIJ' 6, 18 ff., does not use the term of interstitial norms but distinguishes norms stemming from the treaty, meta-norms on the validity and interpretation of the treaty, constructive norms as used by Anzilotti, meaning the logical presuppositions and the necessary logical consequences of norms, such as responsibility, and conflicting norms.

96 *Case Concerning the Factory at Chorzow: Germany v Poland* Judgment of 26 July 1927 [1927] PCIJ Series A 09 Diss Op Ehrlich 38.

> may be due by reason of failure to apply a convention, are consequently differences relating to its application."[97]

Since then, the Court has affirmed throughout its case-law that no specific authorization is required to apply the general rules of international law concerning international responsibility, and the Court defended this jurisprudence against challenges. The Court, for instance, did not accept the argument that the jurisdiction based on the compromissory clause of the VCCR did not extend to claims based on diplomatic protection as part of customary international law.[98] In addition to the law of state responsibility, the Court has applied the general rules of interpretation[99] as well as the rules on the validity of a treaty.[100] Against this background, it is rather surprising that the Court referred in the *Nicaragua* case to its additional jurisdictional basis under article 36(2) ICJ Statute when it addressed Nicaragua's submission that the United States had violated customary international law by defeating the object and purpose of the applicable treaty.[101] If one accepts such a rule of customary international law to exist, this rule will concern the application

97 ibid 21, see also 22 and 24-25 according to which this interpretation is in line with the object and purpose of the compromissory clause, which is the settlement of disputes.

98 *LaGrand* (*Germany v. United States of America*) (Judgment) [2001] ICJ Rep 482-484 paras 40-45.

99 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Judgment) [2007] ICJ Rep 105 para 149: "The jurisdiction of the Court is founded on Article IX of the Genocide Convention, and the disputes subject to that jurisdiction are those 'relating to the interpretation, application or fulfilment' of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligations under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts."

100 *Fisheries Jurisdiction* (*Federal Republic of Germany v. Iceland*) (Jurisdiction of the Court, Judgment) [1973] ICJ Rep 58-59 para 24 on duress, 64-65 paras 40 and 43 on change of circumstances; *Appeal Relating to the Jurisdiction of the ICAO Council* (*India v. Pakistan*) (Judgment) [1972] ICJ Rep 64-65 para 32 on the validity of a treaty containing a compromissory clause.

101 *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 135-136 paras 270-271.

of the treaty which, just like the rules of responsibility, is governed by the compromissory clause.[102]

2. A controversial case? Succession to responsibility

The "general part" of international law is not excluded in situations where jurisdiction is conferred upon the Court according to compromissory clauses. The precise scope of this general part, however, has been subject to debate in the recent judgment of 2015 on the dispute between Croatia and Serbia. The case was based on the compromissory clause of the Genocide Convention and concerned potential violations of the convention starting in 1991.

Prior to 1992 the Socialist Federal Republic of Yugoslavia (SFRY) was a party to the Genocide Convention. From the SFRY the Federal Republic of Yugoslavia (FRY) emerged in 1992 and claimed at the beginning to be the continuator of SFRY.[103] This claim, however, was contested and "not free from legal difficulties".[104] After the Milošević regime had been overthrown, the new FRY (Serbia and Montenegro) was no longer claiming to be the legal continuator of SFRY and applied successfully for membership to the UN and to the Genocide convention. Montenegro declared itself independent, and Serbia claimed to be the legal continuator of FRY (Serbia and Montenegro). As such, Serbia accepted in a case against Croatia that article IX of the Genocide Convention conferred on the Court jurisdiction *ratione temporis* for the time since the FRY had acceded to the Genocide convention; but it

102 See also Kolb, 'The Scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ' 462-3.

103 See Vojin Dimitrijević and Marko Milanović, 'The Strange Story of the Bosnian Genocide Case' (2008) 21(1) Leiden Journal of International Law 66 ff.; Marko Milanović, 'Territorial Application of the Convention and State Succession' in *The UN Genocide Convention: a commentary* (Oxford University Press 2009) 473 ff.; Federica Paddeu, 'Ghosts of Genocides Past? State Responsibility for Genocide in the Former Yugoslavia' (2015) 74(2) The Cambridge Law Journal 199.

104 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Order of 8 April 1993) [1993] ICJ Rep 14 para 18; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] ICJ Rep 43, 97-98 paras 130-131; Andreas Zimmermann, 'The International Court of Justice and State Succession to Treaties: Avoiding Principled Answers to Questions of Principle' in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 56.

challenged Croatia's claim that the Court had jurisdiction for events prior to this date. Croatia, for her part, argued that Serbia was responsible for acts prior to 27 April 1992, when the FRY became a party to the Genocide convention, based on state succession into responsibility of the SFRY.

The Court sided with Croatia on jurisdiction. In contrast to the *Badinter* Commission which once had held that "rules applicable to State succession and State responsibility fell within distinct areas of international law"[105], the ICJ accepted that it had jurisdiction on state succession in principle:

> "[T]he rules on succession that may come into play in the present case fall into the same category as those on treaty interpretation and responsibility of States."[106]

This conclusion was important for jurisdictional purposes. On the merits, however, the Court held that the necessary genocidal intent (*dolus specialis*) for acts committed by the SFRY could not be established.[107] Therefore, the Court did not address the question of whether Serbia had succeeded into the responsibility of SFRY for genocide.

This jurisdictional holding of the Court can be read as support for the view according to which international responsibility is no longer understood as a personal obligation (*actio personalis*) which was incapable of being succeeded into by another state.[108] Since an internationally wrongful act now

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105 *International Conference on the Former Yugoslavia Arbitration Commission* Opinion No 13 (16 July 1993) 96 ILR 727; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2015] ICJ Rep 3, Sep Op Judge *ad hoc* Kreća para 76: "Responsibility of a State is one thing and succession to responsibility is another. Suffice it to say that, whereas the rules on responsibility are secondary rules, the rules on succession are a part of the corpus of primary norms whose violation entails activation of the rules on responsibility."

106 ibid 56-57 para 115.

107 ibid 128-129 paras 440-442.

108 Cf. for this classical view Max Huber, *Die Staatensuccession. Völkerrechtliche und staatsrechtliche Praxis im XIX. Jahrhundert* (Duncker & Humblot 1898) 100 ff.; Arrigo Cavaglieri, 'Règles générales du droit de la paix' (1929) 26 RdC 374; Michael John Volkovitsch, 'Righting wrongs: toward a new theory of state succession to responsibility for international delicts' (1992) 92(8) Columbia Law Review 2195; *Robert E Brown* U.S. v. U.K, Gr. Brit.-U.S. Arb. Trib. (23 November 1923) VI RIAA 120 ff. and *F H Redward* U.K. v. U.S.A, Gr. Brit.-U.S. Arb. Trib. (10 November 1925) VI RIAA 158 ff.; critical of the historical genesis of the rule of non-succession: Ernst H Feichenfeld, *Public Debts and State Succession* (The MacMillan Company 1931) 20, 423, 424 note 4; Daniel Patrick O'Connell, 'Recent problems of state succession in relation to new states' (1970) 130 RdC 162-165; American Law Institute, *Restatement of the law, The Foreign Relations Law of the United States* (vol 1, 1987)

is understood as a form of objective responsibility divorced from the personal fault or *culpa*[109], the idea of a clean slate rule regarding responsibility is difficult to reconcile with "the stability of international relations governed by law and the very idea of equity and justice."[110]

According to a minority in the Court, however, the Court went too far when it stated the principle that the law of state succession fell into the same category as the law of international responsibility and treaty interpretation: the compromissory clause of the Genocide Convention, the argument goes, did not confer upon the Court jurisdiction for state succession into responsibility.[111] The Court, it was argued, had endorsed a controversial doctrine of state succession into responsibility without serious examination.[112] Furthermore, the dissenting judges argued[113] that the Court's endorsement implied a retroactive application of the Genocide Convention which stood in contrast to the Court's earlier judgment in the *Hissene Habre* case where the Court had rejected the retroactive application of the Convention against Torture.[114]

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para 209; Wladyslaw Czaplinski, 'State Succession and State Responsibility' (1990) 28 Canadian Yearbook of International Law 339 ff.; Brigitte Stern, 'La succession d 'États' (1996) 262 RdC 174.

109 On this development cf. Stern, 'Et si on utilisait le concept de préjudice juridique?: retour sur une notion délaissée à l'occasion de la fin des travaux de la C. D. I. sur la responsabilité des états' 4 ff.

110 Marcelo G Kohen, 'La succession d'Etats en matière de responsabilité internationale State Succession in Matters of State Responsibility' (2016) 76 Yearbook of the Institute of International Law - Tallinn Session 525 para 28; on this topic see also Pavel Šturma, 'State Succession in Respect of International Responsibility' (2016) 48 The George Washington International Law Review 653 ff.; Crawford, *State Responsibility: The General Part* 455; Patrick Dumberry, *State succession to international responsibility* (Martinus Nijhoff 2007) 302; *Report of the International Law Commission: Sixty-ninth session (1 May-2 June and 3 July-4 August 2017)* UN Doc A/72/10 203-210.

111 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2015] ICJ Rep 3 Sep Op Tomka paras 24-25 and Sep Op Judge *ad hoc* Kreća para 65.

112 ibid Sep Op Owada para 20; see also Sep Op Skotinov para 2; see Decl. of Xue para 23 and Sep Op Judge *ad hoc* Kreća para 65.

113 ibid Decl. of Judge Xue para 21, Sep Op Sebutinde para 13; see also Sep Op Tomka paras 7-9.

114 *Questions relating to the Obligation to Prosecute or Extradite* [2012] ICJ Rep 422, 457 para 100 referring to article 28 VCLT. Even though the Court had jurisdiction under article 36(2) as well, it argued that no dispute as to the prohibition of torture under customary international law existed.

It is argued here, however, that both judgments are not in conflict since the Court did not apply the Genocide Convention retroactively. On the contrary, the Court affirmed the presumption against retroactivity as set forth by article 28 VCLT with respect to the Genocide Convention generally and with respect to its compromissory clause specifically[115], which answered a question the Court had left open in earlier decisions.[116] The jurisdiction for "acts said to have occurred before 27 April 1992"[117] was not based on a retroactive application of a convention but on general international law, namely succession into the responsibility of SFRY. As Robert Kolb has argued, the link to the Genocide convention was so strong that the succession to responsibility was covered by the compromissory clause.[118]

III. The relationship between jurisdictional clauses and "substantive" law

The Court's jurisprudence does not suggest that compromissory clauses direct the Court's focus solely to the respective treaty. In other words, the confinement as to the applicable law does not necessarily correspond to a confinement of the Court's perspective.

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115 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2015] ICJ Rep 3, 49-51, paras 93-100, referring also to *Questions relating to the Obligation to Prosecute or Extradite* [2012] ICJ Rep 422. The Court rejected to endorse a "general presumption of temporal non-limitation of the titles of the jurisdiction", Kolb, 'The Compromissory Clause of the Convention' 422; Robert Kolb, 'Chronique de la jurisprudence de la cour International de Justice en 2015' (2016) 1(26) Swiss Review of International and European Law 143-144.

116 In earlier cases, the Court "confine[d] itself to the observation hat the Genocide Convention - and in particular Article IX -does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end", *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Preliminary Objections, Judgment) [1996] ICJ Rep 617 para 34; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*) (Preliminary Objections, Judgment) [2008] ICJ Rep 458 para 123.

117 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2015] ICJ Rep 3, 51 para 101.

118 Kolb, 'Chronique de la jurisprudence de la cour International de Justice en 2015' 140: "Le lien avec le traité est manifestement si fort qu'il serait artificiel d'expulser la question de cette succession du domaine de la clause compromissoire."

The Court emphasized on several occasions that jurisdictional clauses would not constitute a bar to "considering", as opposed to ruling on, events and violations outside the jurisdictional limitations.[119] Furthermore, the Court's willingness to confirm the customary status of a treaty obligation did not seem to depend on whether the Court had jurisdiction under article 36(1)[120] or under article 36(2)[121] of the ICJ Statute.

The terms of the treaty may refer to concepts of customary international law or included in other treaties to which the Court then will refer.[122] This is of particular importance with respect to NPM provisions setting forth a list of measures which are not precluded by the treaty. According to the jurisprudence of the Court, these provisions do not exclude the listed matters from the Court's jurisdiction. They constitute a "defence on the merits", which means that the Court will assess whether this provision is pertinent to the present case and whether a state invoking such a provision can rely on

119 *United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep 3, 42 para 91: after the Court had found a violation of the Vienna Conventions, the Court considered further human rights violations of the UDHR and the Charter. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2015] ICJ Rep 3, 45 para 85, the Court was not being prevented from "considering [...] whether a violation of international humanitarian law or international human rights law has occurred to the extent that this is relevant for the Court's determination of whether or not there has been a breach of an obligation under the Genocide Convention."

120 *Questions relating to the Obligation to Prosecute or Extradite* [2012] ICJ Rep 422, 457 para 99: "[T]he prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*). That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application [...], and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora." The Court could have affirmed jurisdiction based on article 36(2) though, but it held that there had been no dispute on customary international law, 445 para 55.

121 *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (Compensation, Judgment) [2012] ICJ Rep 671 para 87, where the Court held "that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments."

122 Kolb, 'The Scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ' 456 ("'renvoi'-logic").

it.[123] At the same time, the Court also stressed the distinctiveness of sources and the confinement to the treaty as far as the applicable law is concerned.

This section will first examine how the Court approached the relationship and the difference between applicable law and interpretation; by way of illustration, it will focus on the *Oil Platforms* case and the *Pulp Mills* case (1.). Subsequently, the section will zero in on the Court's interpretation of the Genocide Convention's compromissory clause and the Court's emphasis on the distinction between the convention and customary international law (2.).

1. The relationship between applicable law and interpretation

a) The *Oil Platforms* case

The *Oil Platform* case concerned a dispute between the United States of America and Iran on whether the destruction of Iranian oil platforms violated the freedom of commerce as guaranteed by the 1955 Treaty of Amity, Economic Relations and Consular Rights[124]. The treaty's compromissory clause, article XXI(2), was in conjunction with article 36(1) ICJ Statute the sole jurisdictional basis.

The United States denied a violation of the treaty and relied, *inter alia*, on the treaty's NPM provision; according to article XX(1)(d), the treaty shall not preclude the application of measures "necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." Iran argued that the treaty should be construed in light of the Charter, custom on the use of force and UNGA resolutions, so that the treaty obliged both

123 *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 116 para 222; *Certain Iranian Assets* (*Islamic Republic of Iran v. United States of America*) (Preliminary Objections Judgment of 13 February 2019) [2019] ICJ Rep 25 para 47; *Oil Platforms* (*Islamic Republic of Iran v. United States of America*) (Preliminary Objections, Judgment) [1996] ICJ Rep 811 para 20; Kolb, 'The Scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ' 460-461.

124 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States of America (signed 15 August 1955, entered into force 16 June 1957) 248 UNTS 93.

parties to conduct their relations in a peaceful manner.[125] The Court accepted the existence of a dispute for the purposes of the compromissory clause on the basis of a literal interpretation of the treaty without any reference to other international law or to article 31(3)(c) VCLT.[126] This was different in the final judgment where the Court referred to article 31(3)(c) VCLT in its interpretation of the NPM provision:

> "[The Court] cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The *application of the relevant rules of international law* relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty [...]. [The Court's jurisdiction] extends where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law. The Court would, however, emphasize that its jurisdiction remains limited to that conferred on it by Article XXI, paragraph 2, of the 1955 Treaty. The Court is always conscious that it has jurisdiction only so far as conferred by the consent of the parties."[127]

In the end, the Court reached the conclusion that the actions of the United States did not comply with the law of self-defence and were, therefore, not precluded from the applicability of the treaty pursuant to article XX(1)(d) of the treaty. Having held that the treaty was applicable in principle, the Court concluded that the treaty had not been violated. As there had not existed any commerce between both states in respect of oil produced by those platforms at the time of the attack, the attacks could not have infringed the freedom of commerce in oil as protected by X(1) of the treaty.[128]

The legal construction and the style of legal reasoning when addressing the law of self-defence were controversial on the bench. Eleven individual opinions were attached, only two of which constituted dissenting opinions disagreeing with the ultimate outcome, whereas the others concerned the judicial reasoning in the judgment. Judge Kooijmans noted that it could have

125 *Oil Platforms* [1996] ICJ Rep 803, 809 para 13, 812-813 paras 23, 25.

126 ibid 820 para 53. Cf. for the view that article 31(3)(c) VCLT had been rarely applied before Philippe Sands, 'Treaty, Custom and the Cross-fertilization of International Law' (1998) 1(1) Yale Human Rights and Development Journal 96, 101 ff., advocating in favour of a greater use of article 31(3)(c) VCLT.

127 *Oil Platforms* [2003] ICJ Rep 161, 182-183 paras 41-42 (italics added).

128 ibid 207 para 98.

been more economical to have held that the treaty had not been violated, which would have made any discussion of the law of self-defence unnecessary; yet he accepted that the Court was at liberty to make a point in relation to the law of self-defence.[129] Whereas for Judge Simma the Court proceeded too cautiously and even appeared to "attemp[t] to conceal the law of the Charter rather than to emphasize it"[130], several judges criticized the style of legal reasoning and argued that the Court should have focused more on the treaty. They criticized the use in the above-quoted passage of the word "application" since in their opinion the Court did not have jurisdiction to "apply" other rules of international law which could become relevant only incidentally in the interpretation of the treaty.[131] In particular, Judge Higgins criticized the Court for "incorporating the totality of the substantive international law [...] on the use of force" by virtue of article 31 3 (c) of the VCLT into the treaty.[132]

b) The *Pulp Mills* case and the environmental impact assessment under general international law

Against the background of this controversy, the Court stressed in the subsequent *Pulp Mills* case that, while the Court would have recourse to customary rules on treaty interpretation as set forth in article 31 VCLT and therefore take account for the interpretation of the 1975 Statute of the River Uruguay[133] of relevant rules, "whether these are rules of general international law or contained in multilateral conventions to which the two States are parties",

129 ibid Sep Op Kooijmans para 31.

130 ibid Sep Op Simma 329 para 8; see also Sep Op Elraby 291, advocating a more detailed assessment of the self-defence problematique.

131 See ibid Sep Op Higgins para 48, Sep Op Kooijmans paras 19-23, Sep Op Buergenthal para 22.

132 ibid Sep Op Higgins para 46. According to Judges Higgins and Owada, there was no complete overlap between the treaty and the law of self-defense under general international law, ibid Sep Op Higgins, Sep Op Owada para 5. For Simma, the *jus cogens* character of the law of self-defence limited the possible interpretations of the treaty, ibid Sep Op Simma para 9: "If these general rules of international law are of a peremptory nature, as they undeniably are in our case, then the principle of interpretation just mentioned turns into a legally insurmountable limit to permissible treaty interpretation."

133 Statute of the River Uruguay (signed 26 February 1975, entered into force 18 September 1976) 1295 UNTS 331.

the jurisdiction "remains confined to disputes concerning the interpretation or application of the Statute."[134] The Court did not use the word "application" with respect to the other rules which are taken into account in the process of interpretation, only the 1975 Statute was applied.[135] Against this jurisdictional background, one may consider the fact that the Court referred to the environmental impact assessment as "a requirement under general international law".[136] The use of the term "general international law" in this context gave rise to debates. Judge Cançado Trindade stressed the importance of general principles of law and criticized the Court for that "diligence and zeal seem to have vanished in respect of general principles of law".[137] In a subsequent judgment, the Court recalled its classification of the obligation to conduct an environmental impact assessment as an obligation under general international law.[138] In an individual opinion, Judge *ad hoc* Dugard pointed to "some debate about the precise meaning attached to this term" and stressed that "'general international law' cannot be equated to general principles of law" which would by and large concern rules of evidence, procedure or defences.[139] For Dugard and for Judge Donoghue, the obligation to conduct

134 *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*) (Judgment) [2010] ICJ Rep 46-47 paras 65-66 (quote).

135 Cf. Papadaki, 'Compromissory Clauses as the Gatekeepers of the Law to be 'used' in the ICJ and the PCIJ' 15-16; cf. on the distinction between applicable law and interpretation Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2(1) JIDS 31 ff.

136 *Pulp Mills on the River Uruguay* [2010] ICJ Rep 14, 83 para 204: "In this sense, the obligation to protect and preserve, under Article 41(a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there was a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."

137 ibid [2010] ICJ Rep 14 Sep Op Cançado Trindade 137 paras 4 and 5.

138 *Certain Activities Carried out by Nicaragua in the Border Area - Construction of a Road in Costa Rica Along The San Juan River* (*Costa Rica v. Nicaragua /Nicaragua v. Costa Rica*) (Judgment) [2015] ICJ Rep 706 para 104.

139 ibid Sep Op Dugard paras 13, 14. He also noted the secondary character of general principles of law, such as responsibility, which presuppose primary obligations. He referred to the PCIJ, cf. *Mavrommatis Palestine Concessions: Greece v. The United Kingdom* Judgment of 30 August 1924 [1924] PCIJ Series A 02, 27.

environmental impact assessments was a rule of customary international law.[140]

Hence, the term of general international law might not have been used as a conceptual alternative or in opposition to customary international law.[141] One possible explanation for the use of the term in *Pulp Mills* might be the jurisdictional context. In light of the jurisdictional discussions in *Oil Platforms*, the Court stressed the jurisdictional limitation in *Pulp Mills* and used the term of "general" international law against the background of the long-standing jurisprudence that "general international law" remains applicable in the context of the interpretation and application of a specific treaty.[142]

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140 *Certain Activities Carried out by Nicaragua in the Border Area - Construction of a Road in Costa Rica Along The San Juan River* [2015] ICJ Rep 665 Sep Op Judge *ad hoc* Dugard para 17; ibid Sep Op Donoghue para 2: "[The Court] uses the terms 'general international law' and 'customary international law', apparently without differentiation."

141 The Court's practice as to the use of the term is not very consistent. For an early use in the context of international organizations see *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 95 para 48 on the obligation to negotiate in good faith: "The Court does so the more readily as it considers those obligations to be the very basis of the legal relations between the Organization and Egypt under general international law, under the Constitution of the Organization and under the agreements in force between Egypt and the Organization."; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* [2010] ICJ Rep 403, 437 para 80 (discussing customary international law in a section on general international law); "general international law" invoked in order to address rules relating to state responsibility, see *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 153 paras 136-137; *Questions relating to the Obligation to Prosecute or Extradite* [2012] ICJ Rep 422, 461 para 121; the pleading of the parties is not always clear: Senegal denied the violation of "any other rule of conventional law, general international law or customary international law", ibid 12; Michael Wood, 'The International Tribunal for the Law of the Sea and General International Law' (2007) 22 International Journal of Marine and Coastal Law 354, noting "a certain degree of imprecision" of the term; see also Nele Matz-Lück, 'Norm Interpretation across International Regimes: Competences and Legitimacy' in Margaret A Young (ed), *Regime Interaction in International Law Facing Fragmentation* (Cambridge University Press 2012) 206: "[I]t is questionable whether the establishment of a defined category of 'general international law' is beneficial, since it seems impossible to identify the content. Moreover it is unclear how such a category should relate to the sources of international law".

142 See also Tomuschat, 'Article 36' 754 para 60.

2. From deconventionalization to reconventionalization? The prohibition of genocide and the distinctiveness of sources for the purposes of jurisdiction

The jurisprudence based on the compromissory clause of the Genocide Convention illustrates how the Court acknowledged the interrelationship between treaty law and customary international law while emphasizing the distinctiveness of the sources for jurisdictional purposes. Article IX of the convention reads as follows:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."[143]

The convention, however, does not set forth in explicit terms a prohibition of genocide applicable in the relations between states, it identifies genocide as a crime and imposes obligations on states parties to prosecute individuals committing this crime.[144]

According to judge Owada[145], the prohibition directed at states was not a conventional obligation and, therefore, could not be the subject of a dispute regarding the application and interpretation of the Convention. He acknowledged that this prohibition was part of general international law but did not belong to the realm of general international law which included the rules on interpretation and state responsibility and which traditionally was encompassed by jurisdiction based on a compromissory clause. However, in his view, the Court had nevertheless jurisdiction with respect to the prohibition of genocide since the jurisdictional clause of article IX Genocide Convention

143 Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

144 See in particular ibid articles I and VI.

145 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] ICJ Rep 43 Sep Op Owada para 58 ff., para 73 for his conclusions. He rejected the Court's incorporation-by-implication argument; for a similar critique see Paola Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?' (2007) 18(4) EJIL 637 ff., 641-643 on two primary rules regarding the prohibition of genocide; for a positive assessment of the Court's interpretation see Pierre-Marie Dupuy, 'A Crime without Punishment' (2016) 14 JICJ 882.

confers jurisdiction for disputes relating to the responsibility of a State for genocide. Other judges expressed similar views.[146]

The majority of the Court, however, considered this part of the compromissory clause to be an "unusual feature".[147] Instead, the Court argued that the prohibition to commit genocide existed also as an obligation under the treaty.[148] The Court argued that the Court's earlier characterization of the prohibition of genocide as "binding on States, even without any conventional obligation"[149] and as "peremptory norm of international law (jus cogens)"[150] was "significant for the interpretation of the second proposition stated in Article I"[151] and therefore for the conventional obligation not to commit genocide.

In its judgment of 2015, the Court acknowledged that principles of customary international law are enshrined in the convention, but it also stressed that its jurisdiction was confined to the treaty. Referring to the *Nicaragua* case, the Court held:

> "Where a treaty states an obligation which also exists under customary international law, the treaty obligation and the customary law obligation remain separate and distinct [...] Accordingly, unless a treaty discloses a different intention, the fact that the treaty embodies a rule of customary international law will not mean that the compromissory clause of the treaty enables disputes regarding the customary law

146 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] ICJ Rep 43 Sep Op Tomka 41, 45, 56 61, in his view the additional reference in article IX would confer jurisdiction upon the Court for determining the responsibility of states for violations of the prohibitions of genocide. See also Joint Declaration Shi and Koroma paras 1-6, criticizing the Court's incorporation-by-implication argument See also Skotinov pp. 370-372, speaking of an "absolute prohibition of genocide" under general international law" (273).

147 ibid 114 para 169. The Court left this open in an earlier judgment, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [1996] ICJ Rep 595, 616 para 32: "The Court would observe that the reference in Article IX to "the responsibility of a State for genocide or for any of the other acts enumerated in Article III", does not exclude any form of State responsibility."

148 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] ICJ Rep 43, 113 para 166: "In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide."

149 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 23.

150 *Armed Activities on the Territory of the Congo (New Application: 2002)* [2006] ICJ Rep 6, 32 para 64.

151 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] ICJ Rep 43, 111 para 162.

> obligation to be brought before the Court. In the case of Article IX of the Genocide Convention no such intention is discernible [...]"[152]

One could say that a deconventionalization in the sense of an emphasis of the binding character of the Genocide Convention's underlying principles even without any conventional obligation in 1951[153] was followed by a re-conventionalization in the sense of an emphasis of the conventional character of the prohibition of genocide for jurisdictional purposes. Instead of interpreting article IX of the Genocide Convention in a way that would confer jurisdiction on the violation of an obligation under customary international law, the Court developed this obligation as a matter of treaty law. This treaty obligation is informed by the prohibition's status in general international law. For the purposes of jurisdiction, the Court affirmed the distinctiveness of sources while for the purposes of content-determination acknowledging the interrelationship.[154] As far as a State's international responsibility is concerned, claims in this regard "remain confined to the provisions of the treaty concerned and cannot be extended to a parallel customary rule."[155] To this extent, one can say that compromissory clauses favour treaty law or disfavour customary international law.[156]

In the very recent dispute between Ukraine and Russia during the Russian invasion of Ukraine which started on 24 February 2022 the question was raised whether the Genocide Convention entails a right not to be subject to a false claim of genocide and to another state's military operation based on an abuse of the obligation to prevent genocide under article 1 Genocide Con-

152 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2015] ICJ Rep 3, 42-43 paras 87-88; see also Anja Seibert-Fohr, 'State Responsibility for Genocide under the Genocide Convention' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2009) 354: "A case challenging the violation of customary international law could not be based on this clause."

153 Cf. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, 23.

154 It is possible that the Court will refer in future cases for the interpretation to the conventional obligation again to the development in customary international law, see Kolb, *The International Court of Justice* 436 for the prospect of the development of the concept of genocide through the jurisprudence of the ICC.

155 Tomuschat, 'Article 36' 754 para 60.

156 See also Tams, 'The Continued Relevance of Compromissory Clauses as a Source of ICJ Jurisdiction' 491: "This is yet another consequence of a dispute settlement system dominated by treaty-specific compromissory clauses – put simplistically, such a system favours treaty over custom."

vention. The Court accepted, *prima facie* in an order of provisional measures Ukraine's submissions that there is "a divergence of views as to whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to genocide in violation of its obligations under the Genocide Convention, as well as whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention."[157] The order is based on a 13:2 majority; two judges, Gevorgian and Xue, dissented, arguing that the Court had no jurisdiction,[158] Judge Bennouna declared that, while he voted in favour of the order because he felt "compelled by the tragic situation", he was not convinced that the Genocide Convention was intended to "to enable a State, such as Ukraine, to seise the Court of a dispute concerning allegations of genocide made against it by another State, such as the Russian Federation, even if those allegations were to serve as a pretext for an unlawful use of force".[159]

IV. Recent Confirmations and Concluding Observations: distinctiveness for jurisdictional purposes

Recent decisions confirm the Court's emphasis on the distinctiveness of sources for jurisdictional purposes. The Court held in *Immunities and Criminal Proceedings* between Equatorial Guinea and France that it had no jurisdiction to entertain Equatorial Guinea's claim that France violated the immunity from foreign criminal jurisdiction of the Vice-President of the Republic of Equatorial Guinea and the immunity of State property of Equatorial

157 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*) (Order of 16 March 2022) (2022) ⟨https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf⟩ accessed 1 February 2023 para 45. On this order see Andreas Kulick, 'Provisional Measures after Ukraine v Russia (2022)' (2022) 13(2) JIDS 323 ff., 337 (on the possibility that the order "may incidentally serve the integrity of international legal argument" and preclude future uses of force under humanitarian pretence).

158 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Order of 16 March 2022) Decl Gevorgian, Decl Xue.

159 ibid Decl Bennouna paras 1-2.

Guinea. The Palermo Convention[160] provides for the Court's jurisdiction for any dispute concerning the interpretation or application of the convention pursuant to article 35. Article 4 of the convention provides that "States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention [...]" and that "[n]othing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction [...]".[161] Whereas France argued that article 4 only recalls without incorporating the rules of customary international law,[162] Equatorial Guinea expressed the view that respect for the principles of sovereign equality and non-intervention "becomes a treaty obligation for a State party when it is applying the other provisions of the Convention" and that the rules relating to immunity "flow directly from the principles of sovereign equality and non-intervention".[163] The Court held that the reference to sovereign equality did not entail an obligation "to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules"[164] and that article 4 could not be interpreted as incorporating the customary international rules on immunities.[165] It is notable that the Court's conclusion related to the customary international law rules on immunity; the Court did not adopt the view that article 4(1) would be only "a without prejudice clause" which would not impose any obligation to act in accordance with the principles referred therein.[166]

In *Certain Iranian Assets* between Iran and the USA, the Court decided that the dispute on the freezing of Iranian assets in the USA, in particular assets of the Iranian national bank Markazi, fell within the Court's jurisdiction under the Treaty of Amity, Economic Relations and Consular Rights. At the

160 United Nations Convention against Transnational Organized Crime (signed 15 November 2000, entered into force 25 December 2003) 2225 UNTS.

161 *Immunities and Criminal Proceedings* (*Equatorial Guinea v. France*) (Preliminary Objections, Judgment) [2018] ICJ Rep 318 para 78.

162 ibid 318 para 79, 320 para 87.

163 ibid [2018] ICJ Rep 292, 319 para 83, 318 para 81.

164 ibid 321 para 93.

165 ibid 322 para 96. The decision to uphold France's first preliminary objects was based on eleven votes to four majority. The four judges argued in their joint dissenting opinion in favour of a less restrictive interpretation of article 4 of the convention, see ibid Joint Diss Op Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka 340, 341, 346 ff.

166 On this point see ibid Decl Judge Crawford 390, 391.

same time, the Court stressed that its jurisdiction did not extend to violations of sovereign immunity under customary international law. The Court held that the various provisions of the treaty (article IX, article XI(4)) did not incorporate the customary rules on sovereign immunity.[167] The fact that article XI(4) excluded claims of immunity in relation to the specific case of publicly owned and controlled enterprises did not mean that there was a treaty obligation to respect immunities under customary international law in all other cases.[168] Moreover, the freedom of commerce protected by article X of the bilateral treaty between Iran and the USA did not "cover matters that have no connection, or too tenuous a connection, with the commercial relations between the States Parties to the Treaty. In this regard, the Court is not convinced that the violation of the sovereign immunities to which certain State entities are said to be entitled under international law in the exercise of their activities *jure imperii* is capable of impeding freedom of commerce, which by definition concerns activities of a different kind."[169]

In this context, the Court held that the fact that a certain act violated multiple rules of international law did not exclude jurisdiction under one particular treaty, as certain acts "may fall within the ambit of more than one instrument and a dispute relating to those acts may relate to the 'interpretation or application' of more than one treaty or other instrument."[170]

Whereas the Court respects the jurisdictional confinements as to the applicable law,[171] its practice also indicates that the interpretation of a conventional rule that is to be applied may require recourse to other principles and rules

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167 *Certain Iranian Assets* [2019] ICJ Rep 7, 28 para 58, 30 para 65, 32 para 70, 33 para 74, 34 para 79; the Court made clear that the question of incorporation needs to be answered by an interpretation of the treaty which is confined to a literal interpretation, see 32 para 70, where the Court held that the fact that an article "makes no mention of sovereign immunities, and that it also contains no renvoi to the rules of general international law, does not suffice to exclude the question of immunities from the scope ratione materiae of the provision at issue".

168 ibid para 65.

169 ibid para 79.

170 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Islamic Republic of Iran v. United States of America*) (Preliminary Objections, Judgment of 3 February 2021) [2021] ICJ Rep 27 para 56 ("To the extent that the measures adopted by the United States following its decision to withdraw from the JCPOA might constitute breaches of certain obligations under the Treaty of Amity, those measures relate to the interpretation or application of that Treaty").

171 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2015] ICJ Rep 3, 48 para 89: "It is not enough that these events may

of international law. The distinctiveness of the sources for jurisdictional purposes should not be equated with the relationship between the sources when it comes to the interpretation and application of international law. This aspect which will be the topic of the next section.

D. The normative environment in the jurisprudence of the ICJ

The purpose of this section is to illustrate the relevance of normative considerations and the normative environment[172] for the interpretation and application of customary international law.[173] The Court often related a rule of international law to its normative environment[174] and took account of "trends" and normative developments in the international legal order.[175] Customary

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have involved violations of the customary international law regarding genocide; the dispute must concern obligations under the Convention itself."

172 Cf. on this term *Fragmentation of international law: difficulties arising from diversification and expansion of international law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi* 212 para 423. Cf. Christian J Tams, 'The ICJ as a 'Law-Formative Agency': Summary and Synthesis' in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 380, the ICJ judgments would operate in a broader normative environment.

173 On general principles, see in this chapter below, p. 305.

174 Cf. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* [1980] ICJ Rep 73, 76 para 10: "But a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 31 para 53: "[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."; also, the Court referred in the context of treaty interpretation to third treaties which were close in substance, see *Wimbledon* PCIJ Series A 01 26-28 and the reference to the "general opinion", and *Ahmadou Sadio Diallo* [2010] ICJ Rep 639, 664 para 68 (referring to regional human rights treaties which were "close in substance"); see also *Ahmadou Sadio Diallo* [2012] ICJ Rep 324, 331 para 13 ff. and the references to the European Court of Human Rights, the Inter-American Court of Human Rights, the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and the United Nations Compensation Commission.

175 *Asylum Case* [1950] ICJ Rep 266, 277, not using the term trend or tendency, but noting that there was too much inconsistency among conventions on asylum and too

international law and general principles of law are not only important as background against which treaties are to be interpreted, customary international law and general principles of law also provide a normative reservoir for general rules and principles which can help the Court in deciding a legal dispute.[176] They ensure the adjudicability of such disputes on the basis of international law, in particular where no treaty is applicable.

In the following, it will be shown that the Court's jurisprudence provides for illustrations of customary norms of varying degrees of generality (I.). Subsequently, the section will focus on the Court's interpretative decisions when it applies customary international law; in particular, it will illustrate the role of default positions and starting points, the Court's "scoping" and tailoring of the legal analysis and the formulation of a rule and of possible exceptions (II.). The section will then examine the Court's jurisprudence on

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much political expediency in order to speak of "any constant and uniform usage, accepted as law". *Nottebohm Case (second phase)* (*Liechtenstein v. Guatemala*) (Judgment of April 6th, 1955) [1955] ICJ Rep 22, speaking of a tendency in arbitration and scholarship that would support the genuine link theory. *Fisheries Jurisdiction* (*Federal Republic of Germany v. Iceland*) (Merits, Judgment) [1974] ICJ Rep 191-192 para 44 referring to the 1960 Conference which had failed to adopt a text by one vote. *Continental Shelf (Tunisia/Libya, Application to Intervene)* [1981] ICJ Rep 3, 38 para 24, the Court was authorized by the compromis to take account "recent trends", the Court stressed that it would have done so proprio motu anyway, for it could not ignore negotiations of multilateral conventions possibly embodying or crystallizing a rule of customary law. *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*) (Judgment) [1982] ICJ Rep 48 para 47; *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 237 para 18, noting that stating the law can involve noting the law's "general trend". See also *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13, 29-30 para 27: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." See also at 33 para 33, where the Court relied on the 1982 Convention to conclude that the continental shelf and the exclusive economic zone "are linked together in modern law".

176 Cf. already in the context of arbitration *Eastern Extension, Australasia and China Telegraph Company, Ltd* Great Britain v. United States (9 November 1923) VI RIAA 114: "International law [...] may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provisions of law, the corollaries of general principles, and so to find [...] the solution of the problem."

the relationship between customary international law and treaty law (III.). This examination will include not only the case-law on the relationship but also illustrations of forms of convergence between the Charter and customary international law and forms of convergence of functionally equivalent rules in the Court's maritime delimitation jurisprudence. Against the background of the previous subsections, the chapter will then zero in on the role of general principles (IV.).

I. Varying degrees of generality of customary international law

Principles and rules of customary international law, terms which the Court used interchangeably,[177] can display a high degree of generality and abstractness and yet remain capable of being applied and concretized by the Court to the individual case.

The Court referred in its *Corfu Channel* judgment to "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[178] The Court concretized these principles and held that Albania's obligations "consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them."[179]

A further example is the *Fisheries jurisdiction* case where the Court argued that, even though "the practice of States does not justify the formulation of any general rule of law"[180] on maritime delimitation, there was still "general international law" available: "It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in

177 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* [1984] ICJ Rep 246, 288-290 para 79; cf. Weil, 'Le droit international en quête de son identité: cours général de droit international public' 150: "Loin de relever d'une source autonome de droit international, tous ces principes ont en réalité le caractère de règles coutumières."

178 *Corfu Channel Case* (*UK v Albania*) (Merits) [1949] ICJ Rep 22.

179 ibid 22.

180 *Fisheries* (*United Kingdom v. Norway*) (Judgment) [1951] ICJ Rep 131.

1935 is not subject to certain principles which make it possible to judge as to its validity under international law."[181] The Court then referred to "certain basic considerations inherent in the nature of the territorial sea, which bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question."[182]

These general principles and rules can require a focus on the particularities of the case. In the case between Tunisia and Libya the Court held that so-called historic waters and historic bays "continued to be governed by general international law which does not provide for a *single* 'règime' [...] but only for a particular règime for each of the concrete, recognized cases".[183]

In the *North Sea Continental Shelf* cases, the Court began to develop its jurisprudence on delimitation on the basis of "equitable principles" and good faith in order to reach an "equitable result" by applying criteria which in part have found expression in law, in part followed from the particularities of the case.[184]

The principle of good faith can also give rise to basic procedural obligations.[185] In the *Icelandic Fisheries* case, the Court highlighted the obligation

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181 ibid 132. As was pointed out by individual judges, the Court did not adopt the so-called Lotus-approach, ibid Op Judge Alvarez 152; Diss Op McNair 160; Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law' (1953) 30 BYIL 11.

182 *Fisheries* [1951] ICJ Rep 116, 133.

183 *Continental Shelf (Tunisia/Libya)* 74 para 100; see also *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras: Nicaragua Intervening*) (Judgment) [1992] ICJ Rep 351, 592-593, 598-602 on the Gulf of Fonseca as "historic bay" and "closed sea" and the joint sovereignty of the three coastal states based on the succession from the Spanish Crown in 1821 as "logical outcome of the principle of *uti possidetis juris* itself" (at 602 para 405); see also Hugh W Thirlway, *The law and procedure of the international court of justice: fifty years of jurisprudence* (vol 2, Oxford University Press 2013) 1164 f., 1198 f., 1421; Maurice H Mendelson, 'The International Court of Justice and the sources of international law' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty years of the International Court of Justice Essays in honour of Sir Robert Jennings* (Cambridge University Press 1996) 72.

184 *North Sea Continental Shelf* [1969] ICJ Rep 3, 46-47 para 85. Cf. also the section below, p. 290.

185 Cf. *Gabčíkovo-Nagymaros Project* [1997] ICJ Rep 7, 66 para 109, where "both parties agree that articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith."

to "pay reasonable regard to the interests of other states" when a state exercises its preferential rights of fishing.[186] And in the *Pulp Mills* case, the Court related the "principle of prevention, as a customary rule" to "the due diligence that is required of a State in its territory" with respect to "activities which take place in its territory, or in any area under its jurisdiction".[187] This is an example of how a traditional principle can be interpreted and applied in a contemporary fashion.

However, these examples should not create the impression, which could arise from a reading of the *Gulf of Maine* judgment, that customary international law consisted only of old, very general rules and principles[188] or that there are two strictly separated categories of customary international law, namely "a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community" and "a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice".[189] Rather, customary international law consists of principles and rules of varying degrees of generality which can interrelate with each other and which should be studied in their interrelationship.[190]

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186 *Fisheries Jurisdiction* [1974] ICJ Rep 175, 198 para 59.

187 *Pulp Mills on the River Uruguay* [2010] ICJ Rep 14, 55-56 para 101, with reference to *Corfu Channel Case* [1949] ICJ Rep 4, 22 and to *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 242 para 29; see also *Certain Activities Carried out by Nicaragua in the Border Area - Construction of a Road in Costa Rica Along The San Juan River* [2015] ICJ Rep 665, 706 para 104; ibid [2015] ICJ Rep 665 Sep Op Donoghue para 3. On procedural obligations under customary international law in the context of international environmental law see Jutta Brunnée, 'International Environmental Law and Community Interests: Procedural Aspects' in Georg Nolte and Eyal Benvenisti (eds), *Community Interests Across International Law* (Oxford University Press 2017) 156-165.

188 According to *Delimitation of the Maritime Boundary in the Gulf of Maine Area* [1984] ICJ Rep 246, 290 para 81, customary international law "can of its nature only provide a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective."

189 ibid 229 para 111: "A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas."

190 Nolte, 'How to identify customary international law? - On the final outcome of the work of the International Law Commission (2018)' 20, speaking of the "risk

Normative and functional considerations[191] as well as state practice can be relevant in specifying and concretizing these broad rules and principles to the particularities of the case and in interpreting specific rules of customary international law against the background of broader principles and rules. As Rudolf Geiger has argued, the Court's analysis of customary international law would often start with first basic principles which the Court would interpret in light of their respective aims and functions and in light of the specific case before the Court. Based on this interpretation, the Court would arrive at more specific norms.[192]

For instance, in the *Jurisdictional Immunities* case, the Court related the rule of state immunity to its wider normative environment, thereby demonstrating that broad rules and principles can give rise to more specific ones and that the latter are to be considered against the background of the former, just as broad principles have to be viewed together:

> "[The rule of state immunity] derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is

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that customary international law is perceived as only consisting of an assortment of certain specific rules, such as those on immunity or diplomatic protection, which can be simply recognized by looking at practice. Customary international law rather consists of rules on a different level of generality which may influence each other." Furthermore, in *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) [2012] ICJ Rep 674 para 139, the Court decided that article 121 UNCLOS as a whole formed part of an "indivisible regime" and as such reflected customary international law. The Court thusly indicated that customary international law consisted not only of separate rules but of rules which can interrelate with each other.

191 In the *Arrest Warrant* case, the Court extended immunities to Foreign ministers because the Foreign Minister assumes functions that are similar to those assumed by the head of the government or the head of state who are protected from personal immunities, the Court also referred to article 7 VCLT which provides that heads of state, heads of governments and foreign ministers are considered as representative of their state, *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v. Belgium*) (Judgment) [2002] ICJ Rep 21-22 paras 53-54. This is an instance of reasoning by analogy.

192 Rudolf H Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal' in Ulrich Fastenrath and others (eds), *From bilateralism to community interest: essays in honour of Judge Bruno Simma* (Oxford University Press 2011) 692-694: "This method of detecting customary international law norms - that is, looking for legal principles and interpreting these principles to find specifying rules suitable for deciding the case, and making use of law-making treaties and resolutions of international organs as guidelines - seems to be the law-finding method which the Court really applies."

> one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it."[193]

The Court then examined practice as to whether an exception to immunity had crystallized.[194]

In the *Chagos* opinion, the Court considered that "[b]oth State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a *corollary of the right to self-determination*."[195] Arguably, as the right to self-determination, including respect for territorial integrity, had been firmly anchored in the international legal order, the burden of reasoning with respect to this right's application to the specific case shifted: as the Court noted, "no example has been brought to the attention of the Court in which, following the adoption of resolution 1514(XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering Power of part of a non-self-governing territory, for the purpose of maintaining it under its colonial rule."[196] The rule that was then applied appeared to have been the right to self-determination, rather than the right to territorial integrity as corollary,[197] as the Could held hat "any detachment by the administering Power of part of a non-self-governing territory, unless

193 *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 123-124 para 57.

194 ibid 127 ff.

195 *Legal consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep [2019] ICJ Rep 95, 134 para 160 (italics added).

196 ibid 134 para 160; the Court also noted that resolution 1514 (XV) was not met with contestation, ibid 132 para 152.

197 On this aspect see in particular Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' 262-263. He also points out that the Court did not always apply the more general standard, as it applied in the *Jurisdictional Immunities* case the rule of state of immunity, rather than the principle of sovereign equality of states, and in the *Nicaragua* case it applied the principle of non-intervention, rather than the principle of sovereign equality.

based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination."[198]

In the *Nicaragua case* the Court considered the principle of non-intervention to be

> "part and parcel of customary international law [...] Expressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find [...] The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as corollary of the principle of the sovereign equality of States".[199]

The Court interpreted the principle of non-intervention by way of reference to its *telos*, against the backdrop of state sovereignty and under consideration of the Friendly Relations Declaration: "A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely [...] Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones."[200] The Court then examined whether "state practice justified" this interpretation of this principle.[201] The Court did not, however, search for affirmative practice; rather, it examined whether state practice derogated from this principle by creating a general right to intervention, which the Court concluded was not the case.[202]

This line of reasoning is partly discussed as an illustration of the difficulty of proving a prohibitive rule, to identify "an intangible practice of abstention"[203] and of the importance of *opinio juris*.[204] It is submitted here that the case also indicates the significance of scoping the case and determining the question which needs to be answered by an examination of the practice

198 *Legal consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* 134 para 160.

199 *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 106 para 202.

200 ibid 108 para 205.

201 ibid 108 para 206.

202 ibid 108-109 paras 206-209.

203 d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' 26.

204 Cf. *ILC Report 2018* at 128: "In particular, where prohibitive rules are concerned, it may sometimes be difficult to find much affirmative State practice (as opposed to inaction); cases involving such rules are more likely to turn on evaluating whether the inaction is accepted as law."

of states.[205] As the principle of non-intervention is firmly anchored in the international legal order, the question turned on whether there is a sufficient body of practice derogating from this principle. In other words, the right to intervention was characterized as an exception to the rule, and with the exception came the burden of reasoning.

Furthermore, practice can shed light on the application of a general principle or a general rule of customary international law. In *Burkina Faso v. the Republic of Mali*, the Court addressed the *uti possidetis* principle, which had characterized the decolonialization in Spanish America in the 19th century, and held that "[t]he fact that the new African States have respected the administrative boundaries and frontiers established by the colonial power must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope."[206]

State practice can also limit the scope of an emerging or latent rule, as the *Nuclear Weapons* Advisory Opinion demonstrates. In the view of the Court, the emergence of an absolute prohibition "is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other."[207]

II. Interpretative Decisions

The legal craft is particularly relevant in light of the broadness of rules and principles. This section will, by way of example, focus on default positions, starting points and differences in the normative context (1.), on the "scoping" and tailoring of the legal analysis (2.) and on the way in which the Court shapes a rule by acknowledging an exception (3.).

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205 On legal techniques see also below, p. 266.

206 *Frontier Dispute* [1986] ICJ Rep 554, 565 para 21.

207 *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 255 para 73. Hence, the fact that nuclear weapons had not been used since 1945 was, as it was argued by a group of states, "not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen" (254 para 66).

1. Default positions, starting points and the normative context

Presumptions, default positions and starting points are important when identifying customary international law. The ICJ jurisprudence illustrates that territory, for instance, can be a starting point, presumption or an important consideration in legal reasoning[208] which, of course, has to be considered against the background of other legal principles and interests.[209] A famous default position is perhaps the interpretation of the *Lotus* judgment according to which states were free to act unless there was a prohibition.[210] However, it is difficult to resolve a conflict of different sovereignties on the basis of the *Lotus* presumption alone; as Sir Gerald Fitzmaurice argued, the outcome of a case would then "depend largely on the accident of which side was plaintiff and which defendant".[211] Arguably, there is no single static default position; rather, the appropriate default position must be determined in each case anew, normative considerations which shift the burden of reasoning can be of particular importance in this regard.

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208 Cf. on territorial jurisdiction *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 124 para 57 (territorial jurisdiction flows from territorial sovereignty); *Asylum Case* [1950] ICJ Rep 266, 275 (territorial sovereignty as default position, a derogation requires a legal basis); *The Case of SS Lotus* PCIJ Series A 10, 18-19 (referring to the exercise of jurisdiction in a state's own territory); *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 106 para 202 (on the relationship between territorial sovereignty and non-intervention). See on the role of territorial considerations in the context of maritime delimitation *North Sea Continental Shelf* [1969] ICJ Rep 3, 51 para 96 ("[...] the land dominates the sea"); *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, 61 para 73; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v. Bahrain*) (Merits, Judgment) [2001] ICJ Rep 97 para 185, on the question of what counts as territory see 102 para 206: "The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands." See also Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal' 688-689.

209 Cf. *Jurisdictional Immunities of the State* 124 para 57 (referring to the sovereign equality of states); cf. *Territorial and Maritime Dispute* [2012] ICJ Rep 624, 690-692 paras 177-180 (on the right to establish a territorial sea of 12 nautical miles).

210 Cf. *The Case of SS Lotus* PCIJ Series A 10, 18.

211 Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law' 11-13 (quote at 12); see also Martti Koskenniemi, 'The Politics of International Law' (1990) 1 EJIL 18.

Two very early cases of the Court illustrate the role of interpretative decisions, the normative environment and the overall context[212], namely the *Asylum* case and the *Nottebohm* case. To Josef Kunz, the Court's rather loose treatment of customary international law in relation to the genuine link requirement in *Nottebohm* was difficult to reconcile with the Court's rather stringent conditions in the *Asylum* case.[213] It is argued here that both cases are difficult to compare because of the different normative settings and default positions.

a) The *Asylum* case

In the *Asylum* case, Colombia relied on several conventions as arguments in support of a rule of (regional) customary international law which would have entitled Colombia to grant Víctor Raúl Haya de la Torre political asylum in a Colombian embassy in Peru.[214] The starting point of the Court's legal analysis was the territorial sovereignty of Peru, and this may explain that the burden

212 The importance of the "overall context" is addressed in the third ILC conclusion on customary international law, *ILC Report 2018* at 126-129. The first paragraph of the third conclusion reads: "In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (opinio juris), regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found".

213 Cf. Josef L Kunz, 'The Nottebohm Judgment (Second Phase)' (1960) 54 AJIL 554, 557, according to whom the Court's identification of the genuine link requirement in customary international law is conflict with the "very stringent conditions which the Court laid down in the Asylum case for the coming into existence of a rule of customary international law."

214 While it could be argued that the *Asylum* case concerns only regional custom and therefore cannot be used for an analysis of general customary international law, it is submitted here that the Court's judgment does not support such a reading. The Court invoked article 38 ICJ Statute in order to explain that a party which relies on a custom needs to substantiate the existence of a rule of customary international law, see *Asylum Case* [1950] ICJ Rep 266, 276-277 and 274 (phrasing Colombia's argument as one based on customary international law); see also Fitzmaurice, 'The General Principles of International Law considered from the standpoint of the rule of law' 106 (the same principles apply to regional and general custom); *Fragmentation of international law: difficulties arising from diversification and expansion of international law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi* para 214 (pointing out that "the Court treated the

of reasoning was on the legal view advanced by Colombia: according to this argument, customary international law as reflected in the Havana convention of 1928 on asylum[215], to which Peru was not a party,[216] or regional customary international law should have provided for a legal ground for diplomatic asylum. According to the Court, however, such a right to grant political asylum would have been tantamount to a unilateral right of qualification with respect to the grounds of asylum, which would have constituted a significant derogation from territorial sovereignty and, therefore, could not lightly be assumed.[217] The Court also related the Havana convention to the overall context and concluded that the convention, rather than endorsing a right to grant political asylum, intended to constrain abusive practices.[218]

b) The *Nottebohm* case and the genuine link requirement

In *Nottebohm*, the ICJ pronounced itself on the genuine link requirement when it determined under which conditions a state can exercise diplomatic protection on behalf of individuals. The dispute between Liechtenstein and Guatemala concerned the question of whether Liechtenstein could exercise diplomatic protection on behalf of Friedrich Nottebohm. Nottebohm was born in Germany in 1881, went to Guatemala in 1905 and lived there until 1943 and successfully applied for Liechtenstein's citizenship in 1939, thereby losing his German citizenship. Guatemala, which sided with the Allies against Germany, treated Nottebohm as an enemy alien, he was arrested, detained, expelled to the United States and denied readmission, his property was seized without compensation.[219]

Colombian claim as a claim about customary law [...] There was, in other words, no express discussion of 'regionalism' in the judgment").

215 Convention on Asylum (signed 20 February 1928, entered into force 21 May 1929) OAS Official Records, OEA/SerX/I Treaty Series 34.

216 *Asylum Case* [1950] ICJ Rep 266, 274, 275.

217 ibid 274-275, 278.

218 ibid 275, 286.

219 Cf. Liechtenstein's Memorial, summarized in *Nottebohm Case (second phase)* [1955] ICJ Rep 4, 5-6; William Thomas Worster, 'Reining in the Nottebohm Case' [2022] SSRN ⟨https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4148804⟩ accessed 1 February 2023 at 2.

The Court held that, while each state was free to enact rules on the grant of its nationality, a state could not claim recognition of its rules by other states

> "unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States."[220]

In its analysis the Court referred to international arbitrators and domestic courts of third states both of which were said to have given their preference to the "real and effective nationality", and the Court considered that "[t]he same tendency prevails in the writing of publicits and in practice".[221] It would be reflected in article 3(2) of the ICJ Statute according to which "[a] person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights" as well as in those national laws which "make naturalization dependent on conditions indicating the existence of a link".[222] Furthermore, certain states would not exercise diplomatic protection on behalf of naturalized persons who have severed their links.[223] The Court also referred to bilateral nationality treaties between the USA and other States since 1868, the so-called Bancroft Treaties which had been abrogated since 1917.[224] Moreover, the Court found support for the existence of international criteria in Article I of the 1930 Convention relating to the Conflict of Nationality Laws which provided that a national law on nationality "shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality"; according to article 5, a third state shall recognize in a case of multiple nationalities "either the nationality of the country in which [the individual] is habitually and principally resident, or the nationality of the country with which in the circumstances [the individual] appears to be in fact most closely connected."[225]

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220 *Nottebohm Case (second phase)* [1955] ICJ Rep 4, 23. See also at 22-23 for a distinction between the conferral of nationality and the exercise of diplomatic protection which the Court considered the case at hand to be concerned with.

221 ibid 22.

222 ibid 22.

223 ibid 22.

224 ibid 22-23.

225 Convention on Certain Questions Relating to the Conflict of Nationality Law (signed 13 April 1930, entered into force 1 July 1937) 179 UNTS; *Nottebohm Case (second phase)* [1955] ICJ Rep 4, 23. See recently Peter Tomka, 'Custom and the International

The Court searched for principles enshrined in the regulation of dual nationality and found a certain effectiveness principle or requirement which it applied to diplomatic protection under customary international law.[226] The general principle of abuse of rights might also have provided some inspiration:[227] Acting for Guatemala, Henri Rolin, while not explicitly advocating in favour of the genuine link requirement as part of customary international law, argued that the grant of naturalization by Liechtenstein without any close relationship constituted an abuse of rights.[228]

Court of Justice' (2013) 12(2) The law and practice of international courts and tribunals 205: "The Court was careful not to rely directly on the Convention, but noted rather that distilling a rule of law from the various indications of practice - in other words, interpreting the regularity of usage as the expression of a general practice *accepted as law* - served to 'explain' why certain States would adopt that rule as binding in a codification convention. In this way, the codification convention served as a tool for interpreting the evidence regarding State practice, which itself was silent as to the reasons motivating the practice."

226 See also Ian Brownlie, 'The Relations of Nationality in Public International Law,' [1963] (39) BYIL 286, 328, 349, 353, 354, 356, 362 (on the application of a general principle); according to Jessup, the ICJ did not "invent" or legislate this principle, see *Barcelona Traction, Light and Power Company, Limited* 3 Sep Op Jessup 186 para 44, pointing out that the principle or requirement of a genuine link had already been established piror to Nottebohm in particular with respect to corporations and constituted a general principle of law. See also Lucius C Caflisch, 'The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case' (1971) 31 ZaöRV 177: "Though using different terms, [the formula] expresses the long recognised idea that nationality conferred upon a person in a manifestly abusive manner need not be taken into account internationally". For a different view, see Kunz, 'The Nottebohm Judgment (Second Phase)' 560: "[...] a clear-cut instance of judicial legislation."; Audrey Macklin, 'Is it time to retire Nottebohm?' (2017) 111 AJIL Unbound 493 ff.

227 See on this aspect in particular Robert D Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50(1) Harvard International Law Review 4, 19 ff.

228 *Minutes of the Public Sittings held at the Peace Palace, The Hague, on February 10th to 24th, March 2nd to 8th, and April 6th, 1955, Verbatim Record* 1955 CR 1955/2 413. The principle of abuse of rights also featured prominently in the dissenting opinions of Guggenheim and Read, both of whom rejected its applicability because of the lack of any damage suffered by Liechtenstein, *Nottebohm Case (second phase)* [1955] ICJ Rep 4 Diss Op Read 37 and Diss Op Guggenheim 57; cf. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' 13 ff.; see also the Court's brief reference to the status of a national of a neutral

The *Nottebohm* decision caused mixed reactions. Proponents like Ian Brownlie argued that "[t]he evidence of practice both before and since Nottebohm, as well as the logical force of other principles of international law, justify the conclusion that the principle of effective nationality is a general principle of international law and should be recognized as such."[229] In Brownlie's view, the Court's "major point is made on the basis of a 'general principle of international law' and not on the basis of a rule which could be classified as a customary rule of the usual sort. [...] Not all the materials support any rule in this way, but there is much material [...] which supports the general principle."[230] Critics of the decision opined that the decision "was wrong then, and may be even more wrong now"[231], arguing that the principle derived from regulations of dual nationality would not fit to situations where individuals possessed only one nationality, the Court's idea of nationality as a bond would be anachronistic and outdated in times of globalization, and that the decision which rendered Nottebohm effectively statelessness for the purpose of diplomatic protection does not align with today's importance of human rights law.[232]

After *Nottebohm*, the genuine link principle could be found in other contexts as well. The subsequent *Flegenheimer* arbitration affirmed the possibility of international judicial review of whether "the right to citizenship was regularly acquired, is in conformity with the very broad rule of effectivity

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state, *Nottebohm Case (second phase)* [1955] ICJ Rep 4, 26; on this point see also Brownlie, 'The Relations of Nationality in Public International Law,' 361.

229 ibid 364.

230 ibid 353, see also 314. The dissenting opinions of judge Read and judge *ad hoc* Guggenheim can be read as a critique against deriving principles of general application from bilateral treaties and decisions on cases of dual nationality for the specific case of diplomatic protection on behalf of a naturalized person, see *Nottebohm Case (second phase)* [1955] ICJ Rep 4 Diss Op Read 41-42 and Diss Op Guggenheim 59-60; see also Kunz, 'The Nottebohm Judgment (Second Phase)' 557.

231 Macklin, 'Is it time to retire Nottebohm?' 492.

232 Kunz, 'The Nottebohm Judgment (Second Phase)' 566; JMervyn Jones, 'The Nottebohm Case' (1956) 5 ICLQ 244; Worster, 'Reining in the Nottebohm Case' 3, 5, 9-10; William Thomas Worster, 'Nottebohm and 'Genuine Link': Anatomy of a Jurisprudential Illusion' [2019] Investment Migration Working Papers ⟨https://investmentmigration.org/wp-content/uploads/2020/10/IMC-RP-2019-1-Peter-Spiro.pdf⟩ accessed 1 February 2023; Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' 33 ff.

which dominates the law of nationals".[233] At the same time, the arbitration commission considered it "doubtful that the International Court of Justice intended to establish a rule of general international law in requiring, in the *Nottebohm* Case, that there must exist as effective link between the person and the State in order that the latter may exercise its rights of diplomatic protection in behalf of the former", the Commission stressed the "relative nature" of the decision which would have concerned in particular the opposability of the newly acquired nationality towards Guatemala.[234] Furthermore, article 5 of the 1958 Geneva Convention on the High Seas stipulated that "[t]here must exist a genuine link between the State and the ship [...]".[235] In *Barcelona Traction*, however, the Court rejected an application of this genuine connection requirement. Belgium had instituted proceedings against Spain on behalf of Belgium shareholders in a company incorporated in Canada. On the basis of the reasoning underlying *Nottebohm*, a minority on the bench had doubts as to the Canadian nationality of the corporation because of the lack of a genuine link to the corporation apart from the incorporation.[236] The majority, however, rejected the relevance of the analogy based on the *Nottebohm* judgment[237] and rejected Belgium's standing. Later, the International Law Commission, in its commentary on article 4 of the Articles on Diplomatic

233 *Flegenheimer Case* United States of America v. Italy, Italian-United States Conciliation Commission (20 September 1958) XIV RIAA 338 para 25, speaking of "abusive practice of diplomatic protection"; the Commission was presided by Georges Sauser-Hall who had acted in the *Nottebohm* case as counsel on behalf of Liechtenstein. For a critical evaluation see Myres S McDougal, Harold D Lasswell, and Lung-chu Chen, 'Nationality and Human Rights: The Protection of the Individual and External Arenas' (1974) 83 The Yale Law Journal 913 ff.

234 *Flegenheimer Case* XIV RIAA 327, 376.

235 Convention on the High Seas (signed 29 April 1958, entered into force 30 September 1962) 450 UNTS 11.

236 See *Barcelona Traction, Light and Power Company, Limited* [1970] ICJ Rep 3 Sep Op Fitzmaurice 80 para 28 and 81 para 30; Sep Op Jessup 189 para 48 and 205 para 80; Sep Op Gros 281 para 22, 282 para 24; see also Diss Op Riphagen 335 para 3, 347 para 17 ff., who criticized the *renvoi* to municipal law with respect to the corporation and advocated a functional approach similar to Nottebohm. See furthermore on the importance of the development by treaties Nigel S Rodley, 'Corporate Nationality and the Diplomatic Protection of Multinational Enterprises: The Barcelona Traction Case' (1971) 47(1) Indiana Law Journal 86.

237 *Barcelona Traction, Light and Power Company, Limited* [1970] ICJ Rep 3, 42 para 70: "[...] given both the legal and factual aspects of protection in the present case the Court is of the opinion that there can be no analogy with the issues raised or the decision given in that case."

Protection of 2006, argued that the ICJ expounded "only a relative rule according to which a State in Liechtenstein's position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties", noting also that a strict application of the genuine link requirement "would exclude millions of persons from the benefit of diplomatic protection".[238]

c) The significance of the normative context

The comparison illustrates that the identification of customary international law and, in particular, the genuine link requirement depended significantly on the specific context. Whereas the alleged rule of customary international law in the *Asylum* case would have constituted a derogation from territorial sovereignty, the genuine link requirement in *Nottebohm* concerned a state's unilateral legislation on nationality conferral and the effects that legislation had on other states, in particular on the state of residence of the individual concerned. Two legal policies underlined the *Nottebohm* judgment: to be entitled to claim opposability and thus recognition of the nationality conferral at the international level, one needed a legitimate, effective, genuine link for extending one's laws to a subject or situation; the second policy is the avoidance of international disputes in cases of nationality conferrals.[239] The genuine link requirement would have had different effects in *Barcelona Traction* than in Nottebohm. In *Barcelona Traction*, it would have enabled

238 *ILC Ybk (2006 vol 2 part 2)* 30; see also also Crawford, *Brownlie's principles of public international law* 503.

239 Cf. the controversial judgments in the South West Africa cases for a policy of avoidance of disputes before the Court, *South West Africa* [1966] ICJ Rep 6, 47 para 88; on the phenomenon of "passportization", the conferral of nationalities in order to construe a basis for subsequent exercises of diplomatic protection in the context of the conflict between Russia and Georgia, see Heidi Tagliavini, Independent International Fact-Finding Mission on the Conflict in Georgia Vol I (2009) ⟨https://www.mpil.de/files/pdf4/IIFFMCG_Volume_I2.pdf⟩ accessed 1 February 2023 18 para 12, and Heidi Tagliavini, Independent International Fact-Finding Mission on the Conflict in Georgia Vol II (2009) ⟨https://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf⟩ accessed 1 February 2023 155-179; Kristopher Natoli, 'Weaponizing Nationality: An Analysis of Russia's Passport Policy in Georgia' (2010) 28 Boston University International Law Journal 389 ff.; Serena Forlati, 'Nationality as a human right' in *The Changing Role of Nationality in International Law* (Routledge 2013) 23.

an international dispute before the ICJ, its rejection in result affirmed the Canadian nationality of the company and denied Belgium standing before the Court.[240]

2. "Scoping" and tailoring of the legal analysis

The art of scoping[241], of specifying the scope of the legal question and legal analysis, presents itself not only in advisory proceedings when the Court had to interpret the respective request for an advisory opinion[242] but also in contentious proceedings. One example is the *Jurisdictional Immunities* case, when the Court addressed Italy's argument according to which a state would be "no longer entitled to immunity in respect of acts occasioning death, personal injury or damage to property on the territory of the forum state, even if the act in question was performed *jure imperii*" (so-called territorial tort principle or territorial tort exception).[243] It is illuminating to compare the Court's approach with the approach advocated by Judge *ad hoc* Gaja.

The Court carefully characterized the question it had to answer for its analysis of state immunity:[244] It did not need to clarify whether there was a general territorial tort principle to immunity. Since the case involved the conduct of troops, the Court identified as central question whether there was a territorial tort exception to immunity for the conduct of the foreign military in the course of conducting an armed conflict.[245] In contrast, the dissenting Judge *ad hoc* Gaja took the tort principle as a starting point and

240 But see also *Barcelona Traction, Light and Power Company, Limited* 32 paras 33-34 on the importance of the judgment for the *erga omnes* jurisprudence and above, p. 38.

241 See Sienho Yee, 'Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases' (2016) 7 JIDS 480, speaking of "scoping" when describing how the ICJ formulated the legal issue that needed to be addressed in the *Jurisdictional Immunities* case.

242 Cf. *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 238-239 paras 20-22; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* [2010] ICJ Rep 403, 423-426 paras 49-56.

243 *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 126 para 62.

244 On this "scoping" see Yee, 'Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases' 480; *Jurisdictional Immunities of the State* Diss Op Judge *ad hoc* Gaja 309 ff.

245 ibid 127-128 para 65.

as the general rule,[246] which arguably shifted the burden of reasoning to the proposed exception for conduct of armed troops.

When examining customary international law on immunity, the Court took also account of conventions and on whether those reflected customary international law. The Court noted that Article 11 of the European Convention on State Immunity[247] set forth a territorial tort principle and that article 31 of this convention qualified this principle by excluding from the scope of the convention "any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State." Therefore, the territorial tort principle as set forth in article 11 of the Convention did not have any effect on customary international law in relation to troops during situations of armed conflict.[248] For Judge *ad hoc* Gaja, however, the European Convention as a regional convention with only a limited number of parties was of limited relevance.[249]

The Court then observed that article 12 of the United Nations Convention[250] sets forth the territorial tort principle; yet, based on the ILC commentary to a draft, this provision does not apply to situations involving armed conflicts.[251] Judge *ad hoc* Gaja noted that this view in the ILC commentary was not taken up by the UN convention's text.[252]

With respect to the case-law of domestic courts and the European Court of Human Rights, the Court concluded that "State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict [...]".[253] Judge *ad hoc* Gaja noted that domestic courts have taken "a variety of approaches".[254]

It is not submitted here that the difference in starting points was necessarily outcome-determinative and that the identification of customary international

246 *Jurisdictional Immunities of the State* Diss Op Judge *ad hoc* Gaja, 309-322.
247 European Convention on State Immunity (signed 16 May 1972, entered into force 11 June 1976) 1495 UNTS 181.
248 *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 129 para 68.
249 ibid Diss Op Judge *ad hoc* Gaja 310 para 2.
250 United Nations Convention on Jurisdictional Immunities of States and Their Property (signed 2 December 2004) UN Doc A/RES/59/38.
251 *Jurisdictional Immunities of the State* 129-130 para 69.
252 ibid Diss Op Judge *ad hoc* Gaja 315.
253 ibid 134-5 para 77.
254 ibid Diss Op Judge *ad hoc* Gaja 318.

law is only a question of phrasing the question. The choice of a default rule can be subject to reevaluation, a judge can modify the default position if said judge finds that practice suggests a different default rule or scope of the question. Yet, in cases of doubt, it can become decisive whether one attempts to ascertain an exception to immunity for armed forces during armed conflicts or whether one attempts to ascertain an exception to the tort exception to immunity.

Another important aspect of tailoring in the legal reasoning in the *Jurisdictional Immunities* case concerned the use of a distinction between substantive rules and rules that are procedural in nature, such as state immunity.[255] On the basis of this distinction, the Court rejected the possibility of a conflict between *jus cogens* operating at the level of substantive rules and state immunity.[256]

3. Shaping the rule by acknowledging an exception

An important interpretative decision concerns the determination of the scope of the rule that is ascertained.

The scope of the prohibition identified by the Court in the *Nuclear Weapons* opinion is characterized by the rule-exception classification. The Court came, based on an interpretation of existing legal rules of international humanitarian law, human rights law and international environmental law, to the conclusion that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law".[257] Yet, "[t]he emergence, as lex lata, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other hand".[258] The Court was, therefore, unable to affirm an absolute prohibition "under any circumstances", in particular in an "extreme circumstance of self-defence, in which the very survival of a State

255 ibid [2012] ICJ Rep 99, 124 para 58; *Arrest Warrant of 11 April 2000* 25 para 60; cf. on this aspect generally Stefan Talmon, 'Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished' (2012) 25 Leiden Journal of International Law 979 ff.

256 *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 140 para 93, 141 para 95.

257 *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 266.

258 ibid 255 para 73.

would be at stake".[259] In other words, the Court considered both the normative environment, which pointed to a prohibition, and the existing practice of deterrence which could not be reconciled with an absolute prohibition. Rather than rejecting a prohibition in principle, the Court recognized a general prohibition subject to an exception.

In the case of practice which conflicts with a possible rule only occasionally, the Court did not modify the scope of the general rule in the *Nicaragua* case and argued that practice supporting a rule of customary international law does not have to be "in absolutely rigorous conformity with the rule"; it sufficed that states generally complied with the rule and that instances of inconsistent state conduct "have been treated as breaches of that rule" without having challenged the rule's validity.[260]

The ICJ's jurisprudence indicates that the identification of customary international law requires a determination of whether practice contrary to a possible rule modifies that rule's scope in the sense of an exception to the rule, whether it is only a violation of the rule, leaving the validity of the rule itself intact, or whether a rule can no longer be assumed to exist because of contrary practice.

III. The relationship between customary international law and treaty law

The jurisprudence of the Court illustrates that treaties and principles expressed in treaties can be important for the identification and interpretation of customary international law. Not only can one rule set forth in a treaty reflect or give rise to a rule of customary international law, treaties can also express legal evaluations and principles which inform the interpretation of customary international law in subtle ways, leading often to a convergence between functionally equivalent rules in treaties and customary international law. At the same time, the Court's jurisprudence makes also clear that customary international law and treaties are distinct sources.

This section will first review early instances in the Court's jurisprudence where the question of the relationship posed itself, namely the *Morocco* case (1.) and the *North Sea Continental Shelf* judgment (2.) the analysis of

259 *Legality of the Threat or Use of Nuclear Weapons* 266.

260 *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 98 para 186, noting that this applies in particular when a state "defends its conduct by appealing to exceptions or justifications contained within the rule itself".

which will be informed by the Court's subsequent decisions. Turning from an abstract discussion of the relationship of the sources to the interplay, this section will illustrate forms of convergence, namely convergence between the Charter and customary international law into common principles (3.) and convergence of functionally equivalent rules in the law of the sea (4.).

1. The *Morocco* case

The question of the distinctiveness and the convergence of the sources arose in the *Morocco* case. The case turned on whether the United States was entitled to exercise consular jurisdiction in the French zone of Morocco. The Court found unanimously that the USA was entitled to such exercise based on the treaty with Morocco of September 1936, and, by 10 to 1, that such exercise could also be based on the General Act of Algeciras of April 7 1906. The Court rejected, by a narrow majority of six to five, the US claim according to which rights of consular jurisdiction could be based also on custom.[261] The disagreement concerned the relationship between sources. The dissenting judges emphasized the convergence of customary international law and treaty law. In their view, usage (by which they arguably referred to the Court's expression of "custom and usage") was always an "established source of extraterritorial jurisdiction" and both sources,

> "treaties and usage, in the broad sense of these terms, have contributed to the total result in varying measure. It is not possible, nor is it of any practical interest, at this distance of time, to isolate and assess separately the contribution made by each of these sources. Both were at work supplementing each other."[262]

The majority, however, put a greater emphasis on the distinctiveness, concluding that it could not be established that "the States exercising consular jurisdiction in pursuance of treaty rights enjoyed in addition an independent title thereto based on custom or usage."[263] Therefore, the United States had

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261 *Rights of Nationals of the United States of America in Morocco* (*France v. United States of America*) (Judgment of August 27th, 1952) [1952] ICJ Rep 212, four of the five issued a dissenting opinion, Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau.

262 ibid [1952] ICJ Rep 176 Diss Op Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau at 220 and 221 ff., where it was argued that the US had always maintained *vis-à-vis* France customary international law as a legal basis and that France acquiesced thereto.

263 ibid 200.

not satisfied the burden to show that the enjoyment of consular jurisdiction was based not only on treaty but on custom.[264] Notably, neither the majority nor the minority supported the French argument according to which "after incorporation [of the usage in a treaty, M.L.] the usages shared the fate of the treaty".[265]

2. The *North Sea Continental Shelf* judgment

The question of the relationship was approached anew and in more detail in the *North Sea Continental Shelf* judgment, where the Court held that the first three articles of the 1958 Convention on the Continental Shelf had been "regarded as reflecting, or as crystallising, received or at least emergent rules of customary international law relative to the continental shelf."[266]

Article 6(2) of the Geneva Convention on the Continental Shelf stipulated that the boundaries between two parties should be determined by the principle of equidistance if no agreement is applicable or no special circumstances advocate for a different solution. Germany was a signatory-state but did not ratify the convention. Denmark and Norway therefore argued, *inter alia*, that Article 6(2) created a customary international law norm which as such would be binding upon Germany.[267] The Court, while considering the passing of a conventional provision "of a fundamentally norm-creating character" "into the general corpus of international law" possible,[268] ultimately rejected that this process, by which a rule of customary international law "has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice"[269], had occurred with respect to article 6.[270] Furthermore, the principle of equidistance was not regarded by the

264 *Rights of Nationals of the United States of America in Morocco* 200. For a critique of the Court's terminology with respect to usage, see Bin Cheng, 'Rights of United States Nationals in the French Zone of Morocco' (1953) 2 ICLQ 361.

265 Cf. *Rights of Nationals of the United States of America in Morocco* Diss Op Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau at 220.

266 *North Sea Continental Shelf* [1969] ICJ Rep 3, 39 para 63; Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* 74.

267 *North Sea Continental Shelf* [1969] ICJ Rep 3, 41 para 70.

268 ibid 39-41.

269 ibid 41 para 70.

270 ibid 43.

Court as an *a priori* principle of the law relating to the continental shelf, it was therefore not binding by virtue of logical necessity on Germany.[271]

The Court emphasized the distinct nature of sources while also acknowledging their interrelationship. The Court pointed to three aspects of the interrelationship of sources: a rule embodied in a treaty could constitute a codification of international law; its adoption could crystallize a rule of customary international law; or the substance of a provision could later become a rule of general international law.[272] The latter process was said to be "a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained."[273] In the specific case before the Court, this process did not occur but the Court argued that, in principle, "it might be [...] that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected."[274]

The Court's tailoring in its legal analysis is not immune to criticism. The Court's analysis was narrowly confined to ascertaining whether the equidistance rule had become part of customary international law. Only if this had been the case, it seems, would the Court have proceeded to examine whether

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271 ibid [1969] ICJ Rep 3, 32 para 46.

272 The term of crystallization was used by Counsel Waldock who argued that the negotiation of the law in the ILC and on the Drafting conference had crystallized this norm as custom: "the emerging customary law, now become more defined, both as to the rights of the coastal State and the applicable regime, crystallized in the adoption of the Continental Shelf Convention by the Conference; and that the numerous signatures and ratifications of the Convention and the other State practice based on the principles set out in the Convention had the effect of consolidating those principles as customary law.", NSCS Verbatim record 1968 242. The term of crystallization had been used earlier, see *The Panevezys-Saldutiskis Railway Case: Estonia v. Lithuania* Merits [1939] PCIJ Series A/B No 76 Diss Op van Eysinga 34-35.

273 *North Sea Continental Shelf* [1969] ICJ Rep 3, 41 para 71; cf. later *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, 38 para 24: "[The Court] could not ignore any provision of the [Law of the Sea] Draft Convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law."

274 *North Sea Continental Shelf* [1969] ICJ Rep 3, 42 para 73.

the special circumstances rule had become part of custom as well.[275] A different approach could have been to regard the equidistance rule together with the special circumstances exception as an "indivisible regime"[276], to borrow a formula the Court used in a later case to indicate that two treaty provisions have to be seen together and jointly reflect customary international law. Commentators take different views on whether a combined equidistance-special circumstances rule could have reflected a general practice accepted as law.[277] The Court, while emphasizing that "there are still rules and principles of law to be applied"[278], held that "certain basic notions [...] have from the beginning reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles."[279] The equidistance method would be one, but not the only method for this purpose,[280] the parties were asked to take account of "all

275 *North Sea Continental Shelf* 46 para 82: "It becomes unnecessary for the Court to determine whether or not the configuration of the German North Sea Coast constitutes a 'special circumstance' for the purposes either of Article 6 of the Geneva Convention or of any rule of customary international law,-since once the use of the equidistance method of delimitation is determined not to be obligatory in any event, it ceases to be legally necessary to prove the existence of special circumstances in order to justify not using that method."

276 cf. *Territorial and Maritime Dispute* [2012] ICJ Rep 624, 674 para 139.

277 See in favour Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* 224; for the contrary view see Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* 360-1 ("[...] the actual use of methods other than equidistance or equidistance-special circumstances in some 40 per cent of the sample treaties examined shows a lack of sufficiently developed state practice to support a customary law character of equidistance [...] This suggests that equidistance rules are not perceived as legal rules, but rather are seen merely as methods of delimitation; methods, moreover, that can be replaced by others where it is advantageous to do so.").

278 *North Sea Continental Shelf* [1969] ICJ Rep 3, 46 para 83.

279 ibid 46 para 85; cf. already United States of America, *Proclamation 2667 of September 28, 1945. Policy of the United States with respect to the natural resources of the subsoil and sea bed of the continental shelf, 10 Fed. Reg. 12.305 (1945)* ("In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the state concerned in accordance with equitable principles").

280 *North Sea Continental Shelf* [1969] ICJ Rep 3, 47 para 85.

the relevant circumstances".[281] As will be described below, the Court would later note a convergence between the customary standard of equitable principles and relevant circumstances and the equidistance-special circumstances rule.[282]

Another interesting aspect concerns the Court's approach to evaluating the practice of states. According to the Court, most states referred to by Denmark and the Netherlands were "or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle."[283] According to one interpretation of this passage of the *North Sea Continental* judgment, the identification of customary international law *dehors* a treaty would become difficult if not impossible. Based on the interpretation that practice of State parties did not count as practice for customary international law, Richard Baxter considered that "the proof of a consistent pattern of conduct by non-parties becomes more difficult as the number of parties to the instrument increases [...] Hence the paradox that as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law *dehors* the treaty."[284]

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281 ibid 47 para 85.

282 *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v. Norway*) (Judgment) [1993] ICJ Rep 62 para 56; cf. earlier *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* Court of Arbitration (Decisions of 30 June 1977 and 14 March 1978) XVIII RIAA 45-8, 57; cf. Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* 405, according to whom the convergence "helped to narrow the opposing views of the parties as to the application of conventional or general international law. Secondly, the Award may also have intended to make a contribution to what the judges considered a false and politicized debate over equidistance versus equity at UNCLOS III."

283 *North Sea Continental Shelf* [1969] ICJ Rep 3, 43-44 para 76.

284 Baxter, 'Treaties and Customs' 64. Jennings would later base his dissenting opinion in the Nicaragua case and his critique of the Court's finding on a rule of customary international law similar to article 2(4) of the Charter on this argument: *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14 Diss Op Jennings 531: "But there are obvious difficulties about extracting even a scintilla of relevant 'practice' on these matters from the behaviours of those few States which are not parties to the Charter; and the behaviours of all the rest, and the *opinio juris*

The implications of this interpretation should not be exaggerated, however. That the identification of customary international law "becomes more difficult" does not necessarily mean that it becomes impossible. Also, Baxter summarized his view in that "[r]ules found in treaties can never be *conclusive* evidence of customary international law",[285] and, indeed, one may consider external, additional elements to mere treaty participation which, however, is one important factor as well.[286] It is doubtful whether the Court really intended to suggest that practice of parties in relation to the treaties would bear no significance at all for the purpose of identifying customary international law. In any case, such a suggestion was not clearly confirmed in the Court's later jurisprudence. In particular in the *Nicaragua* case, the Court argued with a view to the Friendly Relations Declaration that the "effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter", it could also indicate consent as to the validity of the rule in the resolution and therefore be significant for customary international law.[287] It remains true that treatymaking does not necessarily affect customary international law.[288] However, it is also difficult to establish the presumption that states do not wish to shape customary international law by concluding treaties.[289]

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which it might otherwise evidence, is surely explained by their being bound by the Charter itself." On this Baxter-paradox, see also Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996) 90 AJIL 247, see also Crawford, 'Change, Order, Change: The Course of International Law General Course on Public International Law' 90-94.

285 Baxter, 'Treaties and Customs' 99 (italics added).

286 But cf. *North Sea Continental Shelf* [1969] ICJ Rep 3, 43 para 73 (italics added): "[...] a very widespread and representative participation in the convention might suffice *of itself*, provided it included that of States whose interests were specially affected."

287 *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 100 para 188.

288 *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (Preliminary Objections, Judgment) [2007] ICJ Rep 615 para 90: "[The invocation of agreements] is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary."; *Questions relating to the Obligation to Prosecute or Extradite* [2012] ICJ Rep 422 Diss Op Abraham 479 para 37, arguing that no obligation to prosecute torture without any connecting link would exist under customary international law, the 51 states cited by Belgium would act in implementation of the CAT.

289 Cf. also Max Sørensen, 'Principes de droit international public: cours général' (1960) 101 RdC 51, according to whom a consistent practice indicates a presumption of

The so-called Baxter paradox should be understood as a useful reminder that treaties and customary international law are interrelated but distinct concepts which should not be equated.[290]

3. Convergence between the Charter and customary international law into common principles

The purpose of this section is to illustrate the convergence between the Charter and customary international law as it is reflected in the jurisprudence of the Court. Two examples are selected, the right to self-determination and the prohibition of the use of force.

a) Self-determination

One example of convergence concerns the right to self-determination.

After the First World War, the right to self-determination did not find entrance into the Covenant of the League of Nations and was regarded to be more of a political, rather than a legal, principle.[291] This perception changed

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opinio juris; see Crawford, 'Change, Order, Change: The Course of International Law General Course on Public International Law' 109 para 167: "One possibility [to resolve the Baxter paradox] would be to generate a presumption of *opinio juris* from widespread participation in a treaty, at least in normative terms. Indeed this is effectively what the Eritrea-Ethiopia Claims Commission did as regards the four 1949 Geneva Conventions and its Additional Protocol I."; Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making' 68.

290 In this sense Crawford, 'Change, Order, Change: The Course of International Law General Course on Public International Law' 107, 112.

291 Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press 2014) 183; Antonio Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (repr., Cambridge University Press 1996) 32-33; Stefan Oeter, 'Self-Determination' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2013) vol 1 317 para 5; Daniel Thürer and Thomas Burri, 'Self-Determination' [2008] Max Planck EPIL para 4. Even though this text speaks of the "principle" of self-determination, it is not neglected that self-determination consists of different aspects, which is why James Crawford agreed with Cassese that self-determination consists "both of general principles and particular rules", he argued that with regard to neither self-determination nor to

after the Second World War when the right to self-determination received increasing recognition as a legal concept. According to article 1(2) UN Charter, one of the purposes of the UN is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples [...]", which is taken up by article 55 UNC. The text of Chapter XI of the UN Charter on non-self-governing territories, however, does not refer to the principle of self-determination as set forth in article 1(2) UNC, but only to self-government (Art. 73(b) UNC).[292] The General Assembly adopted on 14 December 1960 the Declaration on the granting of independence to colonial countries and peoples, which declared that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[293] In 1966 the common article 1 to the ICCPR[294] and the ICESCR[295] of 1966 emphasizes the right of self-determination of all peoples.

The right to self-determination is said to be the product of an interplay of treaty law and customary international law[296] and the jurisprudence of the

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the law relating to the use of force one can find "a single, self-sufficient norm" James Crawford, 'Book Review' (1996) 90(2) AJIL 331; for a discussion of the norm-type of self-determination see Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press 2002) 29-38.

292 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 112-113.

293 UNGA Res 1514 (XV) (14 December 1960) UN Doc A/Res/1514(XV) para 2.

294 International Covenant on Civil and Political Rights (signed 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

295 International Covenant on Economic, Social and Cultural Rights (signed 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

296 See also Orfeas Chasapis Tassinis and Sarah Nouwen, ''The Consciousness of Duty Done'? British Attitudes towards Self-Determination and the Case of the Sudan' (2019) First View BYIL 50: "Britain was advancing self-determination both as a right under the UN Charter, as well as a right sourced outside the confines of treaty law. International legal scholars have suggested, with respect to the anti-colonial self-determination resolutions, that these two tracks for the establishment of self-determination as a right – that is subsequent practice informing the meaning of the Charter and state practice leading to the formation of a new rule of customary international law – may indeed largely overlap, making it hard neatly to distinguish the two."; Shaw, *International Law* 183: "Practice since 1945 within the UN, both generally as regards the elucidation and standing of the principle and more particularly as regard its perceived application in specific instances, can be seen as having ultimately established the legal standing of the right in international law. This may

ICJ contributed to this convergence as well as to the recognition of the right to self-determination as a *legal*, as opposed to a political, concept.

As the Court held in *East Timor*, the right to self-determination is "one of the essential principles of contemporary international law", has "evolved from the Charter and from United Nations practice has an erga omnes character, is irreproachable. The principle of self-determination of peoples has been recognized [...] in the jurisprudence of the Court."[297] The Court addressed here the principle as customary international law and referred to earlier advisory opinions on the interpretation of this principle as treaty law.[298] Already in these opinions, however, the Court took care to stress the principle's basis both in treaty law and in customary international law.[299]

This principle which was based both on the Charter and customary international law became relevant to the interpretation of Chapter XI of the

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be achieved either by treaty or by custom or indeed, more controversially, by virtue of constituting a general principle of law. All these routes are relevant [...] The UN Charter is a multilateral treaty which can be interpreted by subsequent practice, while the range of state and organization practice evident within the UN system can lead to the formation of customary international law."; Higgins, *Problems and Process: International Law and How We Use It* 112-113, pointing out that Chapter XI of the UN Charter does not refer to the principle of self-determination, "[b]ut international law does not develop from written words alone"; cf. also Cassese, *Self-Determination of Peoples. A Legal Reappraisal* 67-69; Oeter, 'Self-Determination' 316 para 1.

297 *East Timor* [1995] ICJ Rep 90, 102 para 29.

298 Cf. Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (2017) 28(2) EJIL 383: "But the decisions the ICJ referred to – the South West Africa and the Western Sahara advisory opinions – dealt with the interpretation of the principle of self-determination governed by treaty instruments, while the court in East Timor referred to the principle of self-determination contained in customary law."

299 See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, 31-32 paras 52-53, where the Court paid regard to the principle's emergence in the "subsequent development of international law [...] as enshrined in the Charter of the United Nations [...]" but it also emphasized that "the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. [...] In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. [...] In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore." See also *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 32 para 56.

UN Charter on non-self-governing territories. Even though Chapter XI does not explicitly refer to self-determination, the Court held that the law of self-determination constituted the applicable law in relation to non-self-governing territories.[300]

The Court recapitulated this normative development in its recent advisory opinion on the *Chagos Islands*. According to the Court, the process of decolonialization of Mauritius was not lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius by the United Kingdom.[301] When addressing the applicable law, the Court argued that the "determination of the applicable law must focus on the period from 1965 to 1968", without excluding, however, "the evolution of the law on self-determination since the adoption of the Charter of the United Nations and of resolution 1514 (XV) of 14 December 1960 entitled 'Declaration on the Granting of Independence to Colonial Countries and Peoples'" since the two elements of customary international law "are consolidated and confirmed gradually over time."[302] The Court affirmed the customary status of the right to self-determination and held that "[b]oth State practice and *opinio juris* at the relevant time confirm the customary law character of the right to integrity of a non-self-governing territory as a corollary of the right to self-determination."[303]

This example illustrates that the identification of customary international law is informed by the whole normative environment, including treaties, a General Assembly resolution which represented "a defining moment in the consolidation of State practice on decolonization [...] although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with

300 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, 31 para 52; *Legal consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* [2019] ICJ Rep 95, 134-135 paras 160-161.

301 ibid 101 para 1, 140 para 183.

302 ibid 130 para 142.

303 ibid 134 para 160; see also Ulrich Fastenrath, 'Article 73' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2013) vol 2 1836 para 13: "The term 'self-government', which was originally intended to mean no more than autonomy within the State organization of the colonial power and only in exceptional cases to also cover independent statehood for the (former) colony [...], should today only be understood as referring to unrestricted self-determination. In line with Art. 31(3) VCLT this follows from the practice of both States and UN organs as well as from the context of the two Human Rights Covenants of 1966 and from the norm concretizing effect of resolutions."

regard to the right to self-determination as customary norm"[304] and subsequent resolutions based on the assumption that those confirmed customary international law.

b) The prohibition of the use of force

Another example of convergence concerns the law relating to the use of force. In the *Nicaragua* case, the Court not only affirmed the distinctiveness between customary international law and treaties for jurisdictional purposes,[305] it also stressed the interrelationship.

The Court noted that the Charter did not purport to fully regulate the use of force; not only did it reserve a place for customary international in article 51 UNC, it also continued to rely on customary international law for the definitions of armed attack, self-defence and for the requirement of proportionality with respect to self-defence.[306] According to the Court, the Charter contributed to customary international law which developed "under the influence of the Charter"[307]:

304 *Legal consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* [2019] ICJ Rep 95, paras 150, 152; see already *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 254-255 para 70: "The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule." See also Tomka, 'Custom and the International Court of Justice' 211, according to whom it is "the attitude of States towards certain United Nations resolutions that is relevant for deriving an *opinio juris*, and not the existence of the resolution itself".

305 *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 94-96 paras 177-179.

306 ibid 94 para 176; on proportionality see also *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 245 para 41, where the Court held that the above mentioned requirement of proportionality of self-defense as "rule of customary international law [...] applies equally to Article 51 of the Charter".

307 *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 96-97 para 181.

> "The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations."[308]

Rather than having separate principles of the prohibition of the use of force in custom and treaty law, it is, based on this *dictum*, more convincing to assume that there is one principle which is defined by both customary international law and the Charter together.[309] This does not mean, however, that no differences between both sources would exist.[310]

4. Convergence of functionally equivalent rules in the law of the sea

Another example of the convergence of functionally equivalent rules can be found in the Court's jurisprudence on the law of the sea. Whereas a "legislative" process by treaty started in the 1950s in particular with the conclusion of the Geneva conventions on the law of the sea[311], ultimately leading to the 1982 United Nations Convention on the Law of the Sea, the applicable law in maritime disputes for the Court was for a long time by and large customary international law. The 1958 Geneva Convention on the Continental Shelf was for the first time applicable *ratione personae* in 1984 in a case before

308 *Military and Paramilitary Activities in and against Nicaragua* 97 para 181.

309 Abi-Saab, 'Les sources du droit international: essai de déconstruction' 78.

310 See *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 94 para 176 (UN Charter does not contain the proportionality requirement or the definition of an armed attack), 95 para 178 (norms retain a separate existence "from the standpoint of applicability"), 97 para 181, 121 para 235 (reporting obligation under article 51 UNC does not apply under customary international law). For a recent treatment of the relationship and an overview of different views see Marxsen, *Völkerrechtsordnung und Völkerrechtsbruch* 134-49.

311 Convention on the Territorial Sea and the Contiguous Zone (signed 29 April 1958, entered into force 10 September 1964) 516 UNTS 205; Convention on the High Seas (signed 29 April 1958, entered into force 30 September 1962) 450 UNTS 11; Convention on the Continental Shelf (signed 29 April 1958, entered into force 10 June 1964) 499 UNTS 311; and Convention on Fishing and Conservation of the Living Resources of the High Seas (signed 29 April 1958, entered into force 20 March 1966) 559 UNTS 205; see for a general overview Vaughan Lowe and Antonios Tzanakopoulos, 'The Development of the Law of the Sea by the International Court of Justice' in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 178: "[T]he Court's influence on the development of the law of the sea has not been great, and seems to be diminishing."

a Chamber.[312] The Chamber, however, decided that the convention was not applicable *ratione materiae*, since the parties had requested the Court to draw a single line delimitation including both the continental shelf and the superjacent waters, and that the convention could also not be applied by way of extension.[313] The Chamber, therefore, based its decision on the norm that delimitation "must be based on the application of equitable criteria and the use of practical methods capable of ensuring an equitable result."[314] Before the Court as a whole, the convention was applicable *ratione personae* in 1993[315]. By then, the Court had developed its jurisprudence mainly based on customary international law the identification of which, however, was informed by legal evaluations expressed in the respective conventions.[316]

This section will first recapitulate the Court's jurisprudence and its development from a focus on the distinctiveness to the convergence of functionally equivalent rules in treaty law and customary international law (a)). The section will then point to reasons for this convergence (b)). Lastly, this section will comment on UNCLOS and its impact on customary international law in the Court's jurisprudence (c)).

a) From a focus on the distinctiveness to a convergence of functionally equivalent rules

In *North Sea Continental Shelf*, the Court emphasized the distinctiveness of article 6 of the 1958 Convention on the Continental Shelf and the rules of law based "[o]n a foundation of very general precepts of justice and good faith"[317], according to which "delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles".[318]

312 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* [1984] ICJ Rep 246, 291 para 84.
313 ibid 301 para 119, 303 para 124.
314 ibid [1984] ICJ Rep 246, 300 para 113.
315 *Maritime Delimitation in the Area between Greenland and Jan Mayen* [1993] ICJ Rep 38, 52 para 31.
316 The Court spoke of "trends", see *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, 23 para 3, 38 para 24.
317 *North Sea Continental Shelf* [1969] ICJ Rep 3, 46 para 85.
318 ibid 46 para 85.

Equidistance was applied by the Court as one possible method in the delimitation between opposite coasts. In *Libya v. Malta*, the Court continued to emphasize that international law did not prescribe the use of equidistance [319]; at the same time, it held that the equidistance method could be appropriate in order to achieve an equitable result, provided that all relevant circumstances were examined.[320]

Fifteen years later in *Gulf of Maine*, the Chamber maintained that the equidistance method set forth in article 6 of the Geneva Convention on the Continental Shelf was not a mandatory rule under general international law.[321] Yet, the decision also displayed signs of intertemporal convergence between the two functionally equivalent standards: The 1958 Convention was interpreted and applied in light of the jurisprudence which had been developed under general international law subsequently to the adoption of the convention. As stated by article 6 of the 1958 convention, the delimitation must be determined by an agreement of the states concerned. The Chamber added an additional requirement based on the Court's jurisprudence on equitable principles.

> "To this one might conceivably add - although the 1958 Convention does not mention the idea, so that it entails going a little far in interpreting the text - that a rule which may be regarded as logically underlying the principle just stated is that any agreement or other equivalent solution should involve the application of equitable criteria, namely criteria derived from equity which - whether they be designated 'principles' or 'criteria', the latter term being preferred by the Chamber for reasons of clarity - are not in themselves principles and rules of international law."[322]

This convergence was emphasized even more in the *Jan Mayen* case between Denmark and Norway. Both parties were bound by the Geneva Convention

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319 *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13, 38 para 44.

320 ibid 47 paras 62-3, 48 para 65, 56 para 78.

321 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* [1984] ICJ Rep 246, 297 para 107, 302 para 122, where the Chamber held that the "method has rendered undeniable service in many concrete situations", while maintaining that this concept "has not thereby become a rule of general international law, a norm logically flowing from a legally binding principle of customary international law, neither has it been adopted into customary law simply as a method to be given priority or preference." Cf. Robert Kolb, *Case law on equitable maritime delimitation: digest and commentaries = Jurisprudence sur les délimitations maritimes selon l'équité: répertoire et commentaires* (Alan Perry tr, Martinus Nijhof Publishers 2003) 246 (critical of the "anti-equidistance reflex").

322 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* [1984] ICJ Rep 246, 292 para 89.

on the Continental Shelf. According to the definition set forth in article 1, the continental shelf is defined for the purpose of the convention

> "as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarines areas adjacent to the coasts of islands."

In contrast, article 76 UNCLOS, which was not in force yet, provides that the continental shelf

> "comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

As Thirlway pointed out, both parties assumed to be entitled to the greater extent defined by UNCLOS as reflection of customary international law, because "[i]f the areas of continental shelf appertaining to the parties were to be determined according to the criterion of the 1958 Geneva Convention [...] there would be no need for a delimitation, since the shelf of neither coast would extend far enough offshore to encounter the shelf of the other."[323] The Court held that the 1958 convention "governs the continental shelf delimitation to be effected", and it referred only to article 6 on the delimitation and not to the definition in article 1 of the convention.[324] The applicable law for the delimitation of the fishery zone was customary international law.[325]

Moreover, the Court noted in the *Jan Mayen* case a convergence between customary international law and article 6 of the Geneva Convention, and it entertained the idea expressed before by the Anglo-French Court of Arbitration in 1977, namely that "the equidistance-special circumstances rule of the 1958 is, in the light of this 1977 Decision, to be regarded as expressing a general norm based on equitable principles".[326] In particular, the Court argued that taking provisionally the median line between the territorial sea baselines not only followed from the applicable article 6 of the 1958 convention but would also have been appropriate in the case of opposite coasts if the applicable

323 Thirlway, *The Sources of International Law* 137-138.

324 *Maritime Delimitation in the Area between Greenland and Jan Mayen* [1993] ICJ Rep 38, 57-8 para 44, 59 para 49.

325 ibid 59 para 47.

326 ibid 58 para 46.

law had been customary international law.[327] Furthermore, when turning to the delimitation of the fishery zones according to customary international law, the Court held that "there is inevitably a tendency towards assimilation between the special circumstances of article 6 of the 1958 Convention and the relevant circumstances under customary international law, and this if only because they both are intended to enable the achievement of an equitable result."[328] In this case, the Court then came to the conclusion that the median line provisionally drawn needed to be adjusted because "the relationship between the length of the relevant coasts and the maritime areas generated by them by application of the equidistance method [...] is so disproportionate that it has been found necessary to take this circumstance into account in order to ensure an equitable solution".[329] The ultimate boundary line had to be "located in such a way that the solution obtained is justified by the special circumstances contemplated by the 1958 Convention on the Continental Shelf, and equitable on the basis of the principles and rules of customary international law."[330]

In a subsequent decision on a dispute between Cameroon and Nigeria, the Court again noted the similarity of the "equitable principles/relevant circumstances method" and the "equidistance/special circumstances method".[331]

b) Reasons for convergence: the vagueness of rules and judicial pragmatism informed by the normative environment

One can point to several factors which favoured this convergence in the ju-

327 *Maritime Delimitation in the Area between Greenland and Jan Mayen* 60-1 paras 50-1.

328 ibid 62 para 56, cf. Sep Op Shahabuddeen 148.

329 ibid 67 para 65. Cf. *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon/Nigeria*) (Judgment) [2002] ICJ Rep 448 paras 305-6, where the Court applied the equidistance line for the first without modification, on this point see Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* 318, 351, concluding after a survey of the jurisprudence that "strict equidistance without modification has rarely been adopted by the Courts."

330 *Maritime Delimitation in the Area between Greenland and Jan Mayen* [1993] ICJ Rep 38, 70 para 71.

331 *Land and Maritime Boundary between Cameroon and Nigeria* [2002] ICJ Rep 303, 441 para 288.

risprudence of the Court. The vagueness of both the equitable principles under customary international law and the equidistance-special circumstances rule under treaty law put the Court in a dominant position and favoured a focus on the particularities of the case and the interests of the parties.[332] The jurisprudence was marked by pragmatism, accommodation and reasonableness[333] and informed by the normative environment and developments in treatymaking, which may explain the convergence between treaty-based standards and customary international law.

For instance, in the disputes between Germany and the United Kingdom and Iceland on an extension of Iceland's exclusive fishery zone to 50 nautical miles, the 1958 Convention on the High Sea was not applicable. Yet the Court searched for inspiration from this convention for the solution of this dispute when it interpreted and applied customary international law. The Court held that the Icelandic national regulation constituted "an infringement of the *principle enshrined in Article 2 of the 1958 Geneva Convention on the High Seas* which requires that all States, including coastal States, in exercising their freedom of fishing, pay reasonable regard to the interests of other states."[334] The Court concluded that the fishery rights of different states needed to be reconciled, and this reconciliation was informed by principles articulated in international treaties. For instance, the reconciliation in adjacent waters could not be the same as in the zone within 12 miles because of "the notion of preferential rights as it was recognized at the Geneva Conferences of 1958 and 1960".[335] Furthermore, in the view of the Court, "the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and

332 Cf. Massimo Lando, *Maritime Delimitation as a Judicial Process* (Cambridge University Press 2019) 294: "Judicial law-making is justified so long as the applicable law in a given case is sufficiently indeterminate so as not to provide for the manner in which specific rules of international law are practically to be applied." See also Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* 103 on the ICJ's "crucial role in shaping doctrines related to the continental shelf. The ICJ shows the characteristics of an activist, law-making court willing to promote the law."

333 Cf. Koskenniemi, 'General principles: reflexions on constructivist thinking in international law' 141.

334 *Fisheries Jurisdiction* (*United Kingdom v. Iceland*) (Merits, Judgment) [1974] ICJ Rep 29 para 67; *Fisheries Jurisdiction* [1974] ICJ Rep 175, 198 para 59 (italics added).

335 *Fisheries Jurisdiction* [1974] ICJ Rep 3, 30 para 69; *Fisheries Jurisdiction* [1974] ICJ Rep 175, 199 para 62.

the needs of conservation for the benefit of all."[336] Therefore, all parties to the disputes had with respect to conservation an obligation "to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information".[337]

The judgments in relation to Iceland demonstrate that the Court took account of the ongoing treatymaking process of states, when it interpreted and applied broad principles and rules of customary international law in the context of the law of the sea. On the one hand, the Court took into consideration the negotiation during the 1960 Conference when it determined the breadth of the territorial sea and the extent of fishery rights after the negotiated convention had failed to be adopted by only one vote.[338] On the other hand, the Court attempted not to interfere with the ongoing legislative process.[339] These cautious judgments were then outstripped by legal-political

336 *Fisheries Jurisdiction* [1974] ICJ Rep 3, 31 para 72; *Fisheries Jurisdiction* [1974] ICJ Rep 175, 200 para 64.

337 *Fisheries Jurisdiction* [1974] ICJ Rep 3, 31 para 72; *Fisheries Jurisdiction* [1974] ICJ Rep 175, 200 para 64: an "obligation to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement in force between them, such as the North-East Atlantic Fisheries Convention of 24 January as well as such other agreements as may be reached in the matter in the course of further negotiation."

338 *Fisheries Jurisdiction* [1974] ICJ Rep 3, 23 para 52; *Fisheries Jurisdiction* [1974] ICJ Rep 175, 191-192 para 44: "The 1960 Conference failed by one vote to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery rights. However, after that Conference the law evolved through the practice of States on the basis of the debates and near-agreements at the Conference."

339 *Fisheries Jurisdiction* [1974] ICJ Rep 3, 23 para 53; *Fisheries Jurisdiction* [1974] ICJ Rep 175, 192 para 45: "The Court is also aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of this branch of the law [...] Such a general desire is understandable since the rules of international maritime law have been the product of mutual accommodation, reasonableness and Cooperation. So it was in the past, and so it necessarily is today. In the circumstances, the Court, as a court of law, cannot render judgment sub specie legis ferendae, or anticipate the law before the legislator has laid it down."

developments since both Germany and the UK, as well as other states,[340] began to establish 200-mile fishery zones.[341]

The ongoing legislative process was also important for the criteria to be applied to the delimitation of the continental shelf. In the case between Tunisia and Libya, the Court felt compelled to turn "to the question whether principles and rules of international law applicable to the delimitation may be derived from, or may be affected by, the 'new accepted trends' which have emerged at the Third United Nations Conference on the Law of the Sea."[342]

In a different case between Libya and Malta, the Court stressed that UNCLOS was "of major importance, having been adopted by an overwhelming majority of states".[343] The Court considered it as its "duty [...] to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law"[344] even if the parties had not referred to UNCLOS.

The Court was not just paying lip service to the ongoing treaty developments as the jurisprudence on the definition of the continental shelf illustrates. Whereas article 1 of the 1958 Continental Shelf Convention defines the continental shelf "to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas", article 76(1) UNCLOS does not take up the criterion of exploitation and referred instead to the natural prolongation of a state's land territory or to a distance of 200 nautical miles from the baselines form which the breadth of the territorial sea is measured. In the dispute between Tunisia and Libya where the applicable law was customary international law, the Court concluded that the concept of the continental shelf had been "modified by this criterion"[345] of the 200 nautical miles and that the 1982 definition

340 According to Benvenisti, 'Customary International Law as a Judicial Tool for Promoting Efficiency' 96, "[b]etween 1976 and 1979, about two-thirds of the exclusive economic zones and exclusive fishery zones of up to two hundred miles had been unilaterally created".

341 Peter Tomka, 'Fisheries Jurisdiction Cases (United Kingdom v Iceland; Federal Republic of Germany v Iceland)' [2007] Max Planck EPIL para 16; one decade later, the Court held that the exclusive economic zone became customary international law, *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13, 33 para 34; Benvenisti, 'Customary International Law as a Judicial Tool for Promoting Efficiency' 96.

342 *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, 47 para 45.

343 *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13, 29-30 para 27.

344 ibid 30 para 29.

345 *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, 48 para 47.

"discards the exploitability test which is an element in the definition of the Geneva Convention of 1958."[346] Since states began to agree on a distance of 200 nautical miles, the ICJ argued in the case between Libya and Malta that "there is no reason to ascribe any role of geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceedings to a delimitation" since within a distance of 200 nautical miles the title "depends solely on the distance from the coasts of the claimant States [...] and the geological or geo- morphological characteristics of those areas are completely immaterial."[347]

While the convergence in the long run is a characteristic of the ICJ jurisprudence on maritime delimitation, the jurisprudence was also characterized by different approaches or preferences on maritime delimitation.[348] For instance, it was debated whether the criteria which the Court applied for the purposes of delimitation were only factual criteria, but no law. In the *North Sea Continental Shelf cases*, the Court stressed that "the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles." [349] Years later, the ICJ argued in the dispute between Tunisia and Libya that each dispute "should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore, no attempt should be made here to overconceptualize the application of the principles and rules relating to the continental shelf." [350] The Chamber in the *Gulf of Maine* case

346 *Continental Shelf (Tunisia/Libya)* 48 para 47.

347 *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13, 35 para 39, see also 35-36 para 40, where the Court argued that jurisprudence which ascribed a role to geophysical or geological factors in delimitation "now belongs to the past, in so far as sea-bed areas less than 200 miles from the Coast are concerned." Bjarni Már Magnússon, *The Continental Shelf Beyond 200 Nautical Miles* (Brill Nijhoff 2015) 16-17; for an overview of the development of the law relating to the continental shelf, see Joanna Mossop, *The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities* (Oxford University Press 2016) 52 ff; Kate Purcell, *Geographical Change and the Law of the Sea* (Oxford University Press 2019) 77 ff.; Peter-Tobias Stoll, 'Continental Shelf' [2008] Max Planck EPIL para 2 ff.

348 See on the debate between equidistance and equitable principles Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* 378-389, 603 ff., submitting that "the controversy between the equidistance and equitable principles schools reflect nothing short of fundamental divergences in jurisprudence and approach to law" (at 389).

349 *North Sea Continental Shelf* [1969] ICJ Rep 3, 48 para 88.

350 *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, 92 para 132.

emphasized that customary international law "cannot also be expected to specify the equitable criteria to be applied or the practical, often technical, methods to be used for attaining that objective - which remain simply criteria and methods"[351], and argued that "neither the Court's own jurisprudence nor 'any trend in favour thereof discernible in international customary law' would determine methods and criteria."[352] According to Robert Kolb, even though law oscillates between normative and factual dimensions, the Chamber overemphasized the particularities and facts at the expense of the law[353] and implied a "normative poverty of general international law."[354] In a subsequent case between Libya and Malta, the Court as a whole emphasized the values of "consistency and a degree of predictability; even though [justice] looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application".[355] The Court spoke of the "normative character of equitable principles applied as a part of general international law".[356]

Other decisions of the Court also suggest that the use of these criteria when applying the very general rule of customary international law on maritime delimitation were related to, and inspired by, the wider normative environment. With respect to the process of delimitation, the Court rejected to apply criteria which were "totally unrelated to the underlying intention of the applicable rules of international law"[357] and which would not have received any recognition by law, such as landmass or pure economic considerations[358]; also, the Court made clear that security and defence interests would not generally favour the use of the equidistance method, and that the principle of equality of states would "not imply an equality of extent of shelf, whatever

351 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* [1984] ICJ Rep 246, 298 para 110.

352 ibid 313 para 159, 162-163.

353 Kolb, *Case law on equitable maritime delimitation: digest and commentaries = Jurisprudence sur les délimitations maritimes selon l'équité: répertoire et commentaires* 253.

354 ibid 250.

355 *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13, 39 para 45.

356 ibid [1985] ICJ Rep 13, 39 para 46.

357 ibid 41 para 50.

358 See already *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, 77 para 107: "A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource."

the circumstances of the area".[359] The Court stressed that it "may only take into account those that are pertinent to the institutions of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation."[360]

c) UNCLOS and its impact on customary international law

In recent years, UNCLOS[361] became more important in proceedings before the Court. UNCLOS does not establish a genuinely new legal regime of delimitation. It refers in several provisions to international law: according to article 74, "[t]he delimitation of the exclusive economic zone [...] shall be effected by agreement on the basis of international law, as referred to in Article 38 [ICJ Statute]". The same principle applies to the delimitation of the continental shelf according to article 83 UNCLOS.[362]

In the jurisprudence of the Court, large parts of UNCLOS were regarded to reflect customary international law. In the case between Qatar and Bahrain, the Court treated several provisions of existing maritime conventions as reflections of customary international law.[363]

359 *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13, 42 para 51, 43 para 54; on security interests see *Maritime Delimitation in the Black Sea* (*Romania/Ukraine*) (Judgment) [2009] ICJ Rep 128 para 204 ("[...] the legitimate security considerations of the Parties may play a role in determining the final delimitation line [...] The provisional equidistance line determined by the Court fully respects the legitimate security interests of either Party."); cf. also Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* 537-8, 590-3 (arguing that "security does not amount to an inherent element which should be the subject of a prime principle. Instead, it is an aspect of a factual nature, which has to be considered, as the case may be, as a relevant circumstance in order to achieve an equitable solution responding to the needs of acceptability.").

360 *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13, 40 para 48. For a list of equitable standards see Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* 525 ff.

361 United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

362 Cf. Lando, *Maritime Delimitation as a Judicial Process* 294 (judicial lawmaking as "consequences of the vagueness of Articles 74 and 83 UNCLOS").

363 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* [2001] ICJ Rep 40, 94 para 167 (both parties agreed that "most of the provisions of the 1982 Convention which are relevant for the present case reflect customary law."),

Moreover, the Court continued to hold customary international law relevant where UNCLOS was applicable. In a case between Nicaragua and Honduras, UNCLOS was the applicable law "together", as the Court stressed, with state practice and the principles and rules of customary law.[364]

Interestingly, UNCLOS as a treaty may even be relevant when the applicable law in a legal dispute was customary international law, in particular insofar as claims on a continental shelf beyond 200 nautical miles were concerned. In a dispute between Nicaragua and Colombia on the law relating to the zone beyond 200 nautical miles, the applicable law was customary international law, since Colombia had not ratified UNCLOS. Nicaragua submitted that article 76 UNCLOS as a whole constituted custom, whereas according to Colombia only article 76(1) UNCLOS reflected customary international law. Article 76 UNCLOS prescribes a procedure for establishing the outer edge of the continental margin which includes recommendations by the Commission on the Limits of the Continental Shelf on the basis of which the coastal state shall establish the limits of the continental shelf (article 76(8) UNCLOS).[365] The Court solely noted that article 76(1) "forms part of customary international law", on which the parties had agreed before, and did not decide on the customary status of the other paragraphs.[366] Even though customary international law was the applicable law, the Court did not ignore the legal

94 para 176 (article 15 UNCLOS "is virtually identical to Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone, as is to be regarded as having a customary character."), 100 para 201 (the Court held that article 11 of the 1958 Convention on the Territorial Sea which resembles article 11 UNCLOS reflect custom); 102 para 208: based on an analysis of article 4 of the 1958 Convention on the Territorial Sea and of article 7 paragraph 4 of the UNCLOS, the Court declined that low-tide elevations are territory in the same sense as islands. Custom was also relevant in relation to the concept of a single maritime boundary line which according to the Court "does not stem from multilateral treaty law but from State practice", ibid 93 para 173.

364 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* [2007] ICJ Rep 659, 738-740 paras 261-266. The Court referred here to its earlier *dictum* in the case between Qatar and Bahrain which demonstrates that the sources were not regarded as being placed in competition to each other, rather, they complement each other.

365 For an overview see Ted L McDorman, 'The Continental Shelf' in Donald R Rothwell and others (eds), *The Oxford Handbook on the Law of the Sea* (Oxford University Press 2015) 190-198.

366 *Territorial and Maritime Dispute* [2012] ICJ Rep 624, 666 para 118; cf. Naomi Burke, 'Nicaragua v Colombia at the ICJ: Better the Devil You Don't?' (2013) 2(2) Cambridge Journal of International and Comparative Law 317-318.

obligations incumbent on Nicaragua under UNCLOS and placed considerable significance on them. The Court recalled that "any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder".[367] Recalling UNCLOS' preamble according to which UNCOS intends to establish "a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources", the Court argued that "[g]iven the object and purpose of UNCLOS [...] the fact that Colombia is not a party thereto would not relieve Nicaragua of its obligations under Article 76 of that Convention."[368] The Court then observed that Nicaragua by its own admission "falls short of meeting the requirements"[369], and stated that Nicaragua "has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast".[370] In the end, the Court could not uphold Nicaragua's claim.[371] In a subsequent case between Nicaragua and Colombia, the Court did not find Nicaragua in violation of its treaty obligations, which is why it did not need to discuss whether a third state like Colombia could invoke another state's failure to honour its treaty commitments.[372]

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367 *Territorial and Maritime Dispute* [2012] ICJ Rep 624, 668-669 para 126; see already *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*) (Judgment) [2007] ICJ Rep 759 para 319. Cf. in a different context *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 121 para 235: the Court noted in a case where it had to apply customary international law that the United States did not comply with the obligation to report to the Security Council under article 51 UNC. The failure to report did not amount to a breach of customary international law, but the Court observed that " this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence [...]").

368 *Territorial and Maritime Dispute* [2012] ICJ Rep 624, 669 para 126; critical ibid Decl of Judge *ad hoc* Mensah paras 6-8; ibid Decl of Judge *ad hoc* Cot paras 18-19.

369 ibid 669 para 127.

370 ibid para 129.

371 See ibid 670 para 131, 719 para 251; cf. for the subsequent dispute on whether the formula implies a substantial decision to which *res judicata* applies: *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* [2016] ICJ Rep 100, 129 para 74.

372 For a brief discussion see ibid Sep Op Owada para 35.

The recent jurisprudence confirms the tendency in the Court's earlier jurisprudence to stress the alignment between UNCLOS and customary international law and the convergence of the sources. In April 2022, the Court considered that multiple provisions of UNCLOS reflected customary international law, namely the rights and duties in the exclusive economic zone of coastal states and other states in articles 56, 58, 61, 62 and 73 UNCLOS.[373] Customary international law was said to be also reflected "in Articles 88 to 115 of UNCLOS" which apply to the exclusive economic zone.[374] The Court also decided that the 24-nautical-mile limit in article 33 UNCLOS and the prescribed grounds of control (customs, fiscal, immigration or sanitary laws and regulations) that may be exercised by the coastal state reflected customary international law which had been called into question by Colombia.[375] In particular, the Court pointed out that security matters were deliberated not included to article 24 of the 1958 Convention, the precursor to article 33 UNCLOS and that Colombia could not establish that "customary rules on the contiguous zone have evolved since the adoption of UNCLOS".[376]

d) Concluding observations

To sum up, sources remain separate and distinct for jurisdictional purposes, but the Court does not regard treaties and custom as strictly separated and impenetrable compartments when it comes to content-determination. The Court even considered in the just mentioned case the obligation of one party under UNCLOS, even though the applicable law between both parties was customary international law. This illustrates that the Court does not simply collect and examine state practice and *opinio juris*, it understands customary international law as part of one normative system which treaties, in particular widely ratified treaties such as UNCLOS, are part of as well. The context

373 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v. Colombia*) (Judgment of 21 April 2022) (2022) ⟨https://www.icj-cij.org/public/files/case-related/155/155-20220421-JUD-01-00-EN.pdf⟩ accessed 1 February 2023 paras 57, 94, 100.

374 ibid para 62.

375 Colombia had established by Presidential Decree 1946 of 2013 an "integral contiguous zone" beyond 24 nautical miles, ibid paras 145-55.

376 ibid (Judgment) https://www.icj-cij.org/public/files/case-related/155/155-20220421-JUD-01-00-EN.pdf para 154.

of maritime delimitation is an example where customary international law provide for very broad, general principles and rules which are interlinked with general principles such as the principle of good faith.[377] At the same time, it is noteworthy that some of the treaty-based rules of the 1958 Geneva Convention or UNCLOS were not particularly more specific than their respective counterpart in customary international law. This decision of states opens up considerable room for the Court to specify these general principles in particular cases by employing a methodology which focuses on the relevant circumstances of the particular case and takes account of the earlier jurisprudence.[378] Over time, the Court developed a methodology as to the delimitation. Most notably, the ICJ held in the dispute between Romania and the Ukraine, that "the Court proceeds in defined stages"[379], at the first stage it draws a provisional equidistance line between the adjacent coasts, at the second stage it considers whether factors called for the adjustment of the provisional line and at the third stage it will confirm that "no great disproportionality of maritime areas is evident".[380] The Court's methodology raises further questions,[381] but these debates cannot be fully addressed here.

377 As Cottier noted, "Customary law and general principles of law, as much as the general principles of international law, often overlap and are mutually supportive in the establishment of the legitimacy of a normative concept." See Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* 428, with reference to Clarence Wilfred Jenks, *The Prospects of International Adjudication* (Stevens 1964) 264 ("Custom as a basis of legal obligation neither can be nor should be rigidly separated from general principles of law, equity, public policy and practical convenience.").

378 Cf. Malcolm Evans, 'Relevant Circumstances' in Alex G Oude Elferink, Tore Henriksen, and Signe Veierud Busch (eds), *Maritime Boundary Delimitation: The Case Law* (Cambridge University Press 2018) 261 ("recourse to relevant circumstances within the delimitation process represents a principle of customary law").

379 *Maritime Delimitation in the Black Sea* [2009] ICJ Rep 61, 101 para 115.

380 ibid 101, 103 para 122.

381 Cf. on the proportionality jurisprudence see Yoshifumi Tanaka, 'The Disproportionality Test in the Law of Maritime Delimitation' in Alex G Oude Elferink, Tore Henriksen, and Signe Veierud Busch (eds) (Cambridge University Press 2018) 302, 313-4 (considering it arguable "that the disproportionality test can be regarded as an operationalization of the equitable principles that require to resulting in an equitable result", while expressing doubts as to "whether the disproportionality test developed through the jurisprudence is adequately objective and scientific as a norm of international law"); in favour of the role of disproportionality: Lando, *Maritime Delimitation as a Judicial Process* 246 ff. Cf. on the applicable law also Donald McRae, 'The Applicable Law' in Alex G Oude Elferink, Tore Henriksen, and Signe

They are the consequence of the room given by States' choice in favour of general principles and rules and of leaving the delimitation process to a significant extent to the Court. At the same time, it should not be overlooked that the Court responded to the contention of states, that treaties concluded by states informed the Court's reasoning and that states implemented the Court's decisions. As stated by Massimo Lando, maritime delimitation "should be better conceived as having been determined by the continuous interaction between states and international tribunals."[382]

IV. General Principles and the normative environment

General principles of law are said to perform an important function in relation to procedural law[383] and the Court referred to general principles, such as *res judicata*[384], equality of the parties before a court or tribunal[385] or elementary

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Veierud Busch (eds), *Maritime Boundary Delimitation: The Case Law* (Cambridge University Press 2018) 107 ("the applicable law today consists of a requirement to utilize a particular methodology and to engage in a particular process of assessment within that methodology in order to delimit a boundary").

382 Lando, *Maritime Delimitation as a Judicial Process* 322, see also 317 ("Both the formulation of the two-stage approach, and the separation of disproportionality from other relevant circumstances resulting in the formulation of the three-stage approach, built upon the contentions of states.").

383 See the overview in Giorgio Gaja, 'General Principles in the Jurisprudence of the ICJ' in Mads Andenæs and others (eds), *General principles and the coherence of international law* (Brill Nijhoff 2019) 36-39; on the notion of "general principles of procedural law" see *Land, Island and Maritime Frontier Dispute* [1990] ICJ Rep 92, 136 para 102; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 88 para 63.

384 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion of July 13th, 1954) [1954] ICJ Rep 53; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* [2016] ICJ Rep 100, 125 para 58.

385 *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 181 para 36, see also 177 para 29 ("principles governing the judicial process"); *Application for Review of Judgment No 273 of the United Nations Administrative Tribunal* (Advisory Opinion) [1982] ICJ Rep 338 para 29.

fairness[386]. Against the background of the previous sections, this section will reflect on the general principles, which are more often derived from and related to the international, as opposed to the domestic, legal order and which often function as a bridge between customary international law and treaties.

1. The rare recourse to municipal law analogies

The Court hardly invokes general principles of law in the sense of municipal law analogies. According to Giorgio Gaja, the prospect of engaging in comparative legal analysis and making a choice between municipal legal orders may explain Court's reluctance to invoke general principles of law.[387] It is also true, however, that the omission to mention general principles of law explicitly in judgments may not necessarily allow for the conclusion that such general principles did not play a role for the judges' interpretation of the law,[388] in particular since, according to article 9 of the ICJ Statute, the judges on the Court are meant to represent the main forms of civilization and of the principal legal systems of the world. The references to general principles of law in individual opinions suggest that general principles played a role in the legal reasoning,[389] even though the Court was reluctant to base

386 "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error.", *Temple of Preah Vihear* [1962] ICJ Rep 6, 26.

387 Giorgio Gaja, 'General Principles of Law' [2013] Max Planck EPIL para 16.

388 Michael Bothe, 'Die Bedeutung der Rechtsvergleichung in der Praxis internationaler Gerichte' (1976) 36 ZaöRV 287.

389 Examples; several judges invoked general principles of law in different contexts, see for instance *Pulp Mills on the River Uruguay* [2010] ICJ Rep 14 Sep Op Cancado Trindade; *Right of Passage over Indian Territory* [1960] ICJ Rep 6 Diss Op Ferndandes; *Oil Platforms* [2003] ICJ Rep 161 Sep Op Simma; *Gabčíkovo-Nagymaros Project* [1997] ICJ Rep 7 Sep Op Weeramantry; see generally Marcelo G Kohen, 'Les principes généaux du droit international de l'eau à la lumière de la jurisprudence récente de la Cour Internationale de Justice' in *L'eau en droit international: Colloque d'Orléans* (Pedone 2011) 91 ff.; Pierre d'Argent, 'Les principes généraux à la Cour internationale de Justice' in Samantha Besson, Pascal Pichonnaz, and Marie-Louise Gächter-Alge (eds), *Les principes en droit européen* (Schulthess 2011) 107 ff.; Bettina Rentsch, 'Konstitutionalisierung durch allgemeine Rechtsgrundsätze des Völkerrechts? - Zur Rolle des völkerrechtlichen Gutglaubensgrundsatzes für die Integration einer internationalen Werteordnung in das Völkerrecht' in Bardo

a decision on them.[390] Furthermore, it has been argued that the process of judicial reasoning applied to a treaty provision or customary international law and, for instance, teleological reasoning or logical deductions provided the Court with ample instruments to fill gaps or preclude any gap, which may have reduced the need to resort to general principles as additional gap filler.[391]

The Court's treatment of municipal law analogies did not incentivize parties to the proceedings to invoke general principles of law thusly ascertained. One early example is the *Indian Passage* case.[392] Portugal's territory in the Indian Peninsula encompassed two enclaves, Dadra and Nagar-Aveli, and littoral territory, Daman.[393] The case turned on whether Portugal had *vis-à-vis* India a right of passage. Portugal relied not only on an old treaty of 1799 and on decrees of 1783 and 1785 but also on customary international law and general principles of law. For this purpose, Portugal had commissioned an extensive study compiled by the renowned comparative law scholar Max Rheinstein.[394] The Court concluded that "there existed during the British and post-British periods a constant and uniform practice allowing free passage between Daman and the enclaves [...] that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation."[395] The Court then did not consider it necessary to examine "whether general international custom or the general principles of law recognized by civilized nations [on which Portugal had also relied] may lead to the same result."[396]

Fassbender and Angelika Siehr (eds), *Suprastaatliche Konstitutionalisierung: Perspektiven auf die Legitimität, Kohärenz und Effektivität des Völkerrechts* (Nomos 2012) 101 ff.; Saunders, *General Principles as a Source of International Law* 91 ff.

390 For an exception, see *Temple of Preah Vihear* [1962] ICJ Rep 6, 23, 26, 32, where the case was decided on the basis of general principles such as acquiescence and estoppel; on this case see Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' 11-12.

391 Mendelson, 'The International Court of Justice and the sources of international law' 80-81.

392 *Right of Passage over Indian Territory* [1960] ICJ Rep 6.

393 ibid 27.

394 Reference to this study is made by judge Wellington Koo, see ibid [1960] ICJ Rep 6 Sep Op Wellington Koo 66 para 26.

395 ibid 40. According to this practice, passage of armed forces, police and arms was not encompassed from the right of passage and required a formal request, ibid 31-43.

396 ibid 43. In a similar fashion, the Court based its decision in the Nuclear Test cases on an unilateral act of France declaring not to conduct such tests, without addressing the compliance of such tests with the applicable rules of international law, *Nuclear*

The policy behind this choice of the Court was a preference for a *lex specialis* approach that focused on "a practice clearly established between two States which was accepted by the Parties".[397] The Court's decision did not address the relationship of this established *lex specialis* to the *lex generalis*[398] and did not honour Portugal's effort to utilize general principles of law based on comparative law.

In the joined *South West Africa* cases, the Court held that Ethiopia and Libera had no standing in the proceedings against South Africa. The Court did not recognize an

> "'*actio popularis*', or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the 'general principles of law' referred to in Article 38, paragraph 1 (c), of its Statute."[399]

The joint *North Sea Continental Shelf* cases are an example of the rejection of a general principle based on the view that it could not be transposed to the international level; instead the Court based its decision on a different, more general one. The Federal Republic of Germany argued that the delimitation of the continental shelf should take into account Germany's "claim for a

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Tests Case [1973] ICJ Rep 324, 472-477; *Nuclear Tests Case* [1974] ICJ Rep 253, 267-272; Thirlway, *The law and procedure of the international court of justice: fifty years of jurisprudence* vol 1 at 130-131; in the *Gabčikovo-Nagymaros* case the Court could base its decision on the interpretation of a bilateral treaty in force and did not find it necessary whether the proposed principle of "approximate application" was "a principle of international law or a general principle of law", *Gabčíkovo-Nagymaros Project* [1997] ICJ Rep 7, 53 para 76. In the dispute between Tunisia and Libya, Malta justified its application to intervene with arguments based on comparative law. The Court did not address these arguments when it rejected the application, Thirlway, *The law and procedure of the international court of justice: fifty years of jurisprudence* 245-246.

397 *Right of Passage over Indian Territory* [1960] ICJ Rep 6, 44.

398 See for a treatment of this question in individual opinions ibid Sep Op Wellington Koo (the Court's result would fly in the face of the Charter); Diss Op Ferndandes para 29 pointing to the possibility of general rules from which no derogation would be possible, he distinguished general principles of law as analogies from municipal law and certain "fundamental principles inherent in the very fabric of international law" (para 33).

399 *South West Africa* [1966] ICJ Rep 6, 47 para 88; judge Tanaka argued in his dissenting opinion that "the legal norm of non-discrimination or non-separation denying the practice of apartheid can be recognized as a principle enunciated in the said provision", ibid Diss Op Tanaka 294-300 (quote on 294).

just and equitable share" which Germany advanced as a general principle of law.[400] The Court held, however, that the doctrine of just and equitable share could not be transposed to the international legal level:

> "[T]he doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it - namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources."[401]

The Court then based its judgment on more abstract principles; the equitable principles on which a delimitation were based were regarded as principles of law and reflected "very general precepts of justice and good faith".[402]

Against this background, it is not surprising that states rarely plead general principles of law derived from municipal legal orders. A recent example is the litigation strategy in the case between Timor-Leste and Australia. The case turned on the confidentiality of communications between legal counsel and client and could have invited the parties to conduct comparative legal research to examine a general principle of law. Instead, Sir Michael Wood, acting as counsel for Timor-Leste, focused mainly on the confidentiality as a general principle of international law and its recognition in several

400 *North Sea Continental Shelf* [1969] ICJ Rep 3, 21 para 17.

401 ibid 22 para 19.

402 ibid 46 para 58; see in particular ibid Sep Op Ammoun 139 ff., who conducted an impressive survey of common law, Muslim law, Soviet law, Hindu law and the law of countries in Africa and Asia in order to demonstrate that equity was a general principle of law; see also Thirlway, *The law and procedure of the international court of justice: fifty years of jurisprudence* vol 1 at 241 f., who speaks of an "eclipse of general principle by conflicting principle of international law"; another example for the special character of the international legal order can be found in *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 168, where the Court argued that "[b]oth national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent."In contrast to domestic legal systems however, the United Nations lacked a "procedure for determining the validity of even a legislative or governmental act [...] Therefore, each organ must, in the first place at least, determine its own jurisdiction."

branches of international law.[403] Similarly, Australia examined the scope of this general principle in international law.[404] In light of these arguments, it is no surprise that the Court noted that "this claimed right might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order and is reflected in Article 2, paragraph 1, of the Charter of the United Nations", whereas Judge Greenwood expressed his doubts as to whether principle would not be better regarded as a general principle of law.[405]

2. General principles and the international legal order

Very general and abstract principles can be operationalized through the interplay with particular rules. They bridge the different sources and enable legal ideas expressed in treaties to pervade customary international law. As the Court's jurisprudence demonstrates, treaties can rely on a principle of general international law and then be relied upon by the Court for the purpose of interpreting this principle. Treaties can confirm existing, older principles or contribute to the emergence of new principles.

For instance, the Court held that the object of the Genocide Convention is to "confirm and endorse the most elementary principles of morality."[406] In the *Nicaragua* judgment, the Court argued that the "Geneva Conventions are in some respects a development, and in other respects no more than an expression of such principles".[407] Moreover, the rules set forth in common article 3 of the Geneva Conventions "constitute a minimum yardstick [...] and they are rules which, in the Court's opinion, reflect what the Court

403 *Public sitting held on Monday 20 January 2014, at 10 am, at the Peace Palace, Verbatim Record* 20 January 2014 CR 2014/1 paras 19 ff., paras 31-38 for international case-law that would support the classification as general principles of law.

404 *Public sitting held on Tuesday 21 January 2014, at 10 am, at the Peace Palace, Verbatim Record* 21 January 2014 CR 2014/2 para 15.

405 *Questions relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste v. Australia*) (Provisional Measures, Order of 3 March 2014) [2014] ICJ Rep 153 para 27, and Diss Op Greenwood para 12.

406 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, 23.

407 *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 113 para 218. By "such principles", the Court referred to the earlier mentioned "fundamental general principles of humanitarian law".

in 1949 called 'elementary considerations of humanity'."[408] Considering that the applicable law was customary international law in this context, the conventions were used in order to elucidate a general principle such as elementary considerations of humanity[409] which was then used in order to interpret and apply customary international law.

In the *Nuclear Weapons* advisory opinion, the Court argued that many states ratified the Hague and Geneva Conventions "because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'" [...] Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[410]

In addition to the just mentioned examples, where treaties specified already existing general principles of international law, the *Gabčikovo-Nagymaros* case and the *Nuclear Weapons* opinion illustrate how new ideas and emerging norms contributed to the operationalization of broad general principles and rules of customary international law.

In the *Gabčikovo-Nagymaros* case, the Court noted in an *obiter dictum* that the interpretation and application of customary international law on necessity which is now reflected in article 25 ARSIWA and was then reflected in draft article 33 should take account of new international obligations. According to draft article 33, a state could rely on necessity if "the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril" and "the act did not seriously impair an essential interest of the State towards which the obligation existed". For the determination of

408 ibid 114 para 218.

409 Cf. Ian Brownlie, *Principles of public international law* (3rd edn, Clarendon Press 1979) 29: "[c]onsiderations of humanity may depend on the subjective appreciation of the judge, but, more objectively, they may be related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy [...]".

410 *Legality of the Threat or Use of Nuclear Weapons* [1969] ICJ Rep 226, 257 para 79. It remains a subject of speculation whether the Court used this phrase of "intransgressible principles of international customary law" to indicate the customary nature of the general prinicples of humanitarian law or whether this phrase was intended to compensate for the lack of treatment of jus cogens, cf. ibid 258 para 83 ("no need for the Court to pronounce on this matter"); cf. Claus Kreß, 'The International Court of Justice and the Law of Armed Conflicts' in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 266, 282.

what qualifies as an "essential interest of the State", the Court referred to contemporary international law, in particular international environmental law. The Court had "no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčikovo-Nagymaros Project related to an 'essential interest' of that State [...]".[411] The Court later added, as guiding posts for the further negotiations of the parties (which have not been concluded yet), that "new environmental norms" are to be taken into account, as "[t]he awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion".[412] This case can be read as confirmation for the applicability *mutatis mutandis* of a *dictum* which the Court expressed with respect to international instruments, according to which those are "to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[413]

In *Nuclear Weapons*, the Court affirmed the "existence of the *general* obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control" as "part of the corpus of international law relating to the environment."[414]

411 *Gabčíkovo-Nagymaros Project* [1997] ICJ Rep 7, 41 para 53. The idea of ecological necessity was not completely new: See with reference to the ILC discussions on article 33 and the state practice discussed there Andrea K Bjorklund, 'Emergency Exceptions: State of Necessity and Force Majeure' in Peter Muchlinski, Frederico Ortino, and Christoph Schreuer (eds), *The Oxford handbook of international investment law* (Oxford University Press 2008) 474 ff.; Robert D Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106 AJIL 466 ff. In the end, however, the necessity argument could not convince the Court, 42 para 54.

412 *Gabčíkovo-Nagymaros Project* [1997] ICJ Rep 7, 67-68 para 112.

413 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, 31 para 53: "Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." Cf. also *Legal consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* ibid [2019] ICJ Rep 95, 130 para 142; see above p. 288.

414 *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 241-242 para 29 (italics added), cf. 242 para 30, where the Court then spoke of "treaties in question", and 242 para 31, where the Court "notes *furthermore*" (italics added) that articles 35, paragraph 3, and 55 of Additional Protocol I to be "powerful constraints for all the States having subscribed to these provisions". The Court did not say that these provisions reflected customary international law. Arguably, the *dictum* in para

The Court then concluded that "[s]tates must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."[415] Assuming that the principles of necessity and proportionality in the context of the pursuit of legitimate military objectives are part of customary international law, the *Nuclear Weapons* advisory opinion illustrates that principles and rules of customary international law are to be applied under consideration of the international legal order as a whole that exists at the time of application.

E. Concluding observations

Complementing scholarly perspectives which focus on the materials used by the Court when identifying customary international law[416] or distinguish between inductive and deductive approaches to and assertions of customary international law[417], this chapter traced the interrelationship of sources as a *motif* in the ICJ jurisprudence. It began by examining the procedural framework in which the ICJ operates and zeroed in, in particular, on the intervention system[418] and the Court's jurisdiction[419]. Subsequently, it analyzed the importance of normative considerations[420] when identifying customary international law by highlighting the varying levels of generality of principles and rules of customary international law[421] and the Court's

31 does not qualify para 30 in the sense that the consideration of "respect for the environment" does apply only to states parties to the additional protocol.

415 ibid 242 para 30.

416 Cf. Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' 357 ff., 368-369.

417 Talmon, 'Determining Customary International Law: the ICJ's Methodology between Induction, Deduction and Assertion' 434. As Talmon demonstrated, deductive and inductive approaches do not necessarily correspond to a distinction between traditional and modern customary international law, 429-434. Cf. on the mix of deduction and induction in legal reasoning Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' 520.

418 See above, p. 224.

419 See above, p. 236.

420 See above, p. 258.

421 See above, p. 260.

interpretative decisions[422]. Moreover, the relationship between customary international law and treaty law in the Court's jurisprudence was analyzed[423], and convergences into common principles[424] or of functionally equivalent rules[425] could be identified. The chapter then considered the importance of general principles in the Court's jurisprudence.[426]

This chapter highlighted that the institutional setting in which the Court operates is not necessarily neutral towards the sources. The intervention regime which, as applied by the Court, restricted the participation of third states in disputes on customary international law, may have favoured to a certain extent a bilateralist approach of the Court to the law. Moreover, the jurisdictional regime in relation to compromissory clauses will arguably lead to claims based on treaty law instead of customary international law. This chapter also demonstrated that the way in which the intervention regime[427] and the jurisdiction regime are applied is also an expression of the judicial policy of the Court. In particular when it comes to jurisdiction based on compromissory clauses, the Court has to strike a delicate balance between respecting jurisdictional limitations and respecting the general rule of interpretation as set forth in article 31 VCLT.[428] This chapter demonstrated how the Court respected jurisdictional limitations by interpreting its jurisdiction as confined to the particular treaty and so-called rules on rules, as far as applicable law is concerned.

However, the emphasis on the distinctiveness of sources for jurisdictional purposes is different from the interrelationship of sources when it comes to interpretation.[429] This chapter's focus on the significance of the normative environment, in particular in relation to the unwritten international law, illustrated that customary international law should not be understood as just a set of separate rules, but as a set of rules and principles which interrelate with each other.[430] Acknowledging both the distinctiveness of sources as far as applicable law is concerned and the interrelationship of sources when it comes to interpretation can be regarded as a reconciliation of state consent

422 See above, p. 266.
423 See above, p. 278.
424 See above, p. 285.
425 See above, p. 290.
426 See above, p. 310.
427 See above, p. 233.
428 See above, p. 245.
429 See above, p. 258.
430 See above, p. 262.

on the one hand and the rule of law in the international community on the other hand. The Court was careful to take account of developments in treaty-making and principles expressed in treaties, when identifying and applying customary international law, and of relevant customary international law when interpreting and applying treaties. Therefore, a convergence between the sources and between functionally equivalent rules could be observed and principles expressed in treaties informed the identification of customary international law.