Part A.

Introduction

Chapter 1: Setting the Scene

> *"Die Entwicklung der internationalen Gemeinschaft zwingt dazu, auch die Quellen des Völkerrechts stets neu zu überdenken und ihre Veränderungen zu diagnostizieren."*[1]

Questions about the relationship and interaction of sources of law and of written and unwritten law arise in every legal system. Their answers depend on the respective legal culture, the needs of the legal community and the spirit of the times. The international legal order has known three sources of international law which were set forth in article 38 of the Statute of the Permanent Court of International Justice in 1921[2]: written law in the form of treaties and unwritten law in the form of customary international law and general principles of law. Since then, the international legal order has changed in many ways. The so-called decolonization led to the independence of so-called new states and raised the question of the Western character of the international legal order and its sources of law. The proliferation of courts and tribunals in the field of human rights protection, international criminal law, and investment protection law illustrates the increased institutionalization and substantive diversification of the international legal order. These developments also give rise to the question of whether the international legal order continues to recognize one doctrine of legal sources or whether different doctrines of legal sources are emerging in different areas of international

1 Rudolf Bernhardt, 'Ungeschriebenes Völkerrecht' (1976) 37 ZaöRV 50 (The development of the international community requires one to constantly review also the sources of international law and to diagnose changes in the sources, translation by the present author).

2 Protocol of Signature relating to the Statute of the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations (signed 16 December 1920, entered into force 1 September 1921) 6 LNTS 379. Article 38(1) ICJ Statute includes an additional reference to the function of the Court which is "to decide in accordance with international law such disputes as are submitted to it". Furthermore, the last sentence of article 38 PCIJ Statute according to which "[t]his provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto" became a separate paragraph. See Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: a commentary* (Oxford University Press 2019) 832-4.

law. The fact that the sources of international law have recently also been the subject of various studies by the International Law Commission may indicate a need for a reassessment of the normative foundations of the international legal system.

Against this background, the present work focuses on the relationship and the interplay of the sources of international law. The aim of this study is to develop a research perspective that contributes to the understanding of the sources in the present international community and shows that the three sources of international law are not unrelated to each other. Rather, different forms of interaction and balance among the various sources of law can be observed in the international legal order.

For this purpose, this book proceeds as follows: After an introduction and presentation of the conceptual approach and the research interest (chapter 1), the book first approaches its topic from comparative legal historical perspectives (chapters 2-4). The subsequent institutional perspectives (chapters 5-7) focus on the relationship and interplay between the sources of international law in the jurisprudence of the International Court of Justice (chapter 5) and in the work of the International Law Commission (chapter 6). Next, the topic of inquiry is examined in three selected areas (chapters 8-11), namely in the context of the European Convention on Human Rights (chapter 8), international criminal law (chapter 9) and international investment law (chapter 10). The last part is devoted to doctrinal perspectives (chapters 12-13). Based on the analysis so far, the penultimate chapter 12 engages with the scholarship on sources and contextualizes selected explanatory models on the relationship and interplay among sources. The thirteenth chapter offers reflections on the interrelationship of sources and conclusions of this study.

A. The conceptual framework

The purpose of this first chapter is to contextualize the present study and to explain the approach adopted in this book. This chapter first illustrates by way of example that several international instruments, the law of treaties and the law of international responsibility recognize the plurality of sources of international law which is also set forth in article 38(1) ICJ Statute (I.). Whilst the dominant view holds that there is no abstract hierarchy between the sources, one can observe so-called informal hierarchies in the sense of preferences for one particular source, sometimes at the expense of the other, in scholarship and case-law (II-III.). However, this study understands the

three sources set forth in article 38(1) ICJ Statute as an interrelated regime and argues that this understanding, together with a focus on legal practice, can make a valuable contribution to the doctrine of sources (IV.). This chapter situates this study in the context of the work of the ILC, in particular its recent conclusions on customary international law and the ongoing project on general principles of law. It draws inspiration from recent legal-sociological scholarship which illustrates the connection between treaties and customary international law and therefore invites doctrinal research to approach the interrelationship of sources (V.). The chapter concludes with an account of this study's structure (B.).

I. The plurality of sources and the architecture of public international law

Article 38(1) ICJ Statute is one of many provisions that refer to a plurality of sources. For instance, the Martens clause, which appears in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land, stipulates that "in cases not included in the Regulations [...] populations and belligerents remain under the protection and empire of *the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience*."[3] The clause reminds one that a question not addressed or regulated by a specific convention remains subject to unwritten international law. In the preamble of the Charter of the United Nations, "the peoples of the United Nations" pledge to "establish conditions under which justice and respect for the obligations arising from treaties and *other sources of international law* can be maintained", and the Charter "*recognizes*" in article 51 "the *inherent right* of individual or collective self-defence".[4] Several codification conventions contain references to international law outside the convention[5],

3 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (signed 29 July 1899, entered into force 4 September 1900) 32 Stat 1803 (italics added).

4 Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (italics added).

5 United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 affirms in its preamble "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law"; both the Vienna Convention on Consular Relations (signed 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 and the

indicating that, unlike in domestic law, codification in public international law did not strive to replace customary law completely.[6] Moreover, the Rome Statute, which was drafted in order to define the crimes in a written form, explicitly acknowledges in article 10 that part 1 of the Rome Statute does not limit or prejudice "in any way existing or developing rules of international law for purposes other than this Statute".[7]

If one takes a look at the infrastructure of public international law, the general law of treaties as reflected in the Vienna Convention on the Law of Treaties[8] and the ARSIWA[9] will deserve special attention. They set forth so-called "rules on rules"[10], guiding international lawyers in relation to treaties and to internationally wrongful acts. Here, the pluralism of sources finds expression as well, albeit to varying degrees.

1. The General Law of Treaties

Several articles of the VCLT recognize and touch on the pluralism of sources and reflect different approaches to the codification and its relationship with other sources.[11]

Vienna Convention on Diplomatic Relations (signed 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 include a similar provision in their respective preamble.

6 Cf. Wolfram Karl, *Vertrag und spätere Praxis im Völkerrecht: zum Einfluß der Praxis auf Inhalt und Bestand völkerrechtlicher Verträge* (Springer 1983) 362 ("Ziel einer Kodifikation ist es ja, Gewohnheitsrecht durch vertragliches Recht zu ersetzen, es zu verdrängen.").

7 Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

8 Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

9 *Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)* UN Doc A/56/10, Supplement no. 10.

10 On this notion see also Mark E Villiger, *Customary International Law and Treaties* (2nd edn, Kluwer Law International 1997) 292; Mārtiņš Paparinskis, 'Masters and Guardians of International Investment Law: How To Play the Game of Reassertion' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2017) 36; Matina Papadaki, 'Compromissory Clauses as the Gatekeepers of the Law to be 'used' in the ICJ and the PCIJ' [2014] JIDS 21-22.

11 See also Jan Klabbers, 'Reluctant Grundnormen: Articles 31(3)(C) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law' in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff Publishers 2007) 141 ff.

a) Different codification approaches

The preamble affirms that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention. With respect to questions of the treaty's validity, termination, denunciation or withdrawal, article 42 VCLT provides that the VCLT or the respective treaty will govern these matters exhaustively.[12] Article 73 VCLT, however, opens the door to other sources to some extent since the Vienna Convention does not prejudice any question relating to succession of states, to international responsibility of a state or to the outbreak of hostilities.[13] Article 53 recognizes the voidness of a treaty which conflicts with a peremptory norm of general international law.

The case of "multi-sourced"[14] obligations is addressed in articles 38 and 43 VCLT. Article 38 VCLT constitutes a saving reservation that reminds its readers of the possibility that a rule contained in a treaty can become binding

12 It is therefore questionable whether a general principle of law such as the *exceptio non adimpleti contractus* remains additionally available next to article 60 VCLT which governs the termination and suspension of the operation of a treaty as a consequence of its breach, see on this discussion Bruno Simma, 'Reflections on article 60 of the Vienna convention on the law of treaties and its background in general international law' (1970) 20 Österreichische Zeitschrift für öffentliches Recht 5 ff.; Filippo Fontanelli, 'The Invocation of the Exception of Non-Performance: A Case-Study on the Role and Application of General Principles of International Law of Contractual Origin' (2012) 1(1) Cambridge Journal of International and Comparative Law 119 ff.; James Crawford and Simon Olleson, 'The Exception of Non-performance: Links between the Law of Treaties and the Law of State Responsibility' (2000) 21 Australian Year Book of International Law 55 ff.; Maria Xiouri, 'Problems in the Relationship between the Termination or Suspension of a Treaty on the Ground of Its Material Breach and Countermeasures' (2015) 6 Queen Mary Law Journal 63 ff.; Serena Forlati, 'Reactions to Non-Performance of Treaties in International Law' (2015) 25 Leiden Journal of International Law 759 ff.; cf. *Application of the Interim Accord of 13 September 1995* (*The former Yugoslav Republic of Macedonia v. Greece*) (Judgment of 5 December 2011) [2011] ICJ Rep 644 Sep Op Judge Simma 708 para 29 (no longer maintaining his earlier held view, now "join[ing] the ranks of those who regard Article 60 as truly exhaustive", at 705 para 22), Diss Op Judge *ad hoc* Roucounas 745 para 66.

13 The attempt to incorporate the exceptio into the law of international responsibility was not successful, see Crawford and Olleson, 'The Exception of Non-performance: Links between the Law of Treaties and the Law of State Responsibility' 55 ff.

14 The term is borrowed from Tomer Broude and Yuval Shany, 'The International Law and Policy of Multi-sourced equivalent norms' in Tomer Broude and Yuval Shany (eds), *Multi-sourced equivalent norms in international law* (Hart 2011) 1 ff.

on third states as an obligation of customary international law.[15] With respect to multi-sourced obligations, article 43 VCLT clarifies that the

> "invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

A similar *ratio* can be found in guideline 4.4.2. of the ILC's formally non-binding *Guide to Reservations* according to which a reservation to a treaty obligation which also reflects a rule of customary international law "does not *of itself* affect the rights and obligations under that rule".[16] In addition, according to guideline 3.1.5.3, "[t]he fact that a treaty provision reflects a rule of customary international law does not *in itself* constitute an obstacle to the formulation of a reservation to that provision."[17] Earlier, the Human Rights Committee had argued that "provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations."[18] Without taking a view on the respective merit of each approach, it suffices for the purposes of this chapter to point out that both approaches view the relationship between treaty law and customary international law differently. The consequence of the interpretation of the Human Rights Committee would be that customary international law reinforces the treaty obligations under the ICCPR, and, incidentally, the procedural framework treaty obligations are embedded in, by making reservations to such treaty provisions impermissible. In contrast, the position of the ILC stresses the distinctiveness of treaty law and customary international law. They are distinct in that a reservation to a treaty provision does not concern the bindingness of custom, nor does customary international law of itself render a reservation to a treaty provision reflecting customary international law invalid. For the purposes of determining the permissibility

15 Article 38 VCLT reads: "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

16 *Guide to Practice on Reservations to Treaties* ILC Ybk (2011 vol 2 part three) 292 (italics added).

17 ibid 220 (italics added).

18 *General Comment No 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant* Human Rights Committee CCPR/C/21/Rev.1/Add.6 (4 November 1994) para 8.

of a reservation, the treaty's object and purpose are decisive.[19] This distinctiveness does not mean, however, that there is no interrelation at all: the *Guide to Reservations* acknowledges that "in practice, it is quite likely that a reservation to such rule [of customary international law, M.L.] (especially if it is a peremptory norm) will be incompatible with the object and purpose of the treaty by virtue of the applicable general rules."[20] A similar approach can be found in the recently adopted ILC conclusions on peremptory norms of general international law. According to conclusion 13, "[a] reservation to a treaty provision that reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such", furthermore, "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of international law".[21] The adopted commentary stresses the distinctiveness: the legality of the reservation would depend on its compatibility with the treaty's object and purpose, which requires an interpretation of the treaty. At the same time, it is stressed that "a State cannot escape the binding nature of a peremptory norm of general international law (*jus cogens*) by formulating a reservation to a treaty provision *reflecting that norm*"[22] which exists outside the treaty.

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19 *Guide to Practice on Reservations to Treaties* 199, guideline 3.1.

20 ibid 222. See also 225, where the Commission argued "that the principle stated in guideline 3.1.5.3 applies to reservations to treaty provisions reflecting a customary peremptory norm", while adding that it "considers that States and international organizations should refrain from formulating such reservations and, when they deem it indispensable, should instead formulate reservations to the provisions concerning the treaty regime governing the rules in question." Cf. *Armed Activities on the Territory of the Congo (New Application: 2002)* (*Democratic Republic of the Congo v. Rwanda*) (Jurisdiction and Admissibility, Judgment) [2006] ICJ Rep 33 paras 69-70 (the Court noted that no *jus cogens* norm existed that required a state to consent to the jurisdiction and that the Court lacked jurisdiction because of a reservation to article IX of the Genocide Convention), and Sep Op Higgins, Kooijmans, Elaraby, Owada and Simma 72 para 29 (arguing that it was "not self-evident that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention").

21 *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)* UN Doc A/77/10 at 54 (conclusion 13).

22 ibid 55 (last italics added).

b) The rules of treaty interpretation and their relationship with customary international law

The rules of treaty interpretation set forth in articles 31-33 VCLT are of central importance for establishing a relationship between a particular treaty and other sources. Article 31 VCLT sets forth the "general rule of interpretation". The fact that article 31 speaks of "rule" as opposed to "rules" even though it refers to various means of interpretation indicates that all means have to be applied simultaneously in light of each other. Considering all means of interpretation constitutes "the rule of interpretation."[23] Occasionally, one speaks of "general rules of interpretation" when one refers to the whole interpretative regime of articles 31-33 VCLT which the International Court of Justice has considered to reflect customary international law.[24]

According to article 31(3)(c) VCLT, the interpreter shall take account of "any relevant rules of international law applicable in the relations between the parties". Undoubtedly, customary international law and general principles of law, binding all parties to the treaty, are to be taken into account.[25] In addition, the debated view has gained ground that based on this provision an interpreter can take other treaties, or better yet the principles and evaluations expressed therein, into account, even when not all parties to the treaty which

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23 *ILC Ybk (1966 vol 2)* 219 ("single combined operation").

24 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (*Nicaragua v. Colombia*) (Preliminary Objections) [2016] ICJ Rep 116 para 33; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v. Colombia*) (Preliminary Objections) [2016] ICJ Rep 18 para 35; Enzo Cannizzaro, 'The law of treaties through the interplay of its different sources' in Christian J Tams and others (eds), *Research handbook on the law of treaties* (Edward Elgar Publishing 2014) 17 ff.

25 *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* 13 April 2006 UN Doc A/CN.4/L.682 215; Bruno Simma and Theodor Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in Christina Binder and others (eds), *International Investment Law for the 21st Century Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 694-695; Gebhard Bücheler, *Proportionality in investor-state arbitration* (Oxford University Press 2015) 99; Oliver Dörr, 'Article 31. General rule of interpretation' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (2nd edn, Springer 2018) 606-608.

is to be interpreted are parties to the respective treaty to which recourse is made.[26] The scope of the general rule of interpretation and its various means can be important in that it may incentivize interpreters to resort to arguments based on customary international law and general principles of law or to adopt the view that treaty interpretation is flexible enough and that it may be not necessary to work with sources of unwritten international law,[27] as the interpreter has further means of interpretation at her disposal, including, but not limited to, subsequent agreements and subsequent practice on the interpretation of the treaty.[28] The difference between customary international

26 On this debate see *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* 237-238 para 471, arguing that a restrictive interpretation of article 31(3)(c) VCLT would be contrary to the "legislative ethos behind most of multilateral treaty-making and, presumably, with the intent of most treaty-makers."; see *EC - Measures Affecting the Approval and Marketing of Biotech Products* Panel Report (6 February 2006) WT/DS291/R WT/DS292/R WT/DS293/R para 7.68, concluding that only rules applicable between all parties to a treaty can be taken into account under article 31(3)(c) VCLT, para 7.90 ff. suggesting as alternative to use other international law under article 31(1); see Panos Merkouris, *Article 31(3)(c) vclt and the Principle of Systemic Integration* (Brill Nijhoff 2015) 46 ff., pointing out that the Biotech approach was not representative of other panels' and Appellate Bodies' practice, see for instance *United States - Import Prohibition of Certain Shrimp and Shrimp Products* Appellate Body (12 October 1998) AB-1998-4 para 130 ff. (citing conventions not all WTO parties had ratified); see also Isabelle van Damme, *Treaty interpretation by the WTO Appellate Body* (Oxford University Press 2009) 368 ff.; Margaret A Young, 'The WTO's Use of Relevant Rules of International Law: an Analysis of the Biotech Case' (2007) 56(4) ICLQ 914-921 (arguing with respect to article 31(1) that other international law should be used to illuminate the object and purpose rather than the ordinary meaning); on article 31(1) as alternative to article 31(3)(c) see also Mārtiņš Paparinskis, 'Come Together or Do It My Way: No Systemic Preference' (2014) 108 Proceedings of the American Society of International Law at Its Annual Meeting 246 ff. on treaty interpretation by the WTO Appellate Body.

27 Cf. Jean d'Aspremont, 'International Customary Investment Law: Story of a Paradox' in Eric de Brabandere and Tarcisio Gazzini (eds), *International Investment Law* (Martinus Nijhoff 2012) 42, arguing that the principle of systemic integration "already provides judges with a sweeping power to harmonize without unnecessary and costly inroads into the murky theory of customary investment law."

28 For the ILC conclusions on subsequent agreements and subsequent practice see *Report of the International Law Commission: Seventieth session (30 April-1 June and 2 July-10 August 2018)* UN Doc A/73/10 23 ff.; the phenomenon of evolutive treaty interpretation has been examined by Christian Djeffal, *Static and evolutive treaty*

law and subsequent practice is that customary international law establishes an independent norm, whereas subsequent practice relates to an already existing norm of a treaty and embodies an agreement as to the treaty's interpretation.

While "the general rule" set forth in article 31 VCLT requires that all means are simultaneously applied in light of each other in a "single combined operation"[29], the relative weight of each means cannot be determined in the abstract but can differ in each case. When weighing and balancing the different means in order to interpret the treaty in good faith, the interpreter may also be influenced by extra-legal considerations, such as institutional considerations or legal-political considerations.[30] Within this leeway left to law-applying authorities, it is also a question of judicial policy whether and to what extent courts and tribunals adopt an integrative standpoint by invoking the principle of systemic integration and aiming at a decision in accordance with international law as a whole or opt for self-restraint.[31] Thus, the general rules of treaty interpretation can strengthen arguments based on customary international law and general principles of law or render recourse to them less necessary, they offer different ways to further develop the treaty by way

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interpretation: a functional reconstruction (Cambridge University Press 2015); Eirik Bjørge, *The evolutionary interpretation of treaties* (Oxford University Press 2014); Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' (2013) 38 Yale Journal of International Law 289 ff.; Julian Arato, 'Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law' (2012) 37(2) Brooklyn Journal of International Law 349 ff.

29 *ILC Ybk (1966 vol 2)* 219.

30 Joost HB Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals' in *Interdisciplinary perspectives on international law and international relations: the state of the art* (Cambridge University Press 2013) 445 ff.; Daniel Peat, *Comparative Reasoning in International Courts and Tribunals* (Cambridge University Press 2019) 18-21.

31 See Jochen von Bernstorff, 'Hans Kelsen on Judicial Law-Making by International Courts and Tribunals: a Theory of Global Judicial Imperialism?' (2015) 14(1) The law and practice of international courts and tribunals: a practitioners' journal 50:"Instead of hoping for systemic integration through sectorial jurisprudence, I would thus argue in favour of a practice of systemic self-restraint of sectorial courts and tribunals [...] My main fear thus is the future 'colonization' of the fabric of international law by specific and particularly dynamic sectorial regimes."; see also Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66(3) ICLQ 557 ff., 573-575; cf. generally (without reference to article 31(3)(c)) Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13(4) EJIL 815 ff., 836.

of interpretation. Whether a specific path will be taken will depend on the interpretative culture which develops both generally and in specific fields of public international law.

If one understood the rules of interpretation under the VCLT and under custom to be separate and distinct, one could argue, as France did in the *Rhine Chlorides* case,[32] that the general rule of interpretation under customary international law could not be applied "with the same kind of minute and analytical rigour as would be the case if [the Vienna Convention] were itself binding as between the parties."[33] This contention could be supported by a *dictum* of the International Court of Justice in the *Nicaragua* case according to which "[r]ules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application."[34] Yet, the arbitrators did not adopt in the *Rhine Chlorides* case such an artificial distinction between the rules of interpretation under the VCLT and under customary international law. Instead, it was held that the Vienna rules "must be taken as faithful reflection of the current state of customary law."[35] In a similar way, the ILC in its conclusions on subsequent agreements and subsequent practice did not distinguish between the VCLT and customary international law.[36] This view of the relationship between the

32 Richard K Gardiner, *Treaty interpretation* (2nd, Oxford University Press 2015) 44-46.

33 *The Rhine Chlorides Arbitration concerning the Auditing of Accounts* The Netherlands v. France, Award (12 May 2004) PCA Case No 2000-02 para 43 (position of France), unofficial English translation of the PCA.

34 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits) [1986] ICJ Rep 95 para 178; cf. Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 497: "Customary rule should be interpreted independently from its conventional counterpart, according to the rationale it independently possesses. The applicable methods of interpretation have to do with the nature of customary rules." The ICJ emphasized the distinctiveness of the sources for jurisdictional purposes while also acknowledging their interrelationship when it comes to interpretation, see below, p. 258 ff.

35 *The Rhine Chlorides Arbitration concerning the Auditing of Accounts* PCA Case No 2000-02 para 77.

36 *ILC Report 2018* at 19: "Hence, the rules contained in articles 31 and 32 apply as treaty law in relation to those States that are parties to the 1969 Vienna Convention, and as customary international law between all States, including to treaties which were concluded before the entry into force of the Vienna Convention for the States parties concerned."

VCLT and customary international law stresses the entanglement, as opposed to a strict separation, of both sources.

2. The law of international responsibility

The law of international responsibility touches on the pluralism of sources only to a limited extent. Its application is triggered by an internationally wrongful act which will come into existence if conduct is attributable to the state and constitutes a breach of an international obligation of that state (article 2 ARSIWA). It is a general regime composed of secondary rules, as opposed to primary rules in the sense of specific substantive obligations.[37] Article 12 ARSIWA defines a breach as "an act of that State [...] not in conformity with what is required of it by that obligation, regardless of its origin or character." It was decided, as the corresponding commentary reveals, not to use the very term "source" and to speak of "origin", "which has the same meaning, [...] [while] not [being] attended by the doubts and doctrinal debates the term 'source' has provoked."[38]

The following parts of the ARSIWA introduce a certain differentiation, not according to the sources but according to the type of obligations. For instance, if a state's responsibility is engaged by a serious breach of an obligation arising under a peremptory norm of general international law (article 40 ARSIWA), states shall cooperate to bring to an end through lawful means any serious breach (article 41(1) ARSIWA) and shall not recognize

37 James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 64: "The source of the distinction between primary and secondary rules within the terminology of state responsibility is unclear. Potential sources include an adaptation of H.L.A. Hart's famous distinction between primary and secondary rules, continental jurisprudence, or simply organic development within the ILC itself." As will be demonstrated in below, the idea to understand the law of responsibility as an abstract, secondary regime was already present, for instance, at the 1930 Codification Conference, see below, p. 559. See also Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 International Law Studies 299-300 (arguing that the distinction between primary and secondary rules in the context of the ILC differs from Hart's distinction). Cf. Herbert L Hart, *The concept of law: With a postscript* (2nd edn, Clarendon Press 1994) 92; Nicholas Onuf, *Law-making in the global community* (Carolina Acad Press 1982) 11.

38 *ILC Ybk (2001 vol 2 part 2)* 55 para 3; in contrast, delegates at the 1930 codification conference wanted to define the sources and debates at length about making reference to article 38 PCIJ Statute, see below, p. 182 ff.

as lawful a situation created by a serious breach (article 41(2) ARSIWA).[39] Article 41(3) ARSIWA stipulates that this article is without prejudice "to such further consequences that a breach to which this chapter applies may entail under international law". Peremptory norms of general international law are protected from countermeasures (article 50(1)(d) ARSIWA).[40]

Moreover, the articles on reparation and countermeasures benefit international obligations the violation of which results in injury to a specific state.[41] Article 31(1) ARSIWA sets forth the obligation to make full reparation for the injury caused by the internationally wrongful act and defines injury as "any damage, whether material or moral" (article 31(2) ARSIWA).[42] A state is entitled as an injured state to invoke another state's responsibility if the obligation breached is owed to that state individually (article 42(a) ARSIWA) or to a group of states including that state, or the international community as a whole, and the breach of the obligation specially affects that state or is of such a character as to radically change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation (article 42(b) ARSIWA). An injured state may resort to countermeasures (article 49 ARSIWA) which are also recognized as circumstances precluding the wrongfulness of an otherwise internationally wrongful act (article 22 ARSIWA). Article 48 ARSIWA introduces the concept of a "State other than an injured State". "[I]f (a) the obligation breached is owed to a group of states including that state, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international

39 See now also *ILC Report 2022* at 71, commentary to conclusion 19 on peremptory norms of general international law ("[...] the obligation to cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*) is now recognized under international law").

40 See now also ibid at 69 (conclusion 18).

41 See also André Nollkaemper, 'Constitutionalization and the Unity of the Law of International Responsibility' (2009) 16 Indiana Journal of Global Legal Studies 555: "Large parts of the law of international responsibility, in particular the articles on reparation and countermeasures, remain rooted in the idea that responsibility is based on a breach of an obligation toward a person who is entitled to the performance of that obligation. Somewhat paradoxically, in light of Articles 1 and 2 of the Articles on State Responsibility (that do not require injury as a condition for responsibility), the principles of reparation make clear that no remedy is provided for breaches of international obligations where no material or moral damage has occurred."

42 The second chapter of the ARSIWA's second part then is concerned with "reparation for injury", see the articles 34, 37(1) and (3), 39 ARSIWA as well as with respect to damage article 36(1) ARSIWA.

community as a whole" (article 48 (1) ARSIWA), a so-called "State other than an injured State" may claim from the responsible state cessation of the internationally wrongful act, assurances and guarantees of non-repetition (article 48(2)(a) ARSIWA) and performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured state or of the beneficiaries of the obligation breached (article 48(2)(b)).[43] The ARSIWA do not explicitly set forth a right of a non-injured state to resort to so-called collective or community countermeasures in response to an internationally wrongful act on behalf of the international community. According to article 54 ARSIWA, they do not "prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached." Given the risk of potential abuse and the lack of institutional safeguards against vigilantism, there was no agreement for anything more than this saving reservation.[44]

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43 Cf. on the debate of a "legal", "normative" injury (*préjudice juridique*) Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 194 ff. (arguing that the ILC adopted a narrower understanding of injury and introduced instead the concept of a "State other than an injured State"); see also Brigitte 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' (2001) 47 Annuaire français de droit international 5, 19 ff.; see recently *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*) (Preliminary Objections, Judgment of 22 July 2022) [2022] ICJ Rep 477 Decl Judge *ad hoc* Kreß paras 10 ff. See now also *ILC Report 2022* at 64 and 68 (conclusion 17(2) on peremptory norms of general international law and the corresponding commentary). The commentary is silent on the question of whether every state is to be regarded as an injured state in the case of a *jus cogens* violation and refers to article 42 and article 48 ARSIWA.

44 Thus, the articles do not fully operationalize what Elihu Root and Philip C. Jessup described as states' general interest in preserving law as such, see Elihu Root, 'The Outlook for International Law' (1915) 9 Proceedings of the American Society of International Law at Its Annual Meeting 9; Philip C Jessup, *A modern law of nations: An introduction* (Archon books, reprint 1968) 2, 12; cf. for an overview of the discussion in the ILC Denis Alland, 'Countermeasures of General Interest' (2002) 13(5) EJIL 1221 ff.; cf. Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 249-251, describing article 54 as a compromise and concluding (at 250) that "present-day international law recognises a right of all States, irrespective of individual injury, to take countermeasures in re-

One lawful measure can consist, for instance, in resorting to proceedings before the ICJ. After the ICJ had held in the South-West Africa cases that international law would not provide for an *actio popularis*[45], the Court's jurisprudence began to include proceedings concerning *erga omnes partes* obligations.[46] With respect to the prohibition of torture under the CAT and to the prohibition of genocide under the Genocide Convention, the Court held that all parties have "a common interest" in compliance with the respective obligations and "a legal interest in the protection of the rights involved".[47]

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sponse to large-scale or systemic breaches of obligations *erga omnes*."; cf. Andreas L Paulus, 'Whether Universal Values can prevail over Bilateralism and Reciprocity' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 101-102, arguing that if countermeasures are permitted in cases of breaches of bilateral obligations, "it is inconceivable to provide a lower threshold of protection to those obligations considered *erga omnes* or even *jus cogens*. Protection against vigilantism should be rather found in the general limitations to countermeasures [...] The weak implementation of community interests also signifies something else: in the last resort, it is the international institutions that have to take up collective concerns."

45 *South West Africa* (*Ethiopia v. South Africa; Liberia v. South Africa*) (Second Phase, Judgment) [1966] ICJ Rep 47 para 88.

46 On *erga omnes* see already *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*) (Judgment) [1970] ICJ Rep 32 paras 33-34; for examples of *erga omnes partes* cases, see *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*) (Judgment) [2012] ICJ Rep 450 para 70; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*) (Order of 23 January 2020) [2020] ICJ Rep 13 para 42; *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 paras 106-112. Since the Court had no jurisdiction in the proceedings initiated by the Marshall Islands, the Court did not have to address 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* (*Marshall Islands v. India*) (Judgment of 5 October 2016) [2016] ICJ Rep 277 para 56; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. India*) (Judgment of 5 October 2016) [2016] ICJ Rep 573 para 56.

47 *Questions relating to the Obligation to Prosecute or Extradite* [2012] ICJ Rep 422, 449 para 68; see also *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 107.

Thus, proceedings concerning *erga omnes partes* obligations confirm the *ratio* of article 48 ARSIWA according to which so-called non-injured states can concern themselves with violations of international law by other states.[48] It has to be stressed though that the ARSIWA are not concerned with the question of standing before an international court,[49] and that the Court so far has not used the ARSIWA terminology of "non-injured" states in its jurisprudence on *erga omnes* obligations.[50]

According to the recently adopted ILC conclusions on peremptory norms of general international law, norms of *jus cogens* "give rise" to obligations *erga omnes* "in relation to which all States have a legal interest".[51] The ILC relied, *inter alia*, on the ICJ jurisprudence on treaty-based obligations *erga omnes partes*.[52] If this view will be accepted, states can have standing in proceedings before the ICJ in relation to violations of *jus cogens* norms. These proceedings require, however, a jurisdictional basis. If the system of compromissory clauses confines jurisdiction to the application of treaties, the question may arise whether the ICJ's jurisdictional framework is in fact more favourable to treaty obligations than to obligations under customary international law.[53]

48 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* [2016] ICJ Rep 255 Diss Op Crawford 522 para 21.

49 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)* 120-121; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* [2016] ICJ Rep 255, 272-273 para 42 and Diss Op Crawford 522 para 22.

50 Cf. *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 106 and Decl Judge *ad hoc* Kreß paras 7-19.

51 *ILC Report 2022* at 64 (conclusion 17(1)). Note that the UNGA decided that consideration of the conclusions and the commentary adopted by the ILC "shall be continued at the seventy-eighth session of the General Assembly", UNGA Res 77/103 (19 December 2022) UN Doc A/RES/77/103 para 3; see also Sean D Murphy, 'Peremptory Norms of General International Law (Jus Cogens) (Revisited) and Other Topics: The Seventy-Third Session of the International Law Commission' (2023) 117(1) AJIL 95-97.

52 *ILC Report 2022* at 65, 68.

53 See below, p. 236 ff.

II. Traditional approaches to the relationship of sources

The plurality of sources raises the question of their relationship. Different models of relationships between sources are proposed in international legal scholarship.[54] In the following, this section zeroes in on the discussion of the relationship of sources (1.), the relationship between norms of different sources (2.) and the relationship between formal sources and material sources (3.).

1. The relationship between sources

As far as an abstract hierarchy of sources is concerned, one may refer to David Kennedy who has pointed out that "the relative authority of various sources is most often discussed in contrasting treaties and custom. Advocates of all logically available positions exist."[55] Certain scholars regard custom to be the supreme source.[56] Its generality *ratione personae* destines custom to be the common law of a community[57] and it is described to be relevant for the other two sources: the customary rule of *pacta sunt servanda* explains the

54 See Yoram Dinstein, 'The interaction between customary international law and treaties' (2006) 322 RdC 383 ff.

55 David Kennedy, 'The Sources of International Law' (1987) 2 American University Journal of International Law & Policy 16 footnote 25; on different views on the relative primacy of treaty law and customary law see now Mario Prost, 'Sources and the Hierarchy of International Law: Source Preferences and Scales' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 640 ff.

56 Petros Vallindas, 'General Principles of Law and the Hierarchy of the Sources of International Law' in *Grundprobleme des internationalen Rechts: Festschrift für Jean Spiropoulos* (Schimmelbusch 1957) 426-427, who lists custom as first source, followed by general principles of law and conventions. His account stress the interplay between the first, as "various customary rules of international law can be evolved into a system, a legal order, only by their implementation through the general principles of law" (at 431).

57 On custom as consensus of the international community: Marcelo G Kohen, 'La pratique et la théorie des sources du droit international' in Société Française pour le Droit International (ed), *La pratique et le droit international: Colloque de Genève* (Pedone 2004) 93-94.

binding force of treaties[58], and it has also been argued that general principles were recognized as a source by customary international law.[59] Others regard treaties to be the dominant source. Treaties enjoy a "procedural primacy"[60] in that lawyers will first and foremost apply a treaty and according to *lex specialis derogat legi generali* a treaty prevails over the more general customary international law.[61] In addition, treaties are regarded in certain ways as superior. There is a higher certainty as to a treaty's ascertainment ("ontological determinacy"[62]), treaties can regulate any substance matter with detailed procedural rules, and treatymaking is a conscious process which allows for participation of domestic parliaments and faces less legitimacy concerns in comparison to customary international law[63] which has been described as unconscious lawmaking.[64] Last but not least, it has also been argued that general principles of law rank the highest and provide for the

58 Hans Kelsen, 'Théorie du droit international coutumier' (1939) 1 Revue internationale de la théorie du droit, nouvelle série 258; Hans Kelsen, *Principles of International Law* (Rinehart 1952) 366-367.

59 Cf. Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926) 59; on the development of Verdross' thinking as to the relationship between customary international law and general principles of law, see below, p. 204.

60 Prost, 'Sources and the Hierarchy of International Law: Source Preferences and Scales' 648.

61 Cf. Pellet and Müller, 'Article 38' 932 para 274.

62 Prost, 'Sources and the Hierarchy of International Law: Source Preferences and Scales' 648.

63 For a critique of the procedural and democratic legitimacy of custom: James Patrick Kelly, 'The Twilight Of Customary International Law' (2000) 40 Virginia Journal of International Law 452, 457-458, 517-535.

64 Cf. Kelsen, *Principles of International Law (1952)* 308; Gennady M Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers 1993) 78; Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 156; Ago coined the term "spontaneous law", Roberto Ago, 'Science juridique et droit international' (1956) 90 RdC 935 ff. But see David Lefkowitz, 'Sources in Legal-Positivist Theories: Law as Necessarily posited and the Challenge of Customary Law Creation' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook on Sources of International Law* (Oxford University Press 2017) 338, arguing that "[t]he perception that customary norms are the product of a process that is neither intentional nor directed rests on the assumption that acts of willing or positing norms must be legislative".

first rudimentary norms on the basis of which custom and treaty law can develop.[65]

According to the prevailing view, however, there is no abstract hierarchy between the sources in general.[66] If one linked the concept of *jus cogens* to customary international law[67], one could claim that certain rules of customary international law are superior. According to the ILC draft conclusion 5 on *jus cogens*, which the ILC adopted on second reading, "customary international law is the most common basis for peremptory norms of general international law (jus cogens)", yet "[t]reaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (jus

65 On the superior value of general principles in relation to other sources see Alfred Verdross, 'Forbidden Treaties in International Law' (1937) 31 AJIL 575; Alfred Verdross, 'Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle Zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts' in Alfred Verdross and Josef Dobretsberger (eds), *Gesellschaft, Staat und Recht: Untersuchungen zur reinen Rechtslehre* (Springer 1931) 361; Gerhard Leibholz, 'Verbot der Willkür und des Ermessensmißbrauches im völkerrechtlichen Verkehr der Staaten' (1929) 1 ZaöRV 88-89, 122-125.

66 Karl Zemanek, 'The Legal Foundations of the International Legal System' (1997) 266 RdC 132; Mark E Villiger, *Customary International Law and Treaties* (Martinus Nijhof Publishers 1985) 35; James Crawford, *Brownlie's principles of public international law* (9th edn, Oxford University Press 2019) 20; Pellet and Müller, 'Article 38' 932-936; *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* 47 para 85, 233 para 463, considering an "informal hierarchy" of application of the oftentimes more special treaty but also describing that such treaty will be interpreted against the background of the general law and that legal reasoning thus progresses through concentric circles; article 38 itself does not indicate a strict order of application, see below, p. 90. See also Michael Akehurst, 'Hierarchy of Sources' (1974) 47 BYIL 274-275, 279; but cf. Riccardo Monaco, 'Observations sur la hiérarchie des sources du droit international' in Rudolf Bernhardt (ed), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Springer 1983) 599 ff.

67 Cf. Erika de Wet, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 633. If one understands *ius cogens* by its function of non-derogability, it can be based on other sources as well, see Robert Kolb, 'The formal source of Ius Cogens in public international law' (1998) 53(1) ZÖR 69 ff.

cogens)."[68] The draft conclusion is less concerned, however, with an abstract hierarchy of sources rather than with the relative importance of each source for the concept of general international law and peremptory norms of general international law.

2. The relationship between the norms of different sources

The question of the relationship and hierarchy of sources can also be discussed as a question of the relationship and hierarchy of the norms of different sources.

Norms of different sources can be coordinated by *jus cogens* from which no derogation by treaty is permitted (article 53 VCLT), the *lex specialis* maxim, according to which the special law prevails over the general law, the maxim of *lex posterior derogat legi priori*, according to which the later law prevails over the prior law,[69] or by way of accommodation through interpretation as set forth in article 31(3)(c) VCLT (systemic integration).[70]

Furthermore, Dinstein described several modes of interplay between rules of treaties and rules of customary international law. For instance: norms of different sources may complement each other,[71] they may resemble each other while addressing unrelated settings, as the rule of the requirement of exhaustion of local remedies applies both to inter-state disputes based on diplomatic protection and to claims submitted by individuals.[72] Treaties may contain a *renvoi* to customary international law,[73] and subordinate themselves to another treaty or rule of custom by way of a so-called "without-prejudice"

68 *Report of the International Law Commission: Seventy-first session (29 April–7 June and 8 July–9 August 2019)* UN Doc A/74/10 at 143; the draft conclusions were adopted on second reading in 2022, *ILC Report 2022* at 10, 30-6. For further analysis see below, p. 378.

69 Hugh W Thirlway, *The sources of international law* (2nd edn, Oxford University Press 2019) 147; Paul Guggenheim, *Lehrbuch des Völkerrechts: unter Berücksichtigung der internationalen und schweizerischen Praxis* (vol 1, Verlag für Recht und Gesellschaft 1948) 51 (on *lex posterior*).

70 Thirlway, *The sources of international law* 152; Campbell McLachlan, 'The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention' (2005) 54 ICLQ 286.

71 Dinstein, 'The interaction between customary international law and treaties' 283-386.

72 ibid 387.

73 ibid 388.

provision.[74] A treaty rule may extend the protections offered by a rule of customary international law[75], customary international law may fill in loopholes and provide definitions to treaty concepts.[76] In addition, there can be coexistence in the sense of a complete or partial overlap between treaty and custom in relation to one specific issue, in which custom would not necessarily completely vanish but remain in the background.[77] This book will explore these modes of interplay in specific contexts and consider their implications for the topic of the interrelationship of sources of international law.

3. The relationship between formal sources and material sources

Certain authors distinguish between formal sources and material sources. Formal sources are those processes through which law is generated, the formal source is the "source from which the legal rule derives its validity"[78]. Material sources are said to provide "evidence of the existence of rules"[79], to

74 ibid 391.

75 ibid 393.

76 ibid 394.

77 ibid 395-396; see also Rudolf Bernhardt, 'Custom and treaty in the law of the sea' (1987) 205 RdC 271: "[...] treaty law and customary law can coexist and can be applicable side by side in the relations between the same States [...] Only customary norms which are in contradiction to treaties become inapplicable as long as the treaty is valid, and they become applicable again after the treaty has lapsed."

78 Robert Yewdall Jennings and Arthur Watts, *Oppenheim's International Law: Volume 1 Peace* (9th edn, Oxford University Press 2008) 23; see also Thirlway, *The sources of international law* 6; Crawford, *Brownlie's principles of public international law* 18; Robert Kolb, 'Legal History as a Source: From Classical to Modern International Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford handbook on the sources of international law* (Oxford University Press 2017) 282; Iain GM Scobbie, 'Legal Theory As a Source of International Law: Institutional Facts and the Identification of International Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 507; Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in *Symbolae Verzijl: présentées au professeur J. H. W.Verzijl à l'occasion de son LXX-ième anniversaire* (La Haye: M Nijhoff 1958) 153-155; Prosper Weil, 'Le droit international en quête de son identité: cours général de droit international public' (1992) 237 RdC 132, arguing that formal sources answer the question of "how" law is formed whereas material sources answer the question of "why" law is formed.

79 Crawford, *Brownlie's principles of public international law* 18-19.

denote "the provenance of the substantive content of [the] rule"[80], to "furnish the substantive content of the law or of legal relationships between actors"[81], to encompass "all the elements and facts of life which influence and explain the creation of legal norms: for example, social facts, social values, legal conscience, political beliefs, religious motives"[82].

Writers hold different views as to whether all sources set forth in article 38(1)(a)-(c) ICJ Statute qualify as "formal sources"[83] or whether customary international law[84] and general principles of law[85] do not possess the necessary characteristics in order to be described as "formal" source.

This study, in contrast, is not primarily concerned with the relationship of these two categories and with categorizing each source as a formal source or a material source, which would ultimately depend on one's understanding of the attributes formal and material.[86] Nonetheless, certain aspects of the relationship between formal and material sources will be addressed. One relevant aspect concerns treaty law as a material source of customary international

80 Jennings and Watts, *Oppenheim's International Law: Volume 1 Peace* 23.

81 Scobbie, 'Legal Theory As a Source of International Law: Institutional Facts and the Identification of International Law' 507.

82 Kolb, 'Legal History as a Source: From Classical to Modern International Law' 282; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht Theorie und Praxis* (3rd edn, Duncker&Humblot 1984) 321; Pellet and Müller, 'Article 38' 864; Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 170; critical of such understanding Thirlway, *The sources of international law* 7.

83 Affirmative ibid 8 f.; Pellet and Müller, 'Article 38' 864, 941, explicitly describing general principles of law as "a formal source".

84 Cf. Ago, 'Science juridique et droit international' 936-944; Jean d'Aspremont, *Formalism and the Sources of International Law* (Oxford University Press 2011) 119 f. (describing "the impossibility of resorting to formal identification criteria of customary international law"); cf. Kolb, 'Legal History as a Source: From Classical to Modern International Law' 290: "The better view is that the customary process is recognized in international law as a formal source, but that the process itself makes direct reference to the manifold social activities of the subjects of the law whose behaviour customary international law seeks to regulate."

85 Weil, 'Le droit international en quête de son identité: cours général de droit international public' 148-151; Jean d'Aspremont, 'What was not meant to be: General principles of law as a source of international law' in Riccardo Pisillo Mazzeschi and Pasquale de Sena (eds), *Global Justice, Human Rights, and the Modernization of International Law* (Springer 2018) 163 ff.

86 See also Crawford, *Brownlie's principles of public international law* 18-19 (arguing that the distinction between formal and material sources is difficult to maintain).

law. Certainly, a rule set forth in a treaty can enter the body of customary international law. The interplay between treaties and custom is, however, not confined to this process which is also addressed in the recent ILC conclusions on customary international law.[87] This study will also submit that general principles of law should be regarded as a source of international law which, for the present author, does not depend on whether they qualify as a "formal" source.

III. The Politics as to the sources: Source preferences in the international community

Even though there is no formal hierarchy between sources, sources can be subject to "informal hierarchies" established by the preferences of states, adjudicators and scholars.[88]

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87 See below, p. 377.

88 Prost, 'Sources and the Hierarchy of International Law: Source Preferences and Scales' 642, 645, 656 ("informal hierarchies"); on informal hierarchies see also *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* 47 para 85, 233 para 463; cf. David Kennedy, 'When Renewal Repeats: Thinking against the Box' (2000) 32 NYU JILP 352: "Are international norms best built by custom or treaty? International lawyers have worried about this for at least a century, one or the other mode coming in and out of fashion at various points."; see for instance for the relative advantage of treaty obligations *vis-à-vis* the uncertainty surrounding customary international law Andrew T Guzman, *How international law works: a rational choice theory* (Oxford University Press 2008) 207; Oscar Schachter, *International law in theory and practice: general course in public international law* (Martinus Nijhoff Publishers 1991) 66; on the uncertainties of treaty obligations due to broad framing see Bruno Simma, 'A Hard Look at Soft Law' (1988) 82 Proceedings of the American Society of International Law at Its Annual Meeting 378; Louise Doswald-Beck and Sylvain Vité, 'International Humanitarian Law and Human Rights Law' (1993) 33 International Review of the Red Cross 106; on the significance of the precision of legal obligations as to fairness and the willingness to accept sanctions for the obligations' violations, see Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995) 31-33; cf. on the doctrine of sources Daniel Thürer and Martin Zobl, 'Are Nuclear Weapons Really Legal?: Thoughts on the Sources of International Law and a Conception of the Law "Imperio rationis" instead of "Ratione imperii"' in Ulrich Fastenrath and others (eds), *From bilateralism to community interest: essays in honour of judge Bruno Simma* (Oxford University Press 2011) 187.

The work of Jean d'Aspremont has raised awareness for the "politics of formal law-ascertainment"[89] and the choices for or against non-formal law ascertainment[90], the choice of the international legal profession as to its sources and the way in which normativity is produced. Taking inspiration from the sources-thesis of Hart[91], d'Aspremont has argued that the sources ultimately rest on a practice of recognition of international lawyers[92], from which it follows that the sources of a legal community are susceptible to change. Hugh Thirlway noted in response to d'Aspremont's focus on the politics of law-ascertainment that a choice as to the sources of international law "has presumably already been made: custom and the general principles of law are generally recognized to constitute sources, and it is difficult to see how international society could back away from that established system."[93] Whereas this can be the conclusion one ultimately arrives at, this conclusion is by far not self-evident and requires reasoning and justification. The sources of law in a legal community are not set in stone but can change over time.[94] In fact, scholars often have had certain preferences as to which source is particularly fit or unfit to respond to the present challenges of the international community in light of new paradigms, of a changed composition of the legal community or of the expansion of international law.[95]

89 d'Aspremont, *Formalism and the Sources of International Law* 142.

90 ibid 174 ("[...] recognizing customary international law, general principles of law, oral treaties, and oral promises as a source of international legal rules should stem from a conscious choice, i.e. a choice for non-formal law-ascertainment informed by an awareness of its costs, especially in terms of the normative character of the rules produced thereby").

91 Hart, *The concept of law: With a postscript* chapter VI.

92 Jean d'Aspremont, 'The Politics of Deformalization in International Law' (2011) 3 Goettingen Journal of International Law 503 ff.; Jean d'Aspremont, 'The Idea of 'Rules' in the Sources of International Law' (2014) 84 BYIL 116; d'Aspremont, *Formalism and the Sources of International Law* 195 ff.

93 Hugh W Thirlway, *The Sources of International Law* (Oxford University Press 2014) 209-210.

94 See below Chapter 2, p. 97.

95 Joseph HH Weiler, 'The Geology of International Law - Governance, Democracy and Legitimacy' (2004) 64 ZaöRV 547-562, writing that at the beginning of the 20th century, "one discovers a predominance of bilateral, contractual treaties and a very limited number of multilateral lawmaking treaties. One also discovers, in that earlier part of the century, a very sedate, almost 'magisterial' and backward looking practice of customary law typified by a domestic US case such as The Paquete Habana [...]".

1. Source preferences and the spirit of the time

The spirit of the time and leading paradigms can be important for the shift of source preferences. For instance, after a time when municipal law analogies had used to be rejected as dangerous to the recognition of international law as a legal system in its own right,[96] general principles of law based on private law analogies were later considered of great importance for the development of international law by courts and tribunals in the face of failed codification attempts at the international level.[97] In recent years, general principles of public law have been said to be suitable for balancing individual rights of investors and the regulatory interests of the public in the context of international investment law.[98] Moreover, legal principles occupy a prominent place in scholarly accounts analyzing international law from the perspective of a constitutional paradigm.[99]

Turning to treaties and customary international law, Bruno Simma has argued that treaties more than customary international law would be the "workhorses of community interest".[100] Other scholars have emphasized the openness of the concept of customary international law to the "needs of

96 See for instance Otto Nippold, *Der völkerrechtliche Vertrag Seine Stellung im Rechtssystem und seine Bedeutung für das internationale Recht* (1894) 82; Hersch Lauterpacht, 'The mandate under international law in the Covenant of the League of Nations' in Elihu Lauterpacht (ed) (3, Cambridge University Press 1977) vol Hersch Lauterpacht International Law Collected Papers 3. The Law of Peace 57 and 58; on Lauterpacht's study see Martti Koskenniemi, *The Gentle Civilizer of Nations The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2002) 374 ff.

97 Hersch Lauterpacht, *Private Law Analogies* (London, 1927) viii.

98 Stephan W Schill, 'Internationales Investitionsschutzrecht und Vergleichendes Öffentliches Recht: Grundlagen und Methode eines öffentlich-rechtlichen Leitbildes für die Investitionsschiedsgerichtsbarkeit' (2011) 71 ZaöRV 277.

99 Cf. Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Springer 2012) 633, 636, 647, 642, 644, 648-652, 650-660; Jochen Rauber, *Strukturwandel als Prinzipienwandel: theoretische, dogmatische und methodische Bausteine eines Prinzipienmodells des Völkerrechts und seiner Dynamik* (Springer 2018) 153.

100 Bruno Simma, 'From bilateralism to community interest in international law' (1994) 250 RdC 223; Simma argued that "lawmaking by way of custom is hardly capable of accommodating community interests in a genuine sense", ibid 224, similar Mehrdad Payandeh, *Internationales Gemeinschaftsrecht: zur Herausbildung gemeinschaftsrechtlicher Strukturen im Völkerrecht der Globalisierung* (Springer 2010) 296.

the international community",[101] and stressed custom's function as general law[102] of the international community which sets "the ground rules for the international system by imposing a minimum core of binding obligations on all states [...] [protecting] key substantive and structural interests of the international community".[103]

This book will consider these and similar sources preferences and how they inform the way in which the interrelationship of sources is discussed in specific contexts.

2. Source preferences and the changed composition of the legal community

Changing source preferences may also correspond to changes within the particular legal community which concern, for instance, the emergence of new states and of different political and economic systems within states.

Grigory Tunkin, for instance, argued that "in an age of rapid changes in every sphere of life international treaty is a more suitable means of creating norms of international law than custom [...] In contemporary conditions the principal means of creating norms of international law is a treaty."[104]

101 Anja Seibert-Fohr, 'Unity and Diversity in the Formation and Relevance of Customary International Law: Modern Concepts of Customary International law as a Manifestation of a Value-Based International Order' in Andreas Zimmermann and Rainer Hofmann (eds), *Unity and Diversity in International Law* (2006) 257 ff., and Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37(1) Yale Journal of International Law 125. The phrase "needs of the international community" was borrowed from the ICJ, see *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 178; on the relationship between community interests and customary international law see recently Samantha Besson, 'Community Interests in the Identification of International Law With a Special Emphasis on Treaty Interpretation and Customary Law Identification' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests across international law* (Oxford University Press 2018) 64-68.

102 Zemanek, 'The Legal Foundations of the International Legal System' 167, proposing that the meaning of custom, if the term proves immutable, should be "the current and regular conduct of States which corresponds to the current consensus of opinion on what the law requires. Or simpler: general international law".

103 Anthea Roberts, 'Who killed Article 38(1)(B)? A Reply to Bradley and Gulati' (2010) 21(1) Duke journal of comparative & international law 173, 176.

104 Grigory Ivanovich Tunkin, 'Co-existence and international law' (1958) 85 RdC 8, 22-23; on multilateral treaties see Grigory Ivanovich Tunkin, 'General International Law

Also, Sir Gerald Fitzmaurice was under the impression that customary international law, which he regarded to be indispensable, was challenged by newly independent states because it was understood as a genuine western concept.[105]

Against the background of the cold war and the competition of different economic systems, Tunkin was also skeptical of general principles of law as derived from municipal legal systems, "there are no normative principles or norms common to two opposing systems of law: socialist and capitalist law"[106]. He predicted "that with the development of international law the 'general principles of law' will more and more lose their ties with national legal systems from which they penetrated into international law and become more and more "general principles of international law"[107].

Customary Law Only?' (1993) 4 EJIL 534 ff.; on Soviet perspectives to international law see Theodor Schweisfurth, 'Das Völkergewohnheitsrecht - verstärkt im Blickfeld der sowjetischen Völkerrechtslehre' (1987) 30 German Yearbook of International Law 36 ff.; Lauri Mälksoo, 'The History of International Legal Theory in Russia: a Civilized Dialogue in Europe' (2008) 19 EJIL 229 (on Tunkin).

105 Gerald Fitzmaurice, 'The Future of Public International Law and of the International Legal System in the Circumstances of Today' (1975) 5(1) International Relations 746-747; cf. also *North Sea Continental Shelf* (*Federal Republic of Germany/ Denmark; Federal Republic of Germany/Netherlands*) (Judgment) [1969] ICJ Rep Diss Op Koretsky 157 (advocating the use of the term general international law, since custom "turns its face to the past while general international law keeps abreast of the times"). Also, Onuma Yasuaki argued that the doctrine of sources displays an "excessive judicial-centrism" together supported by "a (West-centric) domestic model approach in international legal thoughts" and that general international law based on international treaties would be far more legitimate than "an old customary norm which was created on State practice and opinio iuris of a limited number of powerful States", Onuma Yasuaki, 'A Transcivilized Perspective on International Law Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century' (2009) 342 RdC 221, 236, 240, 242-243; for a critique of customary international law from a TWAIL perspective see BS Chimni, 'Customary International Law: A Third World Perspective' (2018) 112(1) AJIL 1 ff.

106 Grigory Ivanovich Tunkin, '"General Principles of Law" in International Law' in René Marcic and Hermann Mosler (eds), *Internationale Festschrift für Alfred Verdross zum 80. Geburtstag* (1971) 527.

107 Grigory Ivanovich Tunkin, 'Soviet Theory of Sources of International Law' in Peter Fischer, Heribert Franz Köck, and Alfred Verdross (eds), *Völkerrecht und Rechtsphilosophie International Festschrift für Stephan Verosta zum 70. Geburtstag* (Duncker & Humblot 1980) 77.

Looking back, Abdulqawi Yusuf has argued that African states did not oppose customary international law and general principles of law as such, but rather "the genesis and process of identification" and the content of the norms, which African states began to shape.[108] He also has noted a trend from general principles based on domestic law to general principles based on the UN Charter and expressed in the Friendly Relations Declaration, which were "considered more important by newly independent African States" since these principles "offered a protective shield for their newly acquired sovereignty and granted newly independent States equal status with the major powers on the international legal plane."[109]

It is interesting to note that the Asian-African Legal Consultative Organization (AALCO) has taken an active interest in the recent work of the ILC on customary international law. According to Sienho Yee, the AALCO members' motivating concern was "protecting their sovereignty, which manifests itself in three overarching considerations—the promotion of the quality in decision-making in the identification process, the reliance on only the quality exercise of State functions, and the representativeness of the State practice and *opinio juris* at issue."[110] Also, scholars have pointed out that doctrines relating to customary international law, such as the doctrine according to which the identification of custom requires one to pay particular regard to

108 Abdulqawi A Yusuf, 'Pan-Africanism and International Law' (2013) 369 RdC 244 ff., 250-251.

109 ibid 247.

110 Sienho Yee, 'Report on the ILC Project on "Identification of Customary International Law"' (2015) 14(2) Chinese Journal of International Law 375; on the AALCO initiative Rahmat Mohamad, 'Some Reflections on the International Law Commission Topic "Identification of Customary International Law"' (2016) 15(1) Chinese Journal of International Law 41 ff.; Michael Wood, 'The present position within the ILC on the topic 'Identification of customary international law': in partial response to Sienho Yee, Report on the ILC Project on 'Identification of Customary International Law'' (2016) 15(1) Chinese Journal of International Law 3 ff.; Sienho Yee, 'A Reply to Sir Michael Wood's Response to AALCOIEG's Work and My Report on the ILC Project on Identification of Customary International Law' (2016) 15(1) Chinese Journal of International Law 33 ff.; on the Twail perspectives and the ILC-AALCO debate George Rodrigo Bandeira Galindo and César Yip, 'Customary International Law and the Third World: Do Not Step on the Grass' (2017) 16(2) Chinese Journal of International Law 251 ff. For the most recent summary of the AALCO meeting of 2018 see Sienho Yee, 'AALCO Informal Expert Group's Comments on the ILC Project on "Identification of Customary International Law": A Brief Follow-up' (2018) 17(1) Chinese Journal of International Law 187.

the practice of specially affected states can be used by the Global South for advancing their interests *vis-à-vis* Western states.[111] This demonstrates that the changes in the composition of the international community can make a particular source of law subject to both criticism and to strategic engagement and can impact the relative significance of each source.

3. Source preferences and the substantive expansion and diversification of international law

Changing source preferences may also be the result of an expansion of the international legal order itself and the emergence of new fields of international law. The expansion itself is the result of the rise of treaties: between 1946 and 2006 more than 50.000 treaties were registered with the United Nations Secretariat pursuant to Article 102(1) of the UN Charter.[112]

Scholars have expressed different views on the consequences of this expansion for the doctrine of sources. Responding to what they considered to be a too expansive use of customary international law, Bruno Simma and Philip Alston have suggested the consideration of general principles of international law as alternative source of human rights law.[113] With a view to the challenges in human rights law, environmental law, economic development and the transnational prosecution of criminality, Cherif M. Bassiouni has predicted that "it is quite likely that 'General Principles' will become the most important and influential source in this decade", which would have been the 1990s, because "conventional and customary international law have not developed the framework, norms, or rules necessary to regulate these issues, nor is it likely that these two sources of law will catch up with the

111 Kevin Jon Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112(2) AJIL 191 ff.; cf. also Jean d'Aspremont, 'A Postmodernization of Customary International Law for the First World?' (2018) 112 AJIL Unbound 295-296. Cf. on specially affected states *North Sea Continental Shelf* [1969] ICJ Rep 3, 42 para 73.

112 Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford University Press 2014) 35-36, pointing also out that one third of the 6000 multilateral treaties concluded during the 20th century were open to accession by any state.

113 Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 Australian Yearbook of International Law 84-100, 102-106.

needs of the time."[114] The view that general principles can be more important in certain areas of international law than in others has been expressed, for instance, by Christian Tams, according to whom general principles of law are "a wallflower" in public international law in general but at the same time an important source in international investment law.[115]

In comparison thereto, James Crawford argued that "international law is a customary law system, despite all the treaties".[116] Other scholars have raised the question of whether different forms of customary international law have evolved in different fields of international law.[117] Michael Waibel has reflected on the consequences of the functional differentiation for the profession of general international lawyers: "The 'invisible college' of international lawyers appears to be crumbling before our eyes. A patchwork quilt of specialized international lawyers is taking their place."[118] It has also been argued that the specialization and functional differentiation expresses itself in the fact that specific sub-regimes set up "interface-norms" which "regulate to what extent norms and decisions in one sub-order have effect in another", similar to domestic law which regulates the way in which international law

114 Mahmoud Cherif Bassiouni, 'A functional approach to "general principles of international law"' (1990) 11(3) Michigan Journal of International Law 769.

115 Christian J Tams, 'The Sources of International Investment Law: Concluding Thoughts' in Tarcisio Gazzini and Eric de Brabandere (eds), *International Investment Law. The Sources of Rights and Obligations* (Martinus Nijhoff Publishers 2012) 324.

116 James Crawford, 'Change, Order, Change: The Course of International Law General Course on Public International Law' (2013) 365 RdC 49, emphasizing the importance of custom as source of *pacta sunt servanda*; similar Ian Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations, General Course on Public International Law' (1995) 255 RdC 36, customary law "is international law".

117 Robert Kolb, 'Selected problems in the theory of customary international law' [2003] Netherlands international law review 128 (arguing that the common bound of the distinct customs still needs to be shown); Seibert-Fohr, 'Unity and Diversity in the Formation and Relevance of Customary International Law: Modern Concepts of Customary International law as a Manifestation of a Value-Based International Order' 257 ff.; d'Aspremont, 'International Customary Investment Law: Story of a Paradox' (arguing that the general doctrine of sources requires modification in the field of investment law); cf. Daniel Bodansky, 'Customary (and Not So Customary) International Environmental Law' (1995) 3 Indiana Journal of Global Legal Studies 115-116.

118 Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 165.

applies within the domestic legal order.[119] Going one step further, it even has been argued that legal fragmentation is "merely an ephemeral reflection of a more fundamental, multidimensional fragmentation of global society itself"[120] and that a new form of "global law" would grow "from the social peripheries, not from the political centres of nation states and international institutions"[121]. These views illustrate the challenges for "general law" in a

119 Nico Krisch, *Beyond Constitutionalism The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 285 ff.; cf. on "hinge" provisions Andreas L Paulus and Johann Leiss, 'Constitutionalism and the Mechanics of Global Law Transfers' (2018) 9 GoJIL 48-52.

120 Gunther Teubner and Andreas Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 1004.

121 Gunther Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' (1997) 45(1) American Journal of Comparative Law 164-165; Gunther Teubner, 'Global Bukowina: Legal Pluralism in World Society' in Gunther Teubner (ed), *Global law without a state* (Dartmouth 1997) 3 ff.; public international law scholars are skeptical as to the actual existence of such global law without the state and to the desirability of this development which raises questions of political legitimacy and accountability, cf. Crawford, 'Change, Order, Change: The Course of International Law General Course on Public International Law' 143; for a defense of general international law see also Andreas L Paulus, 'Commentary to Andreas Fischer-Lescano & Gunther Teubner The Legitimacy of International Law and the Role of the State' (2004) 25 Michigan Journal of International Law 1050 (arguing that "in spite of an ever-growing functional differentiation, issue areas are held together by a minimum of common values and decision-making procedures - in other words by general international law which bases its legitimacy on decisions of, ideally democratic, national processes of decision-making."); Andreas L Paulus, 'Fragmentierung und Segmentierung der internationalen Ordnung als Herausforderung prozeduraler Gemeinwohlorientierung' in Hans-Michael Heinig and Jörg Philipp Terhechte (eds), *Postnationale Demokratie, Postdemokratie, Neoetatismus Wandel klassischer Demokratievorstellungen in der Rechtswissenschaft* (Mohr Siebeck 2013) 143 ff.; from a private law perspective, Ralf Michaels speaks of the "mirage of non-state governance" and argues that the true *lex mercatoria* was not exclusively non-state law but consisted of a "continuous competition and interplay between state and non-state institutions [...] transcend[ing] the divide between state and non-state law", Ralf Michaels, 'The True Lex Mercatoria: Law Beyond the State' (2007) 14(2) Indiana Journal of Global Legal Studies 465-466; Ralf Michaels, 'The Mirage of Non-State Governance' [2010] Utah Law Review 43; in a similar sense, Lars Viellechner speaks of "transnationalization" of the law, Lars Viellechner, *Transnationalisierung des Rechts* (Velbrück 2013) 301; on this debate, see also Andreas L Paulus, 'Zusammenspiel der Rechtsquellen aus völkerrechtlicher Perspektive' in *Internationales, nationales und privates Recht: Hybridisierung der Rechtsordnungen?:*

legal order that is more and more shaped by specialized regimes. By examining the relative significance of the three sources and their interrelationship in special fields and contexts, this book will also focus on the interplay and the mutual influence between general international law and more special law.

IV. The Concept of interrelationship of sources and the scope of this study

1. The interrelationship of sources

Each source seems to have its own advocates, and it is not the purpose of this book to champion one particular source. This study pursues a different objective and focuses on the interrelationship of sources. This study prefers the term "interrelationship" over "relationship" since this term denotes more clearly the interplay between the sources and the idea of the present sources as an interrelated system.[122]

Immunität, 33. Tagung der Deutschen Gesellschaft für Internationales Recht (CF Müller 2014) 38 (arguing that there is no "hybrid" law but a hybrid set of facts to which the law is applied).

122 Scholars have used the term "interrelationship" before, see for instance Georg Nolte, 'How to identify customary international law? - On the final outcome of the work of the International Law Commission (2018)' [2019] (37) KFG Working Paper Series 19-20 (interrelationship of sources); Alf Ross, *A Textbook of International Law: General Part, originally published 1947* (2nd edn, The LawBook Exchange 2008) 92 (interrelationship of sources); Thirlway, *The sources of international law* 156 (interrelationship of norms of different sources); Jörg Kammerhofer, 'Uncertainty in the formal Sources of international Law: customary international Law and some of its Problems' (2004) 15(3) EJIL 536 (interrelation of sources); Villiger, *Customary International Law and Treaties* xxvii, 146, 189 (interrelation between and of sources). The term "sources" can be understood differently (cf. Thirlway, *The sources of international law* 6-7). For the purposes of the present study, "sources of international law define the rules of the system: if a candidate rule is attested by one or more of the recognized 'sources' of international law, then it may be accepted as part of international law" (Crawford, *Brownlie's principles of public international law* 18). In this sense, sources "refer to processes by which international legal norms are created, modified and annulled, but also to the *places* where their normative outcomes, i.e. valid international legal norms, may be found" (Besson, 'Theorizing the Sources of International Law' 169-170). Cf. also Robert Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' (2006) 53(1) Netherlands International Law Review 3-4; cf. Maarten Bos, 'The Recognized

The question of the interrelationship between written law and unwritten law and the sources as reflected in article 38(1) ICJ Statute[123] is a contingent one, its answer depends on the preferences and perceived needs of the respective legal community.[124] It concerns the relative significance of each source and the distribution of normativity within the international community.[125] This study is, therefore, not meant to be a commentary to article 38. Article 38

Manifestations of International Law A New Theory of "Sources"' (1977) 20 German Yearbook of International Law 10-13, 15.

123 This study is not primarily concerned with the debate on whether additional sources should be recognized, see on this debate, in particular with respect to unilateral acts and decisions of international organizations Verdross and Simma, *Universelles Völkerrecht Theorie und Praxis* 323-328; Pellet and Müller, 'Article 38' 853-864; Thirlway, *The sources of international law* 24-30. Therefore, this study does not engage with scholarship which develops and proposes normative frameworks in which international organizations exercise "global governance", "public authority" and remain accountable and subject to law, see Benedict Kingsbury, Nico Krisch, and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3-4) Law and contemporary problems 20, 29; Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20(1) EJIL 26; Armin von Bogdandy, Matthias Goldmann, and Ingo Venzke, 'From Public International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28(1) EJIL 122; Matthias Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 9(11) German Law Journal 1869 et ff.; Matthias Goldmann, *Internationale öffentliche Gewalt* (Springer 2015) 383; Philipp Dann and Marie von Engelhardt, 'Legal Approaches to Global Governance and Accountability: Informal Lawmaking, International Public Authority, and Global Administrative Law Compared' in Joost HB Pauwelyn, Ramses Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012) 106 ff.

124 Cf. Ago, 'Science juridique et droit international' 942-943; cf. also Kammerhofer, 'Uncertainty in the formal Sources of international Law: customary international Law and some of its Problems' 547-551 (on whether the sources of international law are "normatively ordered" (at 549) which he rejects as there are no "rules" governing the relationship of sources).

125 Cf. also Weil, 'Le droit international en quête de son identité: cours général de droit international public' 138-139; Jennings and Watts, *Oppenheim's International Law: Volume 1 Peace* 24; Crawford, *Brownlie's principles of public international law* 20-21; on the concept of the international community see Andreas L Paulus, *Die internationale Gemeinschaft im Völkerrecht: eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (Beck 2001); Simma, 'From bilateralism to community interest in international law' 217 ff.; Christian Tomuschat, 'Die internationale Gemeinschaft' (1995) 33(1-2) Archiv des Völkerrechts 1 ff.; Hermann Mosler, 'The international society as a legal community' (1974) 140 RdC

is first and foremost a treaty provision relating to the applicable law of the Court.[126] Beyond that it surely is part of international law's cultural heritage and the sources continue to be the basis on which today's international legal order as a whole rests.[127] Yet, Article 38 can be nothing more than a starting point for an analysis of the interrelationship of sources today.[128]

In particular, article 38 does not answer the questions of each source's relative significance in the present international community, of whether courts' and tribunals' institutional framework, shifts in the preferred legal doctrinal technique or the spirit of the time favour one source over the other sources. The legal community may have made different choices as to the

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1 ff.; Payandeh, *Internationales Gemeinschaftsrecht: zur Herausbildung gemeinschaftsrechtlicher Strukturen im Völkerrecht der Globalisierung*.

126 Pierre-Marie Dupuy, 'La pratique de l'article 38 du Statut de la Cour internationale de Justice dans le cadre des plaidoiries érites et orales' in Office of Legal Affairs (ed), *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (The United Nations 1999) 379; Onuma Yasuaki, *International Law in a Transcivilizational World* (Cambridge University Press 2017) 105-6.

127 Kohen, 'La pratique et la théorie des sources du droit international' 82-83; Christian Tomuschat, 'International law: ensuring the survival of mankind on the eve of a new century: general course on public international law' (1999) 281 RdC 307: "Article 38 belongs to the core substance of the constitution of the international community. If major disputes had to be fought on that issue, the notion of an international legal order would be doomed." For a recent study of the reception of article 38, including the jurisprudence of domestic courts see Diego Mejía-Lemos, 'Custom and the Regulation of 'the Sources of International Law'' in Panos Merkouris, Jörg Kammerhofer, and Noora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022) 147.

128 See Weil, 'Le droit international en quête de son identité: cours général de droit international public' 138; Bernhardt, 'Ungeschriebenes Völkerrecht'; Hugh W Thirlway, *International Customary Law and Codification: an examination of the continuing role of custom in the present period of codification of international law* (Leiden: Sijthoff, 1972) 39, 145; it has been argued that a law without sources of law ("Recht ohne Rechtsquellen") will emerge if international law publicists will not detach themselves from article 38(1) of the ICJ Statute, Matthias Ruffert, 'Gedanken zu den Perspektiven der völkerrechtlichen Rechtsquellenlehre' in Matthias Ruffert (ed), *Dynamik und Nachhaltigkeit des öffentlichen Rechts: Festschrift für Meinhard Schröder zum 70. Geburtstag* (Duncker & Humblot 2012) 84; for the term "Recht ohne Rechtsquellen" see Christian Tietje, 'Recht ohne Rechtsquellen? Entstehung und Wandel von Völkerrechtsnormen im Interesse des Schutzes globaler Rechtsgüter im Spannungsverhältnis von Rechtssicherheit und Rechtsdynamik' (2003) 24 Zeitschrift für Rechtssoziologie 27 ff.

relative place given to each source.[129] Continuing to recognize customary international law as one of the sources of international law does not indicate whether customary international law in fact is expansively used as a legal basis for rules and concepts, whether it is used for both primary rules of obligation and secondary rules or whether it is confined to one of the just mentioned categories of rules.[130] Examining the functions and the place of each source in the international community can become important for an evaluation of the sources and their different strengths and weaknesses. For instance, from a practical point of view, uncertainties as to the ascertainment of customary international law and general principles may appear tolerable against the background of their relative significance and the function these sources fulfil. If the lack of normative hierarchy between the sources and the possibility that treaties, customary international law and general principles of law may derogate from each other are accepted, the question will still arise as to whether derogation of a rule in a treaty by customary international law frequently occurs in the present legal community or whether the relationship between sources is characterized more by harmony and convergence than by conflict and rivalry.

For these purposes, it is necessary to analyze international practice when it comes to the interpretation and application of international law.[131] This study will explore the sources of international law in relation to each other and in different contexts.[132] In specific contexts it is possible to examine which one of

129 As will be pointed out below, the history of international investment law and the move to bilateral treaties can be seen against the background that it was not possible on the basis of general principles of law and customary international law alone to overcome the political tensions relating to the protection of the rights of aliens, p. 564 ff.

130 On doubts whether the rules of treaty interpretation can be conceptualized as customary international law at all, see for instance Jean d'Aspremont, 'The International Court of Justice, the Whales, and the Blurring of the Lines between Sources and Interpretation' (2016) 27(4) EJIL 1030 footnote 7.

131 For a perspective that distinguishes between sources on the one hand and interpretation on the other hand see Ingo Venzke, *How interpretation makes international law: on semantic change and normative twists* (Oxford University Press 2012) 29 ff.

132 For the view that the interpretation of a legal norm requires consideration of the context in which it operates see Friedrich von Kratochwil, 'How Do Norms Matter?' in Michael Byers (ed), *The role of law in international politics: essays in international relations and international law* (Oxford University Press 2000) 40-41, 68; Michael Byers, *Custom, power and the power of rules: international relations and customary international law* (Cambridge University Press 1999) 149 (shared understandings);

the different possible relationships between sources asserts itself and to what extent this can be explained then by the institutional characteristics of this context. Such a contextualized approach can contribute to the understanding of the sources today.

2. Benefits of a focus on the interrelationship of sources in international practice

James Crawford once submitted in respect of customary international law, which arguably holds true *mutatis mutandis* for general principles of law as well: "But if we focus too much on the generic formulas of customary international law, we overlook how it tends to work in practice."[133]

Each source of international law can be subjected to questions which could raise serious doubts. For the purposes of illustration and exemplification: customary international law has been described as "smiling sphinx in the

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cf. also Oliver Lepsius, *Relationen: Plädoyer für eine bessere Rechtswissenschaft* (Mohr Siebeck 2016) 22-23 (arguing that norms should be analyzed in relation to each other); Lepsius also suggests that a legal analysis of norms should take account of different institutional contexts, be it the context of the legislature, the context of judicial application and the context of scholarly contemplation, Oliver Lepsius, 'The quest for middle-range theories in German public law' (2014) 12(3) Journal of International Constitutional Law 704-707.

133 Crawford, 'Change, Order, Change: The Course of International Law General Course on Public International Law' 69; see also Eyal Benvenisti, 'Customary International Law as a Judicial Tool for Promoting Efficiency' in Moshe Hirsch and Eyal Benvenisti (eds), *The impact of international law on international cooperation: theoretical perspectives* (Cambridge University Press 2004) 101,103, describing how courts "carefully tailored a specific norm pertaining only to the two litigants", in his view, the doctrine on customary international law does "fail if its role is to provide positive norms based on general and persistent state practice simply because on many important questions there is no such practice". Kolb, 'Selected problems in the theory of customary international law' 147, arguing in relation to customary international law and its relationship to a treaty that "the problem can often easily be solved in a concrete context [...] in a specific context, it will become clear what has to be done."; cf. Thomas M Franck, 'Non-treaty Law-Making: When, Where and How?' in Rüdiger Wolfrum and Volker Röben (eds), *Developments of international law in treaty making* (Springer 2005) 423 (rules of unwritten law need to pass the "but of course"- test).

realm of legal theory"[134], "riddled with paradoxes and contradictions"[135]. When does a normative rule emerge from factual practice, how can a new rule which contravenes an existing one emerge, what is the relationship between the material and the psychological element, between practice and *opinio juris*, can one really ascertain a rule exclusively by induction or deduction, or are rules simply asserted?[136] If general principles of law are understood as municipal law analogies, the question will arise what degree of representativeness as to the selected jurisdictions is necessary.[137] If general principles are understood as broad principles that are inherent in any legal order, they may face the criticism that the content of a particular principle is unclear[138] or that they are a form of "natural law". The concept of the treaties raises the questions of whether a treaty is really a source of law or only a source of obligation that is dependent on another source of law,[139] and whether a truly general or common law is possible at all, given that treaties bind only parties. In addition, even though a treaty may be regarded as having a higher ontological determinacy, other sources of law with their uncertainties may enter the content-determination process. Customary international law as reflected in Article 31(3)(c) VCLT requires the interpreter to take into account any relevant rule of international law applicable in the relations between the parties.[140] The rise of treaties does not indicate whether recourse to unwritten international law remains necessary for the purposes of content-determination or whether such recourse actually takes place at all. It is for

134 Kolb, 'Selected problems in the theory of customary international law' 119.

135 Crawford, 'Change, Order, Change: The Course of International Law General Course on Public International Law' 68: for an overview see László Blutman, 'Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail' (2014) 25(2) EJIL 529 ff.

136 Stefan Talmon, 'Determining Customary International Law: the ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) EJIL 417 ff.; for an overview of these questions cf. Daniel H Joyner, 'Why I Stopped Believing in Customary International Law' (2019) 9(1) Asian Journal of International Law 31 ff.

137 Cf. Neha Jain, 'Comparative International Law at the ICTY: The General Principles Experiment' (2015) 109 AJIL 80 ff.

138 Cf. Weil, 'Le droit international en quête de son identité: cours général de droit international public' 146.

139 Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' 153 ff.; on the Fitzmaurice *dictum* see Asif Hameed, 'Some Misunderstandings about Legislation and Law' (2017) 16(3) Chinese Journal of International Law 507-510.

140 The term "rule" encompasses both customary international law and general principles of law, see above, p. 32.

this reason that the approach of this study will focus in several chapters on legal practice. This does not mean, however, that the practice of sources and the theory of sources have to be separated from each other. On the contrary, a study of the interrelationship of sources in different contexts can be insightful for the theory of sources.

3. Contribution of an analysis of the interrelationship of sources to the doctrine relating to each source

This book's perspective on the interrelationship of sources can complement perspectives that focus on one particular source. The focus on the interrelationship of sources can arguably make an important contribution to the doctrine of sources generally and the doctrine relating to each source specifically.

a) Customary international law

This book's perspective, for instance, highlights and illustrates the significance of interpretative decisions and the legal craft[141] in relation to customary international law.

It must be admitted at the outset that certain scholars suggest that customary international law cannot be subject to interpretation: the reason for this would be that the identification of a rule and the determination of the content of said rule fall together, hence "content merges with existence".[142]

141 For general treatments of legal craft in international law see Clarence Wilfred Jenks, 'Craftsmanship in International Law' (1956) 50(1) American Journal of International Law 32 ff.

142 Maartens Bos, *A methodology of international law* (North-Holland 1984) 109; see also Jean d'Aspremont, 'Reductionist legal positivism in international law' (2012) 106 Proceedings of the American Society of International Law at Its Annual Meeting 369-370; d'Aspremont, *Formalism and the Sources of International Law* 173-174: Rauber, *Strukturwandel als Prinzipienwandel: theoretische, dogmatische und methodische Bausteine eines Prinzipienmodells des Völkerrechts und seiner Dynamik* 564, 569-570; Rudolf Bernhard, 'Interpretation in International Law' in *Encyclopedia of public international law. East African Community to Italy-United States Air Transport Arbitration (1965): [E - I]* (North-Holland 1995) vol 2 1417 (even though "the content and limits of rules of customary international law often need clarification [...] it is neither usual nor advisable to use the notion of inter-

However, it is submitted that the intertwinement of rule identification and content-determination which is characteristic of customary international law and general principles of law does not have to mean that the identification of customary international law does not involve interpretative decisions.[143] Already the observations and comparisons of facts entail normative consid-

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pretation in connection with the clarification of norms of customary law since the process and maxims are different: the rules of interpretation in international law have been developed for written texts [...]"); Félix Somló, *Juristische Grundlehre* (Meiner 1917) 373; cf. Birgit Schlütter, *Developments in customary international law: theory and the practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff Publishers 2010) 89, but see also at 338 ("one preliminary aspect of any assessment of the formation of a new rule of customary international law should be the careful identification, consideration and interpretation of the applicable law as it stands"); see recently Massimo Lando, 'Identification as the Process to Determine the Content of Customary International Law' (2022) 42(4) Oxford Journal of Legal Studies 1045 ff.

143 As put by Kolb, 'Selected problems in the theory of customary international law' 131: "This work of the interpreter is highly creative and introduces into custom an axiological and subjective bent, which hardly jibes with the usual view that custom is simply the faithful reproduction of state practice. It is not. Custom is a legal and intellectual construct, developed through a complex process of analogical reasoning reducing to an 'artificial' unity a series of unconnected facts and acts"; in this sense also Denis Alland, 'L'interprétation du droit international public' (2012) 362 RdC 83-88; Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* 497; Matthias Herdegen, 'Interpretation in International Law' [2013] Max Planck EPIL para 61; *North Sea Continental Shelf* [1969] ICJ Rep 3 Diss Op Tanaka 181 (on logical and teleological interpretation); on the importance of normative considerations see also Oscar Schachter, 'International Law in Theory and Practice: general course in public international law' (1982) 178 RdC 96, 334-335 (on necessary value-judgments and the significance of resolutions and statements for custom); Andreas L Paulus, 'International Adjudication' in Samantha Besson and John Tasioulas (eds), *The philosophy of international law* (Oxford University Press 2010) 221-222 (on the role of normative consideration in the process judicial application of international law); Emmanuel Voyiakis, 'Customary International Law and the Place of Normative Considerations' (2010) 55 American Journal of Jurisprudence 163 ff.; Albert Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht' (1977) 37 ZaöRV 520 ff.; Peter Haggenmacher, 'La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale' (1986) 90 RGDIP 119. Cf. also Duncan B Hollis, 'The Existential Function of Interpretation in International Law' in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 78 ff., arguing that interpretation is also important for the question of what constitutes customary international law.

erations, as the interpreter has to decide what is comparable, to determine default positions and the level of abstractness of the rule to be identified, to evaluate practice and to eliminate practice which is no longer deemed to be appropriate in the present community.[144] In addition, a rule has to be identified, its scope needs to be determined and interpreted and it has to be concretized, which arguably also involves interpretation, by way of application to the case at hand.[145] It has also been questioned whether one can convincingly treat rules of customary international law and such rules which have been codified in a convention differently, as far as interpretability is concerned.[146]

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144 Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) 4 EJIL 317-318: "[...] the more concrete a norm will be formulated, the fewer cases may be found to fall under it and the more difficult it will be to identify that norm as a rule of customary law. Conversely, if a higher degree of abstraction is applied, the range of actions encompassed by the rule will grow."; on different degrees of abstraction of a rule see also Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht' 510; Robert Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* (Bruylant 2006) 228; Orfeas Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 EJIL 243-244, 249-253; Charles de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Pedone 1963) 9 (the doctrine of interpretation should not be confined to treaties only); Peter Staubach, 'The Interpretation of Unwritten International Law by Domestic Judges' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016) 120-121 (describing a "hermeneutic circle" by which the recognition of custom requires facts and legal principles to be considered in light of each other).

145 Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* 221. Cf. in a similar way Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' 245-246; Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht' 522-523 and Klaus Ferdinand Gärditz, 'Ungeschriebenes Völkerrecht durch Systembildung' (2007) 45(1) Archiv des Völkerrechts 22-24, both on the value of past acts of subsumption for the interpretation of custom and the necessity to take account not only of the rule but also of the circumstances to which the rule was applied.

146 Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* 221, 233; cf. also Robert Kolb, 'Is there a subject-matter ontology in interpretation of international legal norms?' in Mads Tønnesson Andenæs and Eirik Bjørge (eds), *A Farewell to Fragmentation Reassertion and Convergence in International Law* (Cambridge University Press 2015) 481-483, 485, while the ascertainment of a rule and the rule's interpretation

Whilst the International Law Commission by and large excluded the questions of interpretation of customary international law and of the interrelationship of sources[147], this study illustrates, for instance, the interpretative decisions made by courts and tribunals in relation to customary international law, the structure of the analysis of customary international law and the significance of normative default positions.[148] Reflections on interpretative decisions in the identification of customary international law may help in explaining why different interpreters or law-applying authorities came to different results when identifying customary international law and in locating the points of disagreement. This can lead to the refinement of criticism and improve the quality of engagement with identifications of customary international law.

b) General principles of law

Before setting out this study's contribution to the doctrine of general principles of law, it is helpful to illustrate the background of the discussion. General principles of law are often portrayed as principles which are based on domestic law analogies, hence which are recognized *in foro domestico*[149] and which can be transposed to the international level.[150] This starting point raises the

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may tend to merge, he argues that the interpretative regime of the VCLT can be extended *mutatis mutandis* to customary international law; see also Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht' 526-528 (on grammatical, systemic and teleological interpretation).

147 *ILC Report 2018* at 124 paras 5-6; see below, p. 374.

148 Cf. for the importance on judicial practice Pierre-Marie Dupuy, 'L'unité de l'ordre juridique international: cours général de droit international public' (2002) 279 RdC 167: "C'est ainsi par une interprétation a posteriori que le juge construit largement lui-même la démonstration de l'existence de la règle de droit bien plus qu'il ne la dévoile".

149 Pellet and Müller, 'Article 38' 927-928; for an overview see also Béla Vitanyi, 'La signification de la "généralité" des principes de droit' (1976) 80 RGDIP 48 ff.]; Vladimir-Djuro Degan, 'General Principles of Law (A Source of General International Law)' (1992) 3 Finnish Yearbook of International Law 1 ff.

150 Jules Basdevant, 'Règles générales du droit de la paix' (1936) 58 RdC 501; Pellet and Müller, 'Article 38' 930-391; *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128, Sep Op McNair 148: "The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules."

question of whether general principles of law can also be inferred from the international legal order or whether general principles of international law[151] fall under article 38(1)(c) ICJ Statute or have to be based on a source referred to in article 38(1)(a) or (b) ICJ Statute.[152]

The purpose of general principles is said to fill gaps and to be a "transitory source"[153] of international law through which new norms arise in customary international law or treaty law. According to Humphrey Waldock, "there is a certain overlap between custom and general principles of national law as sources of rules of international law [...] there will always be a tendency for a general principle of national law recognized in international law to crystallize into customary law."[154] It is also suggested that *rules* of customary international law can be distinguished from general *principles* of law according to a distinction between rules and principles in legal theory[155] or

151 Cf. already Ian Brownlie, *Principles of Public International Law* (2nd edn, 1973) 19: "The rubric [general principles of international law] may refer to rules of customary law, to general principles of law as in Article 38(1)(c), or to logical propositions resulting from judicial reasoning on the basis of existing pieces of international law and municipal law analogies. [...] Examples of this type of general principle are the principles of consent, reciprocity, equality of states [...] In many cases, these principles are to be raced to state practice. However, they are primarily abstractions from the mass of rules and have been so long and so generally accepted as to be no longer directly connected with state practice. In a few cases the principle concerned, through useful, is unlikely to appear in ordinary state practice."

152 Pellet and Müller, 'Article 38' 926 footnote 764, remain skeptical and refer to the French text: "Another indication that the general principles of article 38, para. 1 (c) cannot be assimilated to those general principles of international law is to be found in the French text of this provision: by using the preposition 'de' ('principes généraux de droit international') instead of 'du', it shows that said principles are not limited to international law—they are not the principes généraux du droit international." For the discussions of general principles in the ILC, see below, pp. 386 ff.

153 ibid 941; cf. also Samantha Besson, 'General Principles in International Law - Whose Principles?' in *Les principes en droit européen = Principles in European law* (Schulthess 2011) 19 ff., describing how principles can transform moral values into the legal order.

154 Humphrey Waldock, 'General course on public international law' (1962) 106 RdC 62, see also at 63, concluding that the ICJ treats "'the common law' which it is authorized to apply under Article 38 paragraph (b) and (c), very much as a single corpus of law".

155 Cf. Niels Petersen, 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' (2008) 23(2) American University International Law Review 275 ff.

that customary international law emerges in situation dominated by factual reciprocity, whereas the general principles emerge in situations which are characterized by the absence of factual reciprocity.[156]

The ICJ itself rarely referred explicitly to general principles of law[157] and does not distinguish between rules and principles in a legal theoretical sense.[158] As the *Gulf of Maine* Chamber held, "the association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context 'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character."[159]

This study will delineate the concept of general principles in the second chapter.[160] It will be argued that general principles of law are intrinsically connected to the idea of law and to the process of legal reasoning.[161] Based on this understanding which is informed by comparative historical insights and legal theory, it is possible to reconsider certain controversies discussed in relation to general principles.

Firstly, it is true that, as the recognition requirement in article 38(1)(c) ICJ Statute also indicates, a principle needs to be based on a certain amount of legal practice. Whereas a certain representativeness as to the selection of municipal legal orders is important, one should not, however, overemphasize the requirement of representativeness. Representativeness in municipal legal orders can be important for increasing the persuasiveness of a principle but representativeness alone cannot guarantee that a principle can be transposed

156 Cf. Thomas Kleinlein, 'Customary International Law and General Principles Rethinking Their Relationship' in Brian D Lepard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017) 132.

157 Pellet and Müller, 'Article 38' 924 para 254; see below, p. 306.

158 Cf. d'Aspremont, 'What was not meant to be: General principles of law as a source of international law' 169: "[D]espite a number of authors mechanically identifying a use of general principles of law every time one of these Courts has mentioned the words 'general principles', it is commonly contended that general principles have played a very marginal role in the case law and advisory opinions of these two adjudicatory bodies".

159 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States of America*) (Judgment) [1984] ICJ Rep 288-290 para 79.

160 See below, p. 138.

161 See also Georg Schwarzenberger, 'The fundamental principles of international law' (1955) 87 RdC 200-202.

to the international legal order.[162] It is perhaps not realistic to assume that an interpreter will always keep both steps, the search for commonalities in municipal legal orders and the evaluation of the transposability of such principle, apart. Presumably, the interpreter will be primarily concerned with international law for which she will search for inspiration in legal practice. General principles then embody maxims, judicial experience, precepts of common sense and of good practice[163] which can be of assistance in interpreting international law. As Prosper Weil pointed out, a principle thus ascertained and applied in the context of international law may look different from how it exists in a particular domestic setting.[164]

Secondly, the question of whether article 38(3) PCIJ Statute and article 38(1)(c) ICJ Statute refer not only to the general principles of law recognized *in foro domestico* but also to general principles formed within international law is a question of the interpretation of this provision, rather than of the concept of general principles. It is plausible that the view to require principles' manifestation *in foro domestico* was motivated by historical experiences, the failure of the Prize Court due to uncertainties as to the origin of principles, and the less sophisticated international legal structure as such back in 1920.[165] Based on the understanding of general principles proposed in this study, Article 38(1)(c) ICJ Statute, and article 38(3) PCIJ Statute, can be understood as declaratory recognition of the role of principles in the interpretation, application and development of the law and of the view that international law may benefit from the consideration of certain general principles and legal precepts to which recourse is had in municipal legal orders.

Based on the understanding developed in the second chapter, general principles of law can be based on extrapolations from more specific rules both of the international legal order and of municipal legal orders. It is perhaps a particularity of the international legal order and explicable by reference to the recorded debates of the Advisory Committee of Jurists that the use of general principles derived from separate legal orders, namely domestic legal orders, seems to be traditionally more accepted in public international law doctrine by and large than in domestic law, where the use of general

162 This point has also been raised in the discussions within the ILC, see *ILC Report 2022* at 311, 315.

163 Basdevant, 'Règles générales du droit de la paix' 502.

164 Weil, 'Le droit international en quête de son identité: cours général de droit international public' 147.

165 Kleinlein, 'Customary International Law and General Principles Rethinking Their Relationship' 136-137; see below Chapter 3.

principles derived from the same legal order can be less controversial than the use of principles based on comparative legal research.[166]

General principles need to be balanced against each other and specified in relation to the specific context. Therefore, general principles of law should not be understood in isolation from more specific rules of other sources, as they operate within the confines of legal reasoning and reveal themselves in the interpretation of other rules.[167] In general, a legal reasoning certainly

166 The ILC commentary on the provisionally adopted draft conclusion 7 on general principles lists as one reason in favour of general principles that formed within the international legal order that "the international legal system like any other legal system, must be able to generate general principles of law that are intrinsic to it [...] and not have only general principles of law borrowed from other legal systems", *ILC Report 2022* at 322; *Report of the International Law Commission: Seventy-fourth session (24 April–2 June and 3 July–4 August 2023)* UN Doc A/78/10 at 22. On the debate on the use of comparative legal insights for the interpretation of the US constitution see Vicki C Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119(1) Harvard Law Review 109 ff.; Jeremy Waldron, 'Foreign Law and the Modern Ius Gentium' (2005) 119(1) Harvard Law Review 129 ff.; Ernest A Young, 'Foreign Law and the Denomination Problem' (2005) 119(1) Harvard Law Review 148 ff.; Koen Lenaerts and Kathleen Gutman, 'The Comparative Law Method and the European Court of Justice: Echoes across the Atlantic' (2016) 64 American Journal of Comparative Law 841 ff.; see recently on the use of other domestic constitutional courts' decisions Stefan Martini, *Vergleichende Verfassungsrechtsprechung: Praxis, Viabilität und Begründung rechtsvergleichender Argumentation durch Verfassungsgerichte* (Duncker & Humblot 2018) 28 ff.; Peter-Michael Huber and Andreas L Paulus, 'Cooperation of Constitutional Courts in Europe: the Openness of the German Constitution to International, European, and Comparative Constitutional Law' in *Courts and Comparative Law* (Oxford University Press 2015) 292-293.

167 Cf. in a similar sense Olufemi Elias and Chin Lim, ''General Principles of Law', 'Soft' Law and the Identification of International Law' (1997) 28 Netherlands Yearbook of International Law 28. See below, p. 138; this study will therefore focus on the ways in which general principles operate through the legal operator, no compilation of a list of "general principles" is here intended; for such a list see Marija Dordeska, *General principles of law recognized by civilized nations (1922-2018). The evolution of the third source of international law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice* (Brill Nijhoff 2019) 351 ff. according to whom "it sufficed that the Court referred once to the norm as a 'principle' for it to be considered as a general principle within the meaning of Article 38(1)(c) of the Court's Statute" (at 206) and who excluded only phrases such as "in principle", "of principle", "on this principle" and "as a matter of principle" (at 209).

can derive its persuasiveness from recourse to a general principle of law, but at the same time this specific use of this very general principle as opposed to a competing principle needs to derive its persuasiveness from the legal reasoning.

Therefore, and thirdly, the study will submit that general principles of law should be recognized as a distinct concept without being subsumed under the concept of customary international law. Even though it may be difficult to sharply distinguish between custom and a general principle of law in relation to a norm, in particular when this norm operates on a high level of generality, both remain different and yet interrelated concepts, just as a treaty and a general principle of law remain different concepts when a general principle of law is used in relation to the interpretation and application of a treaty. This does not exclude the possibility that a general principle of customary international law can be both a principle and belong to the realm of customary international law.[168]

c) Treaties

A close look at the identification, interpretation and application of international law reveals that treaties can have different subtle effects and inform

168 Cf. also Brian D Lepard, *Customary International Law A New Theory with Practical applications* (Cambridge University Press 2010) 162-168. Lepard argues that his understanding of customary international law with a focus on *opinio juris* "helps to break down an artificial barrier" between customary international law and general principles of law (163), while acknowledging that differences between the two concepts continue to exist, as the concept of general principles "can encompass general principles of national law as well as general principles of international law and general principles of moral law" (164). Principles from each category may, but do not necessarily have to, also qualify as customary international law; in the case of principles of moral law this may be the case "if states have a belief that the principles should be recognized immediately or in the near future as legally authoritative" (165). The normativity of principles differs from having only persuasive authority to binding authority (168). "The character of any principle will depend on its content, which in turn is a function of the views and attitudes of states" (168); cf. also recently *Comment by Mathias Forteau, Summary record of the 3588th meeting, 5 July 2022* UN Doc A/CN.4/SR.3588 (PROV.) 12 ("a principle that had been deduced from customary international law continued to belong to customary international law, just as a principle that had been deduced from treaty law continued to belong to treaty law").

the identification of customary international law. A treaty can set forth a specific rule which constitutes a codification of customary international law, crystallized or gave rise to an equivalent rule of customary international law. In addition, it is submitted that treaties can affirm, concretize or rely on a general principle of international law and can sometimes therefore be relied upon for the interpretation of this principle by the legal operator. The concept of general principles thus bridges treaties and customary international law and can, in the hands of the able legal operator, contribute to the harmonization and coherence[169] of the international legal system. Last but not least, the international legal system is in many ways shaped by treaties. This study examines to what extent the practice in a treaty-based regime changes the relative significance of each source and how the construction of incorporation of other sources into treaty interpretation can affect the further development of (customary) international law. It also analyzes whether and how concepts based on treaty law complement or functionally replace concepts of general international law.

169 On the aspect of coherence see Mads Andenæs and Ludovica Chiussi, 'Cohesion, Convergence and Coherence of International Law' in Mads Andenæs and others (eds), *General principles and the coherence of international law* (Brill Nijhoff 2019) 9 ff.

V. Situating the present study

This study is not primarily concerned with one particular source[170], one particular paradigm or context[171]. Rather than addressing the interrelationship of sources incidentally, this study puts the interrelationship of sources at the center of its research focus.[172] This choice is underlined by the conviction

170 Géza Herczegh, *General Principles of Law and the International Legal Order* (Kiadó 1969); Pierre-Yves Marro, *Allgemeine Rechtsgrundsätze des Völkerrechts* (Schulthess 2010); Robert Kolb, *La bonne foi en droit international public Contribution à l'étude des principes généraux de droit* (Presses Universitaires de France 2000) 82 ff.; Robert Kolb, *Good Faith in international law* (Hart 2017); Merkouris, *Article 31(3)(c) vclt and the Principle of Systemic Integration* 300, demonstrating that customary international law on the rules of interpretation was interpreted by WTO panels and Appellate Bodies and concluded that systemic interpretation as enshrined in article 31(3)(c) VCLT is apposite also to customary international law; Michael P Scharf, *Customary International Law in Times of Fundamental Change Recognizing Grotian Moments* (Cambridge University Press 2013) 5; Peter G Staubach, *The Rule of Unwritten International Law: Customary Law, General Principles, and World Order* (Routledge 2018) examines the "unwritten international law" as instrument of spontaneous self-organization and focuses in particular on purposive interpretation of custom and on analogical reasoning in relation to general principles. Dordeska, *General principles of law recognized by civilized nations (1922-2018). The evolution of the third source of international law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice* 206, 209; see recently Imogen Saunders, *General Principles as a Source of International Law* (Hart 2021), focusing on general principles of law in the jurisprudence of international courts and tribunals.

171 On general principles and the constitutionalization of international law see Kleinlein, *Konstitutionalisierung im Völkerrecht Konstruktion und Elemente einer idealistischen Völkerrechtslehre*, see below, p. 662; Rauber, *Strukturwandel als Prinzipienwandel: theoretische, dogmatische und methodische Bausteine eines Prinzipienmodells des Völkerrechts und seiner Dynamik*; see below, p. 663.

172 Certain monographic studies on the relationship between sources by Richard Reeve Baxter, 'Treaties and Customs' (1970) 129 RdC 27 ff., Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971), Thirlway, *International Customary Law and Codification: an examination of the continuing role of custom in the present period of codification of international law* and Villiger, *Customary International Law and Treaties* were primarily concerned with the relationship between customary international law and treaties, in particular codification treaties and originated under the impression of the *North Sea Continental Shelf* judgment. For a recent examination of the role of customary international law and the UN Charter with respect to the prohibition of the use of force see Christian Marxsen, *Völkerrechtsordnung und Völkerrechtsbruch* (Mohr Siebeck 2021) 80-149.

that the sources doctrine performs an important integrative function in the international community. The legitimacy of judicial pronouncements rests on the idea that courts apply law enacted by others[173] and on a shared understanding or a general consensus as to the sources of international law. If the doctrine of sources shall not become fragmented into a number of doctrines of sources in different fields of international law, it will be the responsibility of the general international lawyers not to remain on an abstract level, aloof from the specificities and particularities. It will be necessary to study the sources in different normative and institutional contexts and to highlight both similarities and differences.[174]

1. The work of the ILC

The topic of the interrelationship of sources as envisaged here might appear to be an ideal topic for the International Law Commission which, however, has so far not decided to dedicate one project to this topic. During the drafting of the Vienna Convention on the Law of Treaties, certain members, in particular Mustafa Kamil Yasseen, suggested a study of the interrelationship of sources.

173 Cf. Nils Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (Oxford University Press 2010) 125-126: "[...] even if the declaratory theory of legal argument and judicial decision making [...] may be denounced as a fiction, this fiction has an important institutional function. It works as a device for controlling the legal profession: it prevents lawyers from taking full control of the legal system and arbitrarily and illegitimately developing the law."; cf. also Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992) 317-319; Ingeborg Maus, 'Die Trennung von Recht und Moral als Begrenzung des Rechts' (1989) 20 Rechtstheorie 199, 208; see also below, p. 592.

174 This study takes account of the critique that the doctrine of sources should consider to a greater extent the characteristics of particular contexts, without adopting, however, the sometimes raised conclusion that there no longer is one unified doctrine of sources of international law, cf. Curtis A Bradley, 'Customary International Law Adjudication as Common Law Adjudication' in Curtis A Bradley (ed), *Custom's future: international law in a changing world* (Cambridge University Press 2016) 34 ff.; Steven Ratner, 'Sources of International Humanitarian Law and International Criminal Law: War/Crimes and the Limits of the Doctrine of Sources' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 912 ff.; Michelle Biddulph and Dwight Newman, 'A Contextualized Account of General Principles of International Law' (2014) 26(2) Pace International Law Review 286 ff.

Yet, the Commission as a whole decided, in the words attributed to Special Rapporteur Waldock "possibly out of timidity but nevertheless wisely, not to go too far into the subject. The codification of the relation between customary law and other sources of law should be left to others."[175] The Study Group's Fragmentation report as finalized by Martti Koskenniemi was primarily concerned with the place of treaties in their normative environment, and its suggestion to conduct a study on "general international law" in the future as well was not followed up by the ILC.[176] The ILC's recent conclusions on customary international law address to a certain extent the value of treaties for customary international law, without addressing the question of the interrelationship in great detail.[177] The conclusions on customary international law are concerned with the "identification" and "determination" of customary international law and "do not address, directly, the processes by which customary international law develops over time".[178] In addition, "no attempt is made to explain the relationship between customary international law and other sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice".[179] In the context of the ongoing project on general principles of law, the ILC Drafting Committee emphasized that the relationship between customary international law and treaties fell

175 *ILC Ybk (1966 vol 1 part 2)* 94 para 103. See also *ILC Ybk (1964 vol 2)* 112: "the relationship between international custom and treaties depended to a large extent on the nature of the particular custom involved and on the provisions of the treaty. The subject would be considered later in connexion with interpretation [...]"; see also *ILC Ybk (1964 vol 1)* 109 paras 44-45 and 112 para 181 and 195 para 54 and *ILC Ybk (1966 vol 1 part 2)* 91 para 73 (Yasseen), ibid 93 para 95 (Tunkin) and 93 para 97 (El-Erian).

176 *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* 254-255; on the fragmentation report, see below, p. 368.

177 Cf. also Nolte, 'How to identify customary international law? - On the final outcome of the work of the International Law Commission (2018)' 19-20; Paolo Palchetti, 'The Role of General Principles in Promoting the Development of Customary International Rules' in Mads Andenæs and others (eds), *General Principles and the Coherence of International Law* (Brill Nijhoff 2019) 58-59; see in more detail, below, p. 377.

178 *ILC Report 2018* at 124 para 5. See also UNGA Res 73/203 (20 December 2018) UN Doc A/RES/73/203 para 4: the UNGA "[t]akes note of the conclusions [...] brings them to the attention of States and all who may be called upon to identify customary international law, and encourages their widest possible dissemination."

179 *ILC Report 2018* at 124 para 6.

outside the topic's scope; the relationship between general principles of law and the other sources is currently addressed in a draft conclusion.[180]

Whereas the ILC conclusions on customary international law and on general principles of law pursue an important objective as they may guide courts and tribunals in the process of *identifying* customary international law and general principles of law, they do not capture customary international law and general principles of law in their entirety. Customary international law and general principles of law can emerge gradually and sometimes unconsciously.[181] The (draft) conclusions can to a certain extent rationalize the identification process, but the questions of how customary international law and general principles of law will develop, how much room they will be given in an international legal order that is more and more shaped by treaties cannot be answered in an abstract fashion.

Whilst the present study pursues a research objective outside the scope of the specific topics of the ILC, it relies on the ILC's understanding of customary international law. Accordingly, customary international law is a general practice that is accepted as law (conclusion 2).[182] The ILC defended the so-called two-elements approach against alternative views which regarded

180 See *Statement of the Chairman of the Drafting Committee, Mr. Ki Gab Park of 29 July 2022* ⟨https://legal.un.org/ilc/documentation/english/statements/2022_dc_chair_statement_gpl.pdf⟩ accessed 1 February 2023 at 16; on this ILC project see below, p. 386. On the recent second report of the Special Rapporteur, see below, p. 216.

181 Cf. William Michael Reisman, 'Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law' (2015) 30 ICSID Review 619: "Nomo-dynamically, customary international law is a video of an ongoing, informal and unorganized process of consuetudo and desuetudo, of formation, confirmation, transformation and termination of the shared expectations and demands of politically relevant international actors about the right ways of doing things. Nomo-statically, customary international law is one still frame of that video, a snapshot, from one moment, of those expectations and demands that were established in that informal and unorganized process of law formation." See also Monica Hakimi, 'Making Sense of Customary International Law' (2020) 118 Michigan Law Review 1495.

182 For the draft conclusions as adopted by the ILC on second reading see *ILC Report 2018* at 116-112.

either *opinio juris*[183] or practice as central element[184] or which opine that in most cases no separate proof of *opinio juris* is necessary[185] or which argue that both elements are positioned on a sliding scale with each being able to compensate for the weak presence of the other.[186] Against the background of a debate of whether the same two-elements approach may adequately reflect the formation of custom in different areas of international law,[187] the ILC commentary to the adopted draft conclusions attempts to reconcile both views which existed in the Commission. According to the commentary, both elements are needed "in all fields of international law"[188], and the

183 Bin Cheng, 'Custom: the future of general state practice in a divided world' in Ronald Saint John MacDonald and Douglas Miller Johnston (eds), *The structure and process of international law: essays in legal philosophy, doctrine, and theory* (1983) 514 ff.; Lepard, *Customary International Law A New Theory with Practical applications*.

184 Kelsen, 'Théorie du droit international coutumier' 266; Kelsen, *Principles of International Law (1952)* 307; Paul Guggenheim, *Traité de droit international public: avec mention de la pratique internationale et suisse* (vol 1, Georg 1953) 47-48; but cf. later Paul Guggenheim, *Traité de droit international public: avec mention de la pratique internationale et suisse* (2nd edn, vol 1, Georg 1967) 107; Hans Kelsen and Robert W Tucker, *Principles of International Law* (2nd edn, Holt, Rinehart, Winston, 1967) 450-451, and vii.

185 Maurice Mendelson, 'The subjective Element in Customary International Law' (1996) 66 BYIL 204; ILA, *Statement of Principles Applicable to the Formation of General Customary International Law* (London, 2000) ⟨https://www.ila-hq.org/en_GB/documents/conference-report-london-2000-2⟩ accessed 1 February 2023 at 30 ff.

186 See Frederic L Kirgis, 'Custom on a Sliding Scale' (1987) 81(1) AJIL 146 ff.

187 Different and contrary positions were held in the commission which decided in 2013 to leave this question open, *Report of the International Law Commission: Sixty-fifth session (6 May-7 June and 8 July-9 August 2013)* UN Doc A/68/10 97; International Law Commission, Sixty-fourth session, Note by Michael Wood, Special Rapporteur, UN Doc A /CN.4/653, para 22: "it is neither helpful nor in accordance with principle, for the purposes of the present topic, to break the law up into separate specialist fields."; he would later maintain that "the better view is" that there would be no different approaches to custom while however conceding that there may "be a difference in application of the two-element approach in different fields", *Second report on identification of customary international law by Michael Wood, Special Rapporteur* 22 May 2014 UN Doc A/CN.4/672 at 12 para. 28, but see also ibid 13 para. 28: "Any other approach risks artificially dividing international law into separate fields, which would run counter to the systemic nature of international law." See also *ILC Ybk (2014 vol 2 part 1)* 173-174 para 28.

188 *ILC Report 2018* at 126 paras 4, 6.

application of the two-elements approach "may well take into account the particular circumstances and context in which an alleged rule has arisen and operates".[189]

The present study will not challenge the ILC in this regard. To the present author, attempts to emphasize one element at the expense of the other, to distinguish between modern and traditional, deductive and inductive, moral and facilitative customs[190] run the risk of becoming too artificial.[191] In the end, the interpreter needs to evaluate whether there is "a general practice accepted as law", which requires her to look at both elements simultaneously and in light of each other.[192] Based on this understanding, the difference becomes smaller between those who are critical of the "two-elements" terminology and who would like to speak of a single[193] element, consisting of a "general

189 ibid at 126 para 6.

190 Cf. Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 764, 776, 789.

191 Similar Talmon, 'Determining Customary International Law: the ICJ's Methodology between Induction, Deduction and Assertion' 442 (concluding that induction and deduction "are not two competing or opposing monolithic analytical methods but, in practice, are intermixed"); similar William Thomas Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' (2014) 45(2) Georgetown journal of international law 520 (demonstrating that "the actual assessment of custom shows a mixed deductive and inductive process, and that observations on the 'traditional' and 'modern' approaches to the assessment of customary international law overlook the deep way the processes are intermingled"); see furthermore *ILC Report 2018* 126 para 5.

192 Haggenmacher, 'La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale' 30: "La coutume présente donc bien un double aspect matériel et subjectif, mais les deux sont en fait inséparables: ils ne s'analysent pas en un a élément ' matériel et un autre, subjectif [...] La coutume internationale est saisie comme un tout indifférencié: à aucun moment on n'a visé à isoler ses composantes [...]"; Brigitte Stern, 'La coutume au coeur du droit international: quelques réflexions' in *Mélanges offerts à Paul Reuter: le droit international: unité et diversité* (Pedone 1981) 482; Marco Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht: mit besonderer Betrachtung der Regeln zum Schutze der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten* (Helbing & Lichtenhahn 1990) 34; Jörg P Müller, *Vertrauensschutz im Völkerrecht* (Carl Heymanns Verlag KG 1971) 84-85; Dupuy, 'L'unité de l'ordre juridique international: cours général de droit international public' 166.

193 Cf. Haggenmacher, 'La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale' 31 ("seul 'élément'"); cf. in legal theory on customary law Gerald J Postema, 'Custom, Normative Practice, and the Law' (2012)

practice accepted as law",[194] and those who continue to advocate the two-element approach whilst stressing the interrelationship of both elements.[195]

2. Sociological perspectives: the proliferation of norms and socializing states

This study's focus on the interrelationship of sources has been inspired by specific sociological perspectives on international law, in particular on the proliferation of norms. This section's purpose is not to give an exhaustive account on the relationship between international legal doctrine and interdisciplinary approaches to international law. Nevertheless, it should not go unnoticed that the relationship between the so-called "interdisciplinary turn"[196] in international legal scholarship and conventional international legal doctrine was not always without tension, as part of the literature on com-

62 Duke Law Journal 718 ff. (against an additive account and in favour of integration in the sense of an understanding of custom as normative practice).

194 Cf. for a recent critique of the two-elements terminology in this regard Christian J Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making' (2015) 14 The Law and Practice of International Courts and Tribunals 59; Jean d'Aspremont, 'The Four Lives of Customary International Law' [2019] International Community Law Review 229 ff.; cf. on the development of different understandings of customary international law Bradley, 'Customary International Law Adjudication as Common Law Adjudication' 43-47.

195 *ILC Report 2018* at 125: "Draft conclusion 2 sets out the basic approach, according to which the identification of a rule of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice, and whether such general practice is accepted as law (that is, accompanied by *opinio juris*) [...] A general practice and acceptance of that practice as law (opinio juris) are the two constituent elements of customary international law: together they are the essential conditions for the existence of a rule of customary international law. The identification of such a rule thus involves a careful examination of available evidence to establish their presence in any given case. [...] The test must always be: is there a general practice that is accepted as law?".

196 Cf. Anne-Marie Slaughter, Andrew S Tulumello, and Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 AJIL 367 ff.; Gregory Shaffer and Tom Ginsburg, 'The empirical turn in international legal scholarship' (2012) 106 AJIL 1 ff.; see also generally on international relations and customary international law Byers, *Custom, power and the power of rules: international relations and customary international law* 21-32, 147-166.

pliance and rational game theory as well as the reactions to it illustrates.[197] While this book adopts a legal doctrinal approach which must ultimately rest on legal doctrinal arguments, it is also true that sociological perspectives on the interplay between the practice of states and the emergence and proliferation of legal norms can offer important insights for a doctrinal study of

197 Cf. Jack L Goldsmith and Eric A Posner, *The limits of international law* (Oxford University Press 2005); for a critical overview see Stefan Oeter, 'The legitimacy of customary international law' in Thomas Eger, Stefan Oeter, and Stefan Voigt (eds), *Economic Analysis of International Law: Contributions to the XIIIth Travemünde Symposium on the Economic Analysis of Law (March 29-31, 2012)* (Mohr Siebeck 2014) 1 ff.; Detlev F Vagts, 'International Relations Looks at Customary International Law: A Traditionalist's Defence' (2004) 15(5) EJIL 1031 ff.; Hans-Joachim Cremer, 'Völkerrecht - Alles nur Rhetorik?' (2007) 67 ZaöRV 267 ff.; for a critique of Goldsmith's and Posner's biased, short-term understanding of rationality see Anne van Aaken, 'To Do Away with International Law? Some Limits to 'The Limits of International Law'' (2006) 17(1) EJIL 289 ff.; Jens David Ohlin, *The assault on international law* (Oxford University Press 2015) 89 ff.; see also Benedict Kingsbury, 'The Concept of Compliance As a Function of Competing Conceptions of International Law' (1998) 19 Michigan Journal of International Law 345 ff., describing that there is not one but many concepts of compliance with presuppose and are connected with different understandings of international law; see also Robert Howse and Ruti G Teitel, 'Beyond Compliance: Rethinking Why International Law Matters' (2010) 1 Global Policy 127 ff. On the debate of effects of human rights treaties on compliance see Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935 ff.; Ryan Goodman and Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14 EJIL 171 ff.; Beth A Simmons, *Mobilizing for Human Rights International Law in Domestic Politics* (Cambridge University Press 2009) 159 ff.

international law[198], in particular with respect to customary international law and general principles of law.[199]

Against the background of the selected[200] scholarship on the proliferation of norms it may be suggested that treaty-law, customary international law and general principles are not to be understood as separate tracks and that norms enshrined in treaties may shape states' practices. The following account focuses on explanations of how new norms can assert themselves,

198 As eloquently put by Georg Schwarzenberger, 'The Standard of Civilisation in International Law' (1955) 8(1) Current Legal Problems 215: "The international lawyer may realise in a becoming spirit of awareness of the interdependence of all learning that, at this stage, he has to equip himself with new and more congenial tools or at least that he has to accept gratefully the labours of others who, better fitted than he, have done the spade work for him."; Julius Stone, 'Problems Confronting Sociological Enquiries Concerning International Law' (1956) 89 RdC 85, 89 ("Recognition that positive international law requires study not only in itself, but also as determined by and as itself determining facts extraneous to itself, is but a beginning of our problems") and at 92 ("dangers can, I believe, be reduced to proportions which are not fatal to the advancement of knowledge, provided that the inquirer brings them into full consciousness"), and 121-124; Bruno Simma, *Das Reziprozitätselement in der Entstehung des Völkergewohnheitsrechts* (Fink 1970) 21-23 (in favour of pluralism of methods); Bruno Simma, 'Völkerrechtswissenschaft und Lehre von den internationalen Beziehungen: Erste Überlegungen zur Interdependenz zweier Disziplinen' (1972) 23 Zeitschrift für öffentliches Recht 300, 305 (the task of the international legal science should not be confined to cognition and description of positive legal norms); Paulus, *Die internationale Gemeinschaft im Völkerrecht: eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* 6-7 (positive international law cannot be observed without any regard to the surrounding social environment but retains its independence).

199 Cf. for instance the so-called interactional account which is based on inspirations from Lon Fuller and sociological constructivism, Jutta Brunnée and Stephen John Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 Columbia Journal of Transnational Law 65-66, 68; Jutta Brunnée and Stephen John Toope, 'Interactional international law: an introduction' (2011) 3(2) International Theory 308; Jutta Brunnée and Stephen John Toope, *Legitimacy and legality in international law: an interactional account* (Cambridge University Press 2010) 20 ff.; Jutta Brunnée and Stephen John Toope, 'The Rule of Law in an Agnostic World: the Prohibition on the Use of Force and Humanitarian Exceptions' in Wouter G Werner and others (eds), *The law of international lawyers: reading Martti Koskenniemi* (Cambridge University Press 2017) 142.

200 Cf. for a critique of "unregulated reception" of interdisciplinary perspectives in legal discourse Ferdinand Weber, *Staatsangehörigkeit und Status: Statik und Dynamik politischer Gemeinschaftsbildung* (Mohr Siebeck 2018) 303 ff.

how they operate internally within a state and how they are transmitted on the international level through states, all of which can be relevant to understanding the gradual emergence of customary international law and general principles[201].

Norms, broadly speaking, can contribute to the formation of states' identity, which is not predetermined but informing and informed by structure and context.[202] One of the key insights of the approaches discussed here is the so-called norm cycle as described by Martha Finnemore and Kathryn Sikkink. They distinguish three stages or life-cycles of a norm, namely norm-emergence, norm-cascade, and internalization:

> "The characteristic mechanism of the first stage, norm emergence, is persuasion by norm entrepreneurs. Norm entrepreneurs attempt to convince a critical mass of states (norm leaders) to embrace new norms. The second stage is characterized more by dynamic of imitation as the norm leaders attempt to socialize other states to become followers [...] At the far end of the norm cascade, norm internalization occurs; norms acquire a taken-for-granted quality and are no longer a matter of broad public debate."[203]

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201 On the emergence of general principles through the process of argumentative self-entrapment see Kleinlein, *Konstitutionalisierung im Völkerrecht Konstruktion und Elemente einer idealistischen Völkerrechtslehre* 268; Kleinlein, 'Customary International Law and General Principles Rethinking Their Relationship' 156-157.

202 On the interrelationship between agent and structure see Alexander Wendt, 'Collective Identity Formation and the International State' (1994) 88(2) American Political Science Review 384 ff.; Alexander Wendt, 'Anarchy is what States Make of it: The Social Construction of Power Politics' (1992) 46(2) International Organization 391 ff.; Alexander Wendt, 'The Agent-Structure Problem in International Relations Theory' (1987) 41(3) International Organization 335 ff.; see also on the "duality of structure" Anthony Giddens, *The constitution of society: outline of the theory of structuration* (Polity Press 1984) 25 ("The constitution of agents and structures are not two independently given sets of phenomena, a dualism, but represent a duality"); John Gerard Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52(4) International Organization 864 ("[...] there is growing empirical evidence that normative factors in addition to states' identities shape their interests, or their behavior, directly [...]."; see also Thomas Risse and Kathryn Sikkink, 'The power of human rights: international norms and domestic change' in Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (eds), *The power of human rights: international norms and domestic change* (Cambridge University Press 1999) 9 ("Norms become relevant and causally consequential during the process by which actors define and refine their collective identities and interests").

203 Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) International Organization 895 ff.

In order to explain how norms can assert themselves among and within states, Thomas Risse, Stephen C. Ropp and Kathryn Sikkink introduced in *The Power of Human Rights* the idea of a spiral-model with a focus on human rights norms. This model consists of five stages: an initial phase of repression within and by a state is followed by a phase of denial of these repressions and human rights violations after those violations had been brought to the attention of a wider public. Subsequently, the state in question makes tactical concessions in order to alleviate concerns of human rights abuses, these concessions could express themselves in a greater tolerance for mass public demonstrations or in communicating the objective to ratify human rights treaties. In the fourth phase ("prescriptive status"), the state has ratified and implemented human rights treaties, thereby granting human rights norms a prescriptive status. The fifth stage is called "rule-consistent behaviour".[204]

Ryan Goodman and Derek Jinks illustrate in their account the subtle ways in which norms are transmitted and received on the international level and how a general practice can emerge. They argue that three processes influence social behaviour of states can be identified, namely material inducement, persuasion and acculturation:

> "Material inducement refers to the process whereby target actors are influenced to change their behavior by the imposition of material costs or the conferral of material benefits. [...] Persuasion refers to the process whereby target actors are convinced of

204 See the contributions in Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (eds), *The power of human rights: international norms and domestic change* (Cambridge University Press 1999); Risse and Sikkink, 'The power of human rights: international norms and domestic change' 4, 15 ff.; Thomas Risse and Stephen C Ropp, 'Introduction and overview' in Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (eds), *The Persistent Power of Human Rights From Commitment to Compliance* (Cambridge University Press 2013) 5 ff. Since the first publication of *The Power of Human Rights* in 1999, backlashes against international norms have given rise to the question of whether the spiral model was too optimistic, Kathryn Sikkink, 'The United States and torture: does the spiral model work?' in Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (eds), *The Continuing Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013) 150, 156, 162 (on the backlash in the US during the second Bush administration). In particular, Anja Jetschke and Andrea Liese, 'The power of human rights a decade ater: from euphoria to contestation?' in Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (eds), *The Continuing Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013) 33-34, 36 ff. questioned the model's linearity and pointed out how even in later phases human rights norms would compete with other norms, such as norms of national security.

> the truth, validity, or appropriateness of a norm, belief, or practice. [...] Acculturation, on the other hand, is the process by which actors adopt the beliefs and behavioral patterns of the surrounding culture, without actively assessing either the merits of those beliefs and behaviors or the material costs and benefits of conforming to them. Cognitive and social pressures drive acculturation [...] Whereas persuasion emphasizes the content of a norm, acculturation emphasizes the relationship of the actor to a reference group or wider cultural environment."[205]

Socialization in the form of acculturation can be observed at the international level, as states tend to mimic other states within the same network as regards economic policies or human rights norms.[206] Goodman and Jinks describe the significance of "regional social influence"[207] and Brian Greenhill supports this "social influence" in his study on the transmission of human rights. Greenhill's research demonstrates a tendency of convergence among states which are connected in the same international organization with respect to the average human rights performance.[208] What matters is not the mandate of the particular IGOs, but the networks concluded by states in IGOs, states' individual human rights record as well as similar cultural backgrounds.[209] Goodman and Jinks suggest that acculturation may mitigate uncertainties of broadly framed obligations and that this prevent what Thomas Franck[210]

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205 Ryan Goodman and Derek Jinks, *Socializing states: promoting human rights through international law* (Oxford University Press 2013) 22, 26.

206 See ibid 58 ff.; see also Xun Cao, 'Networks as Channels of Policy Diffusion: Explaining Worldwide Changes in Capital Taxation, 1998-2006' (2010) 54 International Studies Quarterly 849 (arguing that networks established through international organization without an economic mandate but a cultural or social mandate can lead to convergence among the member states as to capital taxation rates).

207 Goodman and Jinks, *Socializing states: promoting human rights through international law* 70-71, where Goodman and Jinks summarize with reference to Simmons: "[...] a determining factor for whether a state will ratify a human rights treaty is the ratification practices of other states in its region [...] state practice involving reservations to human rights treaties suggests regional social influence"; Simmons, *Mobilizing for Human Rights International Law in Domestic Politics* 89 ("socially motivated ratification").

208 Brian Greenhill, 'The Company You Keep: International Socialization and the Diffusion of Human Rights Norms' (2010) 54 International Studies Quarterly 127 ff., on the spread of physical integrity rights among states which share membership in international organizations.

209 ibid 143; Brian Greenhill, *Transmitting Rights: International Organizations and the Diffusion of Human Rights Practices* (Oxford University Press 2015) 23 ff., 151 ff.

210 Franck, *Fairness in International Law and Institutions* 79.

once described as "unilateral, self-serving exculpatory interpretations of [...] rules".[211]

These perspectives explain the gradual emergence of norms and describe stages of the process of self-entrapment. They illustrate the different roles that states can play in this regard. In particular, the focus on socialization and acculturation offers a possible explanation of why and how states may support a norm by way of acquiescence. This may be relevant for understanding customary international law as resulting not only from instances of practices but also from acquiescence to these practices which is why it is the product of a legal community as a whole.[212] These perspectives are also interesting with a view to a study of the interrelationship of sources. The idea that norms undertaken by states can shape states' practices may suggest that, for instance, treaty law and the norms expressed therein can inform states' actions and practices and can insofar contribute to customary international law. It may also suggest that this renders contradictions between the sources less likely and forms of convergences and a reconciliation and harmonization of the content of different norms more likely. These perspectives are not only interesting with respect to the character of customary international law as "unconscious lawmaking"[213], but they also give rise to the question of whether states can try to shape the development of customary international law.

Adam Bower's research on lawmaking without great powers, for instance, illustrates that these effects can also be the result of a purposive activity in the sense that states can conclude treaties in order to introduce new ideas to the international legal order and to shape customary international law.[214] The written character of treaty obligations is said to be particularly impactful

211 Goodman and Jinks, *Socializing states: promoting human rights through international law* 116-119.

212 Cf. Brigitte Stern, 'Custom at the heart of international law' (Michael Byers and Anne Denise trs (2001) 11 Duke Journal of Comparative & International Law 108, arguing that "the content of the *opinio juris* of each state will depend on its position of power within the international order"; Kolb, 'Selected problems in the theory of customary international law' 136; on acquiescence see now also *ILC Report 2018* at 140 ff., conclusion 10(3).

213 See above, footnote 64.

214 Adam Bower, *Norms without the great powers: international law and changing social standards in world politics* (Oxford University Press 2017) 36, 45-52; his focus lies on the Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on

"because it creates a structure of repetition for legal language that is key to solidifying social expectations over time."[215] Bower demonstrates with reference to the example of the Ottawa convention on the ban of landmines that third states which had not ratified the Convention remain or become "implicated in the broader complex of values from which a treaty derives"[216] and to which the treaty gives expression. Third states are described to offer *de facto* or rhetorical support to the treaties' core objectives, and even when they argue that the complete ban of landmines would not apply in cases where the state's very survival would be at stake, they indirectly affirm the general prohibition of landmines.[217] Bower concludes that the number of non-ratifications is not necessarily a reliable indicator for the degree of opposition to the substance of a treaty.[218] Brian Greenhill and Michael Strausz even suggest that the internalization of a treaty norm by third states can reduce the likelihood of the treaty receiving further ratifications.[219] These suggestions are particularly interesting when studying and evaluating the relative significance of each source in the present international community: treaties can be used to influence the development of customary international law; in particular, the substance of rules set forth in treaties can become accepted customary international law. At the same time, this process can reduce the likelihood of further ratifications and reduce the ratification pres-

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their Destruction (signed 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.

215 Bower, *Norms without the great powers: international law and changing social standards in world politics* 35; for a similar observation in doctrinal scholarship see Georges Abi-Saab, 'Les sources du droit international: essai de déconstruction' in Marcelo G Kohen and Magnus Jesko Langer (eds), *Le développement du droit international: réflexions d'un demi-siècle. Volume I* (Graduate Institute Publications 2013) 75 (arguing that states can by treaties structure the legal environment and shape the expectations of the participants in the international legal system).

216 Bower, *Norms without the great powers: international law and changing social standards in world politics* 27.

217 ibid 91; cf. also the process described as argumentative self-entrapment, Thomas Risse, '"Let's argue!": Communicative Action in World Politics' (2000) 54(1) International Organization 32.

218 Bower, *Norms without the great powers: international law and changing social standards in world politics* 75. But see Baxter, 'Treaties and Customs' 99, 100 ("when time passes and States neglect to become parties to a multilateral instrument, that abstention constitutes a silent rejection of the treaty").

219 Cf. Brian Greenhill and Michael Strausz, 'Explaining Nonratification of the Genocide Convention: A Nested Analysis' (2014) 10 Foreign Policy Analysis 374-375, 381-382, 388-389.

sure, potentially at the expense of procedural frameworks which can only be established by treaties.

Taking inspiration from these perspectives, the following chapters will analyze whether the suggested higher likelihood of convergence and harmonization in fact characterizes the interrelationship of sources in the present international community and how norms and, for instance, adjudicatory structures of courts and tribunals shape the way in which other sources of international law are addressed by different actors.

B. Structure of this study

The present work analyzes the interrelationship of sources in different contexts, in scholarship, judicial settings and codification settings. The chapters will strive to strike a balance between studying each field or context on their respective own terms and highlighting similarities and differences between different contexts.

I. Comparative-historical perspectives

The first part will present comparative legal perspectives on the interrelationship of sources which informed and was informed by the historical background of article 38 PCIJ Statute.

The second chapter "Comparative Perspectives" will delve into the interrelationship of sources in domestic contexts. The chapter focuses on experiences and developments in domestic legal orders which have served as a source of inspiration in public international law.[220] In particular, the chapter will focus on the relationship between written and unwritten law in common law systems and on lack of support for customary international law in German law. In

220 See Paul Guggenheim, 'Landesrechtliche Begriffe im Völkerrecht, vor allem im Bereich der internationalen Organisationen' in Walter Schätzel and Hans-Jürgen Schlochauer (eds), *Rechtsfragen der internationalen Organisationen Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Klostermann 1956) 134, 141, 150; Christian Tomuschat, 'Obligations Arising For States Without Or Against Their Will' [1993] (241) RdC 317-318 generally on communication between national and international law; see also Mendelson, 'The subjective Element in Customary International Law' 178-179 on the usefulness to study "domestic customary law societies, past and present" for the international lawyer.

addition and based on the experiences in municipal legal orders, the chapter addresses the doctrinal background and the development of modern theories of "general principles of law". Article 38(3) PCIJ Statute arguably did not invent general principles, it was inspired by and gave further inspiration to the concept of general principles of law. In identifying this comparative historical background of general principles of law, this chapter seeks to lay the foundations for this work's understanding of general principles in the international legal order. The chosen perspective here is consistent with the view that general principles of law can be found within many legal orders, including, but not limited to, international law.[221]

The third chapter will first illuminate the process leading to article 38 PCIJ Statute. In particular, the chapter will then delve into the drafting of article 38 and demonstrate how the members of the Advisory Committee of Jurists discussed the interrelationship of sources. Subsequently, the chapter will turn to the treatment of sources in the jurisprudence of the PCIJ, in codification settings and in scholarship with a particular focus on the interwar period.

The fourth chapter will offer concluding observations on the two preceding chapters.

Two potential biases that may be seen as inherent in this structure shall be briefly addressed. To begin with, the selection of legal orders and of scholars in these two chapters can be criticized for its Western focus.[222] One could argue that the Western influences on article 38 ICJ Statute were particularly dominant. At the same time, such an argument should not be carried too far. Recent scholarship has demonstrated that, in spite of insufficient participation and representativeness and in spite of the use of international law

221 See also Robert Kolb, 'Les maximes juridiques en droit international public: questions historiques et théoriques' (1999) 32(2) Revue belge de droit international 412, 424, 430; Schwarzenberger, 'The fundamental principles of international law' 195: "Experience with any of the systems of municipal law teaches that all of them take for granted a stratification of legal principles. Thus, *prima facie*, it may be assumed that the same is true of international law."

222 For a recent treatment of cultural perspectives see Anthea Roberts, *Is International Law international?* (Oxford University Press 2017). See also Arnulf Becker Lorca, 'Eurocentrism in the History of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 1035, arguing that "writing history always entails the production of a perspective from which to include and interpret relevant material and exclude material that is regarded irrelevant to explain the past. However, there is a problem if a Eurocentric perspective generates a distortion in the historical narrative."

by Western states against non-Western states[223], non-Western states did not reject international law and began to engage with it in furtherance of their own objectives, which has been described as a form of "reinterpretation of rules by non-Western states, supporting their admission into the international community."[224]

The Western focus in the first two chapters will be remedied to a certain extent in the next chapters which focus on institutions the members of which are meant to represent "the main forms of civilization and of the principal legal systems"[225] and on perspectives on the sources of international law also by non-western states and scholars. As to the second potential bias, this study

223 Cf. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

224 Arnulf Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation' (2010) 51(2) Harvard International Law Journal 477; Lorca adds nuance to the narrative of European expansion of international law, see Wilhelm G Grewe, 'Vom europäischen zum universellen Völkerrecht Zur Frage der Revision des europazentrischen Bildes der Völkerrechtsgeschichte' (1982) 42 ZaöRV 449 ff.; on the reception in Russia, see Lauri Mälksoo, *Russian approaches to international law* (Oxford University Press 2015); on the reception in Latin-America see Nina Keller-Kemmerer, *Die Mimikry des Völkerrechts: Andrés Bellos "Principios de Derecho Internacional"* (Nomos 2018) 272-273; on African perspectives see Becker Lorca, 'Eurocentrism in the History of International Law' 1045 with further references. See also Stefan Kroll, *Normgenese durch Re-Interpretation: China und das europäische Völkerrecht im 19. und 20. Jahrhundert* (Nomos 2012) 13 ff., 20, 114, 123 ff., 165 ff.; see also Mohammad Shahabuddin, 'The 'standard of civilization' in international law: Intellectual perspectives from pre-war Japan' (2019) 32 Leiden Journal of International Law 14: "[W]hat appears as a straightforward application of European international law and the standard of civilization in Japan's late-nineteenth century imperial projects was in fact shaped by a long-standing process of Japan's historical engagement with a system of cultural hierarchy in the regional order."

225 Article 9 ICJ Statute; Article 8 ILC Statute. It is here acknowledged that also in these institutions problems of representativeness exist; on the underrepresentation of women in the International Law Commission see Miguel de Serpa Soares, 'Seven Women in Seventy Years: A Roundtable Discussion on Achieving Gender Parity at the International Law Commission' [2018] United Nations Office of Legal Affairs ⟨https://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS_ILC70_gender_side_event-24-May-2018.pdf⟩ accessed 1 February 2023; Anne Peters, 'Völkerrecht im Gender-Fokus' in Andreas Zimmermann, Thomas Griegerich, and Ursula E Heinz (eds), *Gender und Internationales Recht* (Duncker & Humblot 2007) 293 ff.; on the underrepresentation of women at international courts and tribunals see Nienke Grossman, 'Achieving Sex-Representative International Court Benches' (2016) 110 AJIL 83; Leigh Swigarth and Daniel Terris, 'Who are International

assumes that the concept of general principles transcends legal orders insofar as this concept can be found both in domestic legal orders and in international law and that scholarly discussions of this concept both in the domestic and in the international context overlapped timewise. Since the municipal legal orders that will be discussed are Western ones, it could be argued that this concept is a genuine Western concept. Such an interpretation then could be based on the fact that in particular Soviet doctrine as well as several newly independent states had reservations as to this concept. The connection of scholarly debates in (Western) municipal legal orders and the international legal order in particular in the first half of the 20th century may explain part of the skepticism. Yet, it is argued here and will be developed further over the course of this study that general principles of law represent a concept which is intrinsically connected to the idea of law and to the practice of further interpreting, concretizing and developing the law through application. It can here only be submitted, but not without some reason, and be left for future scholarship to show that a close study of the interpretation and application of municipal law in many other states will exemplify that general principles can be observed in these domestic legal orders as well.[226]

Judges?' in Cesare P R Romano, Karen Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 624.

226 See Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (reprint, Cambridge Grotius Publications Limited 1987) 19, 400-408, listing municipal codes which provide for the application of the general principles of law, equity or natural law. Reference to general principles of law as applicable law for the judge to apply is made, for instance, in the Peruvian Civil Code of 1852, in the Ecuadorian Civil Code of 1860, the Italian Civil Code of 1865, the Argentine Civil Code of 1869, the Guatemalan Civil Code of 1877, the Spanish Civil Code of 1888, the Cuban Civil Code of 1889, the Brazilian Civil Code of 1916, the Thai (Siamese) Civil Code of 1925, the Chinese Civil Code of 1929, and arguing that "the national law of three of the ten members (from Brazil, Italy and Spain) who drafted the Statute of the Permanent Court of International Justice contained this very formula", which was "one of the most usual in codified provisions on the application of law in the municipal sphere". See also Antônio Augusto Cançado Trindade, 'International Law for Humankind: Towards a New Jus Gentium (I)' (2005) 316 RdC 86, arguing that "every legal system" has fundamental principles and general principles of law; Schwarzenberger, 'The fundamental principles of international law' 195; see also Elias and Lim, ''General Principles of Law', 'Soft' Law and the Identification of International Law' 19 ff.

II. Institutional perspectives

The study will then analyze how the interrelationship has been discussed in different contexts. Chapter 4 and chapter 5 are dedicated to two institutional actors, namely the International Court of Justice and the International Law Commission.

The focus on institutions will start with the International Court of Justice which, as the principal judicial organ of the United Nations, bears not the sole but a very significant responsibility for the administration of international law. As article 38 ICJ Statute does not specifically indicate a strict order of application,[227] the Court enjoys a certain liberty[228] as to whether it bases its judgment on general concepts rather than on a special agreement,[229] on a treaty without examining in depth general principles of law and customary international law,[230] or whether it engages into systemic integration.[231] The chapter will analyze whether the institutional framework in which the Court operates shapes the way in which the interrelationship of sources is discussed by the Court. It will be demonstrated that the Court emphasizes the distinctiveness of sources for jurisdictional purposes while at the same time acknowledging the interrelationship when it comes to the interpretation. This chapter will explore the normative considerations and the legal craft em-

227 Thirlway, *The sources of international law* 152.

228 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."; Richard D Kearney, 'Sources of Law and the International Court of Justice' in Leo Gross (ed), *The future of the International Court of Justice* (Oceana-Publ 1976) vol 2 697 ("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.").

229 Cf. for the PCIJ *Legal Status of Eastern Greenland: Denmark v Norway* Judgment of 5 April 1933 [1933] PCIJ Series A/B 53, 23, 45 ff. (on Denmark's title to sovereignty over Greenland based on a continued display of authority), for a critique see Diss OpAnzilotti 76 and 94 whose analysis focused on an agreement reached between Denmark and Norway.

230 Cf. *Right of Passage over Indian Territory* (*Portugal v. India*) (Judgment of 12 April 1960) [1960] ICJ Rep 43: after having based its judgment on bilateral practice of the parties, the Court "does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result."

231 *Oil Platforms* (*Islamic Republic of Iran v. United States of America*) (Judgment) [2003] ICJ Rep 182 para 41.

ployed by the Court when identifying, interpreting and applying customary international law and the function of general principles as a bridge between custom and treaties.

In contrast, the ILC does not apply the law to a particular set of facts but progressively develops and codifies the law in a general and abstract fashion. The sixth chapter will first explore the implications codification can have on the interrelationship of sources and illustrate that both codification and progressive development of customary international law, which cannot always be clearly separated from each other, call for a normative assessment. It will be demonstrated that early on the ILC searched for inspirations from principles expressed in treaties when codifying and progressively developing international law. The chapter will then explore the implications of the form which the ILC chose for its work and of the trend towards nonbinding forms. Subsequently, this chapter will examine how the interrelationship of sources was approached and addressed in specific projects of the ILC.

The seventh chapter will offer concluding observations on the two preceding chapters.

III. Perspectives on different normative contexts

The next three chapters will explore the interrelationship of sources in certain "fields", namely in the context of the ECHR, of international criminal law and of international investment law.[232] These three fields were selected since they represent different contexts with different conditions.

The chapter on the ECHR examines how the interrelationship of sources manifests itself in a very centralized, treaty-based system, with its own judiciary, the European Court of Human Rights. The chapter will first explore the way in which the European Court interprets the ECHR and takes into account other rules of international law for the purpose of interpreting states' obligations under the ECHR. Subsequently, the chapter will demonstrate how the specific incorporation of these sources by the European Court can shape the development of general international law and how the rationale of human

232 For international environmental law see Christina Voigt, *Sustainable Development as a Principle of International Law Resolving Conflicts between Climate Measures and Law* (Martinus Nijhoff Publishers 2009); Christina Voigt, 'The Role of General Principles in International Law and their Relationship to Treaty Law' (2008) 31 Retfèrd. Nordisk Juridisk Tidsskrift 3 ff.

rights law and the ECHR can inform and pervade international law. It is submitted that the European Court sets general international law into relation with the object and purpose of the ECHR, which may significantly shape the development of general international law.[233] Last but not least, the analysis of the jurisprudence of a regional human rights court raises questions as to the potential tension between special, regional law and general international law. These tensions are illustrated by "functional equivalents" to concepts of general international law which are based on an interpretation of the ECHR.

International criminal law displays a dynamic development from unwritten law to written law. The ninth chapter will firstly revisit the early discussions of the interrelationship of sources in the context of international criminal law which preceded the establishment of the ICTY. The chapter will, secondly, explore the jurisprudence of the International Criminal Tribunals with a particular focus on how the ICTY approaches the interrelationship of sources. Thirdly, the chapter will turn to the Rome Statute. In this context it will focus on the Rome Statute's main features which concern the interrelationship of sources, on the debate on modes of criminal liability as an example of a potential conflict between treaty law and customary international law and on the role of customary international law in relation to immunities.

International investment law can be characterized as a decentralised system that is based on multiple investment treaties. The tenth chapter will first trace the interrelationship of sources in the modern history of international investment law and highlight in particular the prominent role of customary international law and general principles of law, their contested character and the move towards bilateral investment treaties. The chapter will then demonstrate how this bilateralism in form led to a multilateralism in substance and explore the different doctrinal avenues while evaluating their respective explanatory force for this phenomenon of multilateralism in substance. Last but not least, this chapter will focus on the significance of doctrinal constructions in international investment law, exemplified by the distinction between primary rules and secondary rules. The chapter will critically engage with certain receptions of this distinction in international investment law and

233 Cf. on the way in which public international law is perceived through the lenses of a special regime's quasi-judicial body, Ralf Michaels and Joost HB Pauwelyn, 'Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law' (2012) 22(3) Duke Journal of Comparative & International Law 349 ff.

argue against an expansive interpretation of this distinction which would place treaties and custom in strictly separated compartments.

The eleventh chapter will offer concluding observations on the two preceding chapters.

IV. Doctrinal perspectives: revisiting the doctrine of sources

The twelfth chapter will, in light of the previous chapters, focus on how scholars approached the topic of the interrelationship of sources differently under the impression of the respective spirit of the time.

The thirteenth chapter will present observations and conclusions which this study draws from the preceding chapters.